

ORIGINAL

No. 13-13-0283

IN THE
SUPREME COURT OF OHIO

SHARON A. SAUER, et al.,
Plaintiffs

v.

STINSON J. CREWS, et al.,
Defendants/Third-Party Plaintiffs-Appellees,

v.

CENTURY SURETY COMPANY,
Third-Party Defendant-Appellant.

APPEAL FROM THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO
CASE NO. 12AP-320

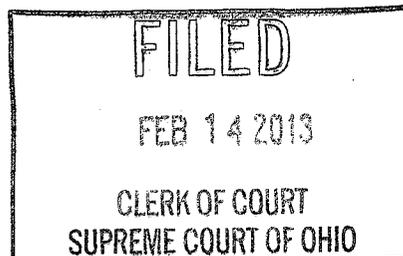
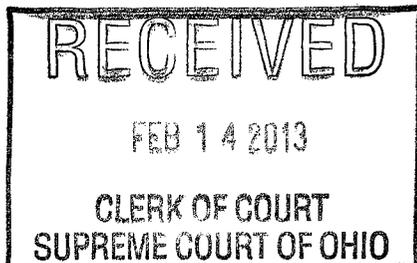
**MEMORANDUM OF *AMICUS CURIAE* OHIO ASSOCIATION OF
CIVIL TRIAL ATTORNEYS IN SUPPORT OF JURISDICTION**

Richard M. Garner (0061734)
DAVIS & YOUNG LPA
140 Commerce Park Drive
Suite C
Westerville, OH 43082
Tel: (614) 901-9600 / Fax: (614) 901-2723
E-mail: rgarner@davisyoung.com

*Counsel for Third-Party Defendant-Appellant
Century Surety Company*

Timothy J. Fitzgerald (0042734)
GALLAGHER SHARP
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, OH 44115-2108
Tel: (216) 241-5310 / Fax: (216) 241-1608
E-mail: tfitzgerald@gallaghersharp.com

*Counsel for Amicus Curiae Ohio Association
of Civil Trial Attorneys*



M. Shawn Dingus (0070201)
Michael R. Guluzian (0088263)
PLYMALE & DINGUS, LLC
111 W. Rich Street, Suite 600
Columbus, OH 43215
Tel: (614) 542-0220 / Fax: (614) 542-0230
E-mail: sdingus@dinguslaw.com
mguluzian@dinguslaw.com

*Counsel for Defendants/Third-Party Plaintiffs-
Appellees Stinson J. Crews and Stinson Crews
Trucking*

TABLE OF CONTENTS

I. INTEREST OF *AMICUS CURIAE* 1

II. EXPLANATION OF WHY THIS CASE PRESENTS A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST. 1

 A. This Court should accept review to clarify that the intent of the parties, determined from reviewing the contract as a whole, is the primary factor driving contract interpretation.....5

 B. This Court should also accept jurisdiction to substantively review the court of appeals’ determination that “cargo” is an ambiguous term.....9

III. STATEMENT OF THE CASE AND FACTS..... 13

IV. ARGUMENT REGARDING APPELLANT’S PROPOSITIONS OF LAW 13

 A. Appellant’s First Proposition of Law:.....13

 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 SUCH POLICIES.....13

 B. Appellant’s Second Proposition of Law:14

 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.....14

V. CONCLUSION..... 15

CERTIFICATE OF SERVICE 16

I. INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys (“OACTA”) is a statewide organization comprised of over 500 attorneys, corporate executives, and managers who devote a substantial portion of time to the defense of civil lawsuits and the management of claims against individuals, corporations, and governmental entities. For nearly half a century, OACTA’s mission has been to provide a forum where such professionals can work together on common problems and promote and improve the administration of civil justice throughout Ohio. Toward that end, OACTA has long been a voice seeking to ensure that the civil justice system is fair and efficient.

In furtherance of this mission, OACTA submits this *amicus curiae* memorandum pursuant to S.Ct.Prac.R. 7.06 to urge this Court to accept jurisdiction over an appeal from the misguided appellate opinion in *Sauer v. Crews*, 10th Dist. No. 12AP-320, 2012-Ohio-6257 (“App. Op.”). *Sauer* adopts an aberrant interpretation of an insurance exclusion in a standard ISO form that flouts the intent of the parties and creates a conflict among Ohio’s appellate courts. The opinion re-defines the scope of coverage available under a commercial general liability policy (“CGL”) at issue here (and widely used throughout Ohio), and serves as seriously flawed authority that may clog Ohio’s trial and appellate courts with meritless claims for coverage based on identical language, which appears commonly in standard CGL policies.

OACTA views this matter as one presenting issues of public and great general interest and urges this Court to accept jurisdiction over the case to reverse the flawed judgment and opinion of the court of appeals.

II. EXPLANATION OF WHY THIS CASE PRESENTS A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST.

The decision of the Tenth Appellate District warrants this Court’s review because it (1) signals an imprudent disregard for the critical distinction between the insurance risks covered by

CGL policies and commercial automobile policies, (2) misinterprets an exception to a standard CGL policy “auto” exclusion for “mobile equipment,” thereby erroneously creating coverage for an auto accident with a parked “trailer” where such coverage was never intended, (3) misconstrues the meaning of “cargo” by failing to construe that word in the context of the CGL policy as a whole and, in a tortured analysis, finding it ambiguous and giving the term the narrowest construction possible, and (4) conflicts with the decisions of another Ohio appellate district and other jurisdictions, which find no ambiguity in identical CGL policy language and enforce the plain and ordinary meaning of the “auto” exclusion.

The dictionary definition of “cargo” arbitrarily selected by the Tenth Appellate District as being limited to goods in the “stream of commerce” significantly expands the original contemplated scope of CGL policy coverage. Under the interpretation given by Tenth Appellate District to vehicles “maintained primarily for purposes other than transportation of persons or cargo,” coverage under a CGL policy could extend to any truck, trailer, or vehicle used to transport an insured’s own property or equipment not intended for sale or delivery to a customer simply because the item being transported could be said to be outside “the stream of commerce.”

It is a matter of public and great general interest when Ohio’s courts interpret the same language found in insurance policies differently depending on the appellate district in which a case is pending. See, e.g., *Ward v. United Foundries, Inc.*, 129 Ohio St.3d 292, 2011-Ohio-3176, 951 N.E.2d 770, ¶ 13 and 21. In this case, Ohio consumers and insurers need definitive guidance on how the standard CGL policy “auto” exclusion and the “mobile equipment” exception to that exclusion will be interpreted throughout the state. This is particularly true when consideration is given to the prevalence of commercial flatbed trailers, like the one at issue here, which are so commonly used by both small and large businesses in Ohio to haul and

transport their own equipment -- such as that used in the construction, paving, plumbing, landscaping and snow-removal industries -- to commercial and residential jobsites and are so frequently found travelling and parked on Ohio's streets and roadways.

This insurance coverage case arises from a declaratory judgment entered against Third-Party Defendant-Appellant Century Surety Company ("Century") in favor of its insureds, Defendants/Third-Party Plaintiffs-Appellees Stinson J. Crews and Stinson Crews Trucking (collectively "Crews"). Both the trial court and appellate court determined that Crews is entitled to insurance coverage under a CGL policy issued by Century for claims arising out of a fatal automobile collision caused by Crews' negligence in parking its flatbed trailer in a roadway. The flatbed trailer had been used to transport an asphalt paver and a skid loader to a job site, a day care center. (App. Op., ¶2) The dispute in this case concerns an exclusion in Crews' CGL policy that precludes coverage for claims arising out of the operation, maintenance or use of an "auto," which is expressly defined to include "trailers." The courts below concluded, however, that this exclusion does not apply because, while Crews' trailer otherwise satisfies the definition of "auto," it is "mobile equipment" excepted from the foregoing "auto" exclusion.

To find Crews' trailer subject to coverage under the "mobile equipment" exception in the CGL policy, the courts utilized one of several parts of the policy's definition of "mobile equipment" which included "[v]ehicles * * * maintained primarily for purposes other than the transportation of persons or cargo." (App. Op., ¶ 17) Since Crews' flatbed trailer was not and could not be used to transport persons, the inquiry turned to whether the trailer was maintained primarily for the transportation of "cargo." (App. Op., ¶ 18) While "cargo" was not defined, the "mere absence of a definition in an insurance contract does not make the meaning of the term ambiguous." *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652

N.E.2d 684 (1995). Yet, the courts here employed a tortured analysis to declare the term “cargo” to be ambiguous and, interpreting it against Century, limited its meaning to “items in the stream of commerce.” (App. Op., ¶ 19-22, 24) Crews’ asphalt paver and skid loader could not be “cargo,” according to the courts below, since they were not items in the stream of commerce. (App. Op., ¶ 27)

A rule of law that limits “cargo” to “describing items in the stream of commerce,” (App. Op., ¶ 24), will sweep within the definition of “mobile equipment” any trailer used to transport equipment to a jobsite because the equipment is not “in the stream of commerce.” Such a rule results in a trailer qualifying as covered “mobile equipment” under its owner’s CGL policy, rather than being covered under its owner’s business automobile policy.

If left undisturbed, the rule of law adopted below will open a “Pandora’s Box.” *Selander v. Erie Ins. Group*, 85 Ohio St.3d 541, 548, 709 N.E.2d 1161 (1999) (Lundberg Stratton, J., dissenting). Going forward, any trailer or other truck or vehicle operated to transport goods or equipment that are not “in the stream of commerce” will now be covered under the owner’s CGL policy. This would, no doubt, surprise most policy holders and insurers. It could also expand coverage under CGL policies to cover all vehicles that transport equipment such as lawn care services, construction and paving companies (as here), plumbers, and electricians. Even commercial moving operations may be covered because they are merely transporting the property of others not destined for sale or part of a product. It is the kind of absurd result which this Court cautioned against in the past. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 35. Such an unprecedented expansion would also threaten to completely upset the Ohio insurance market by suddenly forcing CGL insurers to absorb huge auto-related exposures for which no commensurate premium was collected or even

contemplated.

A. This Court should accept review to clarify that the intent of the parties, determined from reviewing the contract as a whole, is the primary factor driving contract interpretation.

The Century CGL policy at issue *was intended specifically not to cover* “autos” defined as “[a] land motor vehicle, *trailer* or semi trailer designed for travel on public roads, including any attached machinery or equipment[.]” (Emphasis added) (App. Op., ¶15) (quoting Century’s CGL policy, Form CG 00 01 12 04, at 12-13). That is undisputed—even the courts below recognized that “Crews’ CGL policy with Century excludes ‘autos’ from liability coverage, defining an auto to be a trailer.” (App. Op., ¶ 16). That should have been the end of the inquiry. Instead, the courts below went on to bootstrap coverage by broadly and erroneously interpreting an exception to an exclusion.

Namely, the courts below focused on the “mobile equipment” exception to the general auto/trailer exclusion. They looked to the definition of “mobile equipment” being “[v]ehicles not described in [prior definitions] maintained primarily for purposes other than the transportation of persons or cargo.” (App. Op., ¶15). And they reasoned that, even though coverage for “autos” – defined to include “trailers” – was excluded, coverage still applied to “trailers” based on a supposed ambiguity in the exception for “mobile equipment.” Of course, it is settled Ohio law that “an exception to an exclusion cannot create coverage where the coverage is not provided in the insuring agreement.” *Blake v. Thornton*, 182 Ohio App. 3d 716, 2009-Ohio-2487, 914 N.E.2d 1102, ¶ 24 (8th Dist.); *Ohio Valley Livestock Corp. v. Val Decker Packing*, 2nd Dist. No. 81 CA 63, 1982 Ohio App. LEXIS 13643 at *15-16 (July 1, 1982). The law is the same nationwide. Accord *National Union Fire Ins. Co. v. Lynette C.*, 228 Cal.App.3d 1073, 1081 (1991); *St. Paul Fire & Marine Ins. Co. v. Coss*, 80 Cal.App.3d 888 (1978); *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233 (1979); *Carrier v. Reliance Ins. Co.*, 759 So.2d 37 (La. 2000); *Rufener v.*

State Farm; Fire & Cas. Co., 221 Wis.2d 500, 585 N.W.2d 696 (Wis.App. 1998); *Kemper Nat'l Ins. Cos. v. Heaven Hill Distilleries*, 82 S.W.3d 869 (Ky. 2002). In other words, one cannot read coverage into a policy by reading an exception to an exclusion so broadly as to swallow the original exclusion which the exception modifies. Yet, that is precisely what the court of appeals did here.

Next, the court of appeals failed to consider the language of the Century CGL policy as a whole and the intent of the parties imposing an illogical and unreasonable construction on the meaning of “cargo” in order to find Crews’ trailer covered. This Court addressed the proper manner in which to interpret an insurance contract in *Galatis*:

When confronted with an issue of contractual interpretation, ***the role of a court is to give effect to the intent of the parties to the agreement.*** * * * We examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. ***We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy.*** When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. ***As a matter of law, a contract is unambiguous if it can be given a definite legal meaning.***

On the other hand, where a contract is ambiguous, a court may consider extrinsic evidence to ascertain the parties’ intent. ***A court, however, is not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties.***

100 Ohio St. 3d 216, 2003-Ohio-5849, ¶ 11-12 (Emphasis added; citations omitted.) Yet here, the court of appeals gave “cargo” its most narrow meaning possible—not its “plain and ordinary meaning.” (App. Op., ¶ 27). By doing so, the courts ignored the principle that insurance policy provisions must be read in context with the “policy [construed] as a whole.” *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 212, 519 N.E.2d 1380 (1988); *Gomolka v. State Auto. Mut. Ins. Co.*, 70 Ohio St.2d 166, 173, 436 N.E.2d 1347 (1982).

It is beyond dispute that CGL policies cover non-automobile related risks while a

business auto policy is designed to cover automobile risks. *Davidson v. Motorists Mut. Ins. Co.*, 91 Ohio St.3d 262, 268-270, 744 N.E.2d 713 (2001). That is why Crews in the case at bar purchased **both** the Century CGL policy and the Progressive business auto policy. It is also recognized as commonly understood nationwide. *United Farm Family Mut. Ins. Co. v. Pearce*, 3rd Dist. No. 2-08-07, 2008-Ohio-5405, ¶ 16 (“As an additional matter, Pearce obtained a separate automobile liability policy to cover the dump truck, and the CGL policy did not list the dump truck on the scheduled list of equipment. These two facts, though not dispositive, certainly indicate that it was the parties’ intention that the dump truck not be covered under the CGL policy.”); *McQuirter v. Rotolo*, 77 So.3d 76, 82 (La. App. 1 Cir. 2011) (“The risk associated with the operation of automobiles is such a risk that was not intended to be covered by a CGL policy. The unambiguous exclusion imposes a reasonable limitation on the policy and must be given effect.”); *Essex Ins. Co. v. City of Bakersfield*, 154 Cal. App. 4th 696, 709-710 (5th Dist. 2007).

State agencies even advise business owners that a “CGL policy” “does not protect a business against: * * * vehicles [owned] for your business, whether for deliveries or client consultations, you will need separate commercial automobile coverage to protect you and your employees against liability claims resulting from car accidents.” Minnesota Department of Commerce, Liability Insurance for Small Business, <http://mn.gov/commerce/insurance/small-business/liability-insurance.jsp> (accessed Feb. 6, 2013). The court in *Strickland v. Auto-Owners Ins. Co.*, 273 Ga.App. 662, 663, 615 S.E.2d 808 (2005), set forth the universally recognized distinction between CGL policies and business auto policies: these “two separate policies of insurance [are intended] to provide seamless coverage for different risks: (1) a commercial general liability policy such as the one in question, which excludes motor vehicle liability and (2) a separate policy to cover motor vehicle liability exposure. To prevent duplicative premiums and

overlapping coverage, exclusions are included in the commercial general liability policy to make it clear that, although it covers most accidents in the workplace, it explicitly does not cover motor vehicle collisions.”

The basic principle violated by the court of appeals was recently applied by this Court when it reviewed the “business risks” exclusions in a CGL policy in *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 133 Ohio St.3d 476, 2012-Ohio-4712, ¶ 10: “CGL policies are not intended to protect business owners against every risk of operating a business.” This Court then held that “[c]ourts generally conclude that the policies are intended to insure the risks of an insured causing damage to other persons and their property, but that the policies are not intended to insure the risks of an insured causing damage to the insured’s own work.” Accord *Lisn, Inc. v. Commercial Union Ins. Cos.*, 83 Ohio App.3d 625, 615 N.E.2d 650 (9th Dist. 1992) Just as CGL policies are not “intended” to cover business risks, they are also not intended to cover “auto” and “trailer” risks. The same standard of contractual interpretation should be applied uniformly in both circumstances. This Court has clarified the scope of the “business risks” exclusions in the *Custom Agri Sys.* case and should do the same for the “auto” and “trailer” exclusions in CGL policies and the “mobile equipment” exception to that exclusion by accepting jurisdiction in this matter.

The court of appeals did not look to the policy as a whole and its context in order to give controlling consideration to the intent of the parties to the contract as required by precedent of this Court and the Ohio Constitution. The court of appeals first recognized that “[o]ne possible definition of ‘cargo’ is *undisputedly a very general term* for items being transported.” (Emphasis added.) (App. Op., ¶ 24) The court of appeals then rejected that definition without considering the parties’ intent or the Century CGL policy as a whole—including the exclusion of

coverage for “autos” defined to include “trailers.” Instead, it went on to apply the narrowest possible definition of “cargo” it could find. (App. Op., ¶ 24) (“Another valid and commonly used definition of ‘cargo’ limits the term’s usage to describing items in the stream of commerce.”) In doing so, the court of appeals raised hyper-technicality over the clearly expressed intent of the parties to the contract which was expressed in the Century CGL policy as a whole: coverage for “autos” defined to include “trailers” is excluded. But that construction ignores the rule that, while an ambiguity should be interpreted against an insurer, it “will not be applied so as to provide an unreasonable interpretation of the words of the policy.” *Galatis*, ¶ 14.

The court of appeals holding impacts not only the coverage provisions involved but also the foundation of how insurance contracts are interpreted. This Court should accept jurisdiction to clarify that the intent of the parties is the determinative factor to consider and that the contract should be read as a whole to determine that intent. Indeed, by giving the intent of the parties such little weight, the court of appeals raised the issue presented to one of constitutional import. Ignoring the intent of the parties amounts to a violation of the constitutional prohibition on impairment of contracts because “[a] court * * * is not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties.” *Galatis*, ¶ 12, 39. Thus, failing to apply “the manifest intentions of [the] parties” is a deprivation of the rights secured by the Ohio Constitution. *Galatis*, ¶ 11-12, citing “Section 28, Article II, Ohio Constitution.”

B. This Court should also accept jurisdiction to substantively review the court of appeals’ determination that “cargo” is an ambiguous term.

The court of appeals applied the incorrect standard to interpret the Century CGL policy in order to find an ambiguity. As addressed above, that alone warrants this Court’s review. There is, however, an additional reason of public and great general interest why this Court should accept jurisdiction: the court of appeals’ unreasonably narrow construction of “cargo” conflicts

with the holdings of at least one court in Ohio, opinions from its sister states, and is rife with unintended negative consequences to Ohio's insurers and insureds.

The court of appeals holding creates an inter-district conflict because it is at odds with *United Farm Family Mut. Ins. Co. v. Pearce*, 3rd Dist. No. 2-08-07, 2008-Ohio-5405.¹ In *Pearce*, the Third Appellate District was presented with the same ambiguity argument in a CGL policy which included the same "mobile equipment" definition for vehicles "maintained primarily for purposes other than the transportation of persons or cargo." *Id.*, ¶ 9, 12. The insured in *Pearce* hauled various pieces of paving equipment, including a roller, to the job site using a lowboy trailer. *Id.*, ¶ 14, 15. After looking at dictionary definitions of "cargo" similar to those examined by the court of appeals here, the *Pearce* court determined "[a]sphalt **and equipment** fall within the definition of a good, and thus, cargo" and therefore, are not "mobile equipment" under the very same policy exception at issue here. *Id.*, at ¶ 15 (emphasis added).

Likewise, the court of appeals decision in this matter is not in accord with the decisions rendered by the courts of Ohio's sister states. For instance, in *Nautilus Ins. Co. v. Grayco Rentals*, No. 2011-CA-002150-MR, 2013 Ky. App. Unpub. LEXIS 102, at *1-8 (Feb. 1, 2013), the Kentucky court held as follows:

Under the language of the commercial liability policy, the trailer rented by Grayco to Rice qualified as an auto and was excluded from coverage under the terms of the policy. Specifically, Section I (2)(g) of the commercial liability policy excluded from coverage any bodily injury or property damage "arising out of the ownership, maintenance, use, or entrustment to others of any . . . 'auto' . . . owned or operated by or rented or loaned to any insured." (Emphasis added.) And, "auto" is defined by Section V (2)(a) of the commercial liability policy as including "[a] land or motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment[.]" (Emphasis added.) ***As Section V(2)(a) plainly and clearly defines "auto" to include "trailer" or "semitrailer," we think the trailer owned by Grayco and rented to Rice constitutes an auto.*** As an auto, any liability incurred by Grayco is

¹ A motion to certify a conflict has been filed by Century and, as of the filing date of this jurisdictional memorandum, remains pending before the court of appeals.

excluded under the commercial liability policy by operation of Section I (2)(g). ***The language of Section I (2)(g) and Section V (2)(a) are plain and unambiguous.***

Alternatively, even if the circuit court were correct that an ambiguity exists upon whether the trailer constituted an auto under Section V (2)(a) or mobile equipment under Section V (12)(f), ***the ambiguity must be resolved in favor of Section V (2)(a) by interpreting the trailer as an auto.*** Under Section V (2)(a), auto is specifically defined as a trailer or semitrailer; on the other hand, under Section V (12)(f), mobile equipment is generally defined as “[v]ehicles . . . maintained primarily for purposes other than the transportation of persons or cargo.” When resolving such ambiguities between seemingly conflicting clauses, ***it is well-settled that a specific clause shall prevail over a general clause in an insurance contract.*** *State Auto Mut. Ins. Co. v. Ellis*, 700 S.W.2d 801 (Ky. App. 1985). So, ***Section V (2)(a) definition of auto as including a trailer prevails as the more specific clause.*** As a consequence, Rice’s negligence claims related to the trailer are clearly excluded under the commercial liability policy.

(Emphasis added.) Thus, the Kentucky court first found “trailers” to be excluded from coverage under the “plain and unambiguous” language of the exclusion. The court then held that the exception to the exclusion created no ambiguity because—read as a whole—the specific exclusion applied to bar coverage over the generally worded exception to the exclusion. Accord *Hoepker v. Zurich Am. Ins. Co.*, 3rd Dist. No. 14-03-18, 2003-Ohio-5138, ¶ 11.

Similarly, in *Indiana Lumbermens Mut. Ins. Co. v. Timberland Pallet & Lumber Co.*, 195 F.3d 368, 378-379 (8th Cir. 1999), the Eighth Circuit reasoned as follows:

Timberland manufactures hardwood pallets and lumber. This activity produces sawdust which is disposed of as part of its business. * * * On the day of the accident, another Timberland employee told Pliler to take the license plate off another truck and put it on the dump truck for the trip to the farm. Pliler drove the dump truck to the farm, delivered the sawdust and was returning to Timberland when the accident occurred.

* * *

We also cannot agree that a reasonable interpretation of the term “transportation” in the definition of “mobile equipment” in subdivision (f) means long-distance carriage only. The plain meaning of the term “transportation” ***is not limited to carrying persons or cargo over long distances.*** Here, ***it was not disputed that the dump truck 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” within the definition of “mobile***

equipment” in subdivision (f).

* * * We also hold the district court did not err in holding, as a matter of law, that the dump truck was not "mobile equipment" under the terms of the policy and thus was excluded from coverage under the auto exclusion. Accordingly, we affirm the judgment of the district court.

(Emphasis added.) In *Indiana Lumbermens*, the court held that using a dump truck to move the insured’s own sawdust waste qualified as transporting “cargo.”

Due to the court of appeals’ definition of “cargo” as limited to goods in the “stream of commerce,” the originally contemplated scope of CGL policy coverage for vehicles “maintained primarily for purposes other than transportation of persons or cargo” has been significantly expanded. For instance, a moving truck trailer would be transporting “cargo” but arguably not in the stream of commerce. Any truck, trailer, or vehicle used to transport an insured’s own property not intended for sale or delivery to a customer would also be transporting “cargo” arguably outside the stream of commerce. Thus, lawn service companies transporting mowing equipment, construction contractors, road repair contractors, plumbers, electricians, excavators, snow removal outfits —any commercial entity that transports its own equipment to the job site— would now arguably have coverage for the vehicles it uses under its CGL policy rather than its business auto policy which was purchased to provide such coverage. Such an unanticipated expansion of coverage would not only cause confusion to the bench and bar as to how an insurance policy is properly interpreted, but also increase coverage beyond that anticipated by consumers and the insurance industry causing premiums to rise on CGL coverage statewide.

This demonstrates the error in the court of appeals’ interpretive process. When a dictionary definition is utilized to interpret an undefined word in an insurance policy, it is to give guidance as to the common and ordinary understanding of the word, not to find an alternate (and less favored) definition to find coverage. *Fed. Ins. Co. v. Executive Coach Luxury Travel, Inc.*,

128 Ohio St.3d 331, 2010-Ohio-6300, 944 N.E.2d 215, ¶ 12. Here, the court of appeals searched for and then applied the most narrow dictionary definition of “cargo” it could find without regard to its common and ordinary understanding or reference to the policy as a whole as reflecting the intent of the parties. That is not the law in Ohio. *Sam Braman and Son v. Hartford Steam Boiler Inspection & Ins. Co.*, 9 Ohio Misc. 203, 205, 222 N.E.2d 456 (C.P. 1966) (when interpreting insurance policies, as with other contracts, courts may look to dictionary definitions to clarify undefined terms, but the context in which a particular word is used in the policy controls). Here, the court of appeals incorrectly applied a definition out of context which is at odds with the scope of coverage intended to be provided when the CGL policy is reviewed as a whole.

This Court can and should recognize the conflicting authority both within Ohio and from other jurisdictions as indicating that this case is a matter of public or great general interest and one which this Court should accept jurisdiction to resolve. Lawyers, litigants, claims professionals, insurance agents, and insureds statewide require settled law on these issues as the basis for their business and personal choices. Unsettled law and divergent contract interpretations result in uncertainty, higher premiums and litigation costs which neither Ohio businesses and citizens nor their insurers desire or can afford in these economic times.

III. STATEMENT OF THE CASE AND FACTS

OACTA adopts the Statement of the Case and Facts in Appellant Century Surety Company's Memorandum in Support of Jurisdiction. The facts of the underlying tort and wrongful death claim are set forth in *Sauer v. Crews*, 10th Dist. No. 10AP-834, 2011-Ohio-3310.

IV. ARGUMENT REGARDING APPELLANT'S PROPOSITIONS OF LAW

A. Appellant's First Proposition of Law:

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 SUCH POLICIES.

With respect to Proposition of Law No. I, OACTA adopts the arguments set forth by Appellant Century Surety Company in its Memorandum in Support of Jurisdiction.

In brief summary, “cargo” should be interpreted in context to effectuate the intent of the parties. The term should be given its “plain and ordinary meaning” not its narrowest meaning possible. Under this standard, courts have held that “cargo” includes transport of the insured’s own equipment. Accord *United Farm Family Mut. Ins. Co. v. Pearce*, 3rd Dist. No. 2-08-07, 2008-Ohio-5405, ¶15; *Nautilus Ins. Co. v. Grayco Rentals*, No. 2011-CA-002150-MR, 2013 Ky. App. Unpub. LEXIS 102, at *1-8 (Feb. 1, 2013); *Indiana Lumbermens Mut. Ins. Co. v. Timberland Pallet & Lumber Co.*, 195 F.3d 368, 378-379 (8th Cir. 1999). The court of appeals’ decision should, accordingly, be reversed.

B. Appellant’s Second Proposition of Law:

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.

With respect to Proposition of Law No. II, OACTA adopts the arguments set forth by Appellant Century Surety Company in its Memorandum in Support of Jurisdiction. In brief summary, policy provisions must be read in context with the “policy [construed] as a whole.” *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 212, 519 N.E.2d 1380 (1988); *Gomolka v. State Auto. Mut. Ins. Co.*, 70 Ohio St.2d 166, 173, 436 N.E.2d 1347 (1982). The court of appeals erred in failing to give weight to the intent of the parties expressed in the CGL policy as a whole, which is to cover only non-automobile related risks. *United Farm Family Mut. Ins. Co. v.*

Pearce, 3rd Dist. No. 2-08-07, 2008-Ohio-5405, ¶ 16. Automobile risks are both highly regulated and intended to be covered by business auto policies of insurance which are policies drafted to comply with applicable regulations. The court of appeals' decision should thus also be reversed because the context in which the term "cargo" is used and the intent of the Century CGL policy when construed as a whole reveal that Crews' trailer was not intended to be covered under the Century CGL policy.

V. CONCLUSION

For all of these reasons, OACTA respectfully requests that this Court accept jurisdiction over this case to address the issues of public and great general interest raised by the appellate court's failure to recognize that the implementation of the intent of the parties is the guiding principle of insurance policy interpretation, and, in doing so, this Court should reverse the legally flawed judgment and opinion of the court of appeals.

Respectfully submitted,



Timothy J. Fitzgerald (0042734)

GALLAGHER SHARP

Bulkley Building, Sixth Floor

1501 Euclid Avenue

Cleveland, Ohio 44115

Tel: (216) 241-5310 / Fax: (216) 241-1608

E-mail: tfitzgerald@gallaghersharp.com

*Counsel for Amicus Curiae Ohio
Association of Civil Trial Attorneys*

CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum of Amicus Curiae Ohio Association of Civil Trial Attorneys in Support of Jurisdiction* was sent by ordinary U.S. Mail, postage prepaid, this 13th day of February, 2013 to:

Richard M. Garner, Esq.
DAVIS & YOUNG LPA
140 Commerce Park Drive, Suite C
Westerville, OH 43082

*Counsel for Third-Party Defendant-Appellant
Century Surety Company*

M. Shawn Dingus, Esq.
Michael R. Guluzian, Esq.
PLYMALE & DINGUS, LLC
111 West Rich Street, Suite 600
Columbus, Ohio 43215

*Counsel for Defendants/Third-Party
Plaintiffs-Appellees Stinson J. Crew, et al.*



*Counsel for Amicus Curiae Ohio Association
of Civil Trial Attorneys*