

In the  
Supreme Court of Ohio

SHARON A. SAUER, et al.,

Plaintiffs,

Case No. \_\_\_\_\_

13-0283

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 JURISDICTION

---

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

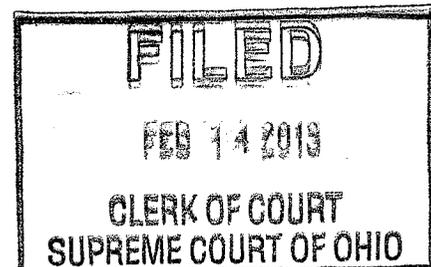
*Counsel for Appellant Century  
Surety Company*

M. Shawn Dingus (0070201)  
PLYMALE & DINGUS, LLC  
111 West Rich Street, Suite 600  
Columbus OH 43215  
Tel: (614) 542-0220  
Fax: (614) 542-0230  
[sdingus@dinguslaw.com](mailto:sdingus@dinguslaw.com)

*Counsel for Appellees Stinson J. Crews and  
Stinson Crews Paving, Inc.*

Thomas E. Szykowny (0014603)  
Michael Thomas (0000947)  
VORYS, SATER, SEYMOUR  
AND PEASE LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus OH 43216-1008  
Tel: (614) 464-5671  
Fax: (614) 719-4990  
[teszykowny@vorys.com](mailto:teszykowny@vorys.com)

*Counsel for Amicus Curiae Ohio  
Insurance Institute*



## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF INTEREST OF AMICUS CURIAE .....	1
STATEMENT OF JURISDICTION.....	4
STATEMENT OF THE CASE AND FACTS .....	6
ARGUMENT .....	6
 <i>Proposition of Law:</i>	
When a term in an insurance policy has more than one possible meaning, it should be interpreted consistent with the intent of the parties at the time the policy was issued. It should not be strictly construed against the insurer unless the parties' intent cannot be determined .....	6
CONCLUSION.....	12
CERTIFICATE OF SERVICE	

## STATEMENT OF INTEREST OF AMICUS CURIAE

The issue presented by this appeal is extremely important to the Ohio insurance industry and has important repercussions for everyone in this State who purchases liability insurance. Amicus curiae Ohio Insurance Institute (“OII”) and its members support appellee Century Surety Company in urging this Court to exercise its discretionary jurisdiction to review -- and, ultimately, reverse -- the ruling by the Court of Appeals below.

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 participated as amicus curiae in many of the landmark insurance cases that have been decided by this Court. It is uniquely qualified to provide the Court a broad perspective on insurance law as well as practical insight into the specific negative consequences that the ruling below will have if it is not reversed.

Insurance is one of the largest industries in Ohio and a major pillar of its economy, generating business activity that benefits all Ohio citizens and all levels of state and local government. On a more fundamental level, insurance makes modern life possible for businesses and individuals by spreading risks of loss that a single business or person could not bear alone. However, insurance companies cannot accurately calculate the premium rates necessary to provide that protection unless their legal obligations to insureds, as defined by the provisions of their insurance policies and by principles of insurance law, are certain and determinate. When coverage is expanded by a judicial interpretation of the policy language to include risks that the

parties did not intend to cover, the premium that was charged for the insurance no longer reflects the actual risk assumed by the insurer. As a result, insurers must indemnify losses for which no premium was paid, and other insureds must ultimately pay higher premiums for the additional coverage they neither wanted nor expected.

Ohio law has always recognized that the touchstone for defining an insurer's obligations to its insured is the intent of the parties at the time they entered into the insurance policy. The scope of the coverage that the insured intends to obtain and the insurer intends to provide determines the amount of premiums the insured must pay to spread the risk. The parties' intentions are expressed in the language used in the insurance policy, and words and phrases that have more than one possible meaning are interpreted consistent with those intentions. However, the ruling by the Court of Appeals in this case completely ignored the intentions of the parties to the insurance policy. Instead, it noted that one word used in the policy, "cargo," has more than one dictionary meaning, and it held that this "ambiguity" must automatically be construed against the insurer and in favor of coverage, without regard to the parties' actual intentions. The Court of Appeals thereby expanded coverage under the insurance policy in ways that the parties had never intended, increasing the risk on which the policy premium had been calculated.

More specifically, the insured had separately purchased (1) a commercial auto insurance policy from another insurer to provide coverage for its trucks and trailer, and (2) a commercial general liability ("CGL") policy from Century Surety to provide coverage for other liabilities described in that policy. The trucks and trailer were expressly excluded from coverage under the CGL policy consistent with established industry custom that CGL policies dovetail with automobile liability policies and do not provide duplicative coverage. In fact, the insured testified that he had intended to insure the trailer under the automobile insurance policy issued by

the other carrier, and he asserted a claim against the other carrier's agent for negligently failing to do so. He nevertheless sought coverage from Century Surety under the CGL insurance policy after the trailer was involved in an accident.

The Court of Appeals made no attempt to discover or implement the intentions of the parties to the CGL insurance policy with respect to coverage for the trailer. It held instead that policy language that has more than one possible meaning must automatically be construed against the insurer and in favor of increased coverage, without any consideration of their intentions. The Court of Appeals concluded that the trailer was covered by provisions of the CGL policy applicable to "mobile equipment" that is not used on public streets and highways to transport "cargo," even though the policy expressly excludes coverage for "trailers." It was undisputed that this trailer was primarily used to transport equipment and paving supplies to job sites, and that the ordinary meaning of "cargo" includes items transported in a trailer, but the Court of Appeals observed that "cargo" also has another, narrower meaning that refers only to goods "in the stream of commerce." On the basis of this "ambiguity," it held that the trailer is not used to transport "cargo" in the narrower sense, and that the CGL policy must therefore be construed to provide coverage.

The Court of Appeals thus believed that it should extend coverage when the language used in an insurance policy is susceptible to more than one meaning, despite evidence that this coverage was never intended or expected by the insured or the insurer. Other Ohio courts have recognized that insurance policy provisions must be understood consistent with the parties' intentions and should not be construed against the insurer unless their intentions cannot be ascertained. In a case involving the same CGL policy language and nearly identical facts, the Court of Appeals for the Third Appellate District properly resolved any perceived ambiguity in

the use of the word “cargo” by examining the intent of the parties; the fact that the insured had purchased an automobile liability policy in addition to the CGL policy demonstrated that he did not intend to cover the vehicle under the CGL policy. *United Farm Family Mut. Ins. Co. v. Pearce*, 3rd Dist. No. 2-08-07, 2008-Ohio-5405.

Virtually all words have multiple meanings, but that does not authorize a court to ignore the parties’ actual intentions in entering into an insurance contract. The approach taken by the Court of Appeals distorts the risk/premium calculus on which insurance policies are offered by judicially creating coverage for losses that neither the insured nor the insurer intended to cover. No one benefits when insurers must charge additional premiums for coverage that policyholders do not want. Amicus curiae OII is therefore extremely interested in the issue presented by this appeal.

#### **STATEMENT OF JURISDICTION**

The issue raised by appellant Century Surety’s appeal is not only very important to amicus curiae OII, its members, and the Ohio insurance industry, as described above. It is also a question of public and great general interest for Ohio jurisprudence generally and for everyone who purchases liability insurance in this State.

The Court of Appeals held that words used in an insurance policy that have more than one dictionary meaning should be automatically construed against the insurer and in favor of insurance coverage, without any consideration whatsoever of the intent of the parties at the time they entered into the insurance policy. This holding violates fundamental principles of Ohio law, which recognize the primacy of the parties’ intentions in interpreting written agreements and therefore construe ambiguities against the drafter only if they cannot be resolved by reference to those intentions. The approach taken by the Court of Appeals converts the judicial process from

a procedure for ascertaining and implementing the parties' intentions into a game of "gotcha" that awards insurance benefits for losses that the insured did not intend to cover -- and that the insurer did not include in calculating premium rates -- when a word in a policy has more than one possible meaning.

Questions of law that invoke "this Court's collective interest in jurisprudence" are issues of public and great general interest and warrant the exercise of discretionary jurisdiction. *Nobel v. Colwell*, 44 Ohio St.3d 92, 94, 540 N.E.2d 1381 (1989). Moreover, the Court of Appeals for the Third Appellate District reached exactly the opposite conclusion on the same legal issue when it interpreted the word "cargo" in a CGL policy by examining the intentions of the parties. *See United Farm Family Mut. Ins. Co. v. Pearce*, 3d Dist. No. 2-08-07, 2008-Ohio-5405. "It must be conceded that any legal question, upon the determination of which two Courts of Appeals disagree, is a question of public and great general interest." *Flury v. Central Publishing House of Reformed Church*, 118 Ohio St. 154, 159, 160 N.E. 679 (1928).

The ruling by the Court of Appeals in the present case is also of public and great general interest because it has far-reaching practical consequences for insureds and insurers alike. "Cargo" is not the only English word that has more than one dictionary definition; almost every word in an insurance policy is "ambiguous" in that sense when it is considered without regard to the surrounding circumstances and the purpose for which the insurance was obtained. The approach taken by the Court of Appeals would make the scope of insurance coverage highly uncertain and invite litigation over every substantive word and phrase used in insurance policies. It bestows a windfall on plaintiffs who never intended or expected the expanded insurance coverage and paid no premium for it, but the cost of that windfall must be borne by insurers and by other insureds.

In the present case, Mr. Crews did not purchase the CGL policy because he read the word “cargo” so narrowly that he believed his trailer would be covered by the policy even though it expressly excluded coverage for trailers. He admits that he intended to obtain coverage for the trailer under his separate automobile liability policy. By industry custom, CGL policies and automobile liability policies dovetail so that policyholders are not charged higher premiums for double coverage they neither need nor want. The decision by the Court of Appeals below ignores the actual intentions of the parties and is thus of public and great general interest to all policyholders and insurers. The uncertainties and economic inefficiencies it will foster can be avoided if this Court accepts jurisdiction and explains that words in insurance policies that have multiple dictionary meanings are construed consistent with the purpose of the insurance and the intent of the contracting parties.

### **STATEMENT OF THE CASE AND FACTS**

There is no dispute as to any fact that is relevant to the purely legal issue presented by this appeal. Amicus curiae OII adopts and incorporates the Statement of the Case and Facts presented in Appellant Century Surety’s Memorandum in Support of Jurisdiction.

### **ARGUMENT**

#### *Proposition of Law:*

When a term in an insurance policy has more than one possible meaning, it should be interpreted consistent with the intent of the parties at the time the policy was issued. It should not be strictly construed against the insurer unless the parties’ intent cannot be determined.

The basic principles that guide Ohio courts in determining the rights and obligations of insureds and insurers under insurance policies are now so rote that their underlying rationale has been obscured. The role of courts is to give effect to the intent of the parties. *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 presumably reflected in the language used in the 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 controlling unless a different intended meaning is shown. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 597 N.E.2d 499 (1978), syllabus paragraph two. If the policy language is ambiguous, the court considers the policy as a whole and all relevant extrinsic evidence to ascertain the parties' intended meaning. *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St.3d 634, 597 N.E.2d 499 (1992). Any remaining ambiguity that cannot be resolved with reference to the intent of the parties is construed against the insurer that drafted the policy. *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 519 N.E.2d 1380 (1988), syllabus.

Even though Ohio courts regularly recite these principles, they have failed to recognize the primacy of the parties' intentions in understanding policy language that -- like most English words -- has more than one dictionary meaning. The intent and purpose of the parties at the time they agreed to the terms of the policy is supposed to be the touchstone of the analysis, and the court's paramount duty is to ascertain and effectuate those intentions. In many cases, however, Ohio courts have side-stepped the factual question of the parties' intentions by simply extending coverage when a word used in the policy is deemed "ambiguous." This has resulted in "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 insurance company. [Citations omitted.] 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. [Citations omitted.] \* \* \* \* 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. No. 64559, 1994 Ohio App. Lexis 1682, at \*11, \*13 (Apr. 21, 1994).

It is obviously more convenient to apply a mechanical rule that automatically results in insurance coverage than to determine the intentions of the parties to the insurance policy. But that approach improperly overrides the parties' intentions whenever the policy language has more than one possible meaning. See *Cincinnati Gas & Electric Co. v. Hartford Steam Boiler Inspection and Insurance Co.*, No. 1:06-CV-331, 2008 U.S. Dist. Lexis 29569, at \*20 (S.D. Ohio, 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").

Ordinary words can almost always be labeled "ambiguous" when they are divorced from the parties' intentions, because the same word can refer to very different things in different contexts. "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). When a word has multiple meanings, the intended meaning in a particular instance depends upon the surrounding circumstances and the purpose for which it is used. For example, the word "soda" is "ambiguous" in the sense that it may refer to carbonated beverages or to certain alkaline chemicals, but its meaning in a contract is evident when the intention of the parties to the contract is considered.

Accordingly, a court cannot deem an insurance policy “ambiguous,” and automatically construe it against the insurer, merely because it contains a word that has several dictionary meanings. Policy provisions 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. *See Gottlieb & Sons, supra*, at \*13, \*15:

Were this court to construe the ambiguous provision against [the insurer], we would, in effect, be subrogating our duty to decipher the parties’ intention.... If, after considering extrinsic evidence of the parties’ intentions, the trial court is still unable to resolve the ambiguity, it should construe the policy against the drafter.

*See also Winningham, supra*, 820 F. Supp. at 344 (“[c]ourts and scholars agree that the intent of the parties to an insurance contract outweighs the maxim of interpreting ambiguous insurance contracts against the insurer”).

This Court recognized the problem in its opinion in *State v. Porterfield*, 106 Ohio St.3d 5, 7, 829 N.E.2d 690, 2005-Ohio-3095, 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.... [R]eading the sentence in isolation is inappropriate. Parsing individual words is useful only within a context.

*See West v. McNamara*, 159 Ohio St. 187, 197, 111 N.E.2d 909 (1953) (“[t]he universal rule that [ambiguous] insurance policies are to be construed strictly in favor of the insured...is not applicable to extend the coverage of the policy to absurd lengths”); *Glenn Medical Systems, Inc. v. RT Services*, 5th Dist. No. 2008-CA-246, 2009-Ohio-4535, at ¶ 7 (“[a] court should only resort to construing an ambiguous contract against the drafter when the court is unable to determine the

intent of the parties”). See also *Westfield Insurance Co. v. Galatis*, 100 Ohio St.3d 216, 228, 797 N.E.2d 1256, 2003-Ohio-5849, at ¶ 49 (holding that an earlier decision finding that the word “you” is ambiguous, and thus construing insurance policies using that word in favor of the insured, had been “wrongly decided” because “the intention of the parties was ignored”).

The ruling by the Court of Appeals in the present case relied on one narrow dictionary definition of the word “cargo,” without considering the parties’ intent. It held on that basis that a trailer used to transport equipment and supplies to job sites did not transport “cargo,” and was therefore covered by the parties’ CGL insurance policy, even though the policy specifically excluded coverage for “trailers.” See 2012-Ohio-6257, at ¶¶ 16-27. Moreover, it was undisputed that the insured had intended to obtain coverage for the trailer under its separate automobile liability insurance policy rather than under the CGL policy, consistent with industry custom. The Court of Appeals did not even mention the intentions of the parties, and it entered summary judgment finding coverage for the trailer despite ample evidence that they did not intend to insure the trailer under the CGL policy.

The Court of Appeals acknowledged but chose not to follow the decision in *United Farm Family Mut. Ins. Co. v. Pearce*, 3rd Dist. No. 2-08-07, 2008-Ohio-5405, which reached the opposite conclusion regarding the meaning of the word “cargo,” in a nearly identical CGL policy, after it considered the intent of the parties. The *Pearce* Court had also noted that the word “cargo” can refer both to items transported in commerce and to items transported generally, but it concluded that the intended meaning of “cargo” in the insurance policy was evident from the surrounding circumstances: the insured had sought to cover its truck 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.

Other courts have similarly 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 under a CGL policy. In *Winningham, supra*, 820 F. Supp. at 344, for example, NARC conducted business operations on and near the Ohio River, and it purchased a wharfinger insurance policy (which covered injuries that occur on water) as well as a CGL policy. The Court held that even if the wharfinger policy was ambiguous with respect to coverage for injuries on land, the parties intended to cover land injuries under the CGL policy rather than the wharfinger policy:

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. \*\*\*\* [This] confirms that the parties did not intend the wharfinger policy to cover injuries on the land.

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”).

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 cited expert testimony that “it has been 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.” Duplicating coverage under the CGL policy “would defeat the industry custom of having coverage under either a CGL policy or a general auto policy, but not under both.” (*Id.*) *See also Appleman, Law of Liability Insurance* (2012), § 9.05(6)(a) (“[i]n general, [automobile] liabilities excluded under the CGL policy...are covered under ‘mirror-image’ insuring agreements of automobile...policies”); *Michael Carbone, Inc. v. General Acc. Ins. Co.*, 937 F.

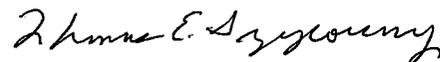
Supp. 413, 424 (E.D. Pa. 1996) (“when interpreting insurance contracts, courts often look to how the policy in question interacts with other types of available coverage,” and the “CGL policy at issue followed the industry custom of not providing coverage for a risk that is instead typically insured under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

The Court of Appeals erred as a matter of law in the present case when it automatically construed the word “cargo” in favor of coverage instead of considering the intent of the parties that the trailer would be covered by the automobile liability policy and not by the CGL policy. Its ruling should be reviewed and reversed by this Court.

### CONCLUSION

For the reasons set forth above, amicus curiae Ohio Insurance Institute supports appellant Century Surety Company and strongly urges the Court to exercise its discretionary jurisdiction to review the decision by the Court of Appeals in this matter.

Respectfully submitted,



---

Thomas E. Szykowny (0014603)  
Michael Thomas (0000947)  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street  
Columbus, Ohio 43216-1008  
Tel: (614) 464-5671  
Fax: (614) 719-4990  
[teszykowny@vorys.com](mailto:teszykowny@vorys.com)

Attorneys for Amicus Curiae  
Ohio Insurance Institute

## CERTIFICATE OF SERVICE

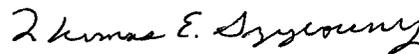
The undersigned hereby certifies that a copy of the foregoing Memorandum of Amicus Curiae Ohio Insurance Institute in Support of Jurisdiction was served via regular United States mail on this 14<sup>th</sup> day of February, 2013, on the following:

Richard M. Garner (0061734)  
DAVIS & YOUNG  
140 Commerce Park Drive, Suite C  
Westerville OH 43082

*Counsel for Appellant Century  
Surety Company*

M. Shawn Dingus (0070201)  
DINGUS, LLC  
111 West Rich Street, Suite 600  
Columbus OH 43215

*Counsel for Appellees Stinson J. Crews  
and Stinson Crews Paving, Inc.*



---

Thomas E. Szykowny