

**IN THE SUPREME COURT OF OHIO**

STINSON J. CREWS, <i>et. al.</i>	:	Case No.: 13 - 0283
	:	
Appellees,	:	ON APPEAL FROM:
	:	Tenth Appellate District,
	:	Case No. 12 AP 320
v.	:	
	:	
CENTURY SURETY COMPANY,	:	
	:	
Appellant.	:	

**MEMORANDUM OF APPELLEES STINSON J. CREWS AND STINSON  
CREWS TRUCKING IN RESPONSE TO APPELLANT CENTURY SURETY  
COMPANY'S MOTION AND MEMORANDUM IN SUPPORT OF  
JURISDICTION**

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## **APPELLEES' STATEMENT OF POSITION**

Appellant Century Surety Company (“Century”) presents no compelling reason why this Court should undertake review of the Tenth District Court of Appeals' decision in this matter. Further, the briefs of Ohio Association of Civil Trial Attorneys and the Ohio Insurance Institute (collectively “Amici Curiae”) present no persuasive reason why this Court should exercise jurisdiction in this case. In order for this Court to certify the record in this matter, the issues raised by Century must be of public or great interest or involve a substantial constitutional question. *Noble v. Caldwell* (1989), 44 Ohio St.3d 92, 94, 540 N.E.2d 1381. This case does not present such a question.

### **LAW AND ARGUMENT**

#### **I. Cases of Public or Great General Interest**

In this matter, Century presents two arguments: (1) that the Tenth District Court was incorrect when it found that the flatbed trailer qualified as an “auto” under the parties’ CGL policy and therefore could not qualify as “mobile equipment” under said policy; and (2) the term “cargo” as used in the parties’ policy was unambiguous and could only have one possible meaning. Neither of Century's arguments involve issues of public or great general interest for this Court's consideration. As such, this Court does not have jurisdiction to hear Century's appeal. Accordingly, Appellees Stinson Crews and Stinson Crews Trucking (collectively “Crews” or “Appellees”) request this Court to decline jurisdiction over Century’s appeal.

While this case may be a matter of great personal interest to Crews and a matter of great company interest for Century, it simply does not satisfy this Court's jurisdictional requirement that the matter be “of public or great general interest” as is required by the

Ohio Constitution, Article IV, Section 2(B)(2)(e). The question that this Court must answer is whether this case presents a question of public or great general interest rather than a question that is solely of interest to the parties to this litigation. *Williamson v. Rubich* (1970), 171 Ohio St. 253, 254, 168 N.E.2d 876. Whether this case presents issues of public or great general interest rests within this Court's discretion. *Id.*

The issues presented by Century do not present questions of public or great general interest. Rather, the questions raised in the Memoranda filed in support of jurisdiction only involve the particular parties to this action, or in the unlikely situation where this particular factual scenario were to repeat itself. Century attempts to bolster its argument by citing to a report by the Virginia Department of Transportation that found in the United States in the year 2000 more than 4,000 people died in accidents between a passenger vehicle and a commercial vehicle. (See Century's Memorandum in Support at p.1 fn.1.) However, out of that number, Century does not specify the number of crashes that occurred specifically in Ohio. As Ohio's population represents only 3.8% of the United States total population, it can be reasonably assumed that no more than 3.8% of these crashes, or 164 crashes per year, would have likely occurred in Ohio. More importantly, the Virginia report found that only 18% of the total crashes occurred when a passenger vehicle collided with the rear of a commercial vehicle. *Id.* at p.2 fn.3. Therefore, each year, no more than thirty (30) crashes would likely occur in Ohio involving the fact pattern of a passenger vehicle striking the rear of a commercial vehicle. In fact, the Virginia report found that such crashes represented a very small subset of the total crashes. (See *Id.* at p.11 of Report.) It must also be considered that the vast majority of these thirty (30) crashes will not involve a stationary flatbed trailer, like the one

involved in this case. Simply put, the scenario in this case is very rare and is unlikely to affect the vast majority of Ohioans on a regular basis. The scenario presented in this case will likely never be seen again by this Court and possibly never by any court of the State of Ohio.

Further, Century and Amici Curiae appear to argue that this court should accept jurisdiction because “insurance is one of largest industries in Ohio and a major pillar of its economy.” (See Ohio Insurance Institute’s (OII) Memorandum in Support at p.1). While it is true that insurance is clearly an important part of Ohio’s economy, that fact alone should not justify review by the Ohio Supreme Court in every dispute involving the interpretation of an insurance contract. OII would have the court accept jurisdiction in every case in which an Ohio appellate court issued a decision relating to an ambiguous term in an insurance contract. Such a finding could potentially result in setting precedent for the review of any case that involves the interpretation of a term contained in an insurance contract.

In summary, granting jurisdiction in this matter would be improper since it only involves the interests of these parties and are not issues of a public or great general interest. Therefore, the Appellees respectfully request that this Court decline to exercise jurisdiction over Century's appeal.

## **II. Ambiguity of Insurance Contract**

While this Court’s only consideration for granting jurisdiction is whether the case presents an issue “of public or great general interest,” Crews will address Century and Amici Curiae Propositions of Law under the issue of whether the term “cargo” is ambiguous in the policy. They urge this Court to exercise jurisdiction over this matter

under the mistaken belief that the Tenth District erred in finding that the flatbed trailer was covered as mobile equipment. Their argument is contingent on the word “cargo,” as used in the Commercial General Liability (CGL) policy at issue in this case, having only one plain and ordinary meaning. They also argue the Tenth District failed to consider the context and the intent of the parties when it considered the CGL policy terms and thus this case should be remanded for such determination. However, Century’s averments relating to the intent of the parties is not supported by the record, which is not even before the court at this time and will only be before the court if jurisdiction is accepted. Century squarely attempts to place the cart before the horse here.

In the event that the court does consider Century’s arguments relating to the meaning of the term “cargo,” Crews does not dispute that many words in the English language have different or multiple meanings. The dispute between these parties is whether the term “cargo” is intended to be defined broadly, such as *any* item, good or thing being transported, as Century argues, or as Crews reasonably argues, as goods being shipped in the flow of commerce. For instance, clothing being shipped from China for sale in the United States would clearly be “cargo,” which is often subject to insurance coverage itself, but the forklifts that are on the ship to help deliver those goods to the dock are clearly *not* “cargo.” Century appears to argue that *anything* being transported is cargo. Had Century intended for the exclusion to include any object being transported, it could have easily broadened the exclusion by using a different word or words (e.g. object, items, etc.). However, the policy does not include those words, but instead, includes a specific type of object, cargo.

A policy term that is reasonably open to different interpretations will be construed most favorably for the insured. *Morfoot v. Stake* (1963), 174 Ohio St. 506, 23 O.O.2d 144, 190 N.E.2d 573, paragraph one of the syllabus. Here, the term “cargo” is not defined by the policy, and as such, a court must look at the word’s plain and ordinary meaning. *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 49, 2008-Ohio-4838.

Century and Amici Curiae attempt to argue that an ambiguity in an insurance policy does not necessarily have to be construed in favor of coverage. (See Brief of Amicus Curiae Ohio Ins. Inst. at p. 8 (citing *Cincinnati Gas & Elec. Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, (S.D. Ohio Apr. 10, 2008) 1:06-CV-00331, 2008 WL 1733115.)) However, it is only when the parties to a contract are of equal business sophistication and bargaining power should an ambiguity not be construed in favor of the insured. Where a written contract is standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the non-drafting party. *Cent. Realty Co. v. Clutter* (1980), 62 Ohio St.2d 411, 413, 16 O.O.3d 441, 406 N.E.2d 515. In the insurance context, the insurer customarily drafts the contract. Thus, an ambiguity in an insurance contract is ordinarily interpreted against the insurer and in favor of the insured. *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380, syllabus. In fact, the *Cincinnati Gas & Elec. Co.* decision cited by OII supports the proposition that ambiguity must be construed against the drafting insurance company. That court stated that when an insured is not on an equal bargaining level with the insurance company, ambiguity must be construed in favor of coverage is appropriate. *Id* at \*8. The policy behind such rule is to force

insurance companies to use their knowledge about policy disputes to affirmatively exclude ambiguous areas of coverage. *Id.*

Century argues that the plain and ordinary meaning of “cargo” leaves only one possible interpretation for the term as used in the policy. Century’s argument would include anything being transported on Crews’ flatbed trailer. However, as the Tenth District correctly points out, the word “cargo” is an inherently ambiguous term. The Tenth District discussed in its decision that “[f]ew courts have addressed directly the scope of the term cargo, **but many that [sic] have seen an ambiguity in the term.**” *Sauer v. Crews*, 2012-Ohio-6257, ¶21 (citing *Am. Home Assurance Co. v. Fore River Dock & Dredge, Inc.*, 321 F.Supp.2d 209, 223 (D.Mass.2004); and *State Farm Fire and Cas. Co. v. Pinson*, 984 F.2d 610, 613 (4th Cir.1993) (both decisions discussing the varying and confusing meaning of the term cargo.))

The Tenth District correctly held that the issue is not whether Crews’ paving equipment falls within the meaning of the term “cargo”, but whether the policy is ambiguous as to that term. *Crews II* at ¶27. Because the term is ambiguous, the CGL policy did not clearly and unambiguously exclude coverage for Crews’ trailer; the contract must be construed in Crews’ favor to the end that Crews was not carrying cargo and thus was covered under Century’s CGL policy.

### **III. Certification of Conflict**

Century and Amici Curiae attempt to argue that this court should exercise jurisdiction over this matter because they mistakenly believe that the Tenth District’s decision in this matter conflicts with the decision of the Third District Court of Appeals in *United Farm Family Mut. Ins. Co. v. Pearce*, 3rd Dist. No. 2–08–07, 2008–Ohio–

5405. This argument not only lacks a factual basis but it is also not a proper consideration for this Court in its decision whether to exercise its discretionary jurisdiction. Century and Amici Curiae argue that there exists a conflict between the appellate circuits and thus this court should resolve this conflict. However, the proper procedure for this argument is, and indeed Century filed for, a Motion to Certify Conflict. (See Century's Motion to Certify Conflict filed 1/10/13.) S.Ct.Prac.R. 7.07(A)(2) states that this Court "will stay consideration of the jurisdictional memoranda filed in the jurisdictional appeal until the court of appeals has determined whether to certify a conflict in the case." As of the filing of this Memorandum, the Tenth District Court of Appeals has not yet issued a decision on Century's Motion to Certify Conflict.

Section 6 of Article IV of the Constitution of Ohio provides that 'whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.' This provision confers plenary authority on the judges of a Court of Appeals to determine the existence of such a conflict, and an affirmative finding and certification with reference thereto vests this Court with jurisdiction to review the judgment in the case. *Farm Bureau Mut. Auto. Ins. Co. v. Buckeye Union Cas. Co.* (1946), 147 Ohio St. 79, 85-86, 67 N.E.2d 906, 909-10, paragraphs two and four of the syllabus. Thus, any argument as to this supposed conflict should not be considered.

## CONCLUSION

For the foregoing reasons, Crews respectfully submit that this case does not involve any issues of public or great general interest, and therefore, respectfully request this Court to deny jurisdiction.

Respectfully submitted,

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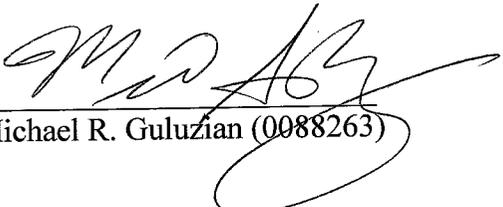
## CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was sent via regular U.S. mail, postage prepaid, this 18<sup>th</sup> day of March, 2013 to the following:

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