ORIGINAL

IN THE SUPREME COURT OF OHIO

STINSON J. CREWS, *et al.*		Case No. 2013-0283
Appellee,	)	
vs.	)	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District, Case No. 12AP-320
CENTURY SURETY COMPANY,	)	
Appellant.	)	

FILED
APR 04 2013
CLERK OF COURT
SUPREME COURT OF OHIO

APPELLANT CENTURY SURETY COMPANY'S
NOTICE OF DENIAL OF MOTION TO CERTIFY CONFLICT

M.SHAWN DINGUS (0070201)
sdingus@dinguslaw.com
PLYMALE & DINGUS, LLC
111 West Rich Street, Suite 600
Columbus, Ohio 43215
(614) 542-0220
Fax: (614) 542-0230
Counsel for Appellees
Stinson J. Crews and
Stinson Crews Trucking

THOMAS E. SZYKOWNY (0014603)
MICHAEL THOMAS (0000947)
VORYS SATER SEYMOUR & PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-5671
Fax: (614) 719-4990
Counsel for Amicus Curiae
Ohio Insurance Institute

RICHARD M. GARNER (0061734)
rgarner@davisyoung.com
DAVIS & YOUNG
140 Commerce Park Drive, Suite C
Westerville, Ohio 43082
(614) 901-9600
Fax: (614) 901-2723
Counsel for Appellant
Century Surety Company

TIMOTHY J. FITZERALD (0042734)
tfitzgerald@gallagersharp.com
RICHARD C.O. REZIE (0071321)
rrezie@gallagersharp.com
GALLAGHER SHARP
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, Ohio 44115-2108
(216) 241-5310
Fax: (216) 241-1608
Counsel for Amicus Curiae
Ohio Association of Civil Trial Attorneys

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NOTICE OF MOTION TO CERTIFY CONFLICT PENDING IN COURT OF APPEALS

Pursuant to S.Ct.Prac.R. 7.07(B)(1), Appellant Century Surety Company ("Century") hereby gives notice that, on March 28, 2013, the Tenth Appellate District denied the Motion to Certify Conflict filed by Century in the Tenth Appellate District in Case No. 12AP-320 on January 10, 2013. See attached.

Respectfully submitted,

RICHARD M. GARNER (0061734)
rgarner@davisyoung.com
DAVIS & YOUNG
140 Commerce Park Drive, Suite C
Westerville, Ohio 43082
(614) 901-9600
Fax: (614) 901-2723
Counsel for Appellant
Century Surety Company

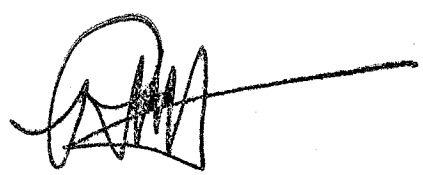
CERTIFICATE OF SERVICE

I hereby certify that the forgoing was served by ordinary U.S. Mail, on this 1st day of April, 2013 upon:

M.SHAWN DINGUS
PLYMALE & DINGUS, LLC
111 West Rich Street, Suite 600
Columbus, Ohio 43215
Counsel for Appellees
Stinson J. Crews and
Stinson Crews Trucking

THOMAS E. SZYKOWNY
MICHAEL THOMAS
VORYS SATER SEYMOUR & PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Counsel for Amicus Curiae
Ohio Insurance Institute

TIMOTHY J. FITZERALD
RICHARD C.O. REZIE
GALLAGHER SHARP
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, Ohio 44115-2108
Counsel for Amicus Curiae
Ohio Association of Civil Trial Attorneys



RICHARD M. GARNER (0061734)
DAVIS & YOUNG
Counsel for Appellant
Century Surety Company

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Sharon A. Sauer et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 12AP-320 (C.P.C. No. 07CV-9394)
Stinson J. Crews et al.,	:	
Defendants/Third-Party Plaintiffs-Appellees,	:	(REGULAR CALENDAR)
	:	
Mariann Jackson et al.,	:	
Defendants-Appellees,	:	
Century Surety Company,	:	
Third-Party Defendant-Appellant.	:	

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on March 28, 2013, appellant's January 10, 2013 motion to certify a conflict is denied. Costs assessed to Century Surety Company.

BRYANT, J., KLATT, P.J., & DORRIAN, J.

By /S/ JUDGE
Judge Peggy Bryant

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Tenth District Court of Appeals

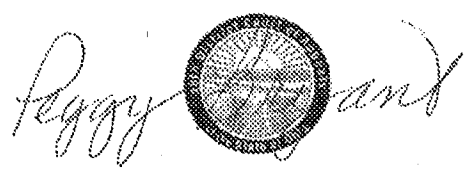
Date: 03-28-2013

Case Title: SHARON A SAUER COEX -VS- STINSON J CREWS

Case Number: 12AP000320

Type: JOURNAL ENTRY

So Ordered



/s/ Judge Bryant

Court Disposition

Case Number: 12AP000320

Case Style: SHARON A SAUER COEX -VS- STINSON J CREWS

Motion Tie Off Information:

1. Motion CMS Document Id: 12AP0003202[redacted]980000
   Document Title: 01-10-2013-MOTION
   Disposition: 3200

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Sharon A. Sauer et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 12AP-320 (C.P.C. No. 07CV-9394)
Stinson J. Crews et al.,	:	
Defendants/Third-Party Plaintiffs-Appellees,	:	(REGULAR CALENDAR)
	:	
Mariann Jackson et al.,	:	
Defendants-Appellees,	:	
Century Surety Company,	:	
Third-Party Defendant-Appellant.	:	

M E M O R A N D U M D E C I S I O N

Rendered on March 28, 2013

Plymale & Dingus, LLC, M. Shawn Dingus and *Michael R. Guluzian*, for appellees Stinson J. Crews and Stinson Crews Paving, Inc.

Weston Hurd LLP, John G. Farnan and *J. Quinn Dorgan*, for appellant Century Surety Company.

ON MOTION TO CERTIFY A CONFLICT

BRYANT, J.

{¶ 1} Pursuant to App.R. 25, third-party defendant-appellant, Century Surety Company, moves this court for an order certifying a conflict between our December 31, 2012 decision in *Sauer v. Crews*, 10th Dist. No. 12AP-320, 2012-Ohio-6257, and the Third

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District's decision in *United Farm Family Mut. Ins. Co. v. Pearce*, 3d Dist. No. 2-08-07, 2008-Ohio-5405.

{¶ 2} Ohio Constitution, Article IV, Section 3(B)(4) requires a court of appeals to certify a conflict when its judgment conflicts with the judgment any other courts of appeals in the state of Ohio pronounced upon the same question. *See also* App.R. 25 and S.Ct.Prac.R. IV. An actual conflict must exist between appellate judicial districts on a rule of law before certification of a case to the Supreme Court of Ohio for review and final determination is proper. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594 (1993). "It is not enough that the reasoning expressed in the opinions in the two courts of appeals is inconsistent; the judgment of the two courts must be in conflict." *State v. Burke,* 10th Dist. No. 04AP-1234, 2005-Ohio-7020, ¶ 46, reconsideration denied, 2006-Ohio-1026, ¶ 14. Further, the alleged conflict must be on a rule of law and not based on facts, as factual distinctions between cases do not serve as a basis for certifying a conflict. *Whitelock* at 599.

{¶ 3} Contending our judgment in *Sauer* "directly conflicts" with *Pearce*, Century proposes we certify a conflict on the following question:

> Whether a vehicle designed, registered and used by a business to transport personal property and equipment on public roads qualifies as "mobile equipment" under a commercial general liability policy that defines this term as a vehicle "maintained primarily for purposes other than the transportation of persons or cargo."

(Appellant's Motion to Certify a Conflict, at 2.)

A. *Sauer*

{¶ 4} *Sauer* involved a dispute between Century, the insurer, and Stinson J. Crews and Stinson Crews Paving, Inc. (collectively, "Crews"), the insured, regarding Crews' coverage pursuant to its commercial general liability ("CGL") policy with Century. Crews owned a non-motorized 1990 Hudson flatbed trailer that the company used for hauling machinery to and from job sites by hitching the trailer to a truck. In November 2006, Crews used the trailer to take paving equipment to a work site and parked the trailer, unattached to the truck, on a public road near the site. *Sauer* at ¶ 2. When a driver traveling on the road collided with the trailer and died, her estate filed a wrongful

death and survivorship action against Crews. Crews, in turn, filed a third-party complaint against Century seeking coverage under its CGL policy. In response, Century requested the trial court issue a declaratory judgment that its policy did not require Century to provide Crews with either a defense or indemnity.

{¶ 5} Generally, Crews' CGL policy with Century excluded "autos" from liability coverage, defining "autos" as including "trailers." *Id.* at ¶ 15. The same definition, however, excluded "mobile equipment" from the definition of autos. The trial court found that Crews' trailer qualified as "mobile equipment" under a provision defining mobile equipment as "[v]ehicles * * * maintained primarily for purposes other than the transportation of persons or cargo." *Id.* at ¶ 17. The court determined the meaning of "cargo" was ambiguous, and the term could apply either to items in the stream of commerce alone or to practically any item capable of vehicular conveyance. Since Century drafted the contract, the court interpreted the term in the manner most favorable to Crews; it thus concluded the non-motorized flatbed trailer was not hauling "cargo." *See Erie Ins. Exchange v. Colony Dev. Corp.*, 10th Dist. No. 02AP-1087, 2003-Ohio-7232. On appeal, Century disputed the trial court's conclusion and cited *Pearce* to support its argument that the term "cargo" was unambiguous and included the equipment Crews' trailer carried. In so arguing, Century relied heavily on *Pearce*.

B. *Pearce*

{¶ 6} In *Pearce*, the insured, Pearce, owned and operated a blacktop business. While blacktopping a driveway, Pearce backed his dump truck up to the driveway to unload some asphalt, blocking the northbound lane of a public road. *Pearce* at ¶ 2. A driver traveling north on the road struck the dump truck and was injured. *Id.* When the driver sued, Pearce notified United Farm Family Mutual Insurance Company of a potential claim under his CGL policy. *Id.* at ¶ 3. In response, United Farm filed a declaratory action with the trial court seeking a declaration of its rights and responsibilities under the policy. *Id.*

{¶ 7} The United Farm policy contained language pertaining to "autos" and "mobile equipment" that is functionally the same as the language in Crews' policy. Like Century, United Farm argued it was not required to provide coverage because Pearce's CGL policy excluded bodily injury arising out of the ownership, maintenance, or use of

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an "auto." In response, the injured driver, having intervened on the declaratory action, contended that the dump truck was covered under the policy as "mobile equipment." *Id.* at ¶ 4. The trial court agreed with United Farm, finding that the insurance policy excluded coverage because Pearce's dump truck was an "auto" and not "mobile equipment," as those terms were defined in the policy. *Id.*

{¶ 8} On appeal, the *Pearce* interveners-appellants contended the dump truck qualified as mobile equipment pursuant to several provisions of the CGL policy. Significant here, they asserted Pearce's dump truck was mobile equipment "because it was 'maintained primarily for purposes other than the transportation of persons or cargo,' " observing the evidence indicated Pearce maintained the dump truck "primarily to haul asphalt and equipment to the job site." *Id.* at ¶ 15. *Pearce* noted Webster's Third International Dictionary (2002) 339 defined cargo as " 'the lading or freight of a ship, airplane, or vehicle: the goods, merchandise, or whatever is conveyed; LOAD, FREIGHT-usu. used of goods only and not of live animals or persons.' " *Id.* Observing the same dictionary, at 978, defined "goods" as " 'tangible movable personal property having intrinsic value,' " the court concluded, "[a]sphalt and equipment fall within the definition of a good, and thus, cargo. According to the record, then, the dump truck was maintained primarily for the transportation of cargo; and therefore, is not 'mobile equipment.' " *Id.* at ¶ 15.

{¶ 9} *Sauer* acknowledged *Pearce* and, specifically, its conclusion that the items at issue in *Pearce* were goods and therefore cargo. Although *Pearce* limited its inquiry to whether the items the dump truck transported were "cargo," *Sauer* required this court to analyze the case differently, since the issue presented for review was "not whether Crews' 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." *Sauer* at ¶ 27.

{¶ 10} To that end, although *Sauer* recognized Webster's definition of goods includes " '(b) *plural*: personal property having intrinsic value,' " *Sauer* further noted Webster's definition of goods has multiple parts and also defined the term as " '(d) *plural*: something manufactured or produced for sale: WARES, MERCHANDISE.' " (Emphasis sic.) *Sauer* at ¶ 20, quoting Merriam–Webster's Online Dictionary, http://merriam-webster.com/dictionary/goods (accessed Dec. 28, 2012). Ultimately, *Sauer* concluded

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"cargo" had more than one common meaning. Because the contract provided no indication it was using the term in the broader sense, *Sauer* construed it in the manner most favorable to the party who did not draft it.

C. *No Conflict*

{¶ 11} *Sauer* and *Pearce* do not conflict. *Sauer* turned upon the ambiguity of the term "cargo," while *Pearce* did not purport to address that issue at all. Century's motion to certify a conflict nonetheless suggests *Pearce*'s use, without qualification, of a particular definition of "cargo" indicates *Pearce* implicitly found the term unambiguous. However the difference in the two decisions may be characterized, the reality is that the two decisions simply used different reasoning to reach their respective conclusions, and a difference in reasoning does not support a motion to certify a conflict. Instead, the issue at the heart of Century's motion is whether the two decisions opined on the same legal question.

{¶ 12} Whether the two decisions were rendered upon the same legal question depends on the scope of the legal question. Both decisions involved construing insurance policy language defining "mobile equipment." Nonetheless, the facts on which those decisions were reached were different, so each decision answered a different question. Although Pearce sometimes attached a non-motorized "lowboy" trailer to the back of the dump truck to transport his paving equipment, that trailer was not involved in the accident. What is more, by stating the dump truck was maintained to transport "asphalt and equipment," *Pearce* seemingly either did not consider the trailer or considered it to be part of the "cargo" the dump truck transported; at no point did *Pearce* examine whether the trailer itself constituted "mobile equipment" pursuant to the policy. *Sauer* did.

{¶ 13} Moreover, in *Pearce,* the asphalt, carried in the bed of a dump truck, arguably met the more rigorous definition of "cargo" applied in *Sauer*. *Pearce* at ¶ 15. *Pearce* apparently considered the asphalt and the equipment separately, since the dump truck itself only carried asphalt, the trailer actually conveying equipment. *Pearce* thus determined the asphalt, arguably meeting the more rigorous definition of cargo, was carried in the dump truck, removing the truck from the definition of mobile equipment.

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Sauer, by contrast, concluded the lowboy trailer did not meet the definition of cargo when the language of the policy was construed against Century.

{¶ 14} Because *Sauer* and *Pearce* decided different questions of law due to the factual differences and different issues to be determined, the decisions do not conflict. Accordingly, we deny appellant's motion to certify conflict. *See Whitelock.*

Motion to certify a conflict denied.

KLATT, P.J., and DORRIAN, J., concur.

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