

IN THE SUPREME COURT OF OHIO

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

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REPLY BRIEF OF  
APPELLANT CENTURY SURETY COMPANY

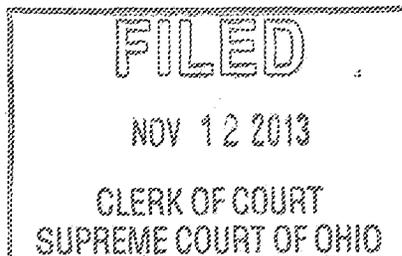
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M. SHAWN DINGUS (0070201)  
[sdingus@dinguslaw.com](mailto:sdingus@dinguslaw.com)  
 PLYMALE & DINGUS, LLC  
 111 West Rich Street, Suite 600  
 Columbus, Ohio 43215  
 (614) 542-0220  
 Fax: (614) 542-0230  
*Counsel for Appellees*  
*Stinson J. Crews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

RICHARD M. GARNER (0061734)  
[rgarner@davisyoung.com](mailto: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*

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*

TIMOTHY J. FITZGERALD (0042734)  
[tfitzgerald@koehlerneal.com](mailto:tfitzgerald@koehlerneal.com)  
 KOEHLER NEAL LLC  
 3330 Erieview Tower  
 1301 East Ninth Street  
 Cleveland, Ohio 44114  
 (216) 539-9370  
 Fax: (216) 916-4369  
*Counsel for Amicus Curiae*  
*Ohio Association of Civil Trial Attorneys*



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## Law & Argument

### **I. Introduction**

As argued in Century's Merit Brief, this Court should reverse the lower courts and enter judgment for Century<sup>1</sup> because: (1) the CGL coverage under the Century Policy was never intended to provide coverage for damages arising from the Accident; and (2) the Century Policy clearly and unambiguously excludes coverage for damages arising from the Accident.

While Crews concedes that the Trailer meets the definition of an "auto" under the Century Policy<sup>2</sup>, it maintains that the Trailer should be subject to the "mobile equipment" exception of that definition because Crews did not use the Trailer primarily to transport goods for sale.<sup>3</sup> Crews also argues that Century has waived any argument that the Trailer could not qualify as "mobile equipment" because it was subject to Ohio's financial responsibility laws.<sup>4</sup> For the reasons that follow, Crews' arguments are without merit and should be rejected by this Court. These issues are addressed in reverse order below.

### **II. Century Did Not Waive Any Argument That The Trailer Could Not Qualify As "Mobile Equipment" Because It Was Subject To Ohio's Financial Responsibility Laws.**

In the Trial Court, the *issue* presented by the parties was whether the Trailer was subject to the "mobile equipment" exception within the "auto" definition such that the damages arising from the Accident were not subject to the auto liability exclusion in the Century Policy. The parties did not dispute whether the Trailer qualified as an "auto"--their dispute was over whether

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<sup>1</sup> For purposes of clarify, brevity and consistency, the same abbreviations used in Century's Merit Brief are used in this Reply Brief.

<sup>2</sup> (Crews' Merit Brief, p. 4).

<sup>3</sup> (Crews' Merit Brief, pp. 4-16).

<sup>4</sup> (Crews' Merit Brief, pp. 4-5).

Crews had proven that the Trailer was subject to an exception to the automobile liability exclusion. It is well-established under Ohio law that Crews bore the burden of going forward with the evidence and the burden of proof with respect to establishing that the Trailer constituted “mobile equipment”. See *U.S. Industries, Inc. v. Ins. Co. of N. Am.*, 110 Ohio App.3d 361, 366, 674 N.E.2d 414 (9<sup>th</sup> Dist. 1996); *Plasticolors, Inc. v. Cincinnati Ins. Co.*, 85 Ohio App.3d 547, 550, 620 N.E.2d 856 (11<sup>th</sup> Dist. 1992); *Owners Ins. Co. v. Singh*, 5<sup>th</sup> Dist. No. 98-CA-108, 1999 WL 976249, at \*4; *M&M Metals Int’l Inc. v. Cont’l Cas. Co.*, 1<sup>st</sup> Dist. Nos. C-060551, C060571, at ¶12.

Whether Crews met this burden would depend upon the policy language and the facts. The Century Policy defines “auto” to mean “a. A land motor vehicle, *trailer* or semitrailer designed for travel on public roads . . . or b. Any other land vehicle that is subject to compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. ***However, ‘auto’ does not include ‘mobile equipment’.***” (Emphasis added).<sup>5</sup> “Mobile equipment”, in turn, was defined, in pertinent part, as “f. Vehicles not described in a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo . . . ***However, ‘mobile equipment’ does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered ‘autos’.***” (Emphasis added).<sup>6</sup> Thus, at the Trial Court level, it was incumbent

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<sup>5</sup> (Supplement, p. 52).

<sup>6</sup> (Supplement, pp. 53-54).

upon *Crews* to prove that the Trailer met all of the requirements of the “mobile equipment” exception, including proving that the Trailer was not subject to Ohio’s financial responsibility laws. *Crews* failed to do so and was wrongly granted summary judgment.

In opposing *Crews*’ arguments, *Century*:

- (1) expressly relied upon the definitions of “auto” and “mobile equipment” and the policy clarification that:

However, “mobile equipment” does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered “autos.”<sup>7</sup>

- (2) presented evidence and argument that the Trailer was “designed for and required to be used on public roads;”<sup>8</sup> and
- (3) presented Civ. R. 56 evidence that that Trailer was registered as a commercial trailer with the Ohio BMV as required by OAC 4501:1-7-05(B).<sup>9</sup>

These arguments were repeated by *Century* in the Tenth Appellate District.<sup>10</sup>

Determination of whether the Trailer was “mobile equipment” required the Trial Court to find that the Trailer was not subject to Ohio financial responsibility law, and therefore that legal issue was squarely before the Trial Court. Although neither party expressly argued this issue to the Trial Court, this Court has made it clear that “[w]hen an issue of law that was not argued below is implicit in another issue that was argued and presented by an appeal, we may consider

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<sup>7</sup> (*Century Coverage Brief*, pp. 8-10[*Supplement*, pp. 8-10]).

<sup>8</sup> (*Century Coverage Brief*, p. 18[*Supplement*, p. 18]).

<sup>9</sup> (*Century Coverage Brief*, pp. 18-19[*Supplement*, pp. 18-19]).

<sup>10</sup> (*Merit Brief of Appellate Century Surety Company*, p. 7 [Tenth Appellate District]).

and resolve that implicit issue. To put it another way, if we must resolve a legal issue that was not raised below in order to reach a legal issue that was raised, we will do so.” *Belvedere Condominium Unit Owners Ass’n v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 279, 1993-Ohio-119; *Hill v. City of Urbana*, 79 Ohio St.3d 130, 133-134, 1997-Ohio-400. Moreover, it is hornbook law that “if an issue was raised in the trial court, new legal arguments in support of a party’s contention on that issue may be raised in the court of appeals.” Oh. App. Prac. §7:4 (2012). Once an issue is raised in the trial court, it is not necessary that every nuance of the issue be argued in order for the issue to be preserved on appeal. *Long v. Village of Hanging Rock*, 4<sup>th</sup> Dist. No. 09CA30, 2011-Ohio-5137, at ¶33; *Ignazio v. Clear Channel Broadcasting, Inc.*, 113 Ohio St.3d 276, 2007-Ohio-1947, at ¶19.<sup>11</sup> While the parties could not argue new issues on appeal, such as late notice, other exclusions or waiver/estoppel, they could emphasize different aspects of the “mobile equipment” issue that was raised in the Trial Court. As this Court’s review is de novo, it owes no deference to the lower courts’ treatment of the issue.

Finally, although it is not dispositive of the issues in this case, it is notable that Crews also failed to argue that the Progressive Policy provided coverage for the Accident pursuant to Form F despite the fact that Crews intended for the Progressive Policy to provide such

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<sup>11</sup> For instance, in the Trial Court, Crews never expressly argued that “cargo” was ambiguous or that it should refer to goods for sale. (See Crews’ Coverage Brief; Defendants/Third Party Plaintiffs’ Stinson Crews and Stinson Crews Trucking Reply Brief in Support Coverage [“Crews Coverage Reply Brief {T.d. 279}”). The Trial Court reached that conclusion on its own, and Crews first made the argument on appeal. However, the issue was squarely before the Trial Court because the issue of whether the Trailer was subject to the “mobile equipment” exception was before the Trial Court.

coverage.<sup>12</sup> Century addressed Form F as background information so that this Court would understand that the Progressive Policy should have responded to the damages sought against Crews as a result of the Accident.<sup>13</sup> Crews counters that: (1) there is no evidence that the Trailer was a commercial vehicle; and (2) even if there was, there is no caselaw in Ohio that holds that the Form F is supposed to work like the MCS-90 Endorsement.<sup>14</sup> Neither assertion has merit.

With respect to the former, Century presented uncontested Civ. R. 56 evidence of the Trailer's BMV registration as a "commercial trailer".<sup>15</sup> There is no evidence in the record to the contrary.

With respect to the latter, Crews is correct that there is little, if any, Ohio legal authority on the issue. However, this does not change the legal significance of Form F as background information in this case. Form F is a standard form used by insurance companies across the nation and has been given consistent application by legal authorities. *See e.g. Scottsdale Ins. Co. Oklahoma Transit Auth., Inc.*, No. 06-CV-0359, 2008 WL 896639 (N.D. Ok. Mar. 28, 2008),

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<sup>12</sup> In the Trial Court, Crews argued that the Trailer was not covered by the Progressive Policy because it was not attached to a covered auto at the time of the Accident. (See Crews' Coverage Brief, p. 7) ("Had it been attached to another automobile, the business automobile policy would have applied. However because it was not so attached and was being used as a piece of equipment, Crews' automobile insurance, Progressive Insurance, did not cover the trailer").

<sup>13</sup> In the Trial Court, Crews argued that there should be coverage under the Century Policy because the Progressive Policy did *not* provide coverage for the Trailer. Crews contended that if the Trial Court did not find that Trailer constituted "mobile equipment", it would "essentially be an undefined, miscellaneous object" without coverage. (See Crews Coverage Brief, p. 7; Crews' Coverage Reply Brief, p. 4). Thus, Crews' incorrect arguments about the lack of coverage under the Progressive Policy were central to its winning strategy in the Trial Court. In a direct turnabout, Crews now argues that "this court should not consider whether coverage was possibly available under the Progressive Policy." (Crews Merit Brief, p. 2).

<sup>14</sup> (Crews' Merit Brief, pp. 1-2).

<sup>15</sup> (Century Coverage Brief, at Ex. F[Supplement, p. 226]).

at \*6. Prior to 1994, Form F (and related Form E) were an integral part of the federal regulation of trucking. See *Northland Ins. Co. v. New Hampshire Ins. Co.*, 63 F.Supp.2d 128, 135-137 (D.N.H. 1999)(explaining the history of Forms E and F prior to 1994). Although federal law no longer requires Forms E or F, states like Ohio have retained the requirement that intrastate motor carriers like Crews use Form F and file Form E as proof thereof. See PUCO Safety Handbook, pp. 14-15 (Century Merit Brief, at Appx., pp. 51-52); *Northland*, 63 F.Supp.2d at 136 (explaining New Jersey intrastate requirements). Ohio financial responsibility laws expressly provide that the scope of coverage provided by Form F must be the same as that provided under the MCS-90 Endorsement. See OAC 4901:2-13-02(C)(requiring intrastate carriers to “maintain insurance as required under 49 C.F.R. 387”). The MCS-90 Endorsement extends coverage “regardless of whether or not each motor vehicle is specifically described in the policy.” 49 CFR 387.15. As this Court has correctly noted, the MCS-90 Endorsement “overrides any ‘condition, provision, stipulation, or limitation’ in the policy that would relieve the insurer from its duty to pay.” *Lynch v. Yob*, 95 Ohio St.3d 441, 2002-Ohio-2485, at ¶19. Thus, the Progressive Policy provided coverage for damages arising from the Accident.

### **III. The Term “Cargo”, As Used In The Century Policy, Is Not Ambiguous.**

Crews concedes that it cannot prevail in this case unless this Court finds that term “cargo”, as used in the Century Policy, can reasonably be interpreted to mean goods for sale, arguing:

[If the vehicle is maintained primarily to transport persons or *cargo*, it is an “auto” and subject to the exclusion under the Policy. Conversely, if the vehicle is primarily maintained to transport other items, it is not subject to the “auto” exclusion and coverage would apply.

\* \* \*

. . . “cargo” is open to interpretation . . . the word could be interpreted to include the transport of any item, *or just as reasonably*, the transport of goods in the stream of commerce.” (emphasis added).<sup>16</sup>

For the reasons that follow, Crews’ interpretation of “cargo” is unreasonable in the context of the Century Policy and should be rejected.

As a preliminary matter, Crews’ claims that its position is supported by two cases: (1) *Am. Home Ass. Co. v. Fore River Dock & Dredge, Inc.*, 321 F.Supp.2d 29 (D. Mass 2004); and (2) *Edward J. Gerrits, Inc. v. Royal Marine Service Co., Inc.*, 456 So.2d 1316 (Fla. 1984).<sup>17</sup> However, neither case examined the term “cargo” in the same context as the Century Policy and neither case supports Crews’ arguments. Both are actually adverse to Crews’ arguments.

In *Fore River Dock & Dredge*, the court, in pertinent part, was called upon to determine whether a crane and other loading equipment and tools on board a barge that ran aground could constitute covered “cargo” under a marine insurance policy. Examining the dictionary definitions of “cargo” in the context of the marine insurance policy, the court concluded that the crane and other loading equipment and tools could not constitute “cargo”, explaining:

*Under the most generous understanding of the term that common sense will allow, “cargo” is 1) any item, 2) transported on a vessel from one point to another, 3) with only a temporary connection to the vessel.*

This understanding of the term “cargo” comports with the language of the Policy as a whole.

\* \* \*

The crane, equipment, and tools at issue here were items transported from one point to another. The more difficult question is whether they had only a temporary connection to the Barge. Although the crane could, in

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<sup>16</sup> (Crews’ Merit Brief, pp. 3, 7)

<sup>17</sup> (Crews Merit Brief, pp. 8-9, 11)

theory, be unsecured and driven off the Barge, it had not actually been removed from the Barge for at least ten years . . . It appears from the record that the Barge functioned as an on-site working platform, and that the crane aided the Barge in this basic function . . . The crane thus had more than a temporary connection to the Barge, and therefore cannot reasonably qualify as cargo. As for the equipment and tools, there does not appear to be enough evidence in the record suggesting either way whether these items had a temporary connection to the Barge. Thus it would be inappropriate to award summary judgment to either party on the equipment and tools coverage. (emphasis added).

321 F.Supp.2d at 223. Thus, in the context of a marine insurance policy, the *Fore River Dock & Dredge* court found that “cargo” unambiguously meant: (1) *any item*; (2) transported on a vessel/vehicle from one point to another; and (3) with only a temporary connection to the vessel/vehicle. This is similar to the argument made by Century and the analysis of the Third Appellate District in *United Farm Fam. Ins. Co. v. Pearce*, 3d Dist. No. 2-08-07, 2008-Ohio-5405. It also appears fatal to Crews’ arguments. Indeed, “Crews concedes that had the Policy defined ‘cargo’ as meaning the transport of *any item*, or simply replaced ‘cargo’ with the phrase ‘*any item*,’ the ambiguity in the case would not be present.”<sup>18</sup> This is precisely how *Fore River Dock & Dredge* interpreted “cargo”—in pertinent part, as “any item”. Consequently, if *Fore River Dock & Dredge* is to be followed, then this Court should enter judgment for Century.

In *Edward J. Gerrits*, the court was also asked to resolve the question of whether a crane used to load cargo onto a barge should be considered “cargo” within the context of a marine insurance policy. 456 So.2d at 1317. Very little information was provided about the context in the one paragraph decision—only that “[t]he protection and indemnity policy covered Royal Marine Service Co., Inc., the company hired by Gerrits to transport certain building materials by

barge, would cover damages to the crane *unless the crane were considered cargo* and thus within an exclusion to the policy.” *Id.*, at FN1 (emphasis added). The court concluded that “the term ‘cargo’ most certainly does not unambiguously include the crane”. *Id.* In so holding, the court referred to the venerable case of *The Manila Prize Cases*, 188 U.S. 254, 47 L.Ed. 463 (1903) as support for the proposition that “it is arguable that the commonly understood meaning of the word “cargo” is goods and merchandise—freight—intended for delivery” in a marine context. *Id.*, at FN 2. *The Manila Prize*, of course, was not an insurance case, but addressed the extent to which ships and their constituent components could constitute “prizes” of war. The Supreme Court of the United States made it clear that “[n]o question of cargo [was] involved”, but used the concept “cargo”, in the maritime sense, as being distinct from the ship and the appurtenances that were necessary to operate the ship in order to emphasize the scope of what constituted a ship “prize”. 188 U.S. at 267-269. In so doing, the high court referred to earlier cases in which it was held:

... that the word ‘appurtenances,’ distinguished between cargo, which was intended to be disposed of at the foreign port, and having a merely transitory connection with the ship, and those accompaniments that were indispensable instruments without which the ship could not perform its functions.

188 U.S. at 269. Such analysis is analogous to the definition of “cargo” subsequently employed in *Fore River Dock & Dredge* (that is: (1) any item; (2) transported on a vessel/vehicle from one point to another; and (3) with only a temporary connection to the vessel/vehicle). If an item had a more permanent connection with the vessel/vehicle, it would be considered an “appurtenance” to the ship rather than “cargo”, and therefore be subject to “prize” rules for ships rather than

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<sup>18</sup> (Crews Merit Brief, pp. 14-15).

“prize” rules for “cargo”. It was against this backdrop that *Edward J. Gerrits* concluded that the crane did not unambiguously constitute “cargo” as to be subject to the cargo exclusion in the marine insurance policy in that case. The crane may have been (1) any item, (2) transported on the barge from one point to another, but it could not be said to have only a (3) temporary connection with the barge (and was not offloaded for delivery). Thus, any ambiguity in the meaning of “cargo” that may have been at play in *Edward J. Gerrits* does not appear to have any relevance to the issues in this case. Certainly, there is nothing to support the argument that the term “cargo”, within the context of the Century Policy, should mean goods for sale.

Instead, this Court should look to the well-reasoned decisions in *Pearce, Baker v. Catlin Specialty Ins. Co.*, 769 F.Supp.2d 1157 (N.D. Iowa 2011) and *Indiana Lumbermens Mut. Ins. Co. v. Timberland Pallet and Lumber Co., Inc.*, 195 F.3d 368 (8<sup>th</sup> Cir. 1999) relied upon at pp. 21-24 of Century’s Merit Brief. Crews contends that these cases are distinguishable, but then fails to provide any meaningful distinctions. For instance, Crews argues that *Pearce, Baker* and *Timberland* are distinguishable because the vehicles in those cases had motors while the Trailer does not.<sup>19</sup> This is a distinction without a difference. The Trailer was a registered commercial vehicle that undisputedly qualified as an “auto” under the Century Policy unless the “mobile equipment” exception applies. Additionally, Crews argues that these cases did not employ a “use” analysis with respect to the items being transported. However, the fact that *Pearce, Baker*

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<sup>19</sup> With respect to *Pearce*, Crews argues: “Crews is not arguing that the dump truck is ‘mobile equipment,’—only the trailer.” (Crews’ Merit Brief, p. 10). With respect to *Baker*, Crews argues: “the vehicle involved was a pick-up truck, which is in every sense of the word a motor vehicle.” (*Id.*, at p. 12); With respect to *Timberland*, Crews argues: “The opinion also involved a dump truck, similar to the truck that contained the asphalt in the present case.” (*Id.*, at p. 13).

and *Timberland* did not consider whether the items being transported were being sold indicates that such an inquiry is irrelevant to the issue what constitutes “cargo”—particularly in light of the fact that neither the *Fore River Dock & Dredge* nor the *Edward J. Gerrits* cases, expressly relied upon by Crews, undertook such an inquiry. In short, Crews is not able to point to any legal authority that directly supports its arguments.

This should not be surprising because there is little doubt that neither Crews nor Century intended for the Century Policy to provide coverage for the Trailer. Such coverage was supposed to be provided by the Progressive Policy. The cardinal rule of contract interpretation is that a reviewing court “give effect to the intent of the parties.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶11. As explained in *Galatis*, the rule of contra proferentem cannot override giving effect to the intent of the parties:

*Scott-Pontzer* ignored the intent of the parties to the contract. Absent contractual language to the contrary, it is doubtful that either an insurer or a corporate policyholder ever conceived of contracting for coverage for off-duty employees occupying noncovered autos, let alone the family members of the employees . . . The *Scott-Pontzer* court even acknowledged that the expansion of coverage for an employee outside the course and scope of employment “may be viewed by some as a result that was not intended by the parties to the insurance contracts at issue.” (Citations omitted).

*Galatis*, at ¶39. Ordinarily, the plain language of the contract is presumed to manifest the intent of the parties. *Sunoco, Inc. v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, at ¶37. However, this Court has directed that plain dictionary definitions too must give way to the paramountcy of the contracting parties’ intent. In *Graham*, this Court considered whether a mining company would be permitted to strip mine a parcel of property where the original conveyance granted the mining company:

. . . all of the minerals of whatsoever nature and description, including oil, gas, salt water together with the right and privilege of entering in, on, or under said premises for purpose of exploring for, testing, mining and removing the same . . .

76 Ohio St.3d at 314. This Court reversed the court of appeals, which had found the provision unambiguously granted the mining company the right to strip mine, and found “unpersuasive” arguments that: (1) “all means all”; and (2) “the dictionary definition of ‘mining’ at the time the deeds were drafted included strip mining.” 76 Ohio St.3d at 316-317. Instead, this Court found that strip mining was inconsistent with the parties’ intent, explaining:

Though strip mining is undeniably a form of mining, and the deeds reserved to Cambria the right to mine and remove all the coal and other minerals, we find the dictionary definition to be far outweighed in our search for the intent of the parties by the weight of the deep-mining context and language of the reservation clauses and by the patent incompatibility of strip mining with separate ownership of the surface of the land.

76 Ohio St.3d at 317. The mining company’s position was not absurd or even completely unreasonable, it was just that “the interpretation which makes a rational and probable agreement must be preferred.” *Id.*, at 316.

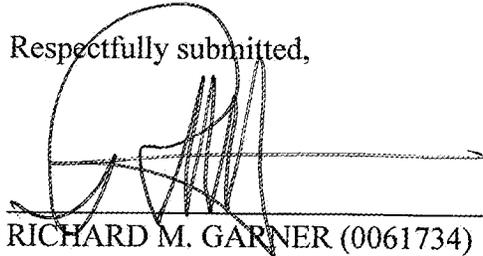
In this case, it is highly unlikely that Century and Crews intended for the Century Policy to provide automobile liability coverage for the Trailer simply because it was not primarily used to haul goods for sale, and Crews has not even attempted to suggest that this is what either party actually intended. Rather, Crews concedes that its current position may not have been “necessarily contemplated at the inception of” the Century Policy.<sup>20</sup> There are times when the rule of *contra proferentem* can legitimately be used by an insured to clarify an ambiguous contract term, but this case should not be one of those times. To hold otherwise is to violate the

fundamental rule of contract law that “the interpretation which makes a rational and probable agreement must be preferred.” 76 Ohio St.3d at 316.

**Conclusion**

Based upon the foregoing, and for all of the reasons in Century’s Merit Brief and the briefs of supporting amici, this Court should reverse *Crews II* and enter judgment that the Century Policy does not provide coverage for damages arising from the Accident.

Respectfully submitted,



RICHARD M. GARNER (0061734)

[rgarner@davisyoung.com](mailto: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*

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<sup>20</sup> (Crews Merit Brief, p. 14)

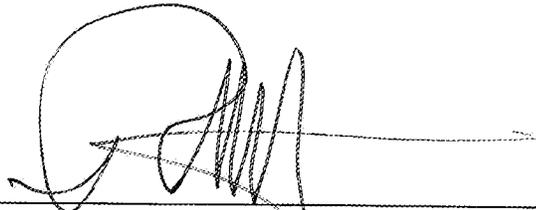
**CERTIFICATE OF SERVICE**

I hereby certify that the forgoing was served by ordinary U.S. Mail, on this 12<sup>th</sup> day of  
November, 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  
KOEHLER NEAL LLC  
3330 Erieview Tower  
1301 East Ninth Street  
Cleveland, Ohio 44114  
*Counsel for Amicus Curiae*  
*Ohio Association of Civil Trial Attorneys*



RICHARD M. GARNER (0061734)  
*Counsel for Appellant Century Surety Company*