ORIGINAL

No. 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

REPLY BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF THIRD-PARTY DEFENDANT/APPELLANT CENTURY SURETY COMPANY

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I. INTRODUCTION

Amicus Curiae Ohio Association of Civil Trial Attorneys ("OACTA"), in continued support of Appellant, Century Surety Insurance Company ("Century Surety"), submits this short reply brief to address how two key issues of law point out critical errors in the arguments made in the Merit Brief of Appellees Stinson J. Crews and Stinson Crews Trucking ("Crews").

II. REBUTTAL ARGUMENT

A. An insurance policy is not rendered ambiguous because of an undefined term.

In the Argument Contra to Proposition of Law No. 2, Crews argues that, without being expressly defined, the use of the term "cargo" in the Century Surety commercial general liability insurance policy ("the CGL Policy") renders the policy ambiguous. (Crews' Merit Br. at p. 3.) The absence of a definition for "cargo" is a common theme in Crews' Merit Brief. (Crews' Merit Br. at pp. 5, 9.) However, the lack of a definition of "cargo" does not make the "mobile equipment" exception to the "auto" exclusion in the CGL Policy ambiguous. As was noted by this Court in *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 652 N.E.2d 684 (1995), "[t]he mere absence of a definition in an insurance contract does not make the meaning of the term ambiguous." *Id.* at 108. See also, *Chicago Title Ins. Co. v. Huntington Natl. Bank*, 87 Ohio St.3d 270, 273, 719 N.E.2d 955 (1999), citing *Guman Bros. Farm.*

In *Guman Bros. Farm*, the insurer sought a declaration of no coverage under its farm liability policy for injuries a student suffered while working as a farm "employee" in a school work program. The student contended that because the insurance contract failed to define "employee," the policy was ambiguous. The trial court determined that the policy exclusion for

employees was inapplicable, but the court of appeals reversed. The student appealed and this Court held that the student qualified as an "employee" while at work for purposes of the employee exclusion in the farm liability policy. This Court explained that "[a] court must give undefined words used in an insurance contract their plain and ordinary meaning." 73 Ohio St.3d at 108, citing *Miller v. Marrocco*, 28 Ohio St.3d 438, 439, 504 N.E.2d 67 (1986). While the term "employee" was not defined in the Nationwide farm policy, since the term has a plain and ordinary meaning, it was unnecessary and impermissible for a court to resort to construction of that language. 73 Ohio St.3d at 108, citing *Karabin v. State Auto. Mut. Ins. Co.*, 10 Ohio St.3d 163, 166-167, 462 N.E.2d 403 (1984).

Here, rather than using the plain, ordinary, and common understanding of the term "cargo," the Court of Appeals selected the most narrow dictionary definition which was most favorable to Crews and one that would give rise to coverage, where such liability coverage was neither expected or intended. While dictionary definitions are relied upon by courts when interpreting undefined terms in written instruments, such as deeds, contracts and insurance policies, a dictionary definition cannot outweigh or trump the intent and clear expectations of the parties or be incompatible with the context of how the term is being used in the document. *See, Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 316-317, 667 N.E.2d 949 (1996).

Courts of Appeals in Ohio have dealt repeatedly with cases requiring the construction of insurance policies where a key policy term has been left undefined. *See, e.g., Suder-Benore Co., Ltd. v. Motorists Mut. Ins. Co.*, 6th Dist. Lucas No. L-12-1351, 2013-Ohio-3959, ¶ 14, quoting *Belich v. Westfield Ins. Co.*, 11th Dist. Lake No. 99-L-163, 2001 WL 20751, *2 (Dec. 29, 2000); *Fahlbush v. Crum-Jones*, 176 Ohio App.3d 328, 2008-Ohio-1953, 891 N.E.2d 1242, ¶ 16 (1st Dist.); *Blair v. Cincinnati Ins. Co.*, 163 Ohio App.3d 81, 2005-Ohio-4323, 836 N.E.2d 607, ¶ 18

(4th Dist.); *Hitt v. Anthem Cas. Ins. Group*, 142 Ohio App.3d 262, 266-267, 755 N.E.2d 418 (11th Dist. 2001); *Nationwide Mut. Fire Ins. Co. v. Wittekind*, 134 Ohio App.3d 285, 290, 730 N.E.2d 1054 (4th Dist. 1999). *See also*, *Bondex Intern., Inc. v. Hartford Acc. and Indem. Co.*, 667 F.3d 669, 676 (6th Cir. 2011), citing *Guman Bros. Farm*, *supra*.

Most recently, the issue of an undefined term in an insurance policy was addressed by the Sixth District in the *Suder-Benore Co., Ltd.* case. A shopping center owner filed a declaratory judgment action against its property insurer seeking a declaration that a vacancy exclusion, under which the insurer had denied the owner's claim arising from a break-in and vandalism in an unoccupied portion of the building, was inapplicable. The issue regarding coverage was whether the owner's reactivation of the property's sprinkler system that provided protection for both an occupied 7,800 square foot store and an unoccupied portion of the same building was a "renovation" of the building so as to preclude application of the policy's vacancy exclusion. The owner argued that the vacancy exclusion was inapplicable because the exclusion provided that "buildings under construction or renovation are not considered vacant." Because the term "renovation" was not defined in the policy, the owner maintained that the term was ambiguous and that the meaning therefore should be strictly construed against the insurer – just as Crews argues here.

The trial court entered judgment in favor of the owner. On appeal, the Sixth District reversed and, after examining other cases addressing the absence of a definition for "renovation" in a vacancy exclusion, entered summary judgment in favor of the insurer, holding that "'renovation' is not an ambiguous term and that no reasonable fact-finder could characterize the de minimis work performed as a 'renovation.'" 2013-Ohio-3959, ¶ 29; *see also*, *id.* at ¶ 43.

In the *Hitt* case, the insured brought a declaratory judgment action against his homeowner's insurers seeking defense and indemnity under a homeowner's policy in an underlying case arising from an accident involving a used dirt bike purchased by the insured for his minor son. The coverage question turned on an exception to the policy's exclusion for bodily injury arising from the ownership, maintenance, or use of a motor vehicle. The exception to the exclusion applied to vehicles not owned by an insured and designed for recreational use off public roads. The insured took possession of the dirt bike on the day he paid the seller. The accident occurred twenty days after the insured took possession of the bike, but an Ohio Certificate of Title was not issued until three days *after* the collision.

The trial court found in favor of the insurers. The court of appeals affirmed. *Hitt* held that the insured became the owner of the dirt bike when he took physical possession, not when the certificate of title was issued in his name. 142 Ohio App.3d at 267. Judge (now Justice) O'Neill, writing for the court, rejected the insured's argument that, because the insurance policy did not define the terms "own" or "ownership," the policy was ambiguous. *Id.* at 266. Giving the word "own" its natural and commonly accepted meaning, the *Hitt* court concluded that the exception to the exclusion did not apply because ownership of the dirt bike transferred when the insured took physical possession of the dirt bike to the exclusion of all others. *Id.* at 266-267.

Guidance is also found in the *Wittekind* case where the insurer filed for a declaratory judgment that it did not owe liability coverage under a homeowner's policy for a death arising from the operation of a Sea-Doo jet ski by the insured's' son. The trial court granted summary judgment to the insurer and the family and estate of the decedent appealed. The court of appeals held that a policy exclusion regarding liability arising out of an insured's use of a "watercraft" extended to use of the jet ski. The court rejected the insured's argument that the undefined term

"watercraft" was ambiguous. The insured maintained that any ambiguity could have been remedied by reference in the policy's exclusion to a "personal watercraft," which would have included the jet ski. The court of appeals explained that the commonly accepted meaning of "watercraft" included all boats, ships, and other vessels that traveled on water, and noted that "a term is not ambiguous simply because it includes a wide variety of objects or concepts in its definition." 134 Ohio App.3d at 290. Likewise, the fact that the dictionary definitions of "cargo" cited by the Court of Appeals include a wide variety of concepts does not render the term ambiguous in the application of the "mobile equipment" exception to the "auto" exclusion in the CGL Policy at issue here.

Crews suggests in their Merit Brief that any "perceived problem [in finding "cargo" to be ambiguous] can be easily remedied by Century and other commercial carriers by either defining 'cargo' or by amending the 'mobile equipment' provision in their policies to comport with Century's argument in this case." (Crews' Merit Br. at p. 16). But whether carriers are "still free" to write the terms of a policy differently in the future is irrelevant. A provision in an insurance policy is not ambiguous simply because there may be a better or more precise term that could have been used. *Ohic Ins. Co. v. Employers Reinsurance Corp.*, 694 F.Supp.2d 794, 804 (S.D. Ohio 2010), citing *Milburn v. Allstate Ins. Co. Prop. & Cas.*, 185 Ohio App.3d 796, 2009-Ohio-5476, 925 N.E.2d 1018 (10th Dist.), citing *Rucker v. Davis*, 4th Dist. No. 02CA2676, 2003-Ohio-3190, ¶17.

It must be noted that policy forms containing the "auto" and "mobile equipment" definitions – denoted with the ISO prefix CG 00 01 and including the form at issue in the CGL Policy in this matter – have been in widespread use by hundreds of insurers for decades. If ISO needed to modify those forms every time an insured, such as Crews, asserts that the forms could

have been drafted differently, the reliability and consistency which insurers and policyholders alike have come to expect from those forms would be lost. Insurers and insureds alike need to know confidently what coverage is afforded based upon the commonly understood meaning of the terms which have been used in insurance policies, not being told – after the fact – that the insurer could have used other words or written policy language a little differently.

Treating commonly understood yet undefined terms in an insurance policy as ambiguous and, in turn, construing those terms against the insurer and in favor of coverage for the insured rather than using the plain and ordinary meaning of the term in the context of the policy at issue has led to disastrous consequences for Ohio's insurance jurisprudence in the past. *See, e.g.*, *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 710 N.E.2d 1116 (1999); *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.*, 86 Ohio St.3d 557, 715 N.E.2d 1142 (1999). For the reasons articulated at length in Century Surety's Merit Brief and the *amicus* briefs of OACTA and the Ohio Insurance Institute, the "mobile equipment" exception to the "auto" exclusion in the CGL Policy here is not ambiguous even though the term "cargo" is not specifically defined.

B. The rule construing an ambiguity in favor of coverage for the insured does not control when an unreasonable interpretation of the policy results.

Playing off of the argument that the CGL Policy is ambiguous because "cargo" is not expressly defined, Crews overstates the rule which governs the construction of ambiguous insurance policies. Crews suggests to the Court that when an insurance policy or a term used therein is found to be susceptible to more than one interpretation, that ambiguity is to be strictly construed against the insurer and liberally in favor of the insured. (Crews' Merit Br. at pp. 6, 7, 9, 15) While true, there are limitations to the preceding rule. The rule of strict construction is

tempered by other canons of construction that seek to bring balance and reason to the analysis. Crews ignores one of these other canons altogether and the Court of Appeals failed to observe it.

"Although, as a rule, a policy of insurance that is reasonably open to different interpretations will be construed most favorably for the insured, that rule will not be applied so as to provide an unreasonable interpretation of the words of the policy." *Morfoot v. Stake*, 174 Ohio St. 506, 190 N.E.2d 573 (1963), paragraph one of the syllabus. *See also*, *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 14. This caveat to the rule has been observed regularly by Ohio's appellate courts. *See*, *King Estate v. Wachauf*, 3rd Dist. Auglaize No. 2-12-10, 2013-Ohio-2498, ¶ 9; *Michaels v. Michaels*, 197 Ohio App.3d 643, 2012-Ohio-118, 968 N.E.2d 550, ¶ 8 (9th Dist.); *Crabtree v. 21st Century Ins. Co.*, 176 Ohio App.3d 507, 2008-Ohio-3335, 892 N.E.2d 925, ¶ 10 (4th Dist.); *Blair v. Cincinnati Ins. Co.*, 163 Ohio App.3d 81, 2005-Ohio-4323, 836 N.E.2d 607, ¶ 9 (4th Dist.). Insurance policies should be construed reasonably so as not to arrive at absurd results. *Felton v. Nationwide Mut. Fire Ins. Co.*, 163 Ohio App.3d 436, 2005-Ohio-4792, 839 N.E.2d 34, ¶ 18 (9th Dist.).

Crews' efforts to distinguish *United Farm Family Mut. Ins. Co. v. Pearce*, 3rd Dist. Auglaize No. 2-08-07, 2008-Ohio-5405 only demonstrates further why the Court of Appeals opinion here is an unreasonable construction of the term "cargo" and results in an absurd interpretation of the CGL Policy. Crews argues that the holding in *Pearce* should not apply here because "that case differs greatly from the present matter." (Crews' Merit Br. at p. 10) But the only tenable factual distinction Crews can muster is that the dump truck "also hauled asphalt and equipment rather than only paving equipment." (Crews' Merit Br. at p. 10, citing *Pearce*, at ¶ 15).[1] But insurance contract interpretation should not be subject to such vagaries and

[1] Any effort to factually distinguish the dump truck in *Pearce* from a trailer, like Crews' non-motorized 1990 Hudson flatbed trailer, based upon whether it is "self-propelled" or not is nonsensical. Trailers by

uncertainty.

According to Crews's argument embraced by the Court of Appeals, if an asphalt paving company like Crews uses a flatbed trailer to haul only its paving equipment to a job site one day, the trailer will qualify as "mobile equipment" – triggering the exception to the "auto" exclusion – because the paving equipment would not qualify as "cargo" under the definition utilized by the Court of Appeals and, thus, there would be coverage under the CGL Policy. But if the same paving company on the very next day returns to the same job site and happens use the same trailer to haul a couple of 60 lb. bags of QUIKRETE® Blacktop Patch[2] and/or several 1 gallon cans of Rust-Oleum® High Performance® Traffic Zone Striping And Curb Paint[3] to apply the yellow lines and striping to a parking lot, the trailer will be hauling "cargo" (i.e., goods in the stream of commerce) and thus would not be "mobile equipment" such that there would be no coverage under the CGL Policy on that day for that jobsite.

The scenarios are not limited to paving companies like Crews. Century Surety offers an excellent cogent example in its Merit Brief at page 20 involving the transportation of steel coils to demonstrate the unreasonableness of the Appellate Court's opinion. Other everyday examples exist. A landscaping company might use its flatbed trailer only to haul its lawn cutting equipment to one customer's location. But to another location later the same day, the landscaper might add a couple of flats of flowers, a bush or tree to be planted, and some bags of fertilizer to be spread. In the former situation, by adopting Crews' argument, there would be coverage under the CGL Policy for the landscaper's trailer because no "cargo" was being hauled; but in the

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their very nature are not "self-propelled." If that distinction had merit, arguably, all non-motorized trailers could be "mobile equipment" qualifying for liability coverage even though the CGL Policy never intended to provide such coverage by expressly including trailers in the definition of an "auto."

[2] QUIKRETE® Blacktop Patch is an asphalt cold patch for repairing potholes and large cracks in asphalt pavement. See, http://www.quikrete.com/productlines/blacktoppatch.asp (last visited on 10/31/2013).

[3] *See*, http://hdsupplysolutions.com/shop/product-1_gallon_yellow_striping_paint_pkg_of_2_-098119 (last visited on 10/31/2013).

latter, the CGL Policy would afford no coverage because "cargo" happened to be transported on the flatbed trailer. Snow removal companies also use flatbed trailers to haul snow blowers, shovels, and salt spreaders. If that is all that is being hauled, according to Crews and the Court of Appeals opinion, coverage applies under the CGL Policy because no "cargo" is included. But if the flatbed trailer is used on an icy winter day to also haul a couple of 50 lb. bags of Ice Melt[4] as well, no coverage would be available under the CGL Policy.

In a moment of candor, even Crews suggests such scenarios would be "an unreasonable restriction on the term 'cargo.'" (Crews' Merit Br. at p. 10). But that is precisely the consequence and effect the Court of Appeals opinion will have in the future if the opinion is allowed to stand.

III. CONCLUSION

WHEREFORE, *amicus curiae* Ohio Association of Civil Trial Attorneys respectfully requests that this Court reject the misguided arguments advanced in the Merit Brief of Appellees Stinson J. Crews and Stinson Crews Trucking, adopt the propositions of law advanced by Appellant Century Surety Company, and thereby reverse the legally flawed judgment and opinion of the Tenth District Court of Appeals.

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[4] *See*, http://www.uline.com/Product/Detail/S-7125S/Grounds-Maintenance/Ice-Melt-Skid-Lot-50-lb-bag?pricode=WU336&gadtype=pla&id=34610099002&gclid=CI2BpOLyw7oCFe47OgodqHEAlw&gclsrc=aw.ds (last visited on 11/01/2013).

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