[Cite as *Sauer v. Crews*, 2012-Ohio-6257.]

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.	:	

D E C I S I O N

Rendered on December 31, 2012

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.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶ 1} Third-party defendant-appellant, Century Surety Company, appeals from a judgment of the Franklin County Court of Common Pleas granting declaratory relief to

Century's insureds, third-party plaintiffs-appellees, Stinson J. Crews and Stinson Crews Paving, Inc. (collectively, "Crews") and determining Crews are entitled to coverage under their Commercial General Liability ("CGL") policy with Century. Because the trial court properly concluded the CGL policy provides coverage to Crews, we affirm.

I. Facts and Procedural History

{¶ 2} Century's appeal arises out of a fatal traffic collision involving a car Julia Augenstein was driving and a parked, non-motorized flatbed trailer that Stinson Crews owned and operated as part of his paving business, Stinson Crews Paving, Inc. According to this court's decision in *Sauer v. Crews*, 10th Dist. No. 10AP-834, 2011-Ohio-3310, Crews hitched the flatbed trailer on November 24, 2006 to the company's dump truck and used it to transport an asphalt paver and a skid loader to the job site, a day care center on Columbus Street. Crews was to patch and repair the deteriorated paving of the day care center's driveway and parking lot.

{¶ 3} Around 5:20 p.m., Augenstein was driving westbound on Columbus Street and apparently failed to see Crews' trailer. Her car hit the rear of the flatbed, and Augenstein sustained multiple injuries. Emergency medical personnel transported Augenstein to Grant Hospital, where she was pronounced dead.

{¶ 4} Augenstein's estate filed a wrongful death and survivorship action against Crews; Crews, in turn, filed a third-party complaint against Century, its CGL carrier, asserting a claim for breach of its insurance contract with Crews and seeking a declaratory judgment that Crews are entitled to coverage for the accident under the CGL policy Century issued to Crews. In response, Century filed a counterclaim requesting the trial court issue a declaratory judgment that the CGL policy did not require Century to provide Crews with either a defense or indemnity. Although Crews also filed a third-party complaint against their automobile carrier Progressive Casualty Insurance Company, Progressive filed a motion for summary judgment; the trial court granted the motion, concluding Crews' automobile policy did not cover the trailer.

{¶ 5} After bifurcating the tort and coverage claims, the trial court conducted a bench trial on the estate's claims. In a decision filed July 22, 2010, the court found Crews negligent in parking the trailer on Columbus Street and entered judgment in favor of Augenstein's estate. This court affirmed the trial court's decision in *Sauer*.

{¶ 6} In light of the decision concluding Crews was liable to Augenstein's estate in the underlying tort matter, the parties renewed their dispute regarding Crews' coverage under the CGL policy Century issued to Crews. In an entry filed September 16, 2011, the parties agreed to submit the coverage issue for the trial court's determination on the briefs. The court also accepted the parties' stipulations as to (1) the CGL policy's authenticity and admissibility, (2) the trial court's findings of fact at the bench trial, and (3) this court's *Sauer* decision.

{¶ 7} On March 19, 2012, the trial court entered a Decision on the Merits as to Coverage, determining "the trailer involved in this case is mobile equipment and the policy of insurance provides coverage for Plaintiff's injuries." (R. 289, Decision on the Merits as to Coverage, 1.) Since the decision resolved the final remaining claim in the case, the court entered a Final Judgment Entry on April 2, 2012.

II. Assignments of Error

{¶ 8} Century appeals, assigning two errors:

> [I.] In declining to apply an exclusion of coverage for "autos" in the commercial general liability insurance policy issued by Appellant Century Surety Company, the trial court erroneously determined that Appellees' flatbed trailer was "mobile equipment" as defined in the policy.
>
> [II.] Even if Appellees' flatbed trailer is "mobile equipment," the trial court erroneously failed to apply an exclusion of coverage for claims arising out of the transport of "mobile equipment."

III. First Assignment of Error - Coverage as "Mobile Equipment" for Trailer

{¶ 9} The parties agree that Crews held a valid CGL policy with Century at the time of the accident and that Crews was found liable for bodily injury and property damage in the amount of $251,552.04, plus interest. The issue is whether Crews' CGL policy with Century applies on the facts here. Century argues the trial court erred in granting declaratory judgment in Crews' favor because it incorrectly determined the trailer was "mobile equipment" and not an "auto" as the CGL policy defines those terms.

A. *Applicable Law*

{¶ 10} An appellate court reviews a trial court's determination regarding the justiciability of a declaratory judgment action for an abuse of discretion. *Arnott v. Arnott,* 132 Ohio St.3d 401, 2012-Ohio-3208, ¶ 13. A trial court's holding regarding questions of law nonetheless is reviewed on a de novo basis, requiring the appellate court to review the legal issue without deference to the trial court's decision. *Arnott* at ¶ 16 (noting that "[n]ever have we deferred to the judgment of the trial court on issues of law").

{¶ 11} Courts generally interpret insurance policies in accordance with the same rules applied in interpreting other types of contracts. *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 64 Ohio St.3d 657, 665 (1992). Because the "interpretation of written contracts, including any assessment as to whether a contract is ambiguous, is a question of law," it is subject to de novo review on appeal. *State v. Fed. Ins. Co.*, 10th Dist. No. 04AP-1350, 2005-Ohio-6807, ¶ 22, citing *Long Beach Assn., Inc. v. Jones*, 82 Ohio St.3d 574, 576 (1998). *See also Cleveland Constr., Inc. v. Ohio Public Emp. Retirement Sys.*, 10th Dist. No. 07AP-574, 2008-Ohio-1630, ¶ 7.

{¶ 12} "When provisions of an insurance policy are reasonably susceptible to more than one interpretation, we must construe them strictly against the insurer" and "adopt any reasonable construction that results in coverage for the insured." *State Farm Mut. Auto. Ins. Co. v. Gourley*, 10th Dist. No. 12AP-200, 2012-Ohio-4909, ¶ 12, citing *Faruque v. Provident Life & Acc. Ins. Co.*, 31 Ohio St.3d 34, 38 (1987), and *Employers Reinsurance Corp. v. Worthington Custom Plastics, Inc.*, 109 Ohio App.3d 550 (10th Dist.1996). The rationale for the rule of construction is that the insurer drafted the policy and should be held responsible for its language.

{¶ 13} In determining whether ambiguities or uncertainties exist, we give words and phrases their plain and ordinary meaning, "unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph two of the syllabus, *superseded by statute on other grounds*; *Hedmond v. Admiral Ins. Co.*, 10th Dist. No. 02AP-910, 2003-Ohio-4138, ¶ 33. "The intent of the parties to a

contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Medical Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus.

B. *The CGL Policy*

{¶ 14} Crews' CGL policy provides:

> "2. Exclusions
>
> This insurance does not apply to:
>
> * * *
>
> g. Aircraft, Auto or Water Craft
>
> 'Bodily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or water craft owned or operated by or rented or loaned to any insured. * * *
>
> * * *
>
> This exclusion does not apply to:
>
> * * *
>
> (5) 'Bodily injury' or 'property damage' arising out of:
>
> (a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of 'mobile equipment' if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; * * *
>
> * * *
>
> h. Mobile Equipment
>
> 'Bodily injury' or 'property damage' arising out of:
>
> (1) The transportation of 'mobile equipment' by an 'auto' owned or operated by or rented or loaned to any insured; * * *."

(Century CGL Policy, Form CG 00 01 12 04, at 2, 4.)

{¶ 15} The policy includes the following definitions:

> "2. 'Auto' means:
>
> a. A land motor vehicle, trailer or semi trailer designed for travel on public roads, including any attached machinery or equipment; * * *

> * * *
>
> However, 'auto' does not include 'mobile equipment.'
>
> * * *
>
> 12. 'Mobile Equipment' means any of the following types of land vehicles, including any attached machinery or equipment:
>
> a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
>
> b. Vehicles maintained for use solely on or next to premises you own or rent;
>
> c. Vehicles that travel on crawler treads;
>
> d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
>
> (1) Power cranes, shovels, loaders, diggers or drills;
>
> (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;
>
> e. Vehicles not described in a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
>
> (1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well services equipment; or
>
> (2) Cherry pickers and similar devices used to raise or lower workers;
>
> f. Vehicles not described in a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo."

(Century CGL Policy, Form CG 00 01 12 04, at 12-13.)

C. *Application of the Policy Terms*

{¶ 16} The equipment at issue is a non-motorized 1990 Hudson flatbed trailer that Crews used for hauling machinery to and from job sites by attaching it to one of his trucks. Crews' CGL policy with Century excludes "autos" from liability coverage, defining an auto to be a trailer. The same definition, however, excludes "mobile equipment" from

the definition of a non-covered auto. If we assume the trailer falls under the definition of an "auto," the issue is whether the flatbed trailer is covered under the policy as an exemption from the "auto" exclusion.

{¶ 17} The trailer does not meet the descriptions of mobile equipment provided in 12(a)-(e); if the trailer is "mobile equipment," it is pursuant to 12(f). Century disputes the trial court's finding that the trailer qualified as "mobile equipment" under that provision, which defines mobile equipment as "[v]ehicles * * * maintained primarily for purposes other than the transportation of persons or cargo." The trial court determined that because the meaning of "cargo" was ambiguous, ambiguities had to be resolved in the insured's favor. Applying that maxim, the trial court concluded the flatbed trailer did not haul cargo.

{¶ 18} Since the flatbed trailer could not feasibly or safely be used to transport people, the relevant inquiry is whether the trailer was maintained primarily for the transportation of "cargo." The policy does not define "cargo," so we apply the " 'ordinary meaning unless manifest absurdity results, or some other meaning is clearly evidenced from the face or overall contents of the instrument.' " *State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 104 Ohio St.3d 559, 2004-Ohio-7102, ¶ 23, citing, *Alexander* at paragraph two of the syllabus; *see also Haimbaugh v. Grange Mut. Cas. Co.*, 10th Dist. No. 07AP-676, 2008-Ohio-4001, ¶ 30.

{¶ 19} The definitions found in two commonly used dictionaries are virtually the same. Black's Law Dictionary defines "cargo" to mean "goods transported by a vessel, airplane, or vehicle." Black's Law Dictionary 226 (8th ed.2004). Merriam-Webster's Online Dictionary defines "cargo" as "the goods or merchandise conveyed in a ship, airplane, or vehicle: FREIGHT." (Emphasis sic.) Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dicitionary/cargo (accessed Dec. 28, 2012).

{¶ 20} Both definitions include the term "merchandise," "goods," or both. Merriam-Webster's Online Dictionary defines "merchandise" as "the commodities or goods that are bought and sold in business: WARES"; the definition thus suggests items in the stream of commerce. (Emphasis sic.) "Goods," in turn, is defined in the same dictionary to include "(3)(a) something that has economic utility or satisfies an economic want[;] (b) *plural*: personal property having intrinsic value but usually

excluding money, securities, and negotiable instruments"; and "(d) *plural*: something manufactured or produced for sale: WARES, MERCHANDISE." (Emphasis sic.) Merriam-Webster's Online Dictionary, http://merriam-webster.com/dictionary/goods (accessed Dec. 28, 2012). Again, two of the usages refer to cargo in the stream of commerce.

{¶ 21} Few courts have addressed directly the scope of the term cargo, but many that have see an ambiguity in the term. The U.S. District Court of Massachusetts, after noting the "American Heritage Dictionary defines cargo as '[t]he freight carried by a ship, airplane, or other vehicle,' " concluded the term nonetheless "may have a varying meaning." *Am. Home Assurance Co. v. Fore River Dock & Dredge, Inc.,* 321 F.Supp.2d 209, 223 (D.Mass.2004), citing *American Heritage Dictionary* 241 (2d college ed.1985) and quoting *Su v. M/V Southern Aster,* 978 F.2d 462, 469 (9th Cir.1992), quoting Black's Law Dictionary 268 (4th ed.1951). The U.S. Fourth Circuit Court of Appeals observed, "Clearly, the term cargo has a strong commercial connotation." *State Farm Fire and Cas. Co. v. Pinson*, 984 F.2d 610, 613 (4th Cir.1993) (concluding a boat being towed by a car is not "cargo").

{¶ 22} Illustrating the ambiguity in the term "cargo," *Edward J. Gerrits, Inc. v. Royal Marine Serv., Inc.,* 456 So.2d 1316, 1317 (Fla.App. 3rd Dist.1984), *review denied sub nom. Lexington Ins. Co. v. Royal Marine Serv. Co., Inc.*, 464 So.2d 555 (Fla.1985), reversed a trial court's determination that the insured's crane was unambiguously cargo. The court concluded "that determination, upon which the judgment stands or falls, is contrary to the well-settled rule that where a term of an insurance policy is susceptible of two interpretations, the interpretation which sustains the claim for indemnity must be adopted." The appellate court determined "the term 'cargo' most certainly does not unambiguously include the crane" and "it is arguable that the commonly understood meaning of the word "cargo" is goods and merchandise-freight-intended for delivery." *Id.*, citing *The Manila Prize Cases*, 188 U.S. 254, 269-70 (1902) (defining cargo as that "which was intended to be disposed of at the foreign port").

{¶ 23} " 'Policies of insurance, which are in language selected by the insurer and which are reasonably open to different interpretations, will be construed most favorably for the insured.' " *Erie Ins. Exchange v. Colony Dev. Corp.,* 10th Dist. No. 02AP-1087,

2003-Ohio-7232, ¶ 37, quoting *Butche v. Ohio Cas. Ins. Co.*, 174 Ohio St. 144 (1962), paragraph three of the syllabus. " 'It is not the responsibility of the insured to guess whether certain occurrences will or will not be covered based on nonspecific and generic words or phrases that could be construed in a variety of ways. * * * [I]n order to defeat coverage, "the insurer must establish not merely that the policy is capable of the construction it favors, but rather that such an interpretation is the only one that can fairly be placed on the language in question." ' " *Id.*, quoting *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 549 (2001), quoting Reiter, Strasser & Pohlman, *The Pollution Exclusion Under Ohio Law: Staying the Course*, 59 U.Cin.L.Rev. 1165, 1179 (1991).

{¶ 24} Century failed to do so. Because the policy does not define "cargo," the term's use creates an ambiguity and its meaning is open to interpretation. One possible definition of "cargo" is undisputedly a very general term for items being transported. Another valid and commonly used definition of "cargo" limits the term's usage to describing items in the stream of commerce. The policy provides no indication that it is using the term in the broader sense. Given the competing but valid interpretations, the trial court properly concluded the term is ambiguous and construed it against Century.

{¶ 25} As it did in the trial court, Century relies on the Third District's decision in *United Farm Family Mut. Ins. Co. v. Pearce*, 3d Dist. No. 2-08-07, 2008-Ohio-5405. In *Pearce*, the policy-holder's dump truck was involved in a traffic accident. Among other arguments, the insured invoked the provision in its policy that created an exemption from the "auto" exclusion for "[m]obile equipment * * * maintained primarily for purposes other than the transportation of persons or cargo." *Id.* at ¶ 12. The dump truck was used "primarily to haul asphalt and equipment to the job site"; the truck carried asphalt in its "dump bed" while it "hauled various pieces of paving equipment * * * using a lowboy trailer." *Id.* at ¶ 14, 15.

{¶ 26} Analyzing the definition of "cargo," the Third District noted " '[c]argo' is defined 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.' " (Emphasis sic.) *Id.* at ¶ 15, citing *Webster's Third International Dictionary* 339 (2002). The court continued, " 'Goods' are 'tangible movable personal

property having intrinsic value[.'] * * * 'Convey' means 'to bear from one place to another: CARRY, TRANSPORT.' " (Emphasis sic.) *Id*. According to these definitions, the court determined "[a]sphalt and equipment fall within the definition of a good, and thus, cargo"; and therefore, is not "mobile equipment" under the policy. *Id*. at ¶ 15.

{¶ 27} The issue here is 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. 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. Accordingly, the trial court properly determined the flatbed trailer was "mobile equipment" as defined in the policy.

{¶ 28} Century's first assignment of error is overruled.

IV. Second Assignment of Error - Transportation of "Mobile Equipment"

{¶ 29} Century's second assignment of error asserts, even if Crews' flatbed trailer is "mobile equipment," the trial court erroneously failed to apply an exclusion of coverage for claims arising out of the transport of "mobile equipment." Section "h" under the "Exclusions" portion of the policy excludes from coverage " '[b]odily injury' or 'property damage' arising out of: (1) The transportation of 'mobile equipment' by an 'auto' owned or operated by or rented or loaned to any insured." (Century CGL Policy, Form CG 00 01 12 04, at 2, 4.)

{¶ 30} In the context of insurer-created exclusions, it is "presumed that 'that which is not clearly excluded from the contract is included.' " *Prudential Prop. & Cas. Ins. Co. v. Koby*, 124 Ohio App.3d 174, 178 (11th Dist.1997), quoting *Home Indemn. Co. of N.Y. v. Plymouth*, 146 Ohio St. 96 (1945), paragraph two of the syllabus. *See also Beaverdam Contracting v. Erie Ins. Co.*, 3d Dist. No. 1-08-17, 2008-Ohio-4953, ¶ 19 (concluding that although the party seeking to recover under an insurance policy bears the burden of proof to demonstrate that the policy provides coverage for the particular loss, "when an insurer denies liability coverage based upon a policy exclusion, the insurer bears the burden of demonstrating the applicability of the exclusion"), citing *Continental Ins. Co. v. Louis Marx & Co., Inc.*, 64 Ohio St.2d 399 (1980), syllabus.

{¶ 31} Pursuant to the same rules of construction applied above, we consider the plain meaning of the policy's language. To "transport" is "to transfer or convey from one place to another." Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/transport (accessed Dec. 28, 2012). The record reveals that the flatbed trailer was unattached to any motorized vehicle at the time of the accident; the accident occurred well after the flatbed trailer had been parked. Because the accident did not arise out of transporting the flatbed trailer, the exclusion does not apply.

{¶ 32} Century nonetheless asserts, in effect, that an auto's previously transporting a piece of mobile equipment should disqualify the mobile equipment from coverage, though it is no longer in transit or even attached to an auto. Because "mobile equipment" must arrive at the job site somehow, and frequently arrives by auto, extending the policy's exclusion to items previously transported by auto would call into question the value of exempting "mobile equipment" from the "auto" exclusion at all.

{¶ 33} Pursuant to the plain meaning of the provision, section "h" does not encompass "mobile equipment" already transported to the job site. As a result, the provision does not exclude the flatbed trailer here. Further, despite Century's assertion that transporting the trailer caused the accident "because [Crews] placed its trailer in the roadway, thus blocking traffic and causing the underlying accident," no language in the policy suggests the trailer should be treated differently because it was set to rest in a public street. (Appellant's Reply Brief, 9-10.)

{¶ 34} Century's second assignment of error is overruled.

V. Disposition

{¶ 35} Having overruled Century's two assignments of error, we affirm the decision of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and FRENCH, JJ., concur.