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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 04/26/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

STATE FARM MUTUAL AUTOMOBILE) 1 CA-CV 10-0657
INSURANCE COMPANY, an Illinois)
corporation,) DEPARTMENT C
)
Plaintiff/Appellee,) **MEMORANDUM DECISION**
)
)
v.) Not for Publication -
) (Rule 28, Arizona Rules
EMILIO RENOVA, individually and) of Civil Appellate
on behalf of all wrongful death) Procedure)
beneficiaries of ARACELI RENOVA)
and ISABEL CUEVAS-RENOVA; and)
SAUL RENOVA, individually and on)
behalf of all wrongful death)
beneficiaries of CLAUDIA RENOVA,)
)
Defendants/Appellants.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-009498

The Honorable Linda H. Miles, Judge

REVERSED AND REMANDED

Stark Williamson & Clausen LLP Phoenix
By Curt W. Clausen and Michael P. Stark
And
Michael Cordova, PC Phoenix
By Michael Fairbairn Cordova and Teri Marscovetra Rowe
Co-Counsel for Defendants/Appellants

B R O W N, Judge

¶1 The narrow question we address here is whether a "course of employment" exclusion in an auto insurance policy is enforceable when an employer has failed to provide workers' compensation coverage for its injured employees. Based on prior case law from this court and our supreme court, we conclude that the exclusion violates public policy as contemplated under Arizona's Financial Responsibility Act. We therefore reverse the trial court's grant of summary judgment.

BACKGROUND

¶2 Isabel Cuevas-Renova, Araceli Renova, and Claudia Renova ("the decedents"), passengers in a vehicle driven by Veronica Renova, suffered fatal injuries in an auto accident. The four women worked as a house-cleaning crew for Roberto and Linda Cangas-Aguilar, who owned the cleaning business. At the time of the accident, they had just finished a cleaning job and were on their way to another house.

¶3 Roberto and Linda owned the vehicle and insured it with State Farm Mutual Automobile Insurance Company ("State Farm") under a policy which provided bodily injury coverage of \$100,000 per person and \$300,000 per accident ("the Policy").

Roberto and Linda, however, had no workers' compensation insurance for their employees. Heirs ("the Renovas")¹ of the decedents made claims against the Policy for the wrongful death of the decedents arising from the accident.

¶14 State Farm filed a declaratory judgment action seeking confirmation that (1) the Policy provided no bodily injury coverage for any wrongful death claims arising out of the accident, and (2) State Farm had no obligation to defend or indemnify Linda, Roberto, or Veronica for such claims. According to State Farm, the decedents were excluded under the following Policy exclusion because they were employees of Roberto and Linda:

THERE IS NO COVERAGE

* * *

2. FOR ANY *BODILY INJURY* TO:

b. ANY EMPLOYEE OF AN *INSURED* ARISING OUT OF HIS OR HER EMPLOYMENT. This does not apply to a household employee who is not covered under any workers' compensation insurance.

¹ The Renovas are Emilio Renova, individually and on behalf of all wrongful death beneficiaries of Araceli Renova and Isabel Cuevas-Renova, and Saul Renova, individually and on behalf of all wrongful death beneficiaries of Claudia Renova. On the court's own motion, it is hereby ordered amending the caption for this appeal as reflected in this decision. The above referenced caption shall be used on all documents filed in this appeal.

* * *

5. FOR ANY OBLIGATION OF AN *INSURED*, OR HIS OR HER INSURER, UNDER ANY TYPE OF WORKERS' COMPENSATION OR DISABILITY OR SIMILAR LAW.

¶15 Veronica contended that the Policy covered wrongful death claims arising from the accident. The Renovas likewise contested the coverage issue in a separate answer and asserted that State Farm was obligated to defend and indemnify Roberto and Linda and/or Veronica against wrongful death claims arising from the accident.²

¶16 The parties filed cross-motions for summary judgment on whether the Policy excluded coverage and whether application of the course of employment exclusion violated the Financial Responsibility Act. See Arizona Revised Statutes ("A.R.S.") sections 28-4001 to -4153 (2004 & Supp. 2011).³ The trial court determined that no issue of material fact existed as to the course of employment exclusion, finding it was valid and enforceable. After further briefing, the court also determined that no genuine issue of material fact existed that the

² After State Farm filed its declaratory judgment action, the Renovas filed an action for wrongful death against Veronica, Roberto, and Linda. The complaint alleged that Roberto and Linda were liable under the doctrine of respondeat superior because Veronica was acting in the course of her employment when the accident occurred.

³ Absent material revision, we cite the statute's current version.

decedents were employees of Roberto and Linda and were acting in the course and scope of their employment at the time of the accident.

¶7 The trial court subsequently entered judgment in favor of State Farm, declaring that the Policy provided no coverage for claims by the Renovas. The court also found that State Farm had no duty to defend or indemnify Veronica, Roberto, or Linda in any claim or action arising from the accident. This timely appeal followed.

DISCUSSION

¶8 The Renovas argue that the trial court erred in granting summary judgment to State Farm. In evaluating the positions of each party, we start from the premise that if we are governed by the clear and unambiguous terms of the Policy, the Renovas are not covered by the Policy based on the course of employment exclusion. See *State Farm Mut. Auto. Ins. Co. v. Karasek*, 22 Ariz. App. 87, 88, 523 P.2d 1324, 1325 (1974). Neither party disagrees with that premise. However, the Renovas contend that the exclusion violates public policy within the context of the Financial Responsibility Act because the decedents were not provided workers' compensation coverage.

¶9 A trial court may grant summary judgment if "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P.

56(c)(1). “[W]e determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law.” *Tierra Ranchos Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195, 199, ¶ 15, 165 P.3d 173, 177 (App. 2007). We also review issues of statutory interpretation and application de novo. *Farmers Ins. Co. of Ariz. v. Young*, 195 Ariz. 22, 24, ¶ 5, 985 P.2d 507, 509 (App. 1998).

¶10 The purpose of the Financial Responsibility Act is to protect “[t]he public using the highways . . . from financial hardship resulting from the use of automobiles by financially irresponsible persons.” *Schwab v. State Farm Fire & Cas. Co.*, 27 Ariz. App. 747, 749, 558 P.2d 942, 944 (1976) (internal quotations and citation omitted); accord *Young v. Beck*, 227 Ariz. 1, 6, ¶ 20, 251 P.3d 380, 385 (2011) (describing the Financial Responsibility Act as requiring “all vehicle owners to carry liability insurance and all policies to provide liability coverage for not only the owner but also all permissive drivers”). Consistent with that purpose, exclusionary clauses in basic motor vehicle liability policies are void as against public policy with respect to the minimum coverage requirements set forth in the Act, unless authorized by statute. See *Phila. Indem. Ins. Co. v. Barerra*, 200 Ariz. 9, 12, ¶ 8, 21 P.3d 395, 398 (2001).

¶11 Section 28-4009 (2004) of the Financial Responsibility Act authorizes exclusions pertaining to employees of the insured who are injured in the course of employment, providing as follows:

- A. An owner's motor vehicle liability policy shall comply with the following:

* * *

- 2. The policy shall insure the person named in the policy as the insured and any other person, as insured, using the motor vehicle or motor vehicles with the express or implied permission of the named insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of the motor vehicle or motor vehicles within the United States

* * *

- C. A motor vehicle liability policy:

* * *

- 4. *Is not required to insure liability either:*

- (a) *Under any workers' compensation law.*

- (b) *On account of bodily injury to or death of an employee of the insured while engaged in the employment, other than domestic, of the insured or while engaged in the operation, maintenance or repair of the motor vehicle.*

(Emphasis added.) Thus, notwithstanding the obligation that an insurance policy must provide that all permissive drivers are

covered, the language of the Act permits an insurance company to exclude coverage as provided in § 28-4009(C)(4)(b).

¶12 Despite the seemingly clear statutory authorization for the exclusion, the Renovas assert that Arizona courts have previously construed "course of employment" exclusions as unenforceable under the Financial Responsibility Act. Although these cases analyzed the exclusions in the context of § 28-4009's predecessor statute, the Renovas maintain that the legislative history reflects no intent to substantively change the prior version and therefore case law interpreting the predecessor statute governs here.⁴

¶13 In *Farmers Ins. Grp. v. Home Indem. Co.* ("*Farmers*"), 108 Ariz. 126, 493 P.2d 909 (1972), our supreme court interpreted a "course of employment" exclusion in light of

⁴ The prior version of A.R.S. § 28-4009, A.R.S. § 28-1170, stated in relevant part as follows:

E. The motor vehicle liability policy need not insure liability under any workers' compensation law nor liability on account of bodily injury to or death of an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance or repair of the motor vehicle

Scottsdale Ins. Co. v. Monares, 153 Ariz. 9, 12, 734 P.2d 106, 109 (App. 1986) (quoting A.R.S. § 28-1170(E)).

A.R.S. § 28-1170.⁵ An independent contractor, operating a crane to load equipment onto a truck owned by Rite-Way Company, caused the death of a Rite-Way employee. *Id.* at 127, 493 P.2d at 910. The employee's surviving spouse brought a wrongful death claim against the independent contractor. *Id.* Although, "[o]rdinarily, [Rite-Way's insurer] would cover for the negligence of [the independent contractor] while loading and unloading the truck[,] the insurance policy contained a "course of employment" exclusion."⁶ *Id.* at 127-28, 493 P.2d at 910-11.

¶14 The court concluded that the exclusionary clause in the vehicle insurance policy supplied by Farmers was unenforceable because it conflicted with the "principal purpose" of the Financial Responsibility Act, which is to protect the

⁵ Neither party cited *Farmers* in the trial court or in the initial briefing in this court. Following oral argument, we ordered the parties to provide supplemental briefing on the applicability of *Farmers*.

⁶ The "course of employment" exclusion provided as follows:

This insurance does not apply: * * *

(c) To bodily injury to any employee of the insured arising out of and in the course of his employment by the insured, but this exclusion does not apply to any such injury arising out of and in the course of domestic employment by the insured unless benefits therefor are in whole or in part either payable or required to be provided under any work[ers'] compensation law[.]

Id. at 128, 493 P.2d at 911.

public "from financial hardship resulting from the use of automobiles by financially irresponsible persons." *Id.* at 128, 493 P.2d at 911. The court explained:

In the present case, we think that public policy would be thwarted by holding that the exclusion will be applied where a person is injured by a third party insured by the owner because he is an employee of the owner. Obviously, the purpose of the exclusion is to protect the owner from the expense of double coverage where his employee is covered by work[ers'] compensation. But to apply the exclusion without limitation to defeat coverage of third parties frustrates the purpose of the Financial Responsibility Act.

Id. at 129, 493 P.2d at 912. The court therefore determined that the exclusion was unenforceable. *Id.* Although the employee who was fatally injured in *Farmers* was covered by workers' compensation insurance,⁷ the court further explained:

Not every employee in Arizona is required to be covered by work[ers'] compensation. . . . It is possible that under the express language of the exclusion they will have neither protection by work[ers'] compensation nor by liability insurance.

Id. at 129, 493 P.2d at 912. The court then concluded: "The construction we here place upon the policy permits an owner having work[ers'] compensation to contract for automobile liability insurance which excludes his employees. He thereby

⁷ This fact is noted in *Farmers Ins. Grp. v. Home Indem. Co.* ("*Farmers I*"), 14 Ariz. App. 211, 212 n.2, 481 P.2d 897, 898 n.2 (App. 1971).

obtains the benefit of a lower premium, but his policy still conforms fully to the purpose of the Financial Responsibility Act." *Id.*

¶15 Although the reasoning provided above from *Farmers* is fairly straightforward, other portions of the opinion are difficult to reconcile.⁸ Indeed, several courts have struggled

⁸ The court in *Farmers* apparently contradicts itself when it first concludes that the "[course of employment] exclusion is not applicable to the [independent contractor,]" but later states, "If we were to construe the . . . policy to mean that the exclusion does not have application to the permissive insured because the injured or deceased was an employee of the owner insured, we would be compelled to hold . . . that the exclusion was void as against public policy." 108 Ariz. at 128-29, 493 P.2d at 911-12. Despite this inconsistency, the court nonetheless found the exclusion inapplicable. *Id.* at 129, 493 P.2d at 912 (reversing the judgment of the trial court); see *Farmers I*, 14 Ariz. App. at 212, 481 P.2d at 898 (noting that the trial court ruled in favor of the insurer and concluded that the exclusion applied). *Farmers* also stated that the language of A.R.S. § 28-1170(E) was "paradoxical," but offered no explanation for this description. See *id.* at 128, 493 P.2d at 911.

The court in *Farmers* explained further, "It is our conclusion that the exclusion is not applicable to the permissive user, [the independent contractor], although it may be given force and effect in a suit by [the employee] or his personal representative against [Rite-Way.]" *Id.* Although this appears to be contradictory, it operates to prevent a double recovery under circumstances where an insurance company insures both an employer and a permissive user. Thus, because *Farmers* ruled that the insurer was required to indemnify the independent contractor/permissive insured, it was not also required to indemnify Rite-Way for the same tortious conduct. Furthermore, the employee in *Farmers* received workers' compensation. See *Farmers I*, 14 Ariz. App. at 212 n.2, 481 P.2d at 898 n.2 ("Work[ers] c[ompensation] benefits had also been applied for and received."). Therefore, under the holding of *Farmers*, the public policy behind the Financial Responsibility Act would not

with interpreting its application and scope. See, e.g., *Granite State Ins. Co. v. Transamerica Ins. Co.*, 148 Ariz. 111, 114, 713 P.2d 312, 315 (1985) (finding that “the language of *Farmers* has caused some real difficulty in determining its scope”). However, notwithstanding these concerns, it is plain that the court in *Farmers* was concerned with protecting employees from financial hardship resulting from automobile accidents in the course and scope of employment, requiring that employers provide some form of compensation, whether consisting of workers’ compensation or liability insurance, to injured employees. 108 Ariz. at 128-29, 493 P.2d at 911-12. Ultimately, the court in *Farmers* held that the exclusion was unenforceable due to the public policy mandated by the Financial Responsibility Act. *Id.* at 129, 493 P.2d at 912 (stating “public policy would be thwarted” by applying the exclusion because such an exclusion would “frustrate[] the purpose of the Financial Responsibility Act”); see also *Stearns-Roger Corp. v. Hartford Accident & Indem. Co.*, 117 Ariz. 162, 165, 571 P.2d 659, 662 (1977) (“The exclusion clause in *Farmers* was applied [sic] in light of the

have been violated in a suit by the employee against Rite-Way because the employee received adequate compensation from Rite-Way by way of workers’ compensation. See 108 Ariz. at 129, 493 P.2d at 912. The exclusion was not applicable against the independent contractor, however, because *Farmers* was concerned not only with providing compensation to the injured employee, but also with providing coverage to the independent contractor tortfeasor. See *id.*

statutory requirements of the Motor Vehicle Financial Responsibility Act."); *Schwab*, 27 Ariz. App. at 749, 558 P.2d at 944 (stating that *Farmers'* holding was "necessary in order to effectuate the purpose of the Financial Responsibility Act.").⁹

¶16 *Martinez v. U.S. Fid. and Guar.*, 119 Ariz. 403, 581 P.2d 248 (App. 1978) is consistent with *Farmers*. In *Martinez*, the plaintiff was awarded damages in a personal injury suit against his co-employee for injuries arising out of an accident that occurred in the scope and course of their common

⁹ Analyzing *Farmers*, the North Carolina Court of Appeals stated:

[Arizona Revised Statutes § 28-1170(E)] by its very terms seems to make possible a situation of no coverage where a policy contains an employee exclusion clause and an injured employee is not covered by Arizona's workers' compensation laws. But the statute has not been so construed. Arizona courts have interpreted § 28-1170 E [sic] to allow exclusion of an employee from coverage under an employer's automobile liability policy only when workers' compensation is available to that employee. See, e.g., *Farmers Insurance Group v. Home Indemnity Co.*, *supra*; *State Farm Mutual Automobile Ins. Co. v. Karasek*, *supra* ("obvious purpose" of § 28-1170 E [sic] "is to allow a policyholder to avoid a situation where [that person] might be required to purchase the same liability coverage from two different carriers, that is, . . . [a workers'] compensation insurance carrier and [a] motor vehicle liability carrier").

S.C. Ins. Co. v. Smith, 313 S.E.2d 856, 860-61 (N.C. Ct. App. 1984).

employment. 119 Ariz. at 403, 581 P.2d at 248. The plaintiff later filed an action for declaratory judgment against his employer's insurer and his employer, as the named insured on the general liability policy. *Id.* The policy contained a "course of employment" exclusion¹⁰ barring coverage for bodily injury to any employee arising out of the scope of employment. *Id.* at 403-04, 581 P.2d at 248-49. In addition, the policy contained a "cross-employee" exclusion, stating that an employee who caused injury to a fellow employee in the scope and course of his employment was not an "insured." *Id.* at 404, 581 P.2d at 249.

¶17 Relying on *Farmers*, we explained, "[t]he only way [an employer can] obtain the benefit of a lower premium by contracting for automobile liability insurance which excludes his employees, therefore, is by use of the ["course of employment"] exclusion, relying on work[ers'] compensation to satisfy the purpose of the Financial Responsibility Act." *Id.* We therefore concluded that the "course of employment" exclusion applied to bar recovery by the plaintiff against his employer

¹⁰ Although *Martinez* refers to this exclusion as a "cross-employee exclusion," it is more properly referred to as a "course of employment" exclusion. *Atkins v. Pac. Indem. Ins. Grp.*, 125 Ariz. 46, 48 n.1, 607 P.2d 29, 31 n.1 (App. 1979); see also *Limon v. Farmers Ins. Exch.*, 11 Ariz. App. 459, 463, 465 P.2d 596, 600 (1970) (stating a "cross-employee" exclusion is an exclusion that bars insurance coverage for an employee who causes injury or death to another employee in the scope and course of employment).

because he "had applied for and received work[ers'] compensation benefits under a work[ers'] compensation policy issued to or applicable to [his employer]." *Id.* Thus, under the public policy reasoning given in *Farmers*, whether an injured employee is covered by workers' compensation is the pivotal question in determining whether the "course of employment" exclusion is applicable.

¶18 State Farm argues that because the course of employment exclusion "almost exactly tracks" the language of § 28-4009, it cannot violate public policy. However, the exclusion in *Farmers* similarly tracked the language of A.R.S. § 28-1170(E), but nevertheless was found to violate the Financial Responsibility Act. See 108 Ariz. at 128-29, 493 P.2d at 911-12. Accordingly, the construction of the statute by our supreme court in *Farmers* controls the result here. See *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993) ("[W]e are bound by decisions of the Arizona Supreme Court and have no authority to overrule, modify, or disregard them.").

¶19 State Farm attempts to distinguish *Farmers* on the basis that the tortfeasor in that case was an independent contractor, rather than an employee, relying on the following statement from *Granite*:

The Court of Appeals' opinions considering *Farmers* have dealt with fact situations where one employee of the insured injured another employee of the insured. We have not considered a case, such as this one and *Farmers*, where a person who is not an employee of the named insured, but who is an omnibus insured as a permissive user, injures an employee of the named insured. The facts of this case are therefore essentially the same as in *Farmers*, and that opinion controls the result here. We distinguish *Limon, Martinez, and Atkins* as cases where one employee of the insured injured another employee of the insured. See also *Orkin Exterminating Co., Inc. v. Robles*, 128 Ariz. 132, 624 P.2d 329 (App.1980). Clearly, in these cases, A.R.S. § 28-1170(E) applies and there is no public policy reason to negate the exclusion. *Cota, supra*.

148 Ariz. at 116, 713 P.2d at 317. State Farm argues that because Veronica, an employee of the insured, injured other employees of the insured, the exclusion applies to bar coverage.

¶20 However, in all but one of the cases cited by the court in *Granite*, the exclusions were found applicable under circumstances in which the injured employee applied for and received workers' compensation benefits. See *Cota v. Indus. Indem. Co.*, 141 Ariz. 526, 527, 687 P.2d 1281, 1282 (App. 1984) ("Cota . . . received_[] work[ers'] compensation benefits_[.]"); *Orkin*, 128 Ariz. at 133, 624 P.2d at 330 ("Robles . . . received work[ers'] compensation benefits from the insurance carrier for Orkin."); *Martinez*, 119 Ariz. at 404, 581 P.2d at 249 ("Martinez had applied for and received work[ers'] compensation benefits

under a work[ers'] compensation policy issued to or applicable to [the employer]."); *Limon*, 11 Ariz. App. at 460, 465 P.2d at 597 ("Limon applied for and was awarded compensation under the Work[ers'] Compensation Insurance Policy issued to the partnership.").¹¹ Although there is no evidence that the employee in *Atkins* received workers' compensation benefits, the court in that case explicitly relied on *Martinez* and *Farmers*, stating:

[T]he supreme court gave its approval to the general principle that an employer could, based upon [§] 28-1170(E), contract for automobile insurance that would exclude his employees and thus avoid the additional premium and double coverage that would result if an employer was required to carry both work[ers'] compensation and liability insurance for the benefit of his employees.

125 Ariz. at 47, 607 P.2d at 30. These cases simply do not address the situation before us and thus we cannot ignore our supreme court's analysis in *Farmers*.

¶21 Moreover, even if the accident in this case had been caused by an independent contractor, as opposed to a co-employee, the same policy rationale would exist. An employee operating or using a company vehicle, by law, should be covered

¹¹ We similarly reject State Farm's reliance on *Hagen v. U.S. Fid. and Guar. Ins. Co.*, 138 Ariz. 521, 522, 675 P.2d 1340, 1341 (App. 1983) ("Hagen has received work[ers'] compensation benefits relating to the accident."), *approved and adopted by Hagen v. U.S. Fid. and Guar. Ins. Co.*, 138 Ariz. 491, 675 P.2d 1310 (1984).

by workers' compensation. If he is, then a course of employment exclusion is valid. If he is not covered by workers' compensation, then the exclusion cannot be enforced. We therefore decline to adopt State Farm's suggested limitation, which could permit an employee to be left without any type of coverage or financial compensation in the event of a work-related accident under circumstances such as those presented here. Doing so would contravene the purpose of the Financial Responsibility Act, which is to protect "[t]he public using the highways . . . from financial hardship resulting from the use of automobiles by financially irresponsible persons." *Schwab*, 27 Ariz. App. at 749, 558 P.2d at 944 (internal quotations and citation omitted).¹²

¹² This reasoning is consistent with A.R.S. § 28-4135 (Supp. 2011) ("Motor vehicle financial responsibility requirement; civil penalties"), which provides in relevant part:

- A. A motor vehicle that is operated on a highway in this state shall be covered by one of the following:
 - 1. A motor vehicle or automobile policy that provides limits not less than those prescribed in § 28-4009.
 - 2. An alternate method of coverage as provided in § 28-4076.
 - 3. A certificate of self-insurance as prescribed in § 28-4007.

¶122 Citing *Limon*, 11 Ariz. App. at 464, 465 P.2d at 601, State Farm also asserts that because the statutorily-authorized exclusion in A.R.S. § 28-4009 is "clear and unambiguous[,]" it must be given effect. In *Limon*, an employee was injured in an automobile accident by co-employees in the course and scope of employment and subsequently sued his fellow employees for negligence. 11 Ariz. App. at 460, 465 P.2d at 597. The injured employee applied for and received workers' compensation. *Id.* Additionally, the employer's policy contained a "course of employment" exclusion similar to the instant case. *Id.* at 461, 465 P.2d at 598.

¶123 We found that § 28-1170(E) clearly and unambiguously authorized the "course of employment" exclusion. *Id.* at 464, 465 P.2d at 601. We also determined that the word, "insured," as set forth in the "course of employment" exclusion,¹³ encompassed both the named insured/employer as well as the permissive insured/negligent employee. *Id.* at 462, 465 P.2d at

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4. A policy that satisfies the financial responsibility requirements prescribed in article 2 of this chapter.

This statute underscores Arizona's legislative policy that all vehicle owners must provide liability coverage, if not under A.R.S. § 28-4009, then by some alternative means.

¹³ The "course of employment" exclusion stated that the policy did not provide coverage for "any employee of the Insured arising out of and in the course of his employment by the insured[.]" *Id.* at 461, 465 P.2d at 598.

599. We concluded that because the employee was employed by the named insured/employer, the "course of employment" exclusion applied to bar coverage under the policy. *Id.* We further stated that the exclusion operated to exclude coverage "regardless of whether the negligent party be the named insured or some other person made an insured by reason of statutory or policy omnibus provisions." *Id.*

¶24 Although *Farmers* did not expressly overrule or even cite *Limon*, see *Martinez*, 119 Ariz. at 404, 581 P.2d at 249, *Limon* applies to circumstances where the employer has provided workers' compensation coverage to the injured employee. See *Farmers*, 108 Ariz. at 129, 493 P.2d at 912; see also *Martinez*, 119 Ariz. at 404, 581 P.2d at 249 ("There is a significant difference between excluding coverage for injuries to a person for whom another remedy has been provided, and an attempt to exclude certain persons as insureds under the policy. It is that distinction, which is recognized in both *Limon* . . . and *Farmers* . . . that makes those cases reconcilable."). *Limon* does not control the outcome of this case.

¶25 Instead, this case is aligned more closely with *Monares*, 153 Ariz. 9, 734 P.2d 106. In *Monares*, this court construed A.R.S. § 28-1170(E) in the context of an automobile policy that excluded coverage for, among other things, (1) any liability of the insured under workers' compensation law, and

(2) “[b]odily injury to any employee of the insured arising out of and in the course of employment.” 153 Ariz. at 10, 734 P.2d at 107. It was undisputed that the employer had no workers’ compensation coverage and thus we concluded that “the exclusions at issue do not deny coverage.” *Id.* at 13, 734 P.2d at 110. Admittedly, we did not specifically address the enforceability of the course of employment exclusion because “appellant [did] not attempt to argue that without worker’s compensation coverage the employee exclusions are in accord with [the Financial Responsibility Act] and Arizona’s public policy.” *Id.* But we did recognize the insurer’s argument that workers’ compensation availability would remove the public policy concern:

Scottsdale does not argue that the employee exclusions alone comport with the requirement of the Financial Responsibility Act and Arizona’s public policy. Rather, it claims that worker’s compensation exclusions are authorized by A.R.S. § 28-1170(E), Monares may be eligible for worker’s compensation coverage, *and if such coverage is available to him*, there is no public policy violation.

Id. at 12, 734 P.2d at 109 (emphasis added). In the context of § 28-4009 and its prior versions, we are not aware of any other reported Arizona decision involving an injured employee who was not covered by workers’ compensation. Thus, the reasoning of *Monares* supports the conclusion that a course of employment

exclusion is valid only if workers' compensation coverage exists.

¶126 State Farm asserts further that an employee's remedy under the "special fund" statute, A.R.S. § 23-907 (Supp. 2011), renders the statute enforceable. Section 23-907 allows an injured employee of an employer who is required to provide workers' compensation, but fails to provide such compensation, to file an application with a commission for compensation from a "special fund" in lieu of filing a civil action in court. However, this court explicitly rejected State Farm's argument in *Monares*, stating that such an interpretation would "force" an employee seeking coverage to resort to the "special fund" statute. 153 Ariz. at 13, 734 P.2d at 110. We reasoned that this would effectively take away the employee's statutory choice to seek coverage by way of either the special fund or by filing a civil suit. *Id.* at 12-13, 734 P.2d at 109-110.¹⁴

¶127 State Farm briefly mentions that cases construing A.R.S. § 28-1170(E) are not controlling in light of the amendments resulting in A.R.S. § 28-4009, the current version of

¹⁴ State Farm mentions in passing that *Farmers* is also distinguishable on the basis that subsequent to the date of that decision, "co-employees are shielded from lawsuits just like the employer." See A.R.S. §§ 23-1022 and -1024 (1995 & Supp. 2011). Because the argument is not developed, we do not consider it. See *Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, 491 n.2, 154 P.3d 391, 393 n.2 (App. 2007) (stating that failure to develop and support argument waives issue on appeal).

the statute. State Farm suggests that because the legislature separated the workers' compensation exclusion from the course of employment exclusions, it indicates legislative intent that the two exclusions are unrelated. We disagree.

¶128 The essence of the former and the current statute is that a policy may exclude coverage relating to (1) workers' compensation matters, or (2) course of employment situations. See *Karasek*, 22 Ariz. App. at 90, 523 P.2d at 1327 (holding that the "obvious purpose" of § 28-1170(E) "is to allow a policyholder to avoid a situation where [that person] might be required to purchase the same liability coverage from two different carriers, that is, . . . [a workers'] compensation insurance carrier and [a] motor vehicle liability carrier"); Irvin E. Schermer and William Schermer, *Automobile Liability Insurance* § 6.5 (4th ed.) (stating that a "course of employment" exclusion is "considered void as against public policy if its effect would be to render coverage unavailable for payment of the claim of an employee not covered by the workers' compensation act or deprived of its benefit by the neglect of his employer"). If the legislature desired to express a different intent, it did not do so with clear language. Moreover, State Farm has not provided us with any history reflecting legislative intent to substantively revise the analysis and reasoning reflected in cases from our supreme court

and this court construing prior versions of § 28-4009. See *Jackson v. Tangreen*, 199 Ariz. 306, 311, ¶ 21, 18 P.3d 100, 105 (App. 2000) (recognizing presumption that the legislature is aware of how Arizona courts have previously interpreted and applied a statute). Had the legislature intended to reject prior court interpretations of the statutory course of employment exception, it presumably would have expressly done so. See *State v. Christian*, 205 Ariz. 64, 70, ¶ 20, 66 P.3d 1241, 1247 (2003).

¶29 In sum, if we were writing on a clean slate, we might find that the course of employment exclusion, virtually identical to the language of A.R.S. § 28-4009(C)(4)(b) and expressly agreed to by Roberto and Linda, is enforceable and thus bars the claims of the decedents' beneficiaries. However, given our supreme court's broad pronouncement of public policy in *Farmers*, we are compelled to conclude otherwise. See *City of Phoenix v. Williams*, 89 Ariz. 299, 303-04, 361 P.2d 651, 655-56 (1961) ("The pronouncements of [the supreme court] are especially significant as correct interpretation of public policy in view of the fact that the state legislature has not acted" to overrule it.). We therefore hold that the Policy's course of employment exclusion violates public policy because the decedents were not covered by workers' compensation.

CONCLUSION

¶130 Based on the foregoing, we reverse the trial court's grant of summary judgment in favor of State Farm and remand for entry of judgment in favor of the Renovas.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

DANIEL A. BARKER, Presiding Judge*

/s/

MARGARET H. DOWNIE, Judge

* Judge Daniel A. Barker was a sitting member of this court when the matter was assigned to this panel. He retired effective December 31, 2011. In accordance with the authority granted by Article 4, Section 3 of the Arizona Constitution and pursuant to A.R.S. § 12-145 (2003), the Chief Justice of the Arizona Supreme Court has designated Judge Barker as judge pro tempore in the Court of Appeals, Division One, for the purpose of participating in the resolution of cases assigned to this panel during his term of office.