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THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

STAKER & PARSON COMPANIES, INC.,

Plaintiff,

SCOTTSDALE INSURANCE COMPANY,

Defendant.

**ORDER CERTIFYING QUESTIONS
TO THE ARIZONA SUPREME COURT**

Case No. 4:18-cv-00014-DN-PK

District Judge David Nuffer
Magistrate Judge Paul Kohler

This order certifies questions to the Arizona Supreme Court. The questions are determinative in this case and are not clearly answered by existing Arizona case law.

The remaining issues in this case involve a dispute over whether Plaintiff Staker & Parson Companies, Inc. (“Staker”) was entitled to defense under a commercial automobile liability insurance policy issued to Blake Reidhead, Inc. d/b/a/ BDR Transport (“BDR”) by Defendant Scottsdale Insurance Company (“Scottsdale”).¹ Scottsdale denied coverage of Staker’s tendered claim for defense and indemnity for a negligence claim alleged against Staker in *William Baughn v. Staker & Parson Companies, Inc. et al.*, filed in the Superior Court of Pima County, State of Arizona (the “*Baughn Suit*”).² Staker initiated this case alleging causes of action

¹ Plaintiff Stake & Parson Companies, Inc.’s Motion for Partial Summary Judgment (“Staker’s Motion”), docket no. 114, filed Jan. 29, 2021; Scottsdale Insurance Company’s Motion for Summary Judgment (“Scottsdale’s Motion”), docket no. 115, filed Jan. 29, 2021. Staker’s claims against Defendants Colorado Casualty Insurance Company and Hancock-Leavitt Insurance Agency, Inc. have been dismissed. Order of Dismissal With Prejudice as to Colorado Casualty Insurance Company, docket no. 113, filed Sept. 2, 2020; Memorandum Decision and Order Granting Defendant’s Motion to Dismiss, docket no. 56, filed July 25, 2018.

² First Amended Complaint and Jury Demand ¶¶ 26-48 at 5-7, docket no. 2-6, filed Apr. 16, 2018.

against Scottsdale for breach of the insurance contract; promissory estoppel; tortious and contractual breach of the implied covenant of good faith and fair dealing; and declaratory relief.³

Staker and Scottsdale filed cross-motions for summary judgment regarding Staker's causes of action.⁴ There are no disputed issues of material fact in the cross-motions.

Additionally, the parties agree that Staker's claims for indemnity are moot.⁵ And Staker has conceded that it cannot prove a claim for promissory estoppel against Scottsdale.⁶

Disposition of the parties' cross-motions for summary judgment (and the remaining issues in this case) turns on application of Arizona law to the relevant policy language and facts to determine whether Scottsdale had a duty to defend Staker in the *Baughn* Suit. Specifically, the primary issues are:

- (1) whether Staker was "using" a vehicle covered by the Scottsdale policy to trigger permissive user coverage under the policy; and
- (2) if Staker was "using" the covered vehicle, whether that "use" had a causal link to the injuries and theories of liability alleged in the *Baughn* Suit to trigger Scottsdale's duty to defend Staker under the policy.

The parties' briefs cite to case law from Arizona and other jurisdictions to support their arguments regarding these issues. This precedent discusses general legal principles regarding the construction of "use" or "using" in insurance contracts and the requisite level of causation to trigger a duty to defend. These general principles are helpful to structure an analysis to resolve the parties' cross-motions for summary judgment. However, they do not provide answers the legal issues raised by the specific facts of this case. There is no controlling Arizona precedent

³ *Id.* ¶¶ 72-100 at 10-14.

⁴ Staker's Motion; Scottsdale's Motion.

⁵ Staker's Motion at 4; Scottsdale's Motion at 2.

⁶ Plaintiff Staker & Parson Companies, Inc.'s Memorandum in Opposition to Scottsdale's Motion for Partial Summary Judgment at 4, docket no. 119, filed Mar. 10, 2021.

addressing the specific factual circumstances and legal issues posed by the parties' cross-motions. Arizona precedent is factually distinguishable to the point that it is entirely unclear how the general legal principles apply in this case. As Scottsdale states, "the particular issue[s] in this case ha[ve] not been addressed by an Arizona court."⁷

Under Arizona Revised Statutes § 12-1861 and Rule 27(a)(1) of the Rules of the Supreme Court of Arizona, a federal court may certify questions to the Arizona Supreme Court regarding Arizona law "which may be determinative of the cause then pending" and for which there appears to be "no controlling precedent in the decisions of the [S]upreme [C]ourt and the intermediate appellate court of [Arizona]."⁸

"[C]ertification is not to be routinely invoked whenever a federal court is present with an unsettled question of state law."⁹ But certification is appropriate "when the case concerns a matter of vital public concern, where the issue will likely recur in other cases, where resolution of the question to be certified is outcome determinative of the case, and where the state supreme court has yet to have an opportunity to illuminate a clear path on the issue."¹⁰

Certification confirms the relative roles of the state and federal courts, and helps resolve cases. Answers to certified questions are authoritative, issued by the court with constitutional responsibility to interpret state law. Those answers put to rest hopes of obtaining a different answer from a different federal judge at the trial or appellate level.¹¹

⁷ Scottsdale Insurance Company's Memorandum Opposing Staker & Parson Companies Motion for Partial Summary Judgment at 17, docket no. 118, filed Mar. 10, 2021.

⁸ A.R.S. § 12-1861.

⁹ *Copier by and Through Lindsey v. Smith & Wesson Corp.*, 138 F.3d 833, 838 (10th Cir. 1998).

¹⁰ *Utah ex rel. Div. of Forestry, Fire & State Lands v. United States*, 335 F. Supp. 2d 1319, 1321 (D. Utah 2004).

¹¹ David Nuffer, Certification of Legal Questions to the Utah Supreme Court, at 80, (Mar. 28, 2018) (unpublished LL.M. thesis, Duke University School of Law), <https://scholarship.law.duke.edu/mjs/7/> (last visited Oct. 15, 2021).

Restraint by federal judges on unclear issues of state law eliminates the anomalous use of federal case law as precedent on state law issues. A state court is powerless to correct erroneous federal decisions and practitioners may be misled by those decisions.

The precedent stemming from the resolution of the unresolved questions of Arizona law raised by the parties’ cross-motions for summary judgment is of vital public concern and likely to recur in other cases involving commercial automobile liability insurance policies. The precedent deserves to be made and will be more compelling if made by the Arizona Supreme Court, rather than a court having no direct authority over Arizona law. Therefore, it is appropriate that the unresolved questions of Arizona law be certified to the Arizona Supreme Court for decision.

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ORDER

IT IS HEREBY ORDERED that the unresolved questions of Arizona law raised by the parties' cross-motions are CERTIFIED to the Arizona Supreme Court for decision.

IT IS FURTHER ORDERED that the Clerk of Court is directed to file an original and six copies of this Order with the Arizona Supreme Court.

IT IS FURTHER ORDERED that the following information is provided to the Arizona Supreme Court in compliance with Arizona Revised Statutes § 12-1861 and Rule 27(a)(3) of the Rules of the Supreme Court of Arizona:

Certified Questions of Arizona Law to be Answered

- (1) Under Arizona law, is an additionally named insured on a commercial automobile liability insurance policy "using" an independent contractor's covered vehicle when that vehicle is being operated by an employee of the independent contractor to transport the additionally named insured's cargo and the additionally named insured does not have active or actual control over the vehicle's operation or the independent contractor's employee?
- (2) Under Arizona law, is an additionally named insured on a commercial automobile liability insurance policy "using" an independent contractor's covered vehicle when that vehicle is being operated an employee of the independent contractor to transport the additionally named insured's cargo over private roads that are owned and maintained by the additionally named insured, regardless of whether the additionally named insured has active or actual control over the vehicle's operations of the independent contractor's employee?
- (3) Under Arizona law, can the managerial functions of an additionally named insured on a commercial automobile liability insurance policy, such as establishing safety training procedures for independent contractors operating vehicles on the additionally named insured's property, constitute a "use" of an independent contractor's covered vehicle?
- (4) If the answer to any of Questions (1) through (3) above is "yes," under Arizona law, is there a sufficient causal link between the additionally named insured's "use" of the covered vehicle and theories of liability for personal injuries sustained by the independent contractor's employee to trigger an insurer's duty to defend the additionally named insured when the employee stopped and exited the vehicle and was injured when attempting to dislodge an

obstruction that became lodged in the vehicle's dual tires while it was being operated on the additionally named insured's private roads?

The phrasing of these questions is not intended to restrict the Arizona Supreme Court's consideration of the issues. The Arizona Supreme Court is invited to reformulate the questions as it determines appropriate.

Facts Relevant to the Certified Questions

The Mine Operation and Accident

1. During the relevant time of the accident, which occurred on January 29, 2014, Staker operated the Ina Pit Mine ("Mine"), located in Pima, Arizona, where rock was mined, transported, and crushed within the Mine's processing areas.¹²
2. From approximately 2010 forward, Staker retained BDR to provide transport services with respect to the Mine, including using BDR's semi-tractors and trailers to haul materials along the Mine's roads between the various processing areas, *e.g.*, from the pit to the crushing area.¹³
3. In late 2013, Staker and BDR entered and executed a written agreement entitled Haul of Materials Agreement ("Haul Agreement").¹⁴
4. The Haul Agreement contains several provisions that required BDR to obtain various types of insurance (including Worker's Compensation, General Liability, and Automobile Liability), which provide, in pertinent part:

¹² Complaint filed in the *Baughn* Suit ("Initial Complaint") ¶¶ 2 at 1, 11-12 at 2-3 (SCOTTSDALE001923-SCOTTSDALE001946), docket no. 114-2, filed Jan. 29, 2021.

¹³ *Id.*; Videotaped Deposition of Blake Reidhead at 25-35 (StakerIns0011059-StakerIns0011060), docket no. 114-3, filed Jan. 29, 2021; Videotaped Deposition of Mike Gamez at 30-40 (StakerIns0010181-StakerIns0010183), docket no. 114-4, filed Jan. 29, 2021.

¹⁴ Haul of Materials Agreement ("Haul Agreement") (SCOTTSDALE001286-SCOTTSDALE001291), docket no. 114-5, filed Jan. 29, 2021.

8. . . . Contractor [BDR] shall at its own costs and expense procure and keep in force and effect throughout the term of this Agreement the insurance listed below:

* * * *

c) Automobile Liability Insurance on all motor vehicles owned, hired, or non-owned, which may be used or connected with any of the work hereunder, with limits of not less than \$1,000,000 for all liability arising out of injury to or death of one or more persons, in any one occurrence

. . . . [S]uch insurance shall specifically name Owner [Staker] as an additional insured party and shall be primary to any and all insurance of Owner [Staker] with respect to any and all claims and demands which may be made against Owner [Staker] for bodily injury or death resulting therefrom, including injury or death to Contractor [BDR], its employees, workmen, agents and servants Such insurance shall specifically provide that it applies separately to each insured against which claim is made or suit is brought, except with respect to the limits of the insurer's liability, and that all rights of subrogation against Owner [Staker] are waived.¹⁵

5. Paragraph 7 of the Haul Agreement contains an indemnity provision, which provides, in pertinent part:

(a) Contractor [BDR] agrees to protect, indemnify, hold harmless and defend Owner [Staker], its parent, and related companies, and the officers, directors, employees, workmen, agents, servants and invitees of Owner [Staker], its parent, and related companies, from and against all losses, damages, demands, claims, suits and other liabilities, including attorney fees and other expenses of litigation, because of (i) bodily injury, including death at any time resulting therefrom; and (ii) damages to all property, including loss of use thereof and downtime; and (iii) violation of or failure to comply with any applicable law, regulation, rule or order, which occur, either directly or indirectly, in connection with performance of the Work contemplated hereunder or by reason of Contractor [BDR] and its employees, workmen, agents, servants, subcontractors and vendors being present on Owner [Staker]'s premises, except to the extent attributable to the negligence of Owner [Staker]. . . . Contractor [BDR]'s indemnity and defense obligations shall apply to any claim against Owner [Staker] covered by Contractor [BDR]'s indemnity obligations hereunder that is set forth by any employee of Contractor [BDR] and Contractor

¹⁵ *Id.* ¶ 8 at 2-3.

[BDR] shall not assert as a defense in any suit by Owner [Staker] to enforce Contractor [BDR]'s obligations under this section 7 or any immunity or other defense provided under any worker's compensation or other laws.¹⁶

6. Paragraph 9 of the Haul Agreement states: "In the performance of all Work hereunder, Contractor [BDR] shall be an independent contractor. Owner [Staker] is to exercise, and have no control over the method and means of accomplishing the work other than to see that the desired results are achieved at the lowest possible costs to Owner [Staker]."¹⁷

7. On January 29, 2014, William Baughn, a driver employed by BDR, was working at the Mine transporting dirt and rock between the Mine's areas over private roads owned and maintained by Staker and was involved in an accident.¹⁸

8. The accident involved a rock getting lodged between a set of the trailer's dual tires. Mr. Baughn discovered the rock; used a hammer to try to dislodge it; and the dual tires exploded, injuring Mr. Baughn.¹⁹

9. At the time of the accident, Mr. Baughn was driving one of BDR's semi-tractors and attached to the tractor was BDR's 2007 Ranco End Dump Trailer, VIN 1R9ESD50X7L008773.²⁰

10. Mr. Baughn suffered multiple injuries from the accident.²¹

¹⁶ *Id.* ¶ 7 at 1-2.

¹⁷ *Id.* ¶ 9 at 3.

¹⁸ Initial Complaint at ¶¶ 11-12 at 2-3, 29 at 4.

¹⁹ *Id.* ¶¶ 25-29 at 4.

²⁰ Ranco Trailer Documents (StakerIns0019266-StakerIns0019268), docket no. 114-6, filed Jan. 29, 2021.

²¹ Initial Complaint ¶ 37 at 5.

The *Baughn* Suit and Initial Complaint

11. On January 29, 2015, Mr. Baughn filed suit, entitled *William Baughn v Staker & Parson Companies, Inc. et al.*, Case No. C20150432, in the Superior Court of the State of Arizona, Pima County, naming as defendants Staker, Staker’s Plant Manager Michael Gamez, BDR, and BDR’s owner Blake Reidhead.²²

12. The *Baughn* Suit sought liability and damages for the accident and liability and damages for the conduct of destroying evidence and failing to report the accident.²³

13. In the first section of the Initial Complaint, the defendants are identified, including Staker and BDR:

2. Defendant Staker & Parson Companies, Inc. (“Staker”) is a Utah Corporation which operates a mine in Pima County sometimes known as the “Ina Pit.”

* * * *

4. Blake Reidhead, Inc., trade name and doing business as BDR Transport (“BDR”) is an Arizona Corporation which employed Baughn on January 29, 2014. For the time period up to and including the January 29, 2014 accident, BDR is protected from liability as a result of Arizona Workers’ Compensation Act, A.R.S. § 23-1022.

* * * *

10. On information and belief, all actions and inactions of employees or agents of Staker and BDR were consistent with instructions given, or understood to be consistent with how the company wanted to execute its responsibilities.²⁴

²² *Id.* ¶¶ 2-5 at 1-2.

²³ *Id.* ¶¶ 11-102 at 2-11.

²⁴ *Id.* ¶¶ 2 at 1, 4 at 2, 10 at 2.

14. After identifying the defendants, the next section of the Initial Complaint, entitled “January 29, 2014” (“Accident Section”), sets forth the facts which existed on the date of the accident and describes conduct which allegedly caused the accident.²⁵

15. The Accident Section alleged facts regarding the relationship between Mr. Baughn, BDR, and Staker and duties of Staker as a mine operator:

11. On January 29, 2014, Baughn was employed by BDR as a truck driver, working at the Ina Pit. Baughn drove what is often referred to as a rear end loading trailer.

12. On January 29, 2014, prior to and until at least the accident, Staker was the mine operator and loaded dirt and rock onto the truck trailer driven by Baughn and other drivers, including BDR co-employees of Baughn.

13. There are limits to what can lawfully be placed onto a truck trailer.

14. Those limits are set in part to protect the drivers, employees, and public from potential hazards.

* * * *

18. Mine operator Staker had a duty to maintain reasonably safe mine road and dump site conditions which would include routine clearance of matter to prevent and minimize the likelihood of rocks interfering with the safe operation of truck tires.²⁶

16. The Accident Section also described the conditions encountered by Mr. Baughn regarding Staker’s loading of the trailer and his transportation of loads along the Mine’s road, alleging ways in which Staker was potentially liable in causing the accident:

15. Among the hazards that occur from overloading a truck trailer is added stress to the tires upon which the weight is borne.

16. Defendant Staker had a practice of routinely overloading trailers.

²⁵ *Id.* ¶¶ 11-40 at 2-5.

²⁶ *Id.* ¶¶ 11-14 at 2-3, 18 at 3.

17. Staker and other Defendants also engaged routinely in the practice of unevenly loading the trailer of trucks. The manner that the uneven loading occurred also increased the stress on the rear tires of the trailer.

18. Mine operator Staker had a duty to maintain reasonably safe mine road and dump site conditions which would include routine clearance of matter to prevent and minimize the likelihood of rocks interfering with the safe operation of truck tires.

19. On January 29, 2014, the routine practices of overloading and unevenly loading “baskets” in the truck trailer were being practiced by Staker.

20. On information and belief, the operator of the loader of dirt and materials onto the trailer was a Staker employee, or otherwise contracted so as to have his work directions controlled by Staker.

21. On information and belief, the operator of the dirt loader ran equipment which allowed the reasonably precise calculation of poundage that had been loaded onto the truck trailer, and each of the baskets on the trailer.

22. Staker, through its employees, was aware that its regular practice would result in overloading trailers, which would add stress to the trailer tires.

23. Staker, through its employees, was aware that its regular practice of uneven loading would add stress to the rear tires.

24. On January 29, 2014, there were inadequately maintained conditions at the Ina Pit road which allowed trailer tires to pick up rocks which had not been cleared by sufficient road maintenance. One or more rocks became lodged between dual tires of truck trailers, including the truck driven by Baughn.²⁷

17. The Accident Section also described how the accident occurred:

25. On January 29, 2014, Baughn’s vehicle picked up a rock between its dual tires prior to the accident.

26. Truck trailers could pick up a rock which would lodge between dual tires without any fault on the part of the driver.

²⁷ *Id.* ¶¶ 15-24 at 3-4.

27. Truck trailers could pick up a rock which would lodge between dual tires on the road, at dump sites, and loading sites without any fault of the driver.

28. Baughn was not at fault for his truck trailer picking up rock(s) between dual tires.

29. The accident in which Baughn was injured was described by BDR in a December 4, 2014, submission to the United States Mine Safety and Health Agency ("MSHA"): "William Baughn was hauling dirt for Staker Parson's yard at 5400 W. Massingale Rd., Tucson, AZ 85743. While in the yard he noticed there was a large rock between two tires on his trailer. (Rear Right Dual Tires). He grabbed his hammer and started hitting the rock to get it out of there. Hit it a couple of times and then both tires blew while he was hitting the rock. After the tires blew, the loader operator looked and noticed him on the ground. He then called his manager to call 911."²⁸

18. The Accident Section alleged two types of wrongful conduct on the part of Staker in causing the accident: (1) Staker overloading and unevenly loading BDR trailers placing stress on their tires; and (2) Staker inadequately maintaining conditions along the Mine's road, thereby creating the driving conditions which allowed rocks to be picked up and lodged in the dual tires of BDR's trailers while transporting Staker's materials.²⁹

19. With respect to the alleged overloading and uneven loading, the Initial Complaint alleged that Staker employees operated a dirt loader and had equipment which allowed the reasonably precise calculation of the weight of materials loaded onto the trailer.³⁰

20. The next section of the Initial Complaint, entitled "Defendants Staker and BDR Fail to Report, and Destroy Evidence of the Accident," alleges facts that neither Staker nor BDR

²⁸ *Id.* ¶¶ 25-29 at 4.

²⁹ *Id.* ¶¶ 13-28 at 3-4.

³⁰ *Id.* ¶¶ 20 at 3.

reported the accident to the Mine Safety and Health Administration (“MSHA”) or other governmental authorities.³¹

21. The Initial Complaint asserted a negligence cause of action against Staker and Mr. Gamez and a third-party spoliation of evidence cause of action against BDR.³²

22. The negligence cause of action provides, in relevant part:

**COUNT 1
NEGLIGENCE OF STAKER PARSONS**

70. Plaintiff incorporates all paragraphs above as if again stated in Count 1.

71. Staker had a duty to provide reasonably safe conditions at the Ina Pit.

72. Staker violated its duties by failing to maintain reasonably safe working conditions, and by creating hazards such as overloading and uneven loading of trailers.

73. The overloading of trailers may be a substantial factor in causing the stress on a tire which would cause the extraordinary result of a tire explosion.

74. Tire explosions due to overloading and being overstressed are conditions that are foreseeable and preventable.

75. On information and belief, the tire or tires that exploded proximately causing the injury to Baughn were overstressed.

76. On information and belief, the tire or tires that exploded proximately causing the injury to Baughn were overstressed by overloading and uneven loading.

* * * *

84. The negligence of Staker proximately caused the accident and injuries to Baughn.³³

³¹ *Id.* ¶¶ 41-69 at 6-8.

³² *Id.* ¶¶ 70-102 at 8-11.

³³ *Id.* ¶¶ 70-76 at 8-9, 85 at 10.

The First Amended Complaint Filed in the *Baughn* Suit

23. On March 18, 2015, Mr. Baughn filed a First Amended Complaint in the *Baughn* Suit.³⁴

24. The First Amended Complaint included additional allegations within its Accident Section that Staker and BDR failed to train and communicate to workers, including Mr. Baughn, regarding the safe procedures to use if a vehicle picks up a rock which gets lodged between dual tires:

11. Staker as a mine operator, and BDR as employer engaging in activity within a mine and within the jurisdiction of the Mine Safety and Health Administration of the United States Department of Labor (MSHA), owed duties to persons working in the mine including Baughn, to train all employees regarding safety and safe techniques to perform their work.

* * * *

13. Staker and BDR failed to have adequate standards and to adequately train workers including Baughn regarding working on equipment with the potential of hazardous release of energy. One such hazard is the potential uncontrolled release of pressure from a tire.

14. Staker and BDR did not have and communicate adequate safe procedures to use if a truck in the mine picked up rocks, including a rock which may become lodged between dual tires.

15. Staker and BDR oversaw a system at the Ina Pit where employees who had not been adequately trained became responsible for dealing with hazards such as rocks lodged between dual tires.

16. Staker and BDR were aware, or if acting reasonably in their responsibilities would have been aware, that hauling within an open pit includes potentially hazardous activity including risks from equipment including tires.

* * * *

³⁴ First Amended Complaint filed in the *Baughn* Suit ("First Amended Complaint") (StakerIns0000053-StakerIns0000066), docket no. 114-7, filed Jan. 29, 2021.

35. Staker and BDR had never instructed Baughn to stop working if and when a rock became lodged between dual tires.

36. Staker and BDR had never instructed Baughn to seek assistance from a designated individual if and when a rock became lodged between dual tires.

37. Staker and BDR had never instructed or authorized Baughn to stop working if and when a rock became lodged between dual tires to call a tire service or supervisor of any sort who was adequately trained to safely resolve the potential hazard.³⁵

25. The First Amended Complaint included the same allegations made in the Initial Complaint regarding overloading and uneven loading of trailers and inadequate maintenance of the Mine's road where BDR's vehicles transported Staker's materials.³⁶

26. The First Amended Complaint's negligence cause of action asserted against Staker and Mr. Gamez included the same allegations made in the Initial Complaint,³⁷ and included allegations regarding negligent training:

80. Staker and BDR failed to comply with requirements of statute, regulation, and/or common law. The failure of compliance and to use reasonable care in devising and implementing adequate safety training and techniques is a proximate cause of the injuries to Baughn which are described in this Complaint.

81. The accident and injuries described in this complaint would not have occurred but for the negligence of Staker.³⁸

³⁵ *Id.* ¶¶ 11 at 2, 13-16 at 3, 35-37 at 5.

³⁶ *Id.* ¶¶ 12 at 3, 17-34 at 3-5, 82-83 at 10.

³⁷ *Id.* ¶¶ 78-79 at 9, 82-97 at 10-11.

³⁸ *Id.* ¶¶ 80-81 at 9-10.

The Policy and Covered Autos

27. Scottsdale issued a commercial automobile liability insurance policy to named insured BDR, Policy No. OPS0062348, with a policy period of October 23, 2013, through October 23, 2014 (“Scottsdale Policy” or “Policy”).³⁹

28. The Scottsdale Policy contained inland marine and commercial auto coverages, and the premium for the commercial auto coverage (“Auto”) was listed as \$135,735.00.⁴⁰

29. The Auto Declaration listed Auto Liability as a coverage and identified the covered autos as symbol 67.⁴¹ The symbol 67 is identified and defined as: “Specifically Described ‘Autos’” which are “[o]nly those ‘Autos’ described in Item Three of the Declarations for which a premium charge is shown (and for Liability Coverage any ‘trailers’ you don’t own while attached to any power unit described in Item Three).” (“Covered Auto”).⁴²

30. Item Three of the Policy’s Declarations is entitled Schedule of Covered Autos You Own and refers the reader to “See Schedule of Covered Autos You Own” (“Schedule Auto Form”) and such form lists the specific covered autos BDR owns.⁴³

31. On the day of the accident, Mr. Baughn was driving a BDR tractor and attached to the tractor was BDR’s 2007 Ranco Trailer, VIN 1R9ESD50X7L008773 (“Ranco Trailer”). It is

³⁹ Scottsdale Policy at 5 Common Policy Declaration (SCOTTSDALE000005), docket no. 114-8, filed Jan. 29, 2021.

⁴⁰ *Id.*

⁴¹ *Id.* at 32 Commercial Auto Coverage Motor Carrier Coverage Form Supplemental Declarations (SCOTTSDALE000032).

⁴² *Id.* at 62 Motor Carrier Coverage Form (SCOTTSDALE000062).

⁴³ *Id.* at 33 Motor Carrier Coverage Form Supplemental Declarations (SCOTTSDALE000033), 37-54 Schedule of Covered Autos You Own Form (SCOTTSDALE000037-SCOTTSDALE000054).

one of the Ranco Trailer's rear sets of dual tires which were involved in the accident injuring Mr. Baughn.⁴⁴

32. The Ranco Trailer is listed and specifically identified as BDR's covered auto no. 37 on the Policy's Schedule Auto Form.⁴⁵

33. Two different BDR tractors were identified as the tractor which Mr. Baughn was driving at the time of the accident. Both identified tractors are listed as covered autos, no. 47 and no. 84, on the Scottsdale Policy's Schedule Auto Form.⁴⁶

Relevant Provisions of the Auto Coverage Form

34. The insuring provision of the automobile liability portion of the Policy ("Auto Coverage Form")⁴⁷ provides, in relevant part:

SECTION II – LIABILITY COVERAGE

A. Coverage

We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

* * * *

⁴⁴ Ranco Trailer Documents (StakerIns0019266-StakerIns0019268).

⁴⁵ Scottsdale Policy at 43 Schedule of Covered Autos You Own Form (SCOTTSDALE000043).

⁴⁶ When the *Baughn* Suit was first reported to Scottsdale, Scottsdale's claims representative received and documented information that the tractor Mr. Baughn was driving on the day of the Accident was a 2001 Peterbilt VIN 1XP5DU9X8IN542144. Scottsdale Claims Note Entry, dated 02/17/2015, entered by Ken Harris (SCOTTSDALE003791-SCOTTSDALE003792), docket no. 114-9, filed Jan. 29, 2021. The 2001 Peterbilt is specifically listed as covered auto no. 47 on the Policy's Schedule Auto Form. Scottsdale Policy at 45 (SCOTTSDALE000045). However, during Scottsdale's investigation, Scottsdale's insurance coverage counsel learned from Monti Hancock, insurance broker for BDR, that Mr. Baughn was driving a 2004 Kenworth Tractor VIN 3WKDDU9X54F066467. Scottsdale Claims Note Entry, dated 02/17/2015, entered by Ken Harris (SCOTTSDALE003791-SCOTTSDALE003792). The Kenworth Tractor is specifically identified as BDR's covered auto no. 84 on the Policy's Change Endorsement No. 002, effective 12-03-2013, and Schedule of Auto Changes. Scottsdale Policy at 122-124 (SCOTTSDALE000122-SCOTTSDALE000124).

⁴⁷ Scottsdale Policy at 62-75 Motor Carrier Coverage Form, CA 00 20 03 10 (SCOTTSDALE000062-SCOTTSDALE000075).

We will have the right and duty to defend any “insured” against a “suit” asking for such damages However, we have no duty to defend any “insured” against a “suit” seeking damages for “bodily injury” or “property damage” . . . to which this insurance does not apply. We may investigate and settle any claim or “suit” as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.⁴⁸

35. The Policy’s Auto Coverage Form describes those persons and entities who qualify as insureds under the Policy:

1. Who Is An Insured

The following are “insureds”:

a. You for any covered “auto”.

b. Anyone else while using with your permission a covered “auto” you own, hire, or borrow except:

(1) The owner, or any “employee”, agent or driver of the owner, or anyone else from whom you hire or borrow a covered “auto”.

(2) Your “employee” or agent if the covered “auto” is owned by that “employee” or agent or member of his or her household.

(3) Someone using a covered “auto” while he or she is working in a business of selling, servicing, parking or storing “autos” unless that business is yours.

(4) Anyone other than your “employees”, partners (if you are a partnership), members (if you are a limited liability company), a lessee or a borrower of a covered “auto” or any of their “employees”, while moving property to or from a covered “auto”.

(5) A partner (if you are a partnership), or a member (if you are a limited liability company) for a covered “auto” owned by him or her or a member of his or her household.

c. The owner or anyone else from whom you hire or borrow a covered “auto” that is a “trailer” while the “trailer” is connected to another covered

⁴⁸ *Id.* at 63-64 Motor Carrier Coverage Form § II A. (SCOTTSDALE000063-SCOTTSDALE000064).

“auto” that is a power unit, or, if not connected, is being used exclusively in your business.

* * * *

e. Anyone liable for the conduct of an “insured” described above but only to the extent of that liability.⁴⁹

36. The Auto Coverage Form contains a number of exclusions limiting coverage and one of the exclusions is entitled “Movement Of Property By Mechanical Device”:

B. Exclusions

This insurance does not apply to any of the following:

* * * *

8. Movement Of Property By Mechanical Device

“Bodily Injury” or “property damage” resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered “auto”.⁵⁰

37. The Auto Coverage Form defines the words “you,” “insured,” and “suit” as follows:

Throughout this policy the words “you” and “your” refer to the Named Insured shown in the Declarations. . . .

* * * *

G. “Insured” means any person or organization qualifying as an insured in the Who Is An Insured Provision of the applicable coverage. Except with respect to Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or “suit” is brought.

P. “Suit” means a civil proceeding in which

1. Damages because of “bodily injury” or “property damages”, or

⁴⁹ *Id.* at 64 Motor Carrier Coverage Form § II A.1. (SCOTTSDALE000064).

⁵⁰ *Id.* at 66 Motor Carrier Coverage Form § II B.8. (SCOTTSDALE000066).

2. A “covered pollution costs or expense”,
to which this insurance applies, are alleged.⁵¹

**The Policy Contains a Designated Insured Endorsement which Names Staker’s d/b/a
Western Rock Products as a Designated Insured**

38. Western Rock Products is an assumed name of Staker. Staker registered Western Rock Products as its assumed name – “d/b/a” – with the State of Utah Department of Commerce on April 20, 2007.⁵²

39. The Scottsdale Policy contains a number of Designated Insurance Endorsements and one of those endorsements identifies Western Rock Products:

DESIGNATED INSURED

* * * *

With respect to coverage provided by this endorsement, the provision of the Coverage Form applies unless modified by this endorsement.

This endorsement identifies person(s) or organization(s) who are “insureds” under the “Who is an Insured Provision of the Coverage Form. This endorsement does not alter coverage provided in the Coverage Form.

* * * *

SCHEDULE

Named of Person(s) or Organization(s)

* * * *

**WESTERN ROCK PRODUCTS
851 N. RED ROCK ROAD
ST. GEORGE, UT 84770**

* * * *

⁵¹ *Id.* at 62, 74-75 Motor Carrier Coverage Form § VI G., P. (SCOTTSDALE000062, SCOTTSDALE 000074, SCOTTSDALE 000075).

⁵² State of Utah, Department of Commerce, Division of Corporation Business Name Registration/DBA Application, dated April 20, 2007 (SCOTTSDALE000815), docket no. 114-10, filed Jan. 29, 2021.

Each person or organization shown in the Schedule is an “insured” for Liability Coverage, but only to the extent that person or organization qualifies as an “insured” under the Who Is An Insured Provision contained in Section II of the Coverage Form.⁵³

• 40. The Designated Insured Endorsement “does not alter coverage provided” within the Policy.⁵⁴

Scottsdale’s Denial of Staker’s Tender of the *Baughn* Suit

41. On February 11, 2015, after being served with the Initial Complaint in the *Baughn* Suit, Staker sent a tender letter to Scottsdale, seeking indemnity and defense as an insured under the Policy that Scottsdale issued to BDR.⁵⁵ BDR also tendered the *Baughn* Suit to Scottsdale.

42. Staker’s tender letter to Scottsdale included a copy of the Complaint in the *Baughn* Suit, a copy of the Haul Agreement as well as copies of two insurance certificates.⁵⁶

43. The certificates of liability insurance were issued by Hancock-Leavitt Insurance as insurance agent for BDR. Each certificate covered different policy periods.⁵⁷

44. Each certificate of liability insurance specified that it: was “issued as a matter of information only and confer[ed] no rights upon the certificate holder[;]” “does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies” listed on the Certificate; and “does not constitute a contract between the issuing insurer(s) . . . and the certificate holder.”⁵⁸

⁵³ Scottsdale Policy at 88 Designated Insured (SCOTTSDALE000088).

⁵⁴ *Id.*

⁵⁵ Letter from M. Craig Hall to Scottsdale, dated February 11, 2015 (STAKER000016-STAKER000068), docket no. 114-11, filed Jan. 29, 2021.

⁵⁶ *Id.* at 7-53 (STAKER000022-STAKER000068).

⁵⁷ *Id.* at 52-53 (STAKER000067-STAKER000068)

⁵⁸ *Id.*

45. Each certificate of liability insurance specified that BDR held commercial automotive liability insurance through Scottsdale.⁵⁹

46. On February 17, 2015, Ken Harris a claims handler for Scottsdale began a coverage analysis. On or before February 19, 2015, Mr. Harris submitted his recommendations relative to coverage to Scottsdale's Technical Resource Center ("TRC") in order to obtain approval to retain coverage counsel.⁶⁰

47. On February 19, 2015, Jacqueline Pincus, a member of the TRC, approved the retention of coverage counsel. Later that day, Scottsdale retained legal counsel, Scott W. McMickle and Jonathan J. Kandell of the law firm of McMickle, Kurey & Branch, L.L.P. (collectively "MKB") to investigate and analyze Staker and BDR's tenders of the *Baughn* Suit for Scottsdale.⁶¹

48. On or about March 26, 2015, Scottsdale, through MKB, sent a letter to Staker's in-house counsel, M. Craig Hall, informing him that Scottsdale "has determined that its insurance policy does not provide coverage for" Staker or Mr. Gamez and is denying Staker's tender of the *Baughn* Suit ("First Disclaimer Letter").⁶²

49. The First Disclaimer Letter explains Scottsdale's decision to deny coverage to Staker and Mr. Gamez:

DISCLAIMER COVERAGE

Based upon the allegations in the Complaint, the facts known to Scottsdale, and the Policy provisions, there is no coverage for S&P

⁵⁹ *Id.*

⁶⁰ Claims File Notes at 12-13 (SCOTTSDALE 003354-003355), docket no. 115-14, filed Jan. 29, 2021; Deposition of Ken Harris dated May 31, 2019 ("Harris Deposition") at 214:18-215:14, 251:2-252:15, docket no. 115-15, filed Jan. 29, 2021.

⁶¹ *Id.*

⁶² Letter from Scott W. McMickle and Jonathan J. Kandell to M. Craig Hall, dated March 26, 2015 (STAKER000342-STAKER000350), docket no. 114-12, filed Jan. 29, 2021.

[Staker] or Mr. Gamez for the claims asserted in the Complaint. Initially, neither S&P nor Mr. Gamez qualify as “insureds” under the Policy. Under Arizona law, the certificates of insurance signed by BDR’s insurance agent do not establish insurance coverage or make S&P an additional insured. . . . Moreover, S&P and Mr. Gamez do not otherwise qualify as insureds under the policy because they are not using a covered auto and, to the extent they were, such use was in the form of loading property to a covered auto. Pursuant to paragraph A.1.b.(4) of the “Who Is Insured” Section of the Policy, S&P and Mr. Gamez do not qualify as insureds. See Wilshire Ins. Co. v. Home Ins. Co., 179 Ariz. 602, 880 P.2d 1148 (Ariz. App. 1994).

In addition, even if S&P or Mr. Gamez qualified as insureds, coverage still would not exist due exclusions in the Policy, including but not limited to the “Movement of Property By Mechanical Device” exclusion. Based on all provisions in the Policy, whether expressly stated in this letter or not, there is not coverage for S&P or Mr. Gamez under the Policy.⁶³

50. Mr. Hall testified that Scottsdale’s March 26, 2015 letter was acknowledged by Staker as an outright denial of its claim.⁶⁴

51. Following Scottsdale’s coverage denial, Staker defended itself in the *Baughn* Suit and on April 6, 2015, filed its answer to the First Amended Complaint and a crossclaim against BDR alleging that BDR breached the indemnity and insurance provisions of the Haul Agreement.⁶⁵

52. Staker’s crossclaim against BDR asserted four causes of action: (1) Breach of Contract, (2) Breach of the Implied Covenant of Good Faith and Fair Dealing, (3) Indemnity, and (4) Apportionment of Fault.⁶⁶

⁶³ *Id.* at 8 (STAKER 000349). MKB also sent a letter to BDR initially denying its tender of the *Baughn* Suit.

⁶⁴ Deposition of Craig Hall dated Sept. 26, 2020 (“Hall Deposition”) at 49:19-50:4, docket no. 115-18, filed Jan. 29, 2021.

⁶⁵ *Staker & Parson Companies and Michael Gamez’s Answer to Plaintiff’s First Amended Complaint and Crossclaim Against All Other Defendants (StakerIns 0000090-StakerIns 0000099)*, docket no. 114-13, filed Jan. 29, 2021.

⁶⁶ *Id.* ¶¶ 1-24 at 6-8 (StakerIns 0000095-StakerIns 0000097).

53. The parties to the *Baughn* Suit moved forward with discovery and in July 2016, the parties scheduled a mediation. Right before the mediation, Staker learned, during the deposition of BDR's insurance broker, that Western Rock Products was identified on a Designated Insured Endorsement of the Scottsdale Policy.⁶⁷

54. Based on the discovery of the Designated Insured Endorsement, Staker retendered the *Baughn* Suit to Scottsdale on July 11, 2016.⁶⁸

55. In its retender letter, Staker also asserted that Scottsdale owed coverage to it because Staker was being sued under the Amended Complaint for "claims arising out of, *inter alia*, negligent training on the part of BDR of its employee, Mr. Baughn." Staker asserted that such claims make it an insured under the Policy section 1e. of "Who Is An Insured" as "Anyone liable for the conduct of an 'insured' described above but only to the extent of that liability."⁶⁹

56. On July 29, 2016, Scottsdale, through MKB, sent a letter to Staker's in-house counsel, Mr. Hall, denying Staker's retender of the *Baughn* Suit to Scottsdale ("Second Disclaimer Letter").⁷⁰

57. The Second Disclaimer Letter questioned Staker's claim for coverage based on Western Rock Products's designated insured status and asked for proof that Western Rock Products is a trade name or /d/b/a of Staker.⁷¹

⁶⁷ Letter from M. Craig Hall to Scott W. McMickle, dated July 11, 2016 (MKB001379-MKB001381), docket no. 114-14, filed Jan. 29, 2021.

⁶⁸ *Id.* at 1 (MKB001379).

⁶⁹ *Id.*

⁷⁰ Letter from Scott W. McMickle and Jonathan J. Kandell to M. Craig Hall, dated July 29, 2016 (MKB001193-MKB001199), docket no. 11-15, filed Jan. 29, 2021.

⁷¹ *Id.* at 3 (MKB001195).

58. The Second Disclaimer Letter also denied that Staker is owed coverage for the Amended Complaint's allegations of negligent training because "it is abundantly clear that S&P [Staker] is being sued for its own negligence and not for vicarious liability for any negligence of BDR."⁷²

59. The Second Disclaimer Letter concluded stating that "[f]or all the reasons in the prior March 26, 2015 letter and herein, there is no coverage for S&P or Mr. Gamez for the claims asserted in the Complaint or First Amended Complaint."⁷³

60. On August 16, 2016, Mr. sent a letter to Scottsdale's coverage counsel, MKB, providing evidence that Western Rock Products is a d/b/a of Staker and contesting Scottsdale's denial of coverage.⁷⁴

61. Neither MKB nor Scottsdale responded in substance to Mr. Hall's August 16, 2016 letter and Staker providing proof that Western Rock Products is a d/b/a of Staker.

62. With respect to any representations or promises made by Scottsdale that Staker was an additional insured and that the coverage was non-contributory, Staker's 30(b)(6) representative Craig Hall testified:

Q. Were there any specific representations made by Scottsdale to Staker that Staker was an additional insured under the Scottsdale policy?

A. No. All the communications I'm aware say that Staker was not.

⁷² *Id.* at 6 (MKB001198).

⁷³ *Id.*

⁷⁴ Letter from M. Craig Hall to Scott W. McMickle, dated August 16, 2016 (SCOTTSDALE000811-SCOTTSDALE000815), docket no. 114-16, filed Jan. 29, 2021.

Q. Okay. Were there any specific representations made by Scottsdale to Staker that the coverage under the police (sic) was primary and noncontributory?

A. No. There must be an insurance certificate.⁷⁵

63. Additionally, with respect to any representations made by Scottsdale that the BDR Policy provided all of the coverage required in the Haul Agreement, Mr. Hall testified:

Q. Did Scottsdale ever directly represent to Staker that the policies provided all coverage as are required in the Haul Agreement?

A. Scottsdale did not.⁷⁶

Disposition of the *Baughn* Suit

64. On August 4, 2016, BDR filed a motion for summary judgment against Staker on its crossclaims.⁷⁷

65. On September 20, 2016, Staker opposed BDR's motion for summary judgment. As part of its opposition, Staker represented that BDR failed to add Staker as an additional insured to the Scottsdale Policy.⁷⁸

66. On October 4, 2016, BDR filed its reply to Staker's memorandum opposing BDR's motion for summary judgment.⁷⁹

67. On October 24, 2016, the trial court in the *Baughn* Suit heard oral argument on BDR's motion for summary judgment against Staker.⁸⁰

⁷⁵ Deposition of Craig Hall at 124:5-9, docket no. 115-19, filed Jan. 29, 2021.

⁷⁶ *Id.* at 125:9-12.

⁷⁷ Defendants BDR Transport and Blake Reidhead's Motion for Summary Judgment on Plaintiff and Co-Defendants' Claims, docket no. 115-8, filed Jan. 29, 2021.

⁷⁸ Staker & Parson Co.'s Memorandum in Opposition to BDR Transport's Motion for Summary Judgment at 2, docket no. 115-9, filed Jan. 29, 2021.

⁷⁹ BDR's Reply to Defendant Staker's Memorandum in Opposition to BDR's Motion for Summary Judgment, docket no. 115-10, filed Jan. 29, 2021.

⁸⁰ Under Advisement Ruling filed in the *Baughn* Suit at 1, docket no. 115-11, filed Jan. 29, 2021.

68. Subsequently, on October 28, 2016, the trial court issued a ruling granting BDR summary judgment on Staker's indemnity claims. The trial court found the following:

The Court finds the contract clearly and unambiguously sets forth a general indemnity agreement allowing for indemnification for a loss resulting in part from Staker's passive negligence, but not active negligence.

The Complaint alleges specific acts of negligence committed by Staker. It does not contain allegation[s] of passive negligence against Staker.⁸¹

69. On June 14, 2017, at the conclusion of a jury trial in the *Baughn* Suit, the jury announced a verdict in favor of Mr. Baughn for damages in the total amount of \$2,550,000, apportioned as follows: 25% to Mr. Baughn, 60% to Staker, and 15% to BDR.⁸²

70. Staker appealed following the conclusion of the jury trial. On October 22, 2018, the Arizona Court of Appeals, Division Two issued a decision vacating the judgment and remanding for entry of a judgment in favor of Staker.⁸³

Staker's Payment of its and Mr. Gamez's attorneys' fees and costs in the *Baughn* Suit and in this Case

71. The law firm of Durham, Jones & Pinegar was hired and paid to represent Staker in the *Baughn* Suit. The attorneys' fees and costs Staker incurred in the *Baughn* Suit, through trial and appeal, total \$1,042,112.71.⁸⁴ Additionally, Staker initiated this case against Scottsdale and has incurred and continues to incur attorneys' fees and costs.⁸⁵

⁸¹ *Id.* at 4.

⁸² *Baughn v. Staker & Parson Cos.*, No. 2 CA-CV 209-029, 2018 WL 5249968 (Ariz. Ct. App. Oct. 22, 2018), docket no. 115-12, filed Jan. 29, 2021.

⁸³ *Id.*

⁸⁴ *Staker & Parson Companies, Inc.'s First Supplemental Disclosures* at 3, docket no. 114-17, filed Jan. 29, 2021.

⁸⁵ *Id.*; Complaint, docket no. 2-5, filed Apr. 16, 2018.

Counsel Currently Appearing in the Case

Counsel for Staker currently appearing in this case are:

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Proportions in which the Parties Shall Share the Required Filing Fees

Stake and Scottsdale agree to share on an equal basis the required filing fees. Upon receipt of notice that the Arizona Supreme Court has accepted jurisdiction of this Order and notice of the amount of the required filing fees, the parties shall promptly remit such amount to the Clerk of the Arizona Supreme Court.

Other Matters Relevant to the Determination of the Certified Questions

Record Documents Relevant to a Determination of the Certified Questions

The following record documents are relevant to the Arizona Supreme Court's determination of the Certified Questions:

- The Scottsdale Policy.⁸⁶
- The Haul Agreement.⁸⁷
- The *Baughn* Suit's Initial Complaint.⁸⁸
- The *Baughn* Suit's First Amended Complaint.⁸⁹
- Staker's Complaint in this case.⁹⁰
- Scottsdale's Second Amended Answer to Staker's Complaint.⁹¹
- Staker's Motion for Partial Summary Judgment, including all responsive briefs and exhibits.⁹²
- Scottsdale's Motion for Partial Summary Judgment, including all responsive briefs and exhibits.⁹³
- The Order for Briefing Regarding Certification of Questions to Arizona Supreme Court.⁹⁴
- Staker's Memoranda Regarding Certification of Questions to the Arizona Supreme Court.⁹⁵
- Scottsdale's Memoranda Regarding Certification of Questions to the Arizona Supreme Court.⁹⁶
- The Order Regarding Certification of Questions to Arizona Supreme Court.⁹⁷

⁸⁶ Docket no. 114-8, filed Jan. 29, 2021.

⁸⁷ Docket no. 114-5, filed Jan. 29, 2021.

⁸⁸ Docket no. 114-2, filed Jan. 29, 2021.

⁸⁹ Docket no. 114-7, filed Jan. 29, 2021.

⁹⁰ Docket no. 2-5, filed Apr. 16, 2018.

⁹¹ Docket no. 88, filed Sept. 27, 2019.

⁹² Docket no. 114, filed Jan. 29, 2021; docket no. 118, filed Mar. 10, 2021; docket no. 123, filed Apr. 2, 2021.

⁹³ Docket no. 115, filed Jan. 29, 2021; docket no. 119, filed Mar. 10, 2021; docket no. 122, filed Apr. 2, 2021.

⁹⁴ Docket no. 126, filed Aug. 17, 2021.

⁹⁵ Docket no. 130, filed Sept. 24, 2021.

⁹⁶ Docket no. 129, filed Sept. 24, 2021.

⁹⁷ Docket no. 131, filed Sept. 29, 2021.

Discussion of Legal Issues and Legal Principles relating to the Certified Questions

Whether Staker was “using” a vehicle covered by the Scottsdale Policy, and if so, whether that “use” has a sufficient causal link to the injuries and theories of liability alleged against Staker in the *Baughn* Suit are determinative of the parties’ cross-motions for summary judgment. If Staker was “using” a covered vehicle, then Staker was a permissive user insured under the Policy. Staker must qualify as an insured under the Policy to have contractual rights that would trigger Scottsdale’s duty to defend Staker in the *Baughn* Suit. And Scottsdale’s duty to defend Staker in the *Baughn* Suit is triggered only if there is a sufficient causal link between Staker’s “use” of the covered vehicle and the injuries and theories of liability alleged against Staker in the *Baughn* Suit.

“A liability insurer’s duty to defend, which is separate from and broader than its duty to indemnify, generally arises if the complaint filed against the insured alleges facts that fall within the policy’s coverage.”⁹⁸ “[T]he purpose of the permissive user or omnibus clause . . . is to ensure that permissive users of vehicles are insured while they are driving in Arizona.”⁹⁹ Such coverage requirements exist for the “protection of the public using the highways from financial hardship which may result from the use of automobiles by financially irresponsible persons.”¹⁰⁰ The Arizona Supreme Court and Arizona Courts of Appeals have construed permissive user insured clauses and permissive user statutory provisions under various fact patterns, construing the terms “using” or “use of” a covered vehicle in a general way.¹⁰¹ Through that analysis,

⁹⁸ *Teufel v. Am. Family Mut. Ins. Co.*, 419 P.3d 546, 548 (Ariz. 2018).

⁹⁹ *GRE Ins. Grp. v. Green*, 980 P.2d 963, 966 (Ariz. Ct. App. 1999) (internal citations omitted).

¹⁰⁰ *New York Underwriters Ins. Co. v. Superior Court*, 456 P.2d 914, 915 (Ariz. 1969); *Principal Cas. Ins. Co. v. Progressive Cas. Ins. Co.*, 838 P.2d 1306, 1308 (Ariz. Ct. App. 1992).

¹⁰¹ *Mission Ins. Co. v. Aid Ins. Servs.*, 585 P.2d 240, 242 (Ariz. 1978); *Chavez v. Arizona Sch. Risk Retention Tr., Inc.*, 258 P.3d 145, 148 (Ariz. Ct. App. 2011); *Odom v. Farmers Ins. Co. of Arizona*, 169 P.3d 120, 126 (Ariz. Ct.

Arizona courts have construed “use of” and “using” to include “more than driving or riding in an automobile,” such as utilizing the vehicle “as an instrumental means to an end” as intended or contemplated by the insured.¹⁰² The Arizona Supreme Court has also analyzed “use of” an automobile in relation to automobile exclusions found in homeowners or commercial general liability policies.¹⁰³

Additionally, the Arizona Supreme Court and Arizona Courts of Appeals have established a causal link test for purposes of determining coverage under automobile liability insuring provisions.¹⁰⁴ For liability coverage to apply when a “use” provision is in effect, a causal relationship between the injury-causing accident and the use of the covered vehicle must exist.¹⁰⁵ But the causal relationship between the covered vehicle and the accident does not have to be the proximate cause of the accident; the accident and negligent act need only be causally connected to the “use” of the covered vehicle.¹⁰⁶

The factual circumstances and theories of liability in the Arizona precedent are highly distinguishable from this case. The legal issues raised by the parties’ cross-motions for summary judgment do not involve personal injuries sustained and negligence in the loading or unloading

App. 2007); *Benevides v. Arizona Prop. & Cas. Ins. Guar. Fund*, 911 P.2d 616, 619 (Ariz. Ct. App. 1995); *Westfield Ins. Co. v. Aetna Life & Cas. Co.*, 739 P.2d 218, 222 (Ariz. Ct. App. 1987).

¹⁰² *Chavez*, 258 P.3d at 148 (citing Lee R. Russ et al., *Couch on Insurance* § 111:31 (3d ed. 2005)).

¹⁰³ *Morari v. Atl. Mut. Fire Ins. Co.*, 468 P.2d 564, 567 (Ariz. 1970).

¹⁰⁴ *Ruiz v. Farmers Ins. Co. of Ariz.*, 865 P.2d 762, 763-64 (Ariz. 1993); *State Farm Mut. Auto. Ins. Co. v. Transp. Indem. Co.*, 505 P.2d 227, 229 (Ariz. 1973); *Mazon v. Farmers Ins. Exch.*, 491 P.2d 455, 457 (Ariz. 1971); *Morari v. Atl. Mut. Fire Ins. Co.*, 468 P.2d at 567; *Brenner v. Aetna Ins. Co.*, 276, 445 P.2d 474, 475, 478 (Ariz. 1968); *Tobel v. Travelers Ins. Co.*, 988 P.2d 148 (Ariz. Ct. App. 1999); *State Farm Mut. Auto. Ins. Co. v. Loesl*, 977 P.2d 140, 142 (Ariz. Ct. App. 1999); *Benevides*, 911 P.2d at 619; *Farmers Ins. Co. of Arizona v. Till*, 825 P.2d 954, 956 (Ariz. Ct. App. 1991); *Associated Indem. Corp. v. Warner*, 694 P.2d 1199, 1201-02 (Ariz. Ct. App. 1983); *Love v. Farmers Ins. Grp.*, 588 P.2d 364, 366-67 (Ariz. Ct. App. 1978); *Vanguard Ins. Co. v. Cantrell*, 503 P.2d 962 (Ariz. Ct. App. 1972); *Rule v. Allstate Fire & Cas. Ins. Co.*, No. 2 CA-CV 2016-0161, 2017 WL 3529108, *2 (Ariz. Ct. App. Aug. 17, 2017); *United Fin. Cas. Co. v. Associated Indem. Corp.*, No. 1 CA-CV 15-0564, 2016 WL 6518491, *3 (Ariz. Ct. App. Nov. 3, 2016).

¹⁰⁵ *Loesl*, 977 P.2d at 142.

¹⁰⁶ *Id.*; *Transp. Indem. Co.*, 505 P.2d at 229.

of a covered vehicle, or in the transport of a covered vehicle. In this case, Staker contracted with the named insured of a covered vehicle, BDR, to transport Staker's materials across Staker's property. Staker was not involved in the actual driving, operation, or control of the covered vehicle or its driver, Mr. Baughn. Mr. Baughn's personal injuries allegedly occurred when he stopped and exited the vehicle and attempting to dislodge an obstruction that became lodged in the vehicle's dual tires while the vehicle was being operated on Staker's private roads. And Mr. Baughn alleged Staker was liable in negligence for failing to adequately maintain conditions along the Mine's road, and failing to train and communicate to workers, including Mr. Baughn, regarding the safe procedures to use if a rock becomes lodged between the dual tires of a vehicle.¹⁰⁷

This relationship between the party seeking permissive user insured status and the covered vehicle has not been addressed in relation to "use" of a covered vehicle by the Arizona courts. Nor have Arizona courts addressed whether this type of "use" (if it is a "use") has a causal link to the injuries and theories of liability alleged in the *Baughn* Suit. Other jurisdictions have addressed somewhat similar issues to those presented in the parties' cross-motions for

¹⁰⁷ Mr. Baughn also alleged Staker was negligent in overloading and unevenly loading the vehicle. However, coverage for these allegations is specifically excluded by the Scottsdale Policy's Movement of Property by Mechanical Device exclusion.

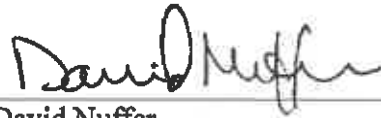
summary judgment.¹⁰⁸ But this precedent is not binding and its persuasive value in applying Arizona law is questionable.

CONCLUSION

Therefore, it is respectfully requested that the Arizona Supreme Court exercise its discretion and answer the above certified questions of Arizona law.

Signed October 18, 2021.

BY THE COURT



David Nuffer
United States District Judge

¹⁰⁸ *Barber v. Encompass Indem. Co.*, 458 F. App'x 617, 618 (9th Cir. 2011); *Hake v. Eagle Picher Co.*, 406 F.2d 893, 896 (7th Cir. 1969); *Halifko v. Cities Serv. Oil Co.*, 510 F. Supp. 1131, 1136 (D. N.J. 1981), *aff'd sub nom. Cities Serv. Oil Co. v. Fireman's Fund Ins. Co.*, 676 F.2d 684 (3d Cir. 1982); *Marathon Oil Co. v. Cont'l Cas. Co.*, 543 F. Supp. 1052, 1055 (E.D. Mich. 1982); *Celina Mut. Ins. Co. v. Aetna Life & Cas. Co.*, 454 N.W. 2d 93, 100 (Mich. 1990); *Int'l Bus. Machines Corp. v. Truck Ins. Exch.*, 474 P.2d 431, 436 (Cal. 1970).

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