ARIZONA SUPREME COURT

MICHAEL COREY CRAVENS, surviving spouse of SAMANTHA J. CRAVENS, deceased, Plaintiff/Appellee, v. MARTIN A. MONTANO JR., a single man; and CASES CUSTOM FLOOR CARE, LLC., an Arizona limited liability company; Defendants. CINCINNATI INDEMNITY COMPANY, Plaintiff in Intervention/ Appellant, MARTIN A. MONTANO JR., Defendant in Intervention.	Arizona Supreme Court No. CV-24-0143-PR Arizona Court of Appeals No. 2 CA-CV 2023-0108 Pima County Superior Court No. C20192093

RESPONSE TO CINCINNATI INDEMNITY COMPANY'S PETITION FOR REVIEW

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INTRODUCTION

1. Issue 1: The Court Of Appeals Properly Interpreted The Policy And Correctly Applied The Commonsense Interpretation In Finding Coverage.

What does the undefined insurance policy term "in connection with" mean to a layperson untrained in law or insurance? "In connection with" means a "a link, association, or relationship." This definition comes directly from the dictionary and *Cal. Cas. Ins. Co. v. Am. Family Mut. Ins. Co. (California Casualty)*, 208 Ariz. 416, 419, ¶ 8 (App. 2004). *California Casualty* sets forth the layperson meaning of "in connection with" in the context of insurance policies. Cincinnati Indemnity Company ("Cincinnati") attempts to avoid covering Martin Montano's ("Montano") liability for the death of Samantha Cravens, the wife of Respondent Michael Corey Cravens ("Cravens") by arguing the phrase "in connection with" means "in the course and scope of employment" to a layperson," relying on extra jurisdictional cases and ignoring the dictionary and *California Casualty*.[1] *(Id.* at p. 9, ll. 10-22.).

[1]Arizona law holds that an employee is in the course and scope of employment if either performing assigned work or if subject to employer control. *Engler v. Gulf Interstate Engineering, Inc.*, 230 Ariz. 55, 58, ¶ 13 (2012), adopting Restatement (Third) of Agency § 7.07. Cincinnati ignores "performing assigned work" and argues course and scope for coverage only means employer direction and control. This error is immaterial though, because course and scope is irrelevant to coverage.

The Court of Appeals correctly applied the interpretation set forth in the dictionary and adopted in *California Casualty*.

Cincinnati admitted to the Court of Appeals, "Coverage for Montano depends on the facts at the time of the accident. **If he was using his personal vehicle in connection with CCFC's business…then the vehicle is a covered auto and he is an insured."** (ROA 192 at ep. 23, bold added.) Casas Custom Floor Care ("Casas") employee Montano used his auto in a way that was linked, connected or associated with Casas's business when he caused the fatal accident. Montano was undisputedly driving from a Casas job site to the Casas main office to complete his timesheet when he struck and killed Samantha. The Superior Court and the Court of Appeals both correctly determined that Montano's driving from a job site to the office to correct his time sheet had a "link, association, or relationship" to Casa's business and therefore his driving was "in connection with CCFC's business."

2. Issue 2: The *Morris* Agreement In This Case Is Standard In Substance, And The So-Called Rescission Clause Does Not Change That Fact.

Is the *Morris* Agreement in this case valid and enforceable even though it contains a clause indicating that it would be rescinded if a court subsequently misinterpreted the intent of the parties?

The *Morris* Agreement in this case was a garden variety *Morris* Agreement. The so-called Rescission Clause, which forms the main basis for Cincinnati's challenge,[2] states:

> 6. In the Superior Court Action, Plaintiff asserts that Montano and Casas are both liable in tort for the wrongful death of Samantha Cravens. Pursuant to A.R.S. § 12-2504(1), it is the intent of the parties that Plaintiff's covenant not to enforce Judgment as set forth in paragraphs (2) and (3) above does not discharge Casas from liability for the wrongful death of Samantha. This Agreement shall be null and void and given the effect of rescission if a court of law determines that this Agreement or any provision of it precludes Plaintiff from pursuing his claim of respondeat superior liability against Casas in the Superior Court Action. But this Agreement shall not be null and void nor given the
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> effect of rescission if a court of law determines, on any other grounds independent of this Agreement, that Casas is not vicariously liable for Defendant's actions.

There is nothing in this Rescission Clause which changes the economic realities of the Morris Agreement such that it would fall outside the permitted parameters of *Morris*. This Court has recently affirmed in part a Court of Appeals decision setting forth the law on whether a *Morris*[3] agreement is "outside the

[2] This argument was waived when Cincinnati failed to renew the argument under Rule 59 after an intervening trial. *BMO Harris Bank N.A. v. Espiau*, 251 Ariz. 588, ¶ 8 (App. 2021). This Court should not grant the petition where Cincinnati has failed to procedurally comply.

[3] *United Service Automobile Association v. Morris*, 154 Ariz. 113 (1987).

permitted parameters of *Morris*." *Fidelity National Title Ins. Co. v. Osborn III Partners LLC*, 250 Ariz. 615 (App. 2021), affirmed in part and vacated in part by *Fidelity Nat. Title Ins. Co. v. Osborn III Partners LLC*, 254 Ariz. 440 (2023). *Osborn III Partners LLC* explained existing law that holds a *Morris* agreement is valid and enforceable and within the permitted parameters of *Morris* so long as the agreement is consistent with the substantive principles underpinning the *Morris* doctrine. *Osborn III Partners LLC*, 250 Ariz. at 619-624, ¶¶ 18-37. A reviewing court should focus on the "economic realities" of the Agreement to determine if the primary components of a *Morris* Agreement are present. *Id*.

In this case, Cincinnati incorrectly reserved its rights to extend coverage to Montano, improperly exposing him to liability and freeing him from the duty to cooperate, just like in *Morris*. In response to being put in such a precarious situation, Montano offered a stipulated judgment and an assignment of rights under the Cincinnati policy. (RA p. 7). In exchange, Cravens offered a covenant not to execute against the other personal assets of Montano. (RA p. 8). In *Morris*, the defendant offered a stipulated judgment and an assignment of rights under an insurance policy. *Morris*, 154 Ariz. at 115-16. In exchange, the plaintiff offered a covenant not to execute against the personal assets of the defendant. *Id*. The settlement was reasonable and not collusive. The Rescission Clause is a red herring.

RELEVANT FACTS

On April 26, 2018, Montano was an employee of Casas. (ROA 189[4] ep 31-35). He was late to work, so he drove his own vehicle to a jobsite. (ROA 189 ep 31-35). When he finished work at the job site, he began to drive to the Casas office to correct his timesheet. (ROA 189 ep 31-35). While doing so, he ran a red light and drove his truck into a vehicle driven by Respondent Michael Corey Cravens' wife, Samantha Cravens. (ROA 189 ep 31-35). The impact killed Samantha. (ROA 189 ep 31-35).

Cravens sued Montano, for direct liability, and Casas, for vicarious liability. Montano's primary insurer, Geico, took over his defense. Casas' insurer, Cincinnati, defended Casas. Montano also tendered the claim to Cincinnati under a policy with an "Expanded Coverage Plus" policy endorsement that stated "The following are 'insureds':

> **3.** Any of your "employees" while using a covered "auto" in your business or your personal affairs, provided you do not own, hire or borrow that "auto".

(RA[5] p. 23). In the underlying policy, Cincinnati defined an "auto" as including:

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[4] Citations to the Court of Appeals Electronic Record of Appeals are indicated with "ROA___" and an electronic page number "ep."

[5] For the convenience of the Court, Cravens has prepared an Appendix with the documents most relevant to the issues here, which are identified as RA for Respondent's Appendix.

> **9 =** NONOWNED "AUTOS" ONLY. Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes "autos" owned by your "employees",

(RA p. 13).

Notwithstanding the Expanded Coverage Plus endorsement, and the language set forth above, Cincinnati reserved its rights to deny coverage to Montano. (ROA 188 ep. 41-43). To protect himself, Montano entered into a *Morris*-type agreement with Cravens (the "*Morris* Agreement") in which Montano stipulated to judgment and assigned his rights under the Cincinnati policy. (RA p. 7). In exchange, Cravens provided a covenant not to execute against the personal assets of Montano. (RA p. 8). Pursuant to the *Morris* Agreement, Cravens pursued Montano's rights under the insurance policy in a declaratory action, and secured a coverage finding in the trial court. (TX02/05/21, ep. 29:22-30:4, 30:20-25, 32:10-22). Subsequently, the trial court conducted a reasonableness hearing, and found that the stipulated judgment amount was reasonable, and that the judgment was not the product of fraud or collusion. (ROA 320 ep. 7-9). The appeal followed, and the trial court was affirmed. This Petition followed.

REASONS THE COURT SHOULD DENY REVIEW

1. **This Case Concerns the Interpretation of Insurance Policy Language That is Unambiguous and Has Been Previously Defined by the Court of Appeals.**

Coverage depends on whether Montano was using a "covered auto" when he caused the accident that killed Samantha Cravens. Cincinnati admits, as it must, that the auto Montano drove that day is a "covered auto" if, at the time of the accident, it was being used "in connection with" the business of Casas.

In Arizona, insurance contract interpretation begins with determining the meaning of the disputed undefined policy term to a layperson untrained in law or insurance. *Fidelity Nat. Title Ins. Co. v. Osborn III Partners,* LLC, 254 Ariz. 440, 443, ¶14 (2023). **Arizona's public policy protects insureds.** This Court has repeatedly affirmed this interpretative canon. *Nat. Title Ins. Co. v. Osborn III Partners, LLC,* 254 Ariz. 440, 443, ¶14 (2023); *Teufel v. Am. Family Mut. Ins. Co.*, 244 Ariz. 383, 385, ¶ 10 (2018); *Equity Income Partners, LP v. Chi. Title Ins. Co.*, 241 Ariz. 334, 338, ¶ 13 (2017); *Samsel v. Allstate Ins. Co.*, 204 Ariz. 1, 4, ¶ 8 (2002); *Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 534 (1982).

Principles of interpretation require courts to "eschew technical jargon or 'commercial customs' that are both unexplained and unincorporated in the terms of the insurance policy itself and in fact contrary to a commonly held view of the term in dispute." *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 471, ¶ 25 (App. 2010). In the absence of express definitions within a contract, courts may consider dictionary definitions to ascertain a lay person meaning. *Centerpoint Mech. Lien Claims, LLC v. Commonwealth Land Title Ins. Co.*, 255 Ariz. 261, ¶ 45, (App. 2023).

Cincinnati would have this Court interpret "in connection with" to mean the more restrictive legal term of art "course and scope of employment." Layperson-meaning analysis precludes Cincinnati's interpretation. Reading "in connection with" to mean the complicated legal concept "course and scope of employment" violates Arizona public policy, contradicting the requirement to read the policy from the perspective of a layperson untrained in law or insurance who will have no understanding of a "course and scope" analysis. Accordingly, course and scope of employment is not a reasonable interpretation of "in connection with." And the Court of Appeals has already done this analysis. *California Casualty* got it right: based on the plain language "in connection with" means a "link, association, or relationship." 208 Ariz. 416, 419, ¶ 8. This interpretation relies solely on commonly understood meanings of "connection" and "in connection with." (*Memorandum Decision* at ¶ 25.) Cincinnati's reliance on distinguishable, out of jurisdiction cases cannot overcome controlling Arizona authority. *Cf. State v. Donahoe*, 220 Ariz. 126, ¶ 10 (App. 2009).

Cincinnati attempts to support its interpretation by focusing on factors besides plain language. A court should only resort to looking to legislative goals, social policy, and the transaction as a whole to interpret a policy if that policy's language is ambiguous. *Teufel*, supra.; *First American Title Ins. Co. v. Action Acquisitions, LLC*, 218 Ariz. 394, 397, ¶ 8 (2008). Policy language is only ambiguous if it is

subject to "conflicting reasonable interpretations." *Nat. Title Ins. Co. v. Osborn III Partners, LLC*, 254 Ariz. 440, 444, ¶19 (2023) (Insurance clause subject to only one reasonable interpretation is unambiguous); *Teufel v. Am. Family Mut. Ins. Co.*, 244 Ariz. at 385, ¶ 10. There is no ambiguity in the phrase "in connection with," and there is no need to go beyond the plain language. *See California Casualty*, 208 Ariz. 416, 419, ¶¶ 5, 8 (finding no ambiguity in phrase "in connection with").

The Memorandum Decision succinctly explains:

> **Cincinnati identifies nothing in the policy's text supporting the conclusion that "in connection with your business" means "in the course and scope of employment." Nor does Cincinnati explain how a non-law-trained person could reasonably interpret the provision to mean "in the course and scope of employment." That phrase is a legal term of art that carries a technical meaning far more restrictive that the common understanding of 'in connection with…"** *Memorandum Decision* at ¶ 26.

Cincinnati has still not put forth an argument that addresses the relevant legal standard. Instead, Cincinnati makes an argument that should only be reached if the plain language were ambiguous. Cincinnati continues to fail to establish that course and scope of employment, and with it the concept of employer direction and control or right to control, is a reasonable interpretation of the policy term "in connection with" viewed from the necessary layperson perspective.

Cincinnati speculates the Court of Appeals' interpretation will result in an unwarranted expansion of coverage, and may even have some unarticulated, unintended impact on the public. (*Petition* at p. 7.) Arizona law does not allow courts

to rewrite insurance policies to "avoid possible harsh results." *See State Farm Mut. Auto. Ins. Co. v. O'Brien*, 24 Ariz. App. 18, 20 (1975); *Messina v. Midway Chevrolet Co*., 221 Ariz. 11, 14, ¶ 9 (App. 2008). Regardless, as Judge Vasquez confirmed with Cincinnati's counsel at oral argument, Cincinnati can define the terms in its policy however it chooses. Arizona courts have repeatedly noted that the insurer is in the best position to prevent ambiguity in a standard form contract. *Equity Income Partners,* 241 Ariz. at 334, ¶ 13. Cincinnati need only define "in connection with" in its policy or rewrite its non-owned autos provision. No harm will befall Cincinnati or the auto insurance industry by correctly interpreting "in connection with" in accordance with Arizona law.

Turning from defining the phrase "in connection with," the remaining coverage question is: was Montano's use of his auto at that time Samantha died linked, connected, or associated with the business of Casas?

Cincinnati "[did] not argue in its opening brief that a material factual dispute exists regarding whether Montano acted 'in connection with' Casas's business under California Casualty's definition of that term." (*Memorandum Decision* p. 11 ¶ 29). Even if it did, "the undisputed facts on which the superior court relied to grant summary judgment establish that Montano left a Casas jobsite and drove to Casas's office in order to amend his timesheet, along the way causing Samantha's death." (*Memorandum Decision* p. 11 ¶ 29).

2. The Court of Appeals Correctly Found That The *Morris* Agreement In This Case Fully Complied With The Relevant Legal Standards

Before turning to the merits, the Court of Appeals correctly found that Cincinnati waived its challenge to the enforceability of the *Morris* Agreement. Cincinnati failed to file a motion for new trial pursuant to Rule 59, *Ariz.R.Civ.P.*, seeking the trial court revisit its denial of Cincinnati's Motion for Summary Judgment regarding the enforceability of the *Morris* Agreement post-trial. (See *Memorandum Decision*, fn 6.) The denial of Cincinnati's motion included factual considerations of whether specific terms of the agreement concerned the interests of Cincinnati in the *Morris* context. The "purely legal grounds" exception does not apply to permit appeal from the order denying Cincinnati's summary judgment motion. Accordingly, the trial court order denying Cincinnati's motion for summary judgment on the enforceability of the *Morris* Agreement is not appealable. *BMO Harris Bank N.A. v. Espiau*, 251 Ariz. 588, ¶ 8 (App. 2021).

Waiver aside, the economic realities Montano faced as a result of Cincinnati's reservation of rights/erroneous interpretation of its policy are indistinguishable from those faced by the insureds in *Morris* and/or *Arizona Property and Casualty Guaranty Fund v. Helme*, 153 Ariz. 129 (1987). As such, the specific form of the agreement is of no legal significance—the law requires only that a *Morris* agreement

be consistent with *Morris* in substance, not form. *Osborn III Partners LLC*, 250 Ariz. at 619-624, ¶¶ 18-37.[6]

The substance of a typical *Morris* agreement is this: Once an insurance company issues a reservation of rights to deny coverage, the insured is freed from the duty of cooperation. *Morris*, 154 Ariz. at 119-120. The insured is thereafter free to enter into any settlement of the underlying lawsuit he or she deems fit, so long as that settlement is 1) reasonable, and 2) free from fraud or collusion. *Id*. at 119-21. The agreement in *Morris* involved a stipulated judgment and a covenant not to execute against the non-insurance assets of the insured. *Id*. at 115.

Under Arizona law, a *Morris* agreement falls "outside the permitted parameters" only if it diverges from the substantive principles underlying *Morris*, not the technical form of the agreement. *Osborn III Partners*, 250 Ariz. at 623, ¶ 32. In cases like *Leflet*[7] and *Centerpoint*[8], where courts found *Morris* agreements unenforceable, the *Morris* agreements "were non-compliant because they violated

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[6] This Court accepted review of that case, issuing its opinion on March 1, 2023. *Fidelity Nat. Title Ins. Co. v. Osborn III Partners LLC*, 254 Ariz. 440 (2023). While this Court's opinion vacated paragraphs 48-59 of the Court of Appeals decision, it did not disturb paragraphs 1-47 which include the lengthy discussion of *Morris* in substance versus *Morris* in form. *Id*. at 447, ¶ 30.

[7] *Leflet v. Redwood Fire and Casualty Insurance Co*., 226 Ariz. 297 (App. 2011).

[8] *Fidelity National Title Insurance Co. v. Centerpoint Mechanic Lien Claims, LLC*, 238 Ariz. 135 (App. 2016).

its principles." *Id*. at ¶ 33. Specifically, they involved fraud or collusion to increase liability for an insurance company beyond what was factually supportable.

As an intervenor, Cincinnati is limited in its defenses. It can only contest the Morris settlement on the grounds of: (1) no coverage; (2) fraudulent or collusive agreement; (3) lack of notice; and (4) unreasonable in amount. *Morris*, supra.; *Helme*, supra. The economic realities Montano faced because of Cincinnati's refusal to unconditionally grant him coverage are indistinguishable from those faced by the insureds in *Helme* or *Morris*. The rescission clause[9] Cincinnati complains about is only relevant as possible evidence of fraud or collusion. *See Osborn III Partners* at ¶ 36; *Memorandum Decision*, fn 6. But as Judges Metcalf and Johnson both found in the trial court, and the Court of Appeals unanimously affirmed, the rescission clause does not amount to fraud or collusion, or impact Cincinnati's interests. The risks to the insurer inherent in the *Morris* agreement context (unreasonable or collusive settlements) are not impacted by the rescission clause.

The rescission clause does nothing more than clarify the intent of the parties. The parties did not intend for anyone to receive a release—indeed, releases are not

[9] The *Petition* erroneously asserts that the *Morris* agreement is "subject to rescission if Cravens was eventually prohibited from obtaining two judgments, one against Montano and a separate judgment against Casas." *Petition*, p. 4. Untrue. Rescission was only possible if the agreement itself *released* Casas, which neither Cravens nor Montano intended, and in fact would be contrary to the concept of a covenant not to execute. If claims against Casas failed for any other reason, precluding a judgment against Casas, rescission was expressly unavailable.

typically contemplated in the *Morris* agreement context. See *Morris*, 154 Ariz. at 115 (providing covenant not to execute rather than release). The fact that Montano and Cravens wanted any interpreting court to understand that the *Morris* Agreement did not include a release is not evidence of fraud or collusion. The *Morris* agreement protects Montano, is fair to Cincinnati, is reasonable, valid and enforceable.

CONCLUSION

There are no credible reasons for this Court to review this case or grant the *Petition*. Existing Arizona law controls the disposition of the coverage dispute. The law of insurance contract interpretation is well established, and Cincinnati failed to perform a lay person meaning analysis Arizona law requires to determine the reasonable interpretation of its undefined insurance policy term. The analysis required under Arizona law precludes Cincinnati's proffered interpretation of its policy. As such, Cravens' interpretation, clearly reasonable, is unambiguous.

Well-settled existing law establishes that a *Morris* agreement is legally valid and enforceable and not outside the permitted parameters of *Morris*, whatever its form or terms, so long as the agreement is consistent with the substantive principle underpinning the Morris doctrine. The *Morris* agreement here is consistent with the substantive principles underlying *Morris*, is squarely within the permitted parameters of *Morris*, and is valid and enforceable. And Cincinnati waived this argument.

Cravens requests that this Court deny review. Furthermore, in accordance with *ARCAP* Rule 21(a)(1), Cravens requests this Court enter an order awarding Cravens his reasonable attorneys' fees incurred, pursuant to A.R.S. §12-341.01.

RESPECTFULLY SUBMITTED this 2nd day of August, 2024.

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