ARIZONA SUPREME COURT

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

Cincinnati Indemnity Company's Petition for Review

Michael J. Raymond – 009272
(mraymond@raymondgreerlaw.com)
Raymond Greer, P.C.
7373 North Scottsdale Road, Suite D-210
Scottsdale, Arizona 85253
(602) 274-0500

Attorneys for Appellant/Petitioner Cincinnati Indemnity Company

Appellant/Petitioner Cincinnati Indemnity Company ("Cincinnati"), pursuant to Rule 23, Ariz. R. Civ. App. P., petitions the Arizona Supreme Court to review the attached decision of the Court of Appeals.

1. Issues presented for review.

This insurance coverage dispute concerns a commercial auto insurer's duty to indemnify an off-duty worker who causes an accident while using a personal auto. And second, whether a contingent *Morris* Agreement is per se unenforceable and/or unreasonable.

The two issues presented for review are as follows:

1. Whether the non-owned auto provision in an employer's business auto policy bars coverage for a worker's liability for the unauthorized use of a personal vehicle on his own time.

2. Whether a contingent *Morris* Agreement is unenforceable as contrary to the prescribed parameters that serve its purpose—protection of the insured.

2. Additional issues to be decided if review is granted.

If coverage is dependent on vicarious liability, does a determination that the employer is not vicariously liable[1] preclude coverage for the worker's liability.

[1] The jury found for Casas on the issue of vicarious liability. Cravens appealed. [See Cravens v. Casas Custom Floor Care, 2 CA-CV 2023-0250]

3. Statement of facts and procedural history.

Late for work one morning, Montano, a laborer for Casas, was unable to meet at the main yard where workers convene before transferring to company-owned vehicles. [ROA 196 ep 3-4] Instead, he drove his mother's car directly to a jobsite. [ROA 194 ep 3-4] After completing the job, the supervisor dismissed Montano for the day. [ROA 194 ep 5; 195 ep 5; 197 ep 3] Free to go anywhere, Montano, on his own accord, drove toward Casas' yard to correct a time sheet. [ROA 194 ep 5]. On the way he collided with a car driven by decedent Samantha Cravens. [ROA 6 ep 2-3; 320 ep 1]

Yet Montano's trip was unnecessary. [ROA 194 ep 10] Nobody from Casas directed or expected Montano to make the journey. [ROA 195 ep 6] Critically, Montano himself admitted he was "off the clock". [ROA 194 ep 14] And he could have corrected the time sheet by calling one of Casas' owners. [ROA 193 ep 7 ¶30; 194 ep 10; 198 ep 6; 199 ep 6, 7, 10-11] Further, company policy prohibited employees from driving personal vehicles for work. [ROA 199 ep 3-4]

In the subsequent wrongful death lawsuit, GEICO, the personal liability insurer defended Montano. [ROA 320 ep 2 ¶4] As to the vicarious liability claim against Casas, Cincinnati accepted coverage pursuant to a

commercial auto policy which afforded coverage for non-owned autos "used in connection with [Casas] business or personal affairs". [ROA 320 ep 2 ¶5-6] Regarding Montano, Cincinnati reserved its rights, advising coverage was dependent on Montano being in the course and scope of employment at the time of the accident. [ROA 320 ep 2 ¶5-6]

Cravens and Montano then entered into a *Morris* Agreement: Montano stipulated to a $3.85 million judgment and assigned his rights against Cincinnati. [ROA 173; 320 ep 2 ¶7-9] In exchange Montano received a conditional covenant not to execute— subject to rescission if Cravens was eventually prohibited from obtaining two judgments, one against Montano and a separate judgment against Casas. [ROA 173 ep 6-7 ¶6; 320 ep 3 ¶1-4]

In the subsequent declaratory action, both the trial court and court of appeals held that Montano's intent was the only necessary fact that drove coverage. [ROA ep 211; RT 2/5/21 ep 29:14-33:6; Court of Appeals Memo. Dec. ep 11 ¶29] Both courts found Montano's stated intent —correcting a timesheet—was a sufficient "association, link or relationship" with Casas business so as to constitute use of a non-owned auto "in connection with" the business, and thus found that Montano was covered under Cincinnati's policy. [ROA ep 211; RT 2/5/21 ep 29:14-33:6; Memo. Dec. ep 11 ¶29]

Cincinnati also sought summary judgment as to the enforceability of a contingent *Morris* Agreement, arguing that such contingency was inimical to the purpose for which *Morris* Agreements were created—fully protecting an insured from potential financial catastrophe. [ROA 225, 226, 227, 228, 229, 230]

The trial court denied summary judgment, holding that Cincinnati had not demonstrated prejudice with respect to the contingency. [ROA 260 ep 4] In a later reasonableness hearing, the trial court found the agreement both compliant with *Morris* and reasonable, again contending Cincinnati had not demonstrated prejudice. [ROA 320 ep 7]

Though acknowledging the trial court's error in imposing a prejudice requirement, the court of appeals affirmed, holding that Cincinnati had no interest in challenging the legitimacy or arms-length requirement of a *Morris* Agreement. [Memo. Dec. p. 19-20, ¶53] It further distinguished decisions that have invalidated *Morris* Agreements as: "…all involved agreements that directly and prejudicially impacted the insurer." [Memo. Dec. p. 19-20, ¶53]

4. Reasons for Granting this Petition.

Under ARCAP 23(d)(3), and as relevant here, the Supreme Court may accept review where "no Arizona decision controls the point of law in

question…or that important issues of law have been incorrectly decided." The Supreme Court may also grant review of a petition that presents recurring issues of statewide importance. *See Fidelity Nat'l Title Ins. Co. v. Osborn III Partners LLC*, 254 Ariz. 440, 443, ¶12 (2023).

Here, there is no controlling Arizona decision on whether the standard definition of "non-owned" auto coverage in a commercial policy applies to worker's liability independent of their employer's vicarious liability. The court of appeals erred in applying a wooden interpretation of what constitutes use of a non-owned auto in connection with the employer's business—one that anomalously affords broader protection to an employee than the named insured/employer. Further, the decision is contrary to authorities from other jurisdictions that consistently link coverage for a worker to the employer's vicarious liability, i.e., course and scope of employment.

This issue is of critical importance given the vast number of workers who use their personal autos to drive to or from work, or to perform some incidental yet non-essential task loosely tied to their jobs. Nor would a reasonable employer expect coverage for a worker's unauthorized use of a personal vehicle on their own time, much less one involving an unnecessary

work-related task. If left to stand, the decision will increase the cost of an otherwise inexpensive add-on to a commercial liability policy. It may even have the unintended effect of reducing coverage under personal auto policies that exclude coverage for autos used in connection with a business pursuit.

Second, while the appellate courts have recently weighed in on the permitted parameters of *Morris* Agreements in other scenarios, no court has passed on the legitimacy of a contingent *Morris* Agreement.

Here, the court of appeals erred in holding that Cincinnati did not have an interest in challenging a one-sided *Morris* Agreement that could be rescinded by plaintiff based on a future advisory opinion from a court. *Morris* Agreements must be reasonable when entered into and cannot become so based on future events. Allowing the equivalent of a legal "do-over" if plaintiffs do not succeed in a desired outcome provides illusory protection to an insured, is at odds with the required "arms-length transaction", flouts public policy, and is detrimental to the efficient administration of justice.

A. Considered in its proper context, a plain reading of the Policy confirms that Casas' business auto coverage does not apply to Montano's unauthorized use of a personal vehicle on his own time.

The court of appeals found *California Casualty Ins. Co. v. Amer. Fam. Mut. Ins. Co.,* 208 Ariz. 416 (App. 2004) controlling. That case involved a renter's policy with an owned premises exclusion where the court determined a phrase "in connection with" to mean "an association, link or relationship".[*California Casualty,* 208 Ariz. at 419 ¶8] As such, the phrase "in connection with" in Casas' business auto policy was applied to mean "an association, link, or relationship". [Memo Dec. p. 10 ¶28] Thus, the court of appeals only considered Montano's intent when he "…left a Casas jobsite and drove to Casa's office in order to amend his timesheet…" [Memo Dec. p. 11 ¶29]

Despite conceding it was obligated to consider the facts in the light most favorable to Cincinnati, [Memo. Dec. p. 3-4 ¶5] the court of appeals ignored critical facts referenced above, to wit: 1) Montano had finished work for the day; 2) Montano admitted that he was on his own time; 3) Montano's trip was unnecessary, and 4) use of personal vehicles was prohibited.

The decision thus unduly relies on a worker's unexpressed intent to dictate coverage for non-owned autos. The danger in this unwarranted

expansion of coverage under a business auto policy for such off-duty workers is manifest. And it likely will have an unintended and deleterious impact on the public as well, particularly those with personal auto policies that exclude coverage for non-owned autos while used in one's business or occupation. *See, e.g. Holder v. Mercury Cas. Co.*, 2010 WL 431234 (Dist. Ariz. 2010) (Personal auto policy's exclusion while vehicle used for commercial purposes valid; construing policy to cover insured while driving in course of employment would increase risk to insurer greatly beyond that which it assumed); *See also*, C.P. Jhong, Annotation, *Construction of provision excluding automobile used in insured's "business or occupation" from nonowned automobile coverage of automobile liability policy,* 85 A.L.R. 2d 502 (1962). As such, if the decision were to stand, it would further blur the distinction between a personal and commercial auto policy.

Moreover, a closer reading of *California Casualty* actually supports Cincinnati's analysis. *California Casualty* did not apply a blind application of "association, link, or relationship" but instead carefully formulated a test for

determining if the owned premises exclusion applies[2]. By faithfully applying *California Casualty's* analysis, the court should have considered the purpose of the clause which is to protect employers for work related liabilities thereby dictating a standard that tethers coverage to the employer's right to control:

> The "non-owned auto" provision is a common feature in commercial insurance policies and is meant to **"provide employers with protection from liability based on the doctrine of respondeat superior arising out of an employee's commission of a tort while using their own personal vehicles in the employer's business."** ***Union Standard Ins. Co. v. Hobbs Rental Corp.*****, 566F.3d 950, 954 (10th Cir. 2009)** (internal quotation omitted).

United Financial Cas. Co. v. Smith, 2017 WL 1330559, at *2 (N.D. Cal 2017).

Other authorities are in accord*: Hudson Specialty Ins. Co. v. Brash Tygr, LLC,* 769 F.3d 586 (8th Cir. 2014) (applying Missouri law*)*; (purpose of non-owned auto coverage is to protect employer/insured under doctrine of respondeat superior); *Bartolomucci v. Fed. Ins. Co.*, 770 S.E.2d 451 (Va. 2015) (Virginia Supreme Court held morning commute to work does not constitute 'use' of the lawyer's vehicle 'in' a law firm's business or personal affairs."…

[2] "…in determining whether premises are used "in connection with" other premises, courts generally consider the proximity of the premises, the type of use of the premises, and the purpose of the insurance policy as a whole". *Id.*, at 419 ¶9.

"merely thinking about work does not make a commute *'in' the business, as contemplated by the policy language." Id. at 458.); Gore v. State Farm Mut. Ins. Co,* 649 So. 2d 416, 421 (La. Ct. App. 2000*)(*course and scope analysis*).*

Expanding commercial auto coverage based on the vagaries of a worker's intent — unmoored by any direction or control of the employer or even its knowledge much less consent to the use of a personal auto — undercuts the purpose of the insurance transaction, i.e., protecting the employer from its employee's torts. Arizona employers will now assume an additional cost of insuring their workers when they are outside their control: when they drive to work, when they pick up snacks to treat co-workers, or even when they meander around town thinking about work.

Indeed, the court of appeals decision is at odds with the stated purpose behind commercial auto coverage purchased by an Arizona employer.

> We do not believe it unusual or unexpected that a business policy would not cover an employee's personal use of his own vehicle on his own time.

Ogden v. U.S. Fid. & Guar. Co., 188 Ariz. 132, 139 (App. 1996).

Contrary to these authorities, the court of appeals contends a test akin to course and scope of employment is inappropriate since it is a "legal term of art" that carries a "technical meaning" more restrictive than the common

understanding of "in connection with". [Memo. Dec., p. 9 ¶26] Not so. Most workers readily understand when they are working or "on the clock" and thus under their employer's control, i.e., course and scope of employment.

The court of appeals went further astray when it suggested that its duty was to interpret policy language from the perspective of one "untrained in law or business", but then failed to address whose perspective should be considered. Plainly, it is Casas' interests, not Montano's, that are paramount when determining intent and the purpose of the coverage. *See, Ogden,* 188 Ariz. at 138-39 (employee's expectations have little effect upon the enforceability of a contract of insurance to which he was not a party).

But even if one were to consider Montano's interests, he himself understood that he was not working when the accident happened. [ROA 194 ep 10, 12, 14; 195 ep 6]. *See, Potter v. Am. Alternative Ins. Corp.*, 2016 U.S. Dist. LEXIS 89769 *15 (E. D. Va. July 8, 2016) ("Courts should take an employee's admission that he or she acted outside the scope of his or her employment seriously."); *see also, Pham v. Hartford Fire Ins. Co.*, 419 F. 3d 286, 290 (4th Cir. 2005) (By his own admission, worker was driving his car after business hours and therefore worker is not an insured under employer's policy because he was not acting in employer's business or personal affairs).

In this matter of first impression, the court of appeals erred in denying Cincinnati's motion for summary judgment. It ignored facts that demonstrated Montano's trip was unauthorized, was against company policy, and was neither necessary nor essential to Casas' business. It also erred by broadly construing "in connection with" so as to create coverage for any Arizona employee while driving a personal vehicle to work or for any incidental, non-essential, or unauthorized use loosely connected to one's work.

This Court should reverse the court of appeals determination. It should remand to the trial court mandating that coverage for Montano is dependent on whether vicarious liability is established for Casas. If the jury verdict is affirmed on appeal, the trial court should be instructed to enter a declaratory judgment in favor of Cincinnati that it has no duty to indemnify Montano for his liability to Cravens pursuant to the stipulated judgment.

B. A *Morris* Agreement subject to rescission is inherently inconsistent with the principles of *Morris*, and thus both unreasonable and unenforceable.

Cincinnati also challenged the enforceability of the *Morris* Agreement—one that benefited Cravens both in terms of a $4 million stipulated judgment and an assignment of Montano's rights as against

Cincinnati. In return however, Montano only received contingent protection as Cravens reserved the right to rescind the Agreement, based solely on Cravens's desire to secure multiple judgments.

> 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.

[ROA 227 ep 6]

In Arizona, "a settlement that mimics *Morris* in form but does not find support in the legal and economic realities that gave rise to that decision is both unenforceable and offensive to the policy's cooperation clause." *Leflet v. Redwood Fire and Cas. Ins. Co.,* 226 Ariz 297, 302 ¶ 21. In each circumstance where such agreements are authorized, "protection of the insureds and reduction or elimination of their financial exposure are the fundamental purposes of a *Morris* agreement." *Manterola v. Farmers Ins. Exch.,* 200 Ariz. 572, 578 ¶ 17 (App. 2001).

Controlling standards reveal serious flaws with the *Morris* Agreement between Cravens and Montano. One-sided in the extreme, the Agreement is precisely what *Morris* cautioned against: "To relieve himself of personal exposure, the insured may be persuaded to enter into almost any type of

agreement or stipulation by which the claimant hopes to bind the insurer by judgment and findings of fact." *Morris*, 154 Ariz. at 119-120; see also *Himes v. Safeway Ins. Co.*, 205 Ariz. 31, 38 ¶22 (App. 2003) ("[*Morris*] notes that insureds, when faced with the choice between personal liability or a judgment enforceable only against their insurer, would be 'quite willing to agree to anything as long as plaintiff promised them full immunity.'")

Here, contingent protection is not full immunity. And a stipulated judgment that can be clawed back if plaintiffs second bite at a larger judgment against Montano's employer is later jettisoned, is inherently at odds with the "permitted parameters" of *Morris*. *Safeway Ins. Co., Inc. v. Guerrero*, 210 Ariz. 5, 15 ¶34 (2005).

The potential for such an unprecedented extension of *Morris* has been a significant concern in the Arizona legal community. See, Plitt, Steven and Jordan, *How Far Is Too Far: Exploring the Contoured Nuances of Damron and Morris Agreements*, Arizona Summit Law Review, Sept. 19, 2016, at p. 93. The article cautions that contingent settlement agreements seek indirectly what parties cannot do directly: obtain an advisory opinion from the trial and appellate courts. *Id*., at 111.

The court of appeals failed to address any of these concerns. True, it acknowledged that the trial court erred in imposing a prejudice requirement on Cincinnati. [Memo Dec. p. 19 ¶52] Nonetheless, it affirmed the trial court's decision.[3] It erroneously relied on *Morris* in holding that Cincinnati did not have the right to challenge such agreements "…merely because it contains a provision that the insurer deems unfavorable to the insured." [Memo. Dec., p. 19 ¶53]

But while it is true *Morris* precludes an insurer from disputing its insured's liability, *Morris* sets forth no further limitations on an insurer's right to intervene, or its standing to challenge non-compliant/unenforceable or unreasonable agreements. Indeed, if an intervening insurer cannot challenge such agreements, who can?

Tellingly, Cravens himself had concerns of overreach. He repeatedly assured the trial court that he would never invoke the escape clause. [ROA 233 ep 9:11-10:4; RT, 07/23/21 ep 26:1-27:4, 28:20-29:23] Indeed, he tried to

[3] Given the provision in question is either enforceable or not on its face, the summary judgment denial was based on purely legal grounds. As such, it is, contrary to the court of appeals assertion, reviewable. *See, John C. Lincoln Hosp. and Health Corp. v. Maricopa County*, 208 Ariz. 532, 537 ¶19 (App. 2004). Further, Cincinnati had invoked Rule 52 [ROA 309] and in doing so addressed the enforceability issue post-trial in its proposed findings of fact and conclusions of law. [ROA 317 ep 5-7 ¶21-28]

expressly waive it. [ROA 233 ep 9:11-10:4; RT, 07/23/21 ep 26:1-27:4, 28:20-29:23]

But neither offer is availing. *Morris* Agreements must be reasonable when they are made. *Field v. Artizan Excavation, Inc.* 2020 Ariz. App. Unpub. LEXIS 1138 (October 27, 2020) at * 7 ¶ 14 ("When parties have negotiated a *Morris*-type agreement outside the prescribed parameters, the plaintiff can collect neither from the indemnitee nor the indemnitor."). They cannot be transformed from unenforceable to enforceable by forbearance, waiver, or modification. *Leflet*, 226 Ariz. at 301 ¶ 16; *Guerrero*, 210 Ariz. at 15 ¶ 34.

By wrongly sanctioning contingent *Morris* Agreements, the court has opened the door such that every plaintiff will now consider a similar contingency clause, one that mandates rescission if the trial court's future decisions are deemed unfavorable to plaintiff. The result will likely be chaos.

The Supreme Court should take this opportunity to declare that contingent *Morris* Agreements are unenforceable; they plainly do not comport with an arms-length transaction, are inherently subject to abuse and violate public policy. Cincinnati requests that the Supreme Court hold this contingent *Morris* outside the permitted parameters such that Cravens can collect neither from Montano nor from Cincinnati.

C. Request for Attorneys' Fees

Because this insurance coverage dispute arises out of contract, Cincinnati gives notice under Ariz. R. Civ. App. P. 21(a) and requests an award of its reasonable attorneys' fees on appeal pursuant to A.R.S. 12-341.01.

Respectfully submitted this 3rd day of July 2024.

RAYMOND GREER, P.C.

By /s/ Michael J. Raymond

Michael J. Raymond
7373 N. Scottsdale Road, Suite D-210
Scottsdale, Arizona 85253
Attorneys for Appellant/Petitioner Cincinnati Indemnity Company