IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID FIGUEROA, AN INDIVIDUAL,

Appellant,

vs.

IDS PROPERTY & CASUALTY INSURANCE COMPANY, A WISCONSIN CORPORATION,

Respondent.

No. 69940

Appeal from The Court Of Appeals

PETITION FOR REVIEW

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NRAP 26.1 DISCLOSURE

The law firm representing Appellant, David Figueroa ("Mr. Figueroa"), in both the District Court and in this Court is the Richard Harris Law Firm.

Dated this 19th day of July, 2017.

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I. LEGAL ARGUMENT

Motorcyclist David Figueroa was hit by an intoxicated and uninsured driver, severely injuring and nearly severing one of his legs. Prior to this accident, IDS had "offered,"[1] and Mr. Figueroa had accepted, an insurance policy with UM/UIM limits of $250,000. IDS presented Mr. Figueroa with a one-page "Renewal Declaration" listing UM/UIM coverage equal to bodily injury coverage, "$250,000 each person; $500,000 each accident."

Following his accident, Mr. Figueroa made a demand upon IDS for $250,000.[2] However, IDS improperly denied Mr. Figueroa the full policy benefits IDS now claims it offered and which IDS admits that Mr. Figueroa accepted. IDS relied on two exclusions, unilaterally inserted into the policy by IDS *after the policy was bound*, limiting that coverage to $15,000.

Whether an insurance company is permitted to deceive its insured and deny 94% of the coverage it was required by statute to offer is a question of first impression for this Court and is of general statewide significance. The affirmance of IDS's chicanery by the Court of Appeals blatantly conflicts with this Court's decisions in *Hinkel* and other cases.

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[1] As established herein, IDS never actually made such an "offer," as that term is defined under Nevada law.

[2] AA 119; 11-15.

Nothing in the applicable statute permits an insurer to assert (or this Court to condone) such "exclusions," which are, in this Court's words, "repugnant to the intent of the statute and against public policy." IDS was required to offer Mr. Figueroa UM/UIM coverage equal to his bodily injury coverage, *with no exceptions or exclusions*. In addition, Nevada law defines an "offer" as the "manifestation of willing- ness to enter into a bargain, so made as to justify another person in understanding that *his assent to that bargain is invited and will conclude it*."[3] Because IDS unilaterally changed the terms Mr. Figueroa accepted and issued a different policy, as a matter of law, IDS made no "offer" as the statute requires.

A. NEITHER THE STATUTE NOR NEVADA PUBLIC POLICY PERMITS "EXCEPTIONS" OR "EXCLUSIONS" TO THE "OFFER" OF UM/UIM COVERAGE.

The decisions by the lower courts in this matter reflect a fundamental misconception of Nevada insurance law as mandated by the Legislature. Simply put, nothing in NRS 687B.145(2) permits any insurer to insert, or any Court to approve, *any* exception to the requirement imposed on that insurer.

As this Court has held, "We interpret statutes to 'conform[ ] to reason and public policy.' [ ] In so doing, we avoid interpretations that lead to absurd

[3] *Eagle Materials, Inc. v. Stiren*, 127 Nev. 1131 (2011) (citing Restatement (Second) of Contracts § 24 (1981)) (emphasis added).

results."[4] "[W]hen this court interprets a statute, if 'the language . . . is plain and unambiguous, and its meaning clear and unmistakable . . . the courts are not permitted to search for its meaning beyond the statute itself."[5]

This Court clearly recognized the self-interested desire of the insurance companies to limit UM/UIM coverage through undisclosed exclusions. In 1971, this Court condemned that practice in no uncertain terms, finding that such machinations cannot be reconciled with the language or intent of the Legislature's clear mandates:

> Our statute is forthright and clearly written. It does not contain the myriad of exceptions found in other jurisdictions. *The exclusionary provisions of the policy are void and unenforceable because they are repugnant to the intent of the statute and against public policy*.[6]

For 46 years since *Hinkel*, Nevada insurance companies have worked relentlessly to evade the Legislature's clear mandate that those companies, duly licensed and authorized to provide insurance to Nevadans, *actually provide insurance to Nevadans*.

Unfortunately, court decisions in the interim have too often done what the

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[4] In re *CityCenter Constr. & Lien Master Litig.*, 129 Nev. Adv. Op. 70 (2013).

[5] *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 295 (2008).

[6] *State Farm Mut. Auto. Ins. Co. v. Hinkel*, 87 Nev. 478, 482 (1971) (emphasis added).

lower courts did here—focusing on whether the *exclusion itself* is valid, while ignoring whether that "valid" exclusion was implemented in violation of the express language and intent of the statute and Nevada public policy and must therefore be voided on those grounds, as this Court did in *Hinkel*.

These court decisions have served to erode the coverage the Legislature clearly mandates be provided (or, here, at least offered) to insureds. This "ratchet" effect has operated in *only one direction*—allowing narrower and narrower coverage for consumers (usually without their knowledge). This trend is exactly what this Court condemned in *Hinkel*—and is *exactly the opposite* of what the Legislature has explicitly attempted to accomplish through clear, unambiguous legislation such as NRS 687B.145(2).

The Legislature clearly believes that effective UM/UIM coverage is vital to safeguarding the interest of Nevadans, as evidenced by mandatory minimum UM/UIM coverage that not only cannot be contracted around (*Hinkel*) but also follows the *driver* rather than the *vehicle*. As part of its efforts to have UM/UIM coverage in effect as broadly as feasible, the Legislature enacted NRS 687B.145(2), which requires that an insurer offer UM/UIM coverage in an amount equal to bodily injury coverage when insuring a passenger car.

As this Court held regarding the exclusions in *Hinkel*, allowing IDS (after Mr. Figueroa accepted its "offer" of UM/UIM coverage) to insert exclusions such

that *Mr. Figueroa's explicit acceptance did not result in the coverage described*, is repugnant to both the intent of the statute and Nevada public policy. Nothing in the statute countenances such a result.

Thus, the Legislature has clearly defined Nevada law on this topic: An insurer *cannot* write an insurance policy on a passenger car in the state of Nevada without offering UM/UIM limits equal to the bodily injury limits. In short, the Legislature said what it meant, and it meant what it said. It is wholly improper for any Court simply to create, out of thin air, authority for an exception to that requirement (including and especially one drafted by an insurer for its own benefit) where no such authority has been granted by the Legislature. As this Court has held,

> [t]he named insured . . . did not reject coverage. Accordingly, [he was] entitled to uninsured motorist protection without limitation. The effort by the appellant to restrict that protection by an exclusionary provision violates the expressed public policy. *It was not the intent of the legislature to require the appellant to offer protection with one hand and then take a part of it away with the other*.[7]

Indeed, the Legislature did define *four* exceptions in Subsection 5 of the statute—none of which applies here. Had the Legislature intended for additional exceptions to exist, *it would have defined those exceptions as well*. It is not for the Courts permit an exception to a statutory mandate, when the Legislature itself

[7] *Hinkel*, 87 Nev. at 481-82 (1971) (emphasis added).

did not see fit to codify such an exception.

It would thus be an "absurd[ ] result" for this Court to interpret this statute, which contains no ambiguity whatsoever on this topic, so as to allow IDS to evade this mandate through imposition of an "exception" that the statute neither recognizes nor in any way condones. Rather, this Court's application of NRS 687B.145(2) must simply "construe[ ] [a] clear statutory mandate[ ]."[8] IDS was required to offer Mr. Figueroa the requisite UM/UIM coverage, without exception or exclusion.

B. UNDER NEVADA LAW, AN "OFFER" MUST "MANIFEST WILLINGNESS TO ENTER INTO A BARGAIN, SUCH THAT THE OTHER PARTY'S ASSENT CONCLUDES THE BARGAIN."

The Court of Appeals implied[9] that IDS's "offer" of UM/UIM coverage to Mr. Figueroa satisfied IDS's statutory obligation. That Court apparently reached this conclusion despite the fact that, once Mr. Figueroa accepted that "offer," IDS

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[8] *Cont'l Ins. Co. v. Murphy*, 120 Nev. 506, 511 (2004). In *Murphy*, this Court clearly recognized that the statutory mandate of minimum UM/UIM coverage meant exactly that, and could not be superseded by an insurer's "exception." There is no reason to treat the statutory mandate of NRS 687B.145(2) any differently. Instead, as in *Murphy*, it must simply be applied as written.

[9] The Court of Appeals, while recognizing this issue in its Order Of Affirmance, *does not actually address it*. The Court of Appeals summarizes, but never addresses, the issue of whether IDS's "bait-and-switch" tactic constituted the statutorily-required "offer." AA341-345

unilaterally changed the offered terms (without telling Mr. Figueroa) and issued a policy with exclusions that IDS now claims eliminated the coverage IDS "offered" and Mr. Figueroa accepted. The conclusion that this "bait-and-switch" by IDS constituted an "offer," as this Court has defined that term, is incorrect as a matter of law.

Under Nevada law, "an offer is defined as 'the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that *his assent to that bargain is invited and will conclude it*.'"[10] Because the Legislature did not provide a statute-specific definition of "offer," the word is given this ordinary meaning. Thus, had IDS's premium quote been an actual "offer" *as defined by Nevada law*, Mr. Figueroa's acceptance of that "offer" would have *concluded the bargain*. He would have received what IDS was required to "offer," namely UM/UIM coverage in an amount equal to his bodily injury limits. However, Mr. Figueroa's acceptance did *not* conclude the bargain, because after he accepted, IDS then *unilaterally changed the terms*. Therefore, as a matter of law, IDS's bait-and-switch was not an "offer" to begin with, and IDS violated the statute, which required it to make an actual "offer."[11]

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[10] *Eagle Materials, Inc. v. Stiren*, 127 Nev. 1131 (2011) (citing Restatement (Second) of Contracts § 24 (1981)) (emphasis added).

[11] If IDS then wished to extend a *separate* offer of that coverage *with* exclusions (and, presumably, with reduced premiums reflecting such exclusions), so that Mr.

In light of the plain meaning of the term "offer," the clear language of NRS 687B.145(2) required that IDS offer Mr. Figueroa UM/UIM coverage in an amount equal to his liability coverage, such that acceptance by Mr. Figueroa would "conclude the bargain." If what IDS extended was an "offer," then Mr. Figueroa would have had UM/UIM coverage equal to his liability coverage (as was reflected on the Declarations Page IDS provided, and as Mr. Figueroa believed until IDS informed him *after his accident* that IDS had lied to him and had not provided him such coverage at all).

As a matter of law, IDS cannot prevail on this issue. Only two possibilities exist: (1) IDS extended terms, Mr. Figueroa accepted, and IDS then changed the terms—in which case IDS never made an "offer" as defined under Nevada law, and therefore never complied with the statute; or (2) IDS extended terms, Mr. Figueroa accepted, and IDS then provided coverage according to those terms—in which case, IDS owes Mr. Figueroa another $235,000 under his UM/UIM

Figueroa was fully informed of his options and could make an educated decision regarding his purchase, nothing in the statute precludes that.

Had IDS employed this approach, Mr. Figueroa would have received *two* offers, one complying with the statute and stating a premium reflecting the *actual coverage* IDS was required to "offer," and the other listing exclusions and limitations and stating a premium (presumably the premium Mr. Figueroa was *falsely* quoted for the statutorily-required "offer").

coverage. There is no third option.

C. IDS MUST STACK THE UM/UIM COVERAGE.

IDS argues that, despite Mr. Figueroa's having purchased and paid premiums for UM/UIM coverage on two separate vehicles, IDS is not required to "stack" those coverages.[12] IDS bears the burden of production and persuasion on this point, but points to no valid anti-stacking clause, and even admits that it "is not relying on the anti-stacking clause in Figueroa's policy." [13]

The Court of Appeals found that, because it deemed the "owned but uninsured" exclusion valid, thereby excluding Mr. Figueroa from coverage over $15,000, "IDS was under no obligation to stack coverage to offer more than that amount."[14] Such a conclusion is a *non sequitur* bearing no relationship to the validity *vel non* of the exclusion.[15] Rather, the effectiveness of an anti-stacking provision, if one even exists here, is subject to the general requirements of notice

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[12] *Answering Brief*, AA000281-AA00316

[13] *Opening Brief*, AA310 ; *Answering Brief*, AA334

[14] *Order of Affirmance*, AA344

[15] IDS simply asserts that it is not required to stack UM/UIM coverage under the policy, based on an apparent misreading of this Court's holding in *Nelson v. California State Automobile Association Inter-Business Bureau*, 114 Nev. 345, P.2d 803 (1998). That case turned, not on some general principle against stacking, as IDS asserts, but on the specific anti-stacking provision in the policy at issue.

in insurance policies. As the Ninth Circuit recently held, a UM/UIM anti-stacking provision that does not give the required notice to a reasonable person is void and unenforceable.[16] As this Court has previously held,

> [w]e believe that NRS 687B.145(1) must be strictly construed to require more than a simple lack of ambiguity. If the clarity requirement of this statute is to serve any purpose, we believe that the anti-stacking language must be *truly comprehensible to the average insured.* The purpose of the clarity requirement can only be to put insureds on actual notice of the true effect of anti-stacking clauses.[17]

It would be difficult to envision a purported anti-stacking provision that more egregiously runs afoul of these straightforward requirements. It is undeniable that, as with the insufficient language rejected by this Court in *Torres*, "the average insured, even if quite intelligent, simply will not realize the technically correct the language may be."[18]

Dated this 19th day of July, 2017.

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[16] *Jackoby v. GEICO Gen. Ins. Co.*, Case: 12-16917, *Docket Entry #30.1*, *4 (9th Cir. Jan 9, 2015) (citing *Nationwide Mut. Ins. Co. v. Coatney*, 42 P.3d 265, 267 (Nev. 2002).

[17] *Torres v. Farmers Ins. Exch.*, 106 Nev. 340, 347 (1990) (emphasis in original).

[18] *Id.* at 347, 843.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either: ☒ proportionally spaced, has a typeface of 14 points or more and contains 3050 words; or ☒ does not exceed 10 pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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4. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19th day of July, 2017

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S OPENING BRIEF** were filed electronically with the Nevada Supreme Court on the 19th day of July, 2017 Electronic Service of the foregoing documents shall be made in accordance with the Master Service List as follows:

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