1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

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

Electronically Filed
Dec 02 2016 08:47 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Appeal from The Eighth Judicial District Court, The Honorable Gloria Sturman Presiding

APPELLANT'S OPENING BRIEF

BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
CLOWARD HICKS & BRASIER, PLLC
4101 Meadows Lane, Suite 210
Las Vegas, NV 89107
Telephone: (702) 628-9888
Facsimile: (702) 960-4118
Bcloward@chblawyers.com

Attorneys for Appellant, David Figueroa

NRAP 26.1 DISCLOSURE

The law firm representing Appellant, David Figueroa ("Mr. Figueroa"), in both the District Court and in this Court is Cloward Hicks & Brasier, PLLC.

Dated this 1st day of December, 2016.

CLOWARD HICKS & BRASIER, PLLC

/s/ Benjamin P. Cloward

BENJAMIN P. CLOWARD, ESQ.
CLOWARD HICKS & BRASIER
Nevada Bar No. 11087
4101 Meadows Lane,. Suite 210
Las Vegas, Nevada 89107

Attorneys for Appellant, David Figueroa

TABLE OF CONTENTS

I. JURISDICTIONAL STATEMENT 5

II. ISSUES ON APPEAL: 6

A. WHETHER THE DISTRICT COURT ERRED BY FINDING THAT IDS WAS NOT REQUIRED TO OFFER UIM/UM COVERAGE IN AN AMOUNT EQUAL TO DAVID FIGUEROA'S BODILY INJURY LIMITS PURSUANT AS REQUIRED IN NEVADA REVISED STATUTES 690B.020 AND 687B.145 6

B. WHETHER THE DISTRICT COURT ERRED BY FINDING NO AMBIGUITY IN THE POLICY BETWEEN IDS AND DAVID FIGUEROA AND FAILING TO CONSTRUE ANY AMBIGUITY IN DAVID'S FAVOR 7

C. WHETHER THE DISTRICT COURT ERRED BY FINDING IDS'S ANTI-STACKING LANGUAGE WAS SUFFICIENT 7

III. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT 7

IV. STANDARDS OF REVIEW 8

A. STANDARD OF REVIEW FOR QUESTIONS OF LAW. 8

B. STANDARD OF REVIEW FOR RULE 56 SUMMARY JUDGMENT DISMISSAL 8

V. FACTUAL AND PROCEDURAL BACKGROUND 10

A. IDS DECLARATORY RELIEF AGAINST DAVID FIGUEROA. 10

B. RESPONDENT IDS' MISPLACED MOTION FOR SUMMARY JUDGMENT 10

VI. LEGAL ARGUMENT 11

VII. CONCLUSION 32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

TABLE OF AUTHORITIES

CASES

Birth Mother v. Adoptive Parents, 118 Nev. 972, 59 P.3d 1233 (2002).............8

Marquis & Aurbach v. Dist. Ct., 122 Nev. 1147, 146 P.3d 1130 (2006)............8

Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)………9

Maine v. Stewart, 109 Nev. 721, 726–27, 857 P.2d 755, 758–59 (1993)………..9

Travelers Indemnity Company v. Powell, 206 So.2d 244 (Fla.Ct.App.1968) ...12

Butts v. State Farm Mutual Automobile Ins. Co., 207 So.2d 73 (Fla.Ct.App.1968)……………………………………………………………..13

State Farm Mut. Auto. Ins. v. Hinkel, 87 Nev. 478, 483, 488 P.2d 1151, 1153–54 (1971) ………………………………………………………….12,13,14,23

Continental Insurance Company v. Murphy, 120 Nev. 506, 508, 96, P.3d 747, 749 (2004……………………………………………………13,16,19,21,24

Quinlan v. Mid Century Ins., 103 Nev. 399, 741 P.2d 822 1987)…………….16

Khoury v. Maryland Cas. Co., 108 Nev. 1037, 1039-40, 843 P.2d 822, 823-24 (1992)………………………………………………………………….16,19

Breithaupt v. USAA Prop. & Cas. Ins. Co., 110 Nev. 31, 33-34, 867 P.2d 402, 404-05 (1994)…………………………………………………………16,19

Estate of Delmue v. Allstate Ins. Co., 113 Nev. 414, 936 P.2d 326 (1997)……………………………………………….…………19,21,22,24,25

Ippolito v. Liberty Mut. Ins. Co., 101 Nev. 376, 705 P.2d 134 (1985)…………………………………………………………19,21,22,23,24,25

Zobrist v. Farmers Insurance Exchange, 103 Nev. 104, 105, 734 P.2d 699 (1987)…………………………………………………………………………..20

Farmers Insurance Exchange v. Neal, 119 Nev. 62, 64, 64 P.3d 472, 473 …….20

Neumann v. Standard Fire Ins. Co. of Hartford, Conn., 101 Nev. 206, 209, 699 P.2d 101, 104 (Nev1985)…………………………………………......25,31

Allstate Ins. Co. v. Maglish, 94 Nev. 699, 702, 586 P.2d 313, 314 (1978)…..23

Yosemite Ins. Co. v. State Farm, 98 Nev. 460, 653 P.2d 149 (1982)…………25

Catania v. State Farm Life Ins. Co., Inc., 95 Nev. 532, 534, 588 P.2d 631, 633 (1979)…………………………………………………………..…..25

Benchmark Ins. Co. v. Sparks, __ Nev. ___, 254 P.3d 617, 621 (Nev.011)…..25

Yair Jackoby v. .GEICO Gen. Ins. Co., No. 12-16917, 596 Fed. Appx 544, 546, 2015 wl 128072 (9th Cir. Nov. 21, 2014)……………………………..…25

Century Sur. Co. v. Casino W., Inc., 677 F.3d 903, 908 (9th Cir.2012)………25

Torres v. Farmers Ins. Exch., 106 Nev. 340, 345-46, 793 P.2d 839, 842-43 (1990)………………………………………………………29,30,31, 32

RULES

NRAP 3A(b)(1)……………………………………………………………....6

NRCP 56 ……………………………………………………………….…9

NRS 687B.145.2..…………………………………………………7,8,11,20

N.R.S.485.185(1)…………………………………………………………11

NRS 693.115 …..………………………………………………...............12

NRS 690B.020(b)……………………………………….............11,13,29

NRS 690B.035……………………………………………………………13

NRS 690B.020….…………………………………………………13,14,29

NRS 41.035 ………………………………………………………..…….18

NRS 687B.145 ………………………………………...........14,15,16,17

NRS 687B.147 …………………………………………………........,17, 18, 20, 22
NRS 690B.020.1…………………………………………………..........23
NRS 690B.020.2…………………………………………………......24,25
NRS 687B.145.1 ……………………………………………...........28,30,32
NRS 687B.145.2 ……………………………………………...............23,24

I. JURISDICTIONAL STATEMENT

Mr. Figueroa's ("Appellant" or "Mr. Figueroa") insurance company, IDS Property & Casualty Insurance Company ("Respondent" or "IDS") sued him in District Court asking for declaratory relief.

Mr. Figueroa ("Appellant" or "Mr. Figueroa") insured a 2002 GMC Yukon and a 2014 Jeep Wrangler with IDS. The declarations page indicates that Mr. Figueroa maintained underinsured motorist coverage in the amount of $250,000.00 for each vehicle. The declarations page also indicates that Mr. Figueroa maintained medical expense coverage in the amount of $5,000.00 for each vehicle. On March 7, 2015, Mr. Figueroa was involved in a tragic crash with an underinsured and intoxicated driver while riding a motorcycle he owns after finishing his shift as a Las Vegas Metropolitan Police Officer.

Mr. Figueroa's injuries are undisputedly life-altering resulting in over 15 surgeries with over $2 million in medical bills. As a result of the catastrophic injuries, Mr. Figueroa made a demand upon IDS to stack the full policy limits of his Uninsured/Underinsured Motorist coverage and Medical Expense coverage for the 2002 GMC Yukon and the 2014 Jeep Wrangler. Mr. Figueroa was never

informed by anyone that his policy contained exceptions that would limit his coverage to $15,000 and until the instant lawsuit was under the belief that he would receive the full benefit of $500,000 he purchased.[1]

The District Court dismissed Mr. Figueroa's claims on Defendant's Motion for Summary Judgment.[2] The Notice of Entry of Order of Findings if Facts, Conclusions of Law and Order Granting IDS Property & Casualty Insurance Company's Motion for Summary Judgment was filed on February 18, 2016.[3]

Within 30 days of the Notice of Entry of Order of Judgment of Dismissal, Mr. Figueroa filed a notice of appeal.[4]

Therefore, according to NRAP 3A(b)(1) (allowing for an appeal from a final judgment), Mr. Figueroa has appealed from a final judgment, and this Court has appellate jurisdiction over this case.

II. ISSUES ON APPEAL:

A. WHETHER THE DISTRICT COURT ERRED BY FINDING THAT IDS WAS NOT REQUIRED TO OFFER UIM/UM COVERAGE IN AN AMOUNT EQUAL TO DAVID FIGUEROA'S BODILY INJURY LIMITS PURSUANT AS REQUIRED IN NEVADA REVISED STATUTES 690B.020 AND 687B.145.

[1] AA 119

[2] AA 042-159

[3] AA 271-280

[4] AA 269-270

B. WHETHER THE DISTRICT COURT ERRED BY FINDING NO AMBIGUITY IN THE POLICY BETWEEN IDS AND DAVID FIGUEROA AND FAILING TO CONSTRUE ANY AMBIGUITY IN DAVID'S FAVOR

C. WHETHER THE DISTRICT COURT ERRED BY FINDING IDS'S ANTI-STACKING LANGUAGE WAS SUFFICIENT

III. <u>STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT</u>

Mr. Figueroa was hit while driving his motorcycle by an underinsured and intoxicated driver. He made a demand upon IDS for underinsured motorist coverage. Mr. Figueroa purchased the policy limits of $250,000 for two vehicles believing he was covered up to those amounts for each vehicle in underinsured/uninsured benefits.[5] However after a tragic crash on his motorcycle where his leg was nearly amputated, IDS denied him his full policy benefits, instead relying on an exclusion offering him only the state minimum of $15,000. Due to the numerous exclusions, Mr. Figueroa was never truly offered UIM/UM coverage "up to the limits of [his] own coverage" as required by Nevada law.

This appeal deals with the District Court's judgment on IDS's Motion for Summary Judgment that IDS fulfilled the "offer requirement" as set forth in NRS 687B.145.2.

This appeal deals with public policy considerations as it deals with insurance companies offering policy benefits to Nevadans on one hand, but then

[5] AA 119; 11-15

taking them away after a loss through exclusions. Nevadans should be offered unrestricted coverages ***without*** exclusion to satisfy NRS 687B.145.2, and separately also offered coverages ***with*** exclusions so that Nevadans are fully informed and can make educated decisions on their policies. However, currently, Nevadans ***are not*** being offered UIM/UM benefits as required in NRS 687B.145.2, because the offers are subject to many hidden exclusions which are not known at the time the policies are bound, but instead are buried within the contract of insurance which is typically sent in the mail after the policy has already been bound.

IV. STANDARDS OF REVIEW

A. STANDARD OF REVIEW FOR QUESTIONS OF LAW.

This Court reviews questions of law de novo.[6] Statutory interpretation is a question of law which this Court reviews de novo.[7] When this Court reviews a district court's interpretation of court rules, a de novo review also applies.[8]

B. STANDARD OF REVIEW FOR RULE 56 SUMMARY

---

[6] Birth Mother v. Adoptive Parents, 118 Nev. 972, 974, 59 P.3d 1233, 1235 (2002).

[7] Id.

[8] Marquis & Aurbach v. Dist. Ct., 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006).

1 **JUDGMENT DISMISSAL**

2 Summary judgment is proper when there is no genuine issue of material

3 fact and the moving party is entitled to judgment as a matter of law.[9] "[W]hen

4 reviewing a motion for summary judgment, the evidence, and any reasonable

5 inferences drawn from it, must be viewed in a light most favorable to the

6 nonmoving party."[10] An issue of material fact is genuine when the evidence is

7 such that a rational jury could return a verdict in favor of the nonmoving party.[11]

8 existence of a genuine issue of material fact.[12]

9

10 This court reviews a district court's grant of summary judgment de novo,

11 without deference to the findings of the lower court."[13] Under NRCP 56, the

12 burden of proving that there is no genuine issue of material fact lies with the

13 moving party.[14] However, once the moving party satisfies his or her burden as

14 required by NRCP 56, the burden shifts to the nonmoving party to show the

15

16

17

18 [9] Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

19 [10] Id.

20 [11] Id. at 731, 121 P.3d at 1031.

21 [12] Id. at 727, 857 P.2d at 759.

22 [13] Id. at 729, 121 P.3d at 1029.

23 [14] Maine v. Stewart, 109 Nev. 721, 726–27, 857 P.2d 755, 758–59 (1993).

existence of a genuine issue of material fact.[15] Whether a factual issue is material is determined by the controlling substantive law.[16]

V. FACTUAL AND PROCEDURAL BACKGROUND

A. IDS DECLARATORY RELIEF AGAINST DAVID FIGUEROA.

On March 7, 2015, David Figueroa, while riding his motorcycle was involved in a major and life-altering accident with an underinsured motorists. David made a demand upon IDS for his underinsured motorist coverage. On April 10, 2015 IDS filed a Complaint for Declaratory Relief against David Figueroa.[17] On April 14, 2015 IDS filed an Amended Complaint.[18] David Figueroa filed his Amended Answer on June 5, 2015.[19]

B. RESPONDENT IDS' MISPLACED MOTION FOR SUMMARY JUDGMENT

The Respondent, IDS filed a Motion for Summary Judgment arguing that IDS fulfilled its obligations to David Figueroa under his policy by issuing payment to David Figueroa in the amount of $15,000.00 which is the statutory

---

[15] Id. at 727, 857 P.2d at 759.

[16] Id.

[17] AA 015-029

[18] AA 001-014

[19] AA 030-041

minimum for underinsured motorist coverage in Nevada as set out in N.R.S. 690B.020(b) and N.R.S. 485.185(1). IDS argued the clear language of the policy issued to David Figueroa by IDS prohibits coverage other than the statutory minimum of $15,000.00 for an accident involving a motorcycle owned by David Figueroa but not insured by IDS. IDS further argued that the clear language of the policy prohibits medical payments for motorcycles.

When the policy was sold to David Figueroa, he was presented with a one-page "Renewal Declaration" stating that UM/UIM coverage was covered in the amount of the bodily injury coverage, i.e., "$250,000 each person; $500,000 each accident." At no time was David Figueroa was offered uninsured and underinsured injury coverage, as such coverage is traditionally defined in Nevada, in an amount equal to the limits of coverage for bodily injury. Mr. Figueroa affirmatively and specifically sought UM/UIM coverage in the amount of his coverage for bodily injury and was assured by the Respondent IDS that, in fact, he was covered in the same amount of his bodily injury coverage; otherwise he would not requested the benefit sought or would have purchased the coverage elsewhere.

VI. <u>LEGAL ARGUMENT</u>

A. Defendants never complied with NRS 687B.145.2 and NRS

690B.020 by failing to offer UM/UIM coverage[20] and the bodily injury limits are implied.

For decades, Nevada courts have embraced the strong public policy that insured motorists should be protected from injuries sustained by uninsured or underinsured motorists. In *Hinkel*, the Nevada Supreme Court stated:

> An insurance company may limit coverage only if the limitation does not contravene public policy.
>
> **The expressed public policy of Nevada is that an insurance company may not issue an automobile or motor vehicle liability policy which does not protect the insured from owners or operators of uninsured motor vehicles, unless the named insured rejects such coverage**. N.R.S. 693.115. The named insured, Donald Hinkel, did not reject coverage. Accordingly, he, and the 'residents of his house, his spouse and the relatives of either,' were 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. In *Travelers Indemnity Company v. Powell*, 206 So.2d 244 (Fla.Ct.App.1968), the court annulled the same exclusionary clause we are here concerned with, noting that it was not the intention of the legislature to limit coverage to an insured by specifying his location or the particular vehicle occupied at the time of injury. The legislative expression of public policy denied court power to honor such a limitation.
>
> 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. In *Aetna Insurance Company v. Hurst*, 2 Cal.App.3d 1067, 83 Cal.Rptr. 156, 158 (1969), that court said: 'Under the unqualified language of the statute his coverage is not dependent upon whether

[20] While it is true that IDS offered UIM/UM coverage, it was not equal to his bodily injury limits ***as required by Nevada law*** because of the exclusions contained within the policy.

> or not he is in any kind of vehicle. The fact that he was riding an uninsured motorcycle thus has no bearing upon his coverage as defined by the statute.'
>
> We find the same reasoning applied to other efforts by the insurance companies to limit uninsured motorist protection. In *Butts v. State Farm Mutual Automobile Ins. Co.*, 207 So.2d 73 (Fla.Ct.App.1968), the court struck down an effort to exclude the son of the named insured. In *Vaught v. State Farm Fire & Casualty Co.*, 413 F.2d 539 (8th Cir. 1969), the court annulled an attempt to exclude automobiles owned by the city. In *Hendricks v. Meritplan Insurance Company*, *supra*, the court would not allow the insurance company to exclude from coverage one under 25 years of age who was operating the insured vehicle. **The underlying premise of each decision is that the attempted exclusion from coverage violated the public policy of the statute and was, therefore, void.**[21]

Because of the importance of this public policy consideration, it should come as no surprise that the basic policy remains in full effect today. Specifically, NRS 690B.020.2 sets forth the following:

> 1. Except as otherwise provided in this section and NRS 690B.035, ***no policy insuring against liability*** arising out of the ownership, maintenance or use of any motor vehicle ***may be delivered or issued*** for delivery in this State ***unless coverage is provided*** therein or supplemental thereto ***for the protection of persons*** insured thereunder who are legally entitled to recover damages, ***from owners or operators of uninsured or hit-and-run motor vehicles***, for bodily injury, sickness or disease, including death, resulting from the ownership, maintenance or use of the uninsured or hit-and-run motor vehicle. No such coverage is required in or supplemental to a policy issued to the State of Nevada or any political subdivision thereof, or where rejected in writing, on a form furnished by the insurer describing the coverage being rejected, by an insured named therein, or upon any renewal of such a policy unless the coverage is then requested in writing by the named insured. The coverage required in this section may be referred to as "uninsured vehicle

[21] *State Farm Mut. Auto. Ins. Co. v. Hinkel*, 87 Nev. 478, 481-82, 488 P.2d 1151, 1153 (1971) (emphasis added).

coverage."[22]

Considering the strong public policy to protect insureds from uninsured and underinsured motorists, it is no surprise that the Nevada Supreme Court "ha[s] traditionally held that UM/UIM insurance follows the insured ***regardless of whether the accident involved the vehicle designated in the policy***."[23]

In response to *Hinkel* and other similar cases, the legislature sought to *further protect insured motorists* by mandating that insurers provide UM/UIM at least in the amount that Nevada law requires motorists to carry liability insurance.[24] The same year that *Hinkel* was decided (1971), the legislature passed § 690B.020, quoted above, which *requires* such UM/UIM coverage in all but very few specifically excepted liability insurance policies. Section 690B.020(2) of the Nevada Revised Statutes currently states:

> The amount of coverage to be provided must be not less than the minimum limits for liability insurance for bodily injury provided for under chapter 485 of NRS, but may be in an amount not to exceed the coverage for bodily injury purchased by the policyholder.

Chapter 485N requires vehicle owners to "continuously provide . . .: insurance in the amount of $15,000 for bodily injury to one person . . . in any one accident."

---

[22] Nev. Rev. Stat. Ann. § 690B.020.

[23] *Cont'l Ins. Co. v. Murphy*, 120 Nev. 506, 507, 96 P.3d 747, 748 (2004).

[24] *See*, *Id.*

Ironically, despite the legislative policy behind § 690B.020, this statutory mandate is now most often cited by insurance companies which rely on boilerplate policy exclusions to support efforts to pay the nominal amount of $15,000 in disregard of the policy's limits on bodily injury coverage. Indeed, IDS is relying on subsection 2 of § 690B.020 to *deny* Mr. Figueroa the vast majority of coverage to which he should be entitled under IDS's insurance policy, in light of Plaintiff's unlawful practices, and when considering public policy.

Allowing IDS to only pay $15,000 in this case, where damages undisputedly far exceed the bodily injury policy limits, would egregiously violate longstanding Nevada public policy and statutory authority. In 1979, eight years *after* passing § 690B.020, the Nevada Legislature passed § 687B.145 of the Nevada Revised Statutes. That statute required (and continues to require) that insurance companies **must offer** "uninsured and underinsured vehicle coverage in an amount equal to the limits of coverage for bodily injury sold to an insured under a policy of insurance covering the use of a passenger car" contemporaneously with the sale of the policy.[25]

[25] Nev. Rev. Stat. Ann. § 687B.145.2.

Much litigation arose regarding the sufficiency of the notice required by § 687.145.2.[26] And, in response to *Quinlan*, the legislature ***again heightened*** consumer protections by amending § 687B.145 in 1990 to require that the offer be made on a form provided by the Insurance Commissioner.[27] Specifically, the Court in *Khoury* set forth the following:

> In discussing the amendments to the provision, Commerce Committees of both the State Assembly and State Senate expressed dissatisfaction with our *Quinlan* decision, apparently interpreting it to mean that we had held that the only thing an insurance company needed to do to comply with the provision was to include a small notice at the bottom of the renewal form using language such as, "You now have the right to buy uninsured coverage equal to bodily injury coverage. Contact your agent for more details." Hearing on A.B. 404 Before the Assembly Commerce Committee, April 7, 1989, p. 2–3; *see also* Hearing on A.B. 404 Before the Senate Committee on Commerce and Labor, May 11, 1989, p. 8.[28]

The required notice/offer must be "sufficient to inform the average layman who is untrained in the law or the field of insurance" that UM coverage equal to bodily injury coverage was available."[29]

---

[26] *See e.g.*, *Quinlan v. Mid Century Ins.*, 103 Nev. 399, 741 P.2d 822 (1987).

[27] *Khoury v. Maryland Cas. Co.*, 108 Nev. 1037, 1039-40, 843 P.2d 822, 823-24 (1992).

[28] *Id*. at 1039-40, 843 P.2d at 823-24.

[29] *Breithaupt v. USAA Prop. & Cas. Ins. Co.*, 110 Nev. 31, 33-34, 867 P.2d 402, 404-05 (1994) (citations omitted).

In this case, Mr. Figueroa argues that because of the legislative mandate to inform the average layperson that coverage is available to purchase, certainly it also logically follows that if coverage is excluded, it should be done in language to inform the average layperson as well. This is supported by NRS 687B.147 which sets forth with specificity when an exclusion can be used and how it should be set forth in the policy.

The undisputed facts in Mr. Figueroa's case are that he was not aware of the limiting exclusions, otherwise as he stated, he would have requested the coverage without the exclusions or shopped elsewhere.[30]

Further, because UM/UIM coverage "follows the insured regardless of whether the accident involved the vehicle designated in the policy,"[31] pursuant to § 687B.145.2, **Mr. Figueroa should have been at least offered UM/UIM coverage in the amount of his bodily injury liability without the "owned but uninsured" or motorcycle exclusion** upon which Plaintiff now relies.

Not only is there no "owned but uninsured" or motorcycle exception to the language of § 687B.145.2, the plain language of the statute supports Mr.

[30] AA 119; 11-15

[31] *Murphy*, 120 Nev. at 507, 96 P.3d at 748.

Figueroa's position that he should have been offered the UM/UIM coverage without any buried exclusion:

> Uninsured and underinsured vehicle coverage **must include a provision which enables the insured to recover up to the limits of the insured's own coverage any amount of damages for bodily injury from the insured's insurer which the insured is legally entitled to recover from the owner or operator of the other vehicle to the extent that those damages exceed the limits of the coverage for bodily injury carried by that owner or operator.** If an insured suffers actual damages subject to the limitation of liability provided pursuant to NRS 41.035, **underinsured vehicle coverage must include a provision which enables the insured to recover up to the limits of the insured's own coverage any amount of damages for bodily injury from the insured's insurer for the actual damages suffered by the insured that exceed that limitation of liability.**[32]

Further and more important, immediately following NRS 687B.145 is NRS 687B.147, which specifies the very limited instances when an exclusion ***can be used*** and it does not mention ***either of the exclusions*** sought by IDS to apply in the instant case. Had the Legislature intended to allow either of the exclusions sought by IDS to apply, the Legislature certainly could have added those exclusions to NRS 687B.145, but instead, did not.[33]

Moreover, <u>this statute must be strictly construed in favor of recovery by</u>

[32] Nev. Rev. Stat. Ann. § 687B.145.2.

[33] Nev. Rev. Stat. Ann. § 687B.147 (only setting forth two instances when an exclusion can be used).

the insured.[34] Thus, this Court should hold that the required offer must be for traditional UM/UIM coverage that follows the insured rather than coverage that is riddled with exceptions.

It is IDS's burden to prove this required offer was made.[35] Yet, IDS has not even attempted to meet that burden, but instead asserts that its offer of providing an insurance policy with exclusions that reduced the policy limit to $15,000 was sufficient. This is not in harmony with Nevada law. Nowhere in the legislative scheme is there any support for an insurance company to do what IDS has done in the instant case. Instead, the Legislature has taken great steps to protect Nevadans and has insisted that UIM/UM benefits be offered to members of this State in an amount equal to the selected bodily injury limits.

Indeed, it is beyond any genuine dispute that no offer for UM/UIM coverage without the "owned but uninsured" or motorcycle exclusion was ever made.[36] In fact, Mr. Figueroa, a motorcycle police officer, affirmatively sought

---

[34] *Estate of Delmue v. Allstate Ins. Co.*, 113 Nev. 414, 417, 936 P.2d 326, 328 (1997); *Ippolito v. Liberty Mutual,* 101 Nev. 376, 378–79, 705 P.2d 134, 136 (1985).

[35] *See Khoury v. Maryland Cas. Co.*, 108 Nev. 1037, 1041, 843 P.2d 822, 824 (1992) ("we conclude that NRS 687B.145(2) requires an insurance company to prove that the notice of uninsured/underinsured motorist coverage be established by *clear and convincing* evidence"), *disapproved of on other grounds by Breithaupt v. USAA Prop. & Cas. Ins. Co.*, 110 Nev. 31, 867 P.2d 402 (1994) (emphasis added).

[36] AA 119

UM/UIM coverage in the amount of his bodily injury coverage.[37] Not only was no quote made to Mr. Figueroa for premiums for additional UM/UIM coverage, but also Mr. Figueroa was affirmatively assured by Defendants' agents or representatives that his UM/UIM coverage was the same as his bodily injury coverage and the sole purpose he increased his bodily injury coverage limits to the maximum or near maximum levels was for the UM/UIM injury coverage.[38]

In the motion for summary judgment, IDS cited to several cases with similar issues, but none of those cases addressed the "must offer" mandate as set forth in NRS 687B.145.2 ***or the*** exclusions set forth in NRS 687B.147. Accordingly, this case ***is not*** analogous to *Zobrist*, *Neal*, or *Murphy* as urged by IDS.[39] Because the failure to provide the required offer as mandated by § 687B.145.2 is not even discussed in those cases, nor were the allowed exclusions as set forth in NRS 687B.147 discussed, the cases cited by IDS are simply not helpful or applicable because the issue and analysis is different. Instead the cases

---

[37] *Id.*

[38] *Id.*

[39] IDS cited *Zobrist v. Farmers Insurance Exchange*, 103 Nev. 104, 105, 734 P.2d 699 (1987); *Farmers Insurance Exchange v. Neal*, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003); and *Continental Insurance Company v. Murphy*, 120 Nev. 506, 508, 96, P.3d 747, 749 (2004)).

that ***do apply*** are those of *Estate of Delmue*[40] and *Ippolito*[41].

In *Estate of Delmue*, the family patriarch, Mr. Delmue, was concerned that his existing insurance policy provided insufficient coverage for his two teenage boys.[42] Thus, Mr. Delmue approached his carrier's agent seeking to increase his automobile insurance coverage and the agent instead recommended that Mr. Delmue purchase a $1 million umbrella policy.[43] "At no time during the acquisition of the umbrella policy did [the agent] or Allstate offer Mr. Delmue UM/UIM motorist coverage."[44]

One of Mr. Delmue's sons was tragically killed w***hile occupying a friend's vehicle***.[45] Mr. Delmue sued claiming that he was not fully compensated under the other available policies and Allstate claimed that because the policy was an umbrella policy, it was not required to offer UM/UIM coverage under § 687.145(2).[46] The Nevada Supreme Court rejected Allstate's argument and

---

[40] *Estate of Delmue v. Allstate Ins. Co.*, 113 Nev. 414, 936 P.2d 326 (1997).

[41] *Ippolito v. Liberty Mut. Ins. Co.*, 101 Nev. 376, 705 P.2d 134 (1985).

[42] *Delmue*, 113 Nev. at 415, 936 P.2d at 327.

[43] *Id.*

[44] *Id.*

[45] It is worth noting that one of IDS's arguments/exclusions is that Mr. Figueroa was not in one of the vehicles that was insured by IDS.

[46] *Id*. at 417, 328.

adopted Mr. Delmue's proposal as to the intended application of § 687.145(2):

> Delmue further asserts that the plain language of NRS 687B.145(2) contains five separate elements: [1] Insurance companies [2] transacting motor vehicle insurance in this state [3] must offer ... [4] uninsured and underinsured vehicle coverage ... [5] to an insured under a policy of insurance covering the use of a passenger car. Through Allstate's own admissions and the plain meaning of NRS 687B.145(2), Delmue maintains that all five requirements are satisfied in this case. We agree.[47]

Thus, the holding in *Delmue* is that absent an **express statutory** exception (in that case an exception for excess insurance policies), ***the offer must be made***. Other than the two exclusions set forth in NRS 687B.147, there are no other statutory exception permitting an offer of ***anything less than traditional UM/UIM coverage***, which supports IDS's position.[48] Further, *Delmue*, like *Murphy* stand for the proposition that the insurance ***follows the insured*** and Mr. Figueroa should have been offered the UM/UIM coverage without the "owned but uninsured" or motorcycle exclusion.

Importantly, the remedy that Mr. Figueroa seeks here was also affirmed in *Delmue*:

> Thus, as in *Ippolito,* **when an insurance company fails to comply with NRS 687B.145(2), this court will "imply into the policy's provisions the increased protection afforded ... by NRS**

[47] *Id*. at 417, 328.

[48] *See*, Nev. Rev. Stat. Ann. § 687B.147 (which only sets forth two instances when an exclusion can be used).

687B.145(2).”[49]

Further, the language in *Ippolito* is helpful to understand the policy considerations at issue, more specifically:

> We have previously determined that we will strictly construe provisions of an uninsured motorist statute in favor of recovery by the insured, and **that the requirements of such a statute are implicitly a part of every policy of automobile insurance in Nevada, as if expressly written into the policy**. *State Farm Mut. Auto. Ins. v. Hinkel,* 87 Nev. 478, 483, 488 P.2d 1151, 1153–54 (1971); *Allstate Ins. Co. v. Maglish,* 94 Nev. 699, 702, 586 P.2d 313, 314 (1978). **We have recognized that the policy itself may not limit coverage in contravention of the public policy provided in the statute, and that provisions in conflict are “void and unenforceable because they are repugnant to the intent of the statute and against public policy.”** 87 Nev. at 482, 488 P.2d at 1154. The public policy expressed in NRS 687B.145(2) is that, effective July 1, 1979, insurance companies doing business in Nevada must offer uninsured-underinsured motorist coverage “equal to the limits of bodily injury coverage sold to the individual policy holder.”[50]

Application of this remedy is so engrained in Nevada law that in *Ippolito*, the Nevada Supreme Court held that the requirements of § 687B.145(2) were implied into the Ippolito’s policy despite the fact that the policy was sold six months before § 687B.145(2) even became effective.[51]

Because Mr. Figueroa was never offered UM/UIM coverage in the amount of his bodily injury coverage, and particularly was never offered any UM/UIM

---

[49] *Id*. at 418, 329 (emphasis added) (citation to *Ippolito* omitted).

[50] *Ippolito*, 101 Nev. at 378-79, 705 P.2d at 136 (1985) (emphases added).

[51] *Id.*

coverage that followed him (as UM/UIM has forever and universally been understood in Nevada), this Court should hold that the amount of Mr. Figueroa's bodily injury coverage should be implied into Mr. Figueroa's policy as if it were expressly written in the policy.[52] From Mr. Figueroa's perspective, IDS's conduct is more indicative of active concealment of insureds' rights to purchase UM/UIM coverage than simply failing to offer the coverage as required by § 687.145(2).

This Court should reverse the Motion for Summary Judgment and remand for further proceedings.

B. The ambiguous application of any exclusion must be construed in favor of Mr. Figueroa.

Here, there is no evidence that Mr. Figueroa rejected any coverage. *See* Nev. Rev. Stat. § 690B.020.1 ("[n]o such coverage is required . . . where rejected in writing . . ."). In fact, Plaintiff concedes that there was UM/UIM coverage but, relying on a buried and vague exception, seeks to limit that coverage to $15,000 pursuant to § 690B.020.2

It is true, as urged by IDS, that the Nevada Supreme Court has held "owned but uninsured" exceptions valid in light of the language of Nev. Rev. Stat. §

[52] *Ippolito*, 101 Nev. at 378-79, 705 P.2d at 136; *Delmue*, 113 Nev. at 417, 936 P.2d at 328.

690B.020.2.[53] However, the authority to exclude "owned but uninsured" coverage remains nonetheless subject to Nevada's well-established and longstanding "policy of construing ambiguities [and uncertainty] in insurance policies against the drafter" and viewing the "ambiguity form the standpoint of a layman, rather than a lawyer."[54]

Plaintiff has produced the policy as well as a separate "Amendment of Policy Provisions – Nevada." ("Amendment").[55] The Amendment states "[t]his endorsement changes the policy. Please read it carefully."[56] The first paragraph under "Part III – Uninsured Motorists/Underinsured Motorists Coverage," contains three important sentences that should be dispositive of IDS's appeal:

> [1] We will pay compensatory damages which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle or underinsured motor vehicle because of bodily injury caused by accident. [2] We will pay these damages for bodily injury and insured person suffers in a car accident while

---

[53] *See Murphy*, 102 Nev. at 509, 96 P.3d at 749-50.

[54] *Neumann v. Standard Fire Ins. Co. of Hartford, Conn.*, 101 Nev. 206, 209, 699 P.2d 101, 104 (Nev. 1985) (*citing Yosemite Ins. Co. v. State Farm*, 98 Nev. 460, 653 P.2d 149 (1982) *and* 2 Couch on Insurance 2d, § 15.84 (1984)); *Catania v. State Farm Life Ins. Co., Inc.*, 95 Nev. 532, 534, 588 P.2d 631, 633 (1979); *Benchmark Ins. Co. v. Sparks,* __ Nev. ___, 254 P.3d 617, 621 (Nev. 2011);*Yair Jackoby v. .GEICO Gen. Ins. Co.*, No. 12-16917, 596 Fed. Appx 544, 546, 2015 wl 128072 (9th Cir. Nov. 21, 2014); *Century Sur. Co. v. Casino W., Inc.,* 677 F.3d 903, 908 (9th Cir.2012). Moreover, § 690B.020 must be strictly construed in favor of recovery by the insured. *See Delmue*, 113 Nev. at 417, 936 P.2d at 328 (1997); *Ippolito,* 101 Nev. at 378–79, 705 P.2d at 136.

[55] AA 083

[56] *Id.*

> occupying your insured car or utility car, or as a pedestrian as a result of having been struck by an uninsured motor vehicle or an underinsured motor vehicle. [3] We will pay this coverage only after any applicable bodily injury liability bonds or policies have been exhausted by payments of judgments or settlements.[57]

Plaintiff would have this Court read the second sentence as an exclusion or limitation to UM/UIM coverage that modifies the first sentence that promises coverage without any "owned but uninsured" exception. However, the second sentence merely confirms that the coverage promised in the first sentence will be provided where the insured is occupying his insured car or is a pedestrian. Importantly, it does not say that coverage will **only** be provided where the insured is occupying his insured car or is a pedestrian. Indeed, the entire Amendment which by its own language "changes the policy," makes no reference whatsoever to *any* limitation on coverage other than those contained in the Amendment itself.[58]

The only other limitations to UM/UIM coverage within Part III are:

1. coverage is only provided after other sources of compensation have been exhausted. *Id.* (Sentence 3, quoted above);

2. the tortfeasor's liability for damages "must arise out of the

[57] *Id.*

[58] *Id.*

ownership, maintenance or use of the uninsured motor vehicle or underinsured motor vehicle. *Id.*; and

3. Plaintiff must be provided notice of any litigation following an injury by an uninsured or underinsured tortfeasor.[59]

Pursuant to the longstanding and well-established policy of construing the language of insurance policies against insurance companies and from the standpoint of a layman, clearly, this amendment which "changes the policy" and references no exclusions or limitations other than those listed on the amendment and cited above should be read to provide the coverage that Mr. Figueroa seeks.

Nevertheless, IDS argues that an "owned but uninsured" exclusion buried in the policy should override the Amendment that IDS drafted and provided to Mr. Figueroa and which "changes the policy."[60] IDS also cites a purported

---

[59] *Id.*

[60] Specifically, IDS cites the "owned but uninsured" exception which states:

> 1. Occupying or when struck by, any motor vehicle owned by you or any relative which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle. This exclusion applies only to the extent that the limits of liability for this coverage exceed the limits of liability required by the Nevada Motor vehicle Safety Responsibility Act.

Notably, the subheading "Exclusion" does not even appear above the purported exclusion.

“motorcycle exception” that appears in an *entirely different section of the policy*.[61]

IDS’s argument may have some merit had Section III of the Amendment made any reference whatsoever that the promise of coverage was in any way subject to any other exceptions or limitations than those on the face of the Amendment which “changes the policy.” Nowhere in the Amendment, and particularly within Section III of the Amendment, is there any indication that these promises would be subject to any further exclusions. Thus, at the very least ambiguity that must be construed against IDS does exist.

This Court should construe the language on behalf of Mr. Figueroa.

C. The policy contains no valid “anti-stacking” provision.

Even if IDS could somehow enforce these ambiguous exclusions despite having made no offer of UM/UIM coverage that did not contain the exclusions, which they cannot, IDS attempts to subvert their statutory obligations under

[61] Not only is the purported UM/UIM exclusion that is buried in the policy under an entirely different and separate section of the policy, but also, the word “motorcycle” is never even mentioned. Instead, IDS purports to exclude payment of medical expenses where the insured occupies “a motorized vehicle with less than four wheels.” Moreover, the Amendment of Section II contains only and “Additional Definition” of “insured person.” Mr. Figueroa would clearly be covered under that definition which conflicts with Plaintiff’s current position.

Section 687B.145(1) of the Nevada Revised Statutes. Specifically, IDS appears to argue that the statutory $15,000 limitation that they insist applies here cannot be "stacked" despite Mr. Figueroa having insured two separate vehicles.

Nevada law plainly requires clear and prominently displayed language pertaining to anti-stacking provisions:

> 1. Any policy of insurance or endorsement providing coverage under the provisions of NRS 690B.020 or other policy of casualty insurance may provide that if the insured has coverage available to the insured under more than one policy or provision of coverage, any recovery or benefits may equal but not exceed the higher of the applicable limits of the respective coverages, and the recovery or benefits must be prorated between the applicable coverages in the proportion that their respective limits bear to the aggregate of their limits. **Any provision which limits benefits pursuant to this section must be in clear language and be prominently displayed in the policy, binder or endorsement. Any limiting provision is void if the named insured has purchased separate coverage on the same risk and has paid a premium calculated for full reimbursement under that coverage.**[62]

Plaintiff carries both the "burden of persuasion and production on the issue of validity of an anti-stacking clause."[63] Here, Plaintiff has pointed to no applicable anti-stacking clause and, instead, relies on its meritless position that only $15,000 coverage applies because of the ambiguous exclusions that were buried in the policy despite IDS's failure to offer Mr. Figueroa true UM/UIM

---

[62] Nev. Rev. Stat. Ann. § 687B.145.

[63] *Torres v. Farmers Ins. Exch.*, 106 Nev. 340, 345-46, 793 P.2d 839, 842-43 (1990).

coverage. The failure to point to any such clause should, alone, prove fatal to IDS's position.

Nevertheless, the closest provision to an "anti-stacking" clause that appears on the Amendment which "changes the policy" set forth as:

> WE WILL PAY NO MORE THAN THESE MAXIMUMS REGARDLESS OF THE NUMBER OF VEHICLES DESCRIBED IN THE DECLARATIONS, INSURED PERSONS, CLAIMS, CLAIMANTS, POLICIES, OR VEHICLES INVOLVED IN THE ACCIDENT. THE INSURING OF MORE THAN ONE PERSON OR VEHICLE UNDER THIS POLICY WILL NOT INCREASE THE LIMITS SHOWN FOR ANY ONE CAR, EVEN IF A SEPARATE PREMIUM IS CHARGED FOR EACH CAR.[64]

This provision (if even construed as an attempt at "anti-stacking") fails the prominence requirement of § 687B.145(1). The Nevada Supreme Court has determined that the language must be in large, double-spaced print to direct the reader to the critical language.[65] The clause cited above is neither larger than any font of any surrounding language nor is it double spaced.

Moreover, the clause must be not only unambiguous but also not "difficult to understand."[66] "[T]he anti-stacking language must be *truly comprehensible to the average insured.* The purpose of the clarity requirement can only be to put

---

[64] AA 084

[65] *Torres, supra.*; *Neumann,* 101 Nev. at 211, 699 P.2d at 105; *Bove v. Prudential Ins. Co. of Am.*, 106 Nev. 682, 687, 799 P.2d 1108, 1111 (1990).

[66] *Id*. (*citing Neumann,* 101 Nev. at 209–10, 699 P.2d at 104).

insureds on actual notice of the true effect of anti-stacking clauses."[67] Even if the above-cited clause is construed as an "anti-stacking" clause, the parameters of that clause are far from clear. Specifically, there is no mention of the effect of any anti-stacking clause as to the application of the statutory minimum upon which IDS insists. Indeed, as shown above, the application of that statutory minimum itself is not "truly comprehensible to the average insured" and Mr. Figueroa believes that the required availability of such UM/UIM coverage was, at best, actively concealed by IDS.

Further, this clause suffers the same deficiencies as those analyzed in *Neumann* and *Torres*, *supra*. It does not refer to single *vehicle* limits, and instead it only refers to "these maximums."[68] "Additionally, the use of the plural form of the word ['maximums'] is misleading since coverage is in fact limited to the highest *single* coverage limit on a *single* vehicle."[69] Here, it is unclear to what "maximums" even refers. It makes no mention of any limitations as to other insurance policies.[70] And, it makes no distinction as to whether "the insureds

---

[67] *Id.*

[68] *Torres*, 106 Nev. at 346, 793 P.2d at 843-44 ("[r]eferring to the *policy* limits rather than the single *vehicle* limit simply is not clear enough . . .").

[69] *Id.*

[70] *Id.*

vehicles are covered under a single, multi-car policy, or under separate policies."[71]

If an anti-stacking clause "fail[s] on its fact to satisfy any of the three requirements established for such clauses under NRS § 687.145(1)" it must be stricken.[72] IDS's position must be reversed as it has: a) failed to produce any applicable anti-stacking provision; b) the only possible anti-stacking provision fails the prominence requirement; and c) whether the provision would apply to the statutory minimal coverage under UM/UIM is not clear and not even mentioned.

VII. CONCLUSION

In summary, this Court should vacate the District Court's dismissal and remand for further proceedings.

Dated this 1st day of December, 2016

CLOWARD HICKS & BRASIER

/s/ Benjamin P. Cloward, Esq.

Benjamin P. Cloward, Esq.
Nevada Bar No. 11087
4101 Meadows Lane, Suite 210
Las Vegas, Nevada 89107

[71] *Id.*

[72] *Torres*, 106 Nev. at 345-46, 793 P.2d at 842-43.

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 2007 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 7495 words; or ☒ does not exceed 33 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.

/ / /

/ / /

/ / /

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 1st day of December, 2016.

CLOWARD HICKS & BRASIER, PLLC.

/s/ *Benjamin P. Cloward, Esq.*

BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
4101 Meadows Lane, Suite 210
Las Vegas, Nevada 89107
Attorneys for Appellant, David Figueroa

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S OPENING BRIEF** and **APPELLANT'S APPENDIX** were filed electronically with the Nevada Supreme Court on the 1st day of December, 2016. Electronic Service of the foregoing documents shall be made in accordance with the Master Service List as follows:

Benjamin Cloward, Esq.

I further certify that I served a copy of these documents by mailing a true and correct copy thereof, postage prepaid, addressed to:

Kevin A. Brown, Esq.
Beth A. Cook, Esq.
BROWN, BRONN & FRIEDMAN, LLP
5528 South Fort Apache Road
Las Vegas, Nevada, 89148
Facsimile (702) 942-3901
Attorneys for Respondent
IDS PROPERTY & CASUALTY INSURANCE COMPANY

/s/ Tina Jarchow
Tina Jarchow, an employee of CLOWARD HICKS & BRASIER, PLLC.