IN THE SUPREME COURT OF THE STATE OF NEVADA

FILIPPO SCIARRATTA, an individual, Appellant, vs. JONAS STOSS, an individual; FOREMOST INSURANCE COMPANY GRAND RAPIDS MICHIGAN, a Michigan Corporation; MID-CENTURY INSURANCE, a California Corporation; and DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive, Respondents.	Supreme Case No.: 79604 District Court Case No.: A-17-756368-C

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

The undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Filippo Sciarratta – Appellant, is an individual.

Since the inception of the case, Appellant, has been solely represented by Jordan P. Schnitzer, Esq. of THE SCHNITZER LAW FIRM. There are no administrative agency actions in this case and no other attorneys are expected to appear on Appellant's behalf.

DATED this 21st day of September 2020.

/s/ Jordan P. Schnitzer, Esq.

Jordan P. Schnitzer, Esq.
Attorney for Appellant

I. STATEMENT OF THE CASE

The District Court improperly granted summary judgment on Respondent's declaratory relief claim regarding the applicability of an alleged policy exclusion and NRS 687B.147 to an umbrella policy in a motorcycle crash. The District Court granted summary judgment based upon an unreported federal district court case, which erroneously speculated on what it believed the Nevada Legislature "would intend" to do. However, this Court's previous holding in *Estate of Delmue v. Allstate*, 936 P.2d 326, 328 (Per Curiam) (Nev. 1997) required Respondent to fully disclose the alleged exclusion at issue. The insurer admittedly failed to comply with the statute. Furthermore, the District Court failed to address the fact that the exclusion at issue was never provided to the insureds until after the crash at issue. Public policy voids the alleged exclusion at issue because Respondent failed to prove it provided the policy to Appellant and his wife. Therefore, this Court should find the District Court erred in granting summary judgment.

II. JURISDICTIONAL STATEMENT

This case is an appeal taken from the *Order Re Entry of Final Judgment on Second and Fourth Claims for Relief in Counter/Cross Claim*, wherein the District Court certified the judgment at issue as final . AA at 612–16. The Notice of Entry

of that Order was entered on March 25, 2019. The notice of appeal was filed on September 13, 2019. Therefore, the appeal is timely pursuant to NRAP 4(a)(1).

III. ROUTING STATEMENT

This case should be assigned to the Nevada Supreme Court as it raises an issue where there is inconsistency between Nevada Supreme Court precedent and a federal court case on the same topic or, alternatively, raises an issue of first impression involving Nevada law. NRAP 17(a)(11)-(12). Additionally, this case is not presumptively assigned to the Court of appeals as the amount in controversy is $1,000,000, which is over the $75,000 threshold of the presumptive cases of the Court of Appeals. NRAP 17 (b)(6).

IV. STATEMENT OF THE ISSUES

a. **Whether District Court Erred in Determining that NRS 687B.147 Was Not Applicable to Umbrella Policies**

b. **Whether the District Court Erred in Upholding the Exclusion When Farmers Did Not Provide the Exclusion to the Insureds Prior to the Loss**

c. **Whether the District Court Erred in Not Determining the Exclusion is Void as a Matter of Public Policy**

d. **Whether in the Case that Farmers Met Its Burden on Summary Judgment, the District Court Erred in Not Continuing Farmers' Motion for Summary Judgment**

V. STATEMENT OF FACTS

A. Relevant Procedural Background:

On June 2, 2017, Filippo Sciarratta ("Sciarratta" or "Appellant") filed a suit against Jonas Stoss ("Stoss") and Cynthia Sciarratta claiming damages due to injuries he sustained from motorcycle accident that took place on or around June 2, 2015. Appellant's Appendix ("AA") at 1–8. Sciarratta voluntarily dismissed Cynthia Sciarratta from the case before she answered. AA 13. Stoss answered on September 20, 2017. AA 14–21.

On January 12, 2018, Sciarratta filed an amended complaint that added Foremost Insurance Company Grand Rapids Michigan and Mid-Century Insurance on allegations of breach of contract, breach of good faith and fair dealing, contractual breach of the covenant of good faith and fair dealing, fraudulent and intentional misrepresentation, negligent misrepresentation, and unjust enrichment, which were in addition to the negligence and negligence per se actions against Mr. Stoss. AA 24–34.

Foremost Insurance Company Grand Rapids Michigan and Mid-Centruruy Insurance along with Farmers Insurance Exchange ("Farmers Entities") filed an *Amended Answer and Counter/Cross Claims for Declaratory Relief* that included counter/cross claims for relief against Sciarratta. AA at 41–77.

Relevant to this appeal is the declaratory relief found in Count Two, which is

related to Farmers Insurance Exchange Personal Umbrella Policy No. 60521-70-05 (the "Umbrella Policy"). AA at 69–70. On August 3, 2018, Sciarratta filed his answer to Farmers Entities' counter claim. AA at 135–40.

On January 25, 2019, Farmers Entities filed a motion for summary judgment asking for dismissal of Sciarratta's claims against them and for relief on their declaratory judgment claims. AA at 141–315. Sciarratta filed an opposition to Farmers Entities' motion for summary judgment. AA at 316–97. Stoss filed a limited opposition to the Farmers Entities' motion for summary judgment. AA at 398–402. The Farmers Entities filed a reply in support of their summary judgment. AA at 403–41. The District Court held a hearing on the Farmers Entities' motion for summary judgment. AA at 442–73. The District Court issued its decision on Summary Judgment, granting in part and denying in part the Farmers Entities' motion for summary judgment. AA 474–81. Approximately one-week letter, the District Court issued an order compelling the Farmers Entities to respond to Sciarratta's discovery requests. AA 482–84.

The Farmers Entities requested the District Court to reconsider its partial denial of their motion for summary judgment through a Rule 60 motion. AA at 485–549. Sciarratta opposed this motion and asked for reconsideration on the District Court's granting Farmers Entities' motion for summary judgment. AA at 553–73. The Farmers Entities filed a reply in support of their Rule 60 motion and an opposition to Sciarratta's motion to reconsider. AA 574–87. Sciarratta filed a reply

in support of his motion to reconsider. AA 588–94. The Court denied all the parties' motions to reconsider. AA at 605–06. On August 26, 2019, the District Court entered final judgment on the Farmers Entities Second and Fourth Claims. AA at 612–16.

The Farmers Entities filed a notice of appeal on the District Court's final judgment. AA at 617–19. Sciarratta then filed a notice of appeal on September 13, 2019. AA at 625–27.

The parties settled the Farmers Entities' appeal, leaving only Sciarratta's appeal relating the District Court's granting summary judgment regarding the umbrella policy with Farmers Insurance Exchange ("Farmers"). AA at 639–40.

B. Statement of Facts:

On June 3, 2015, Sciarratta was riding as a passenger on a motorcycle owned by him with Stoss driving (the "Incident"). AA at 333. The parties have stipulated that Stoss negligently handled the motorcycle and caused a crash. AA at 333; 637.

The parties have also stipulated that the injuries and damages Sciarratta sustained due to Stoss' negligence exceed all insurance policies available, or potentially available, including the one (1) million dollar umbrella policy at issue in this appeal. AA at 333; 637.

The motorcycle was covered through various policies at the time of the Incident, including a liability policy, Foremost Motorcycle Insurance Policy No.

276-0074215814 (the "Foremost Policy") and an umbrella policy, Farmers Person Umbrella Policy No. 60521-70-05 (the "Umbrella Policy"). AA at 323; 326–27. The Umbrella Policy provided umbrella coverage at the time of the Incident in excess to the Motorcycle Policy. AA at 326. It is undisputed that the Incident was covered under the Foremost Policy and exceeded the policy limits. AA at 324; 637. The Foremost Policy paid Sciarratta the policy limits of $500,000. AA at 324.

Farmers' presented evidence that it sent Cynthia Sciarratta and Sciarratta a copy of the original declaration page at the time of issuance of the policy, but the actual policy with exclusions was not sent until nearly two years **after** the Incident and after the policy had been terminated. AA at 249–56. The cover page states: "**The attached policy back and endorsements did not mail with this declaration page**, but are included as requested." AA at 249. Notably, the declarations pages stop at AA 252. Therefore, according to Respondents own documents, the actual policy with exclusions from pages AA at 261–72. were never sent to the insured during the policy period. AA at 249.

The declarations pages, which were timely sent state:

> **…**
> ***Schedule of Underlying Insurance (Item 3)***
>
> You have told us you have underlying insurance policies with liability limits listed below. If the underlying policies terminate or the liability limits are less than shown below, in the event of a covered loss we will only pay those damages we would have paid if the limits and policies were in place as scheduled. You must keep the coverages and limits

below in effect to avoid gaps in your protection.

AA at 251 (emphasis original). The declarations page then lists the Foremost Insurance Company Motorcycle Coverage as an underling insurance policy to which the Umbrella Policy applies. AA at 251. On the following declarations page, the document shows the general liability limit for the Umbrella Policy is $1,000,000. AA at 252.

While Farmers claims the policy included an exclusion for bodily injury to an insured, Farmers own evidence shows it did not provide the actual the policy with the exclusion to Cynthia Sciarratta or Sciarratta before April 3, 2017, after the motorcycle crash. AA at 249; 157–58.

VI. STANDARD OF REVIEW

The Nevada Supreme Court "reviews a district court's grant of summary judgment de novo." *Wood v. Safeway, Inc.* 121 P.3d 1026, 1029 (Nev. 2005). Summary Judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions and affidavits, if any, that are properly before the Court demonstrate that no genuine issue of material fact exist, and the moving party is entitled to judgment as a matter of law. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (2002). "The burden of proving the nonexistence of a genuine issue of material fact is on the moving party." *Fergason v. LVMPD*, 364 P.3d 592, 595 (Nev. 2015). Substantive law controls whether factual disputes are

material and will preclude summary judgment; other factual disputes are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Valley Bank v. Marble*, 105 Nev. 366, 367, 775 P.2d 1278, 1282 (1989).

"When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party." *Clark County School District v. Payo*, 403 P.3d 1270, 1275 (Nev. 2017). If the moving party meets his burden of demonstrating that there is no genuine dispute of material fact, the non-moving party bears the burden to set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him. *Collins v. Union Federal Savings & Loan*, 99 Nev. 284, 294, 662 P.2d 610, 618-619 (1983).

VII. LEGAL ARGUMENT

A. The District Court Erred in Finding NRS 687B.147 Did Not Apply to Umbrella Policies

When this Court is determining legislative intent, it first looks at the plain language of the statute. *Salas v. Allstate Rent-A-Care, Inc.*, 14 P.3d 511, 513–14 (Nev. 2000). The Court "read[s] statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result." *Allstate Ins. Co. v. Fackett*, 206 P.3d 572, 576 (Nev. 2009).

"Statutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained." *State Department of Business and Industry, Financial Institution Division v. Dollar Loan Center, LLC*, 412 P.3d 30, 33 (Nev. 2018). The insurer has the burden of proving that it has complied with the requirements of the statute. *Serrett v. Kimber*, 874 P.2d 747, 751 (Nev. 1994). "Any auto insurance policy or provision that contravenes [a] statutory scheme is void and unenforceable. *Id.* (citing *Continental Ins. Co. v. Murphy*, 96 P.3d 747, 750 (Nev. 2004)).

NRS 687B.147 states:

> A policy of motor vehicle insurance covering a private passenger car may be delivered or issued for delivery in this state if it contains an exclusion, reduction or other limitation of coverage for the liability of any named insured for bodily injury to:
>
> 1. Another named insured; or
> 2. Any member of the household of a named insured,
>
> unless the named insured rejects the exclusion, reduction or other limitation of coverage ***after full disclosure*** of the limitation by the insurer on a form approved by the Commissioner…The insurer ***must disclose upon renewal*** of the policy that coverage has been excluded, reduced or limited and that the named insured has the right to reject the exclusion, reduction or limitation. The insurer must also disclose to the named insured upon renewal any additional motor vehicle coverages that the insurer sells.

(emphasis added).

Simply stated, NRS 687B.147 requires a written waiver acknowledging and accepting a household exclusion in applicable insurance policies. The definition of

"a policy of insurance covering the use of a passenger car" includes umbrella policies. *Estate of Delmue v. Allstate*, 936 P.2d 326, 328 (Per Curiam) (Nev. 1997).

In the *Estate of Delmue v. Allstate*, this Court was faced with the question of whether an umbrella policy was included in the plain meaning of "a policy of insurance covering the use of a passenger car" under the NRS 687B.145(2). 936 P.2d 326, 328 (Nev. 1997). That Court held: "The plain language of NRS 687B.145(2), specifically the phrase, 'a policy of insurance covering the use of a passenger car,' does not distinguish between primary automobile coverage policies and umbrella policies, as [the insurer] asserts." *Id.* at 328. Neither does NRS 687B.147.

After *Delmue*, the Legislature made a specific amendment to a different statute than the one at issue. Specifically, it amended NRS 687B.145, which deals with requirements to provide UM/UIM insurance coverage, to expressly exclude umbrella policies from the requirement to offer UM/UIM coverage. NRS 678B.147 (1997, p. 3032); NRS 687B.145(5) (stating umbrella policies "need not offer, provide or make available uninsured or underinsured vehicle coverage…[for] an umbrella policy...").

However, the Legislature did not change the definition of "a policy of insurance covering the use of a passenger car". Rather than redefine "a policy of insurance covering the use of a passenger car" to exclude umbrella policies, the Legislature merely excluded the application of the *Delmue* holding to UM/UIM

coverage and NRS 687B.145. In fact, the way that the Legislature amended the NRS 687B.145, it accepted the *Delmue* holding of the definition of "a policy of insurance covering the use of a passenger car" as including umbrella policies. Importantly, the legislature made no change to NRS 687B.147, which is the statute at issue in this appeal.

The District Court relied on *State Farm Fire and Cas. Co. v. Repke*, 2007 WL 7121693 (D.Nev. Feb. 27, 2007) in granting summary judgment in favor of Farmers. Preliminarily, Nevada Courts are not bound by federal court's interpretation of state law. *See Blanton v. North Las Vegas*, 748 P.2d 494, 500 (Nev. 1987) ("We note initially that the decision of federal district court and panels of the federal circuit court of appeal are not binding upon this court.").

The reasoning found in *Repke* is simply flawed and is not in harmony with this Court's clear holding in *Delmue*. As mentioned above, the Legislature accepted the *Delmue* interpretation of the insurance code and merely made a very specific, narrow, exception for umbrella policies *in regard to UM/UIM coverage* in NRS 687B.145; nothing more. The legislature did not change NRS 687B.147, at issue in this case.

The *Repke* court stated that this Court "attempted to define 'a policy of insurance covering the use of a passenger car'" in *Delmue* to include umbrella policies. 2007 WL 7121693, p.5. This is senseless as this Court did not "attempt" to

make the finding of that definition—it held so.

The *Repke* court went on to erroneously, and without legal justification, reason: "Because the legislature intentionally removed umbrella policies from the definition of 'a policy of insurance covering the use of a passenger car' in NRS 687B.145, the court concludes that the legislature ***would intend*** to exclude umbrella policies from the definition of 'a policy of motor vehicle insurance covering a private passenger car' in NRS 687B.147." *Id.* (emphasis added).

The federal district court in *Repke* erred in this reasoning as it was in direct contradiction to this Court's holding in *Delmue*. As the *Delmue* Court stated "[I]t is important to note…***that it is not the business of this court to fill in alleged legislative omissions*** based on conjecture as to what the legislature would or should have done." *Delmue*, 936 P.2d at 329 (emphasis added) (quoting *McKay v. Board of Cty. Comm'rs*, 746 P.2d 124, 125 (Nev. 1987)). The *Repke* holding and reasoning is just that—conjecture.

The *Delmue* Court expressly rejected the rationale the *Repke* court used when it held: "If the legislature had the foresight to provide an express exception [in NRS 687B.145(5) relating to UM/UIM coverage], then it is only logical that the same would be provided in [NRS 687B.147] if the legislature so intended… Moreover, neither [NRS 687B.145(5)] nor [NRS 487B.147] expressly incorporates the other by reference" *Id.*

The *Repke* court further erroneously reasoned that if it held that NRS 687B.147 included umbrella policies that it would "create a conflict between the two statutes, requiring uninsured/underinsured motorist coverage under NRS 687B.147, but explicitly excluding such coverage under NRS 687B.145." Again, this reasoning is in direct conflict to this Court's holding in *Delmue*:

> A court may look beyond the plain meaning of a statute ***only if*** it violates the intent of the act or defeats the legislative policy behind the statute. Thus, this court may not hold that [a Nevada statute] has meaning contrary to its plain language unless the court is effectuating it true intent.

Delmue, 936 P.2d at 329 (emphasis added). If the Court examines the legislative intent, the central purpose behind Nevada's insurance code is to "[p]rotect policy holders and all having an interest under the insurance policies;…[i]nsure that policyholders, claimants and insurers are treated fairly and equitably;…[and] [p]revent misleading, unfair and monopolistic practices in insurance operations…" NRS 679A.140.

The *Repke* court's reasoning is nonsensical as the two different statutes deal with two separate types of issues. NRS 687B.145 addresses the need of insurers to provide UM/UIM coverage whereas NRS 687B.147 addresses the requirements to provide exceptions to coverage to the insureds. It is logical that the Legislature wanted to exempt umbrella policies from needing to provide UM/UIM coverage but still wanted to require that umbrella policies provide ***full disclosure*** of exclusions to

coverage for the insureds of an umbrella policy. Furthermore, requiring full disclosure of exemptions to the insured is in line with the central purposes of the insurance code.

It is undisputed that the Umbrella Policy included the Foremost Policy, which was a policy of insurance covering the use of a passenger car. Accordingly, under this Court's clear holding in *Delmue*, the Umbrella Policy was subject to NRS 687B.147. Farmers failed to provide any evidence that it complied with NRS 687B.147. In fact, it never claimed that it complied with NRS 687B.147. AA at 411–13; 584–85.

The District Court should not have entered summary judgment in favor of Respondent because the insurer essentially acknowledged it failed to comply with NRS 687B.147. The District Court was also bound by the holding in *Delmue* and improperly relied upon a federal district court case that was in conflict with the Nevada Supreme Court on the exact issue.

B. The District Court Erred in Upholding the Exclusion When Farmers Did Not Provide the Exclusion to the Insureds Prior to the Loss

Farmers' evidence demonstrated they only sent the declaration page before the loss and the exclusion was not provided until April 3, 2017, nearly two years after the Incident. AA at 249. The cover page clearly states: "The attached policy back and endorsements did not mail with this declaration page, but are included as

requested." AA at 249. Therefore, the District Court erred in holding the alleged exclusion valid.

While Nevada law presumes that the insured has read the policy,[1] logic cannot sustain such a presumption when there is no evidence that the insured received the policy or exclusions. Other states have held that when an insurer has failed to provide a copy of the policy to the insured, the insurer cannot enforce exclusions that are against the reasonable expectation of the insured. In *Farmers Ins. Exchange v. Call* the Utah Supreme Court held:

> We therefore hold that where the insurer fails to disclose material exclusions in an automobile insurance policy and the purchaser is not informed of them in writing, those exclusions are invalid. Without disclosure, the household exclusion clause fails to "honor the reasonable expectations" of the purchaser, rendering the exclusion clause invalid as to the entire policy.

712 P.2d 231, 236–237 (Utah 1985) (quoting *Transamerica Insurance Co. v. Royle, Mont.*, 656 P.2d 520, 824 (Mont. 1983)).

The Wisconsin Court of Appeals more recently found:

> [I]t would be unjust to permit an insurance company to accept premiums and then deny liability based on an exclusion of which the insured was not aware because the insurance company had not informed him or her of the exclusion or given him or her the means to ascertain its existence. Purchasers of insurance policies, like the one at issue here, commonly rely on the assumption that they are fully covered by the insurance that they buy. If an insured is not given a copy of the policy, he or she cannot take whatever action is appropriate to protect his or her interests nor can he or she ensure that the coverage, which he

[1] *See Farmer Ins. Exchange v. Young*, 832 P.2d 376, 379 n.2 (Nev. 1992).

> or she thinks has been contracted for, is actually provided. We therefore hold that an insurer may not deny coverage based on limitations or exclusions in a policy, even if clearly stated, where the insured was not otherwise informed of such provisions.

Koxlik v. Gulf Ins. Co., 673 N.W.2d 343, 349 (Wis. 2003); *see also Salas v. Mountain States Mut. Cas. Co.*, 173 P.3d 35, 44 (N.M. 2007) ("We resolve the tension by holding that insurers such as Mountain States have a primary responsibility to provide their insureds reasonable notice of the contents of their policy by providing a copy of the policy or some other documentation of its terms."); *Brown Machine Works & Supply Company, Inc. v. Insurance Company of North America*, 659 So.2d 51, 61 (Ala 1995) ("when an insurer fails to deliver a copy of the policy to an insured… the insurer may be estopped from asserting an otherwise valid exclusion.").

Here, the only document sent to the insured prior to the loss was the declarations page. AA at 249. The declarations pages clearly indicates that if one of the named policies is exhausted, then the umbrella policy will then provide coverage. AA at 250–52. The declaration page states:

> **…**
> ***Schedule of Underlying Insurance (Item 3)***
>
> You have told us you have underlying insurance policies with liability limits listed below. If the underlying policies terminate or the liability limits are less than shown below, in the event of a covered loss we will only pay those damages we would have paid if the limits and policies

> were in place as scheduled. You must keep the coverages and limits below in effect to avoid gaps in your protection.

AA at 251 (emphasis added). The declarations page then lists the Foremost Policy as a policy to which the Umbrella Policy is providing excess or umbrella coverage. AA at 251.

"Purchasers of insurance policies, like the one at issue here, ***commonly rely on the assumption that they are fully covered by the insurance that they buy***." *Koxlik.*, 673 N.W.2d at 349. Given the fact that the Umbrella Policy declaration page states the Umbrella Policy provides umbrella coverage for the Foremost Policy, the assumption of the insured would be that the Umbrella Policy provides such coverage.

At worst, there was an issue of fact that would preclude summary judgment. However, given that it is undisputed the exclusion was never disclosed, the exclusion is void and unenforceable. Therefore, the District Court erred in granting summary judgment in regard to the Umbrella Policy.

C. Whether the District Court Erred in Not Determining the Exclusion is Void as Matter of Public Policy

If this Court finds that NRS 687B.147 does not apply to the Umbrella Policy, the Court should find the alleged exclusions void as a matter of public policy. Prior to the passage of NRS 687B.147, household exclusions were void per public policy. *See Progressive Gulf Ins. Co. v. Faehnrich*, 327 P.3d 1061, 1067 (Nev. 2014)

(holding that NRS 687B.147 "changes Nevada from a state that invalidates household exclusions to a state that, by statute, expressly permits them."). Thus, if the District Court was correct in its view of NRS 687B.147, then the exclusions in Umbrella Policy at issue would still be invalid because there is no statutory authority for the Farmers to issue the alleged exclusion at issue.

In other words, the type of exclusion relied upon by Respondent is only valid if allowed by statute. Nevada specifically holds such exclusions void as a matter of public policy, absent an act of the legislature. *Progressive Gulf Ins. Co. v. Faehnrich*, 327 P.3d 1061, 1067 (Nev. 2014). Sciarratta believes, and argued above, that NRS 687B.147 allows such exclusions only upon appropriate written disclosure and written acceptance/waiver. However, if the insurer is correct, and NRS 687B.147 is inapplicable to umbrella policies, then all household exclusions in umbrella policies are void per public policy because there would be no statute to override public policy established in *Progressive Gulf Ins. Co.*

Therefore, the Court should find that the District Court erred in granting summary judgment in Farmers' favors.

D. In the Case that Farmers Met Its Burden on Summary Judgment, the District Court Erred in Not Continuing Farmers' Motion for Summary Judgment

"NRCP 56(f) permits a district court to grant a continuance when a party opposing a motion for summary judgment is unable to marshal facts in support of its opposition. A district court's decision to refuse such a continuance is reviewed for abuse of discretion." *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 110 P.3d 59, 62 (Nev. 2005) (finding that the district court abused its discretion in granting summary judgment instead of granting a continuance.)

As demonstrated in the *Declaration of Counsel in Support of Plaintiff's Opposition to Motion for Summary Judgment*, Sciarratta anticipates being able to present expert testimony that if an underlying policy provides coverage and that coverage is exceeded, then there is a reasonable expectation of an insured for the umbrella policy to provide coverage. AA at 358. However, because Farmers had not complied with discovery, Sciarratta was not able to provide expert testimony. AA at 358. The record supports Farmers failure to comply with discovery. AA at 482–84. Sciarratta diligently sought the discovery it needed to demonstrate a genuine issue of material fact. *See Summerfield v. Coca Cola Bottling Co. of the Southwest*, 948 P.2d 704 (Nev. 1997) (Per Curiam) (finding the trial court abused its discretion in not continuing summary judgment when the nonmovant was not dilatory in

discovery). Furthermore, Farmers filed for summary judgment less than six (6) months after it filed its answer. AA at 650–51. Therefore, the District Court erred in not continuing the summary judgment hearing.

VIII. CONCLUSION

Farmers failed to meet its burden that it complied with Nevada law, making the alleged exclusion in the Umbrella Policy. Furthermore, public policy voids the exclusion due to Farmers failing to provide the exclusion in writing to the insured prior to the loss. Finally, even if the statute was inapplicable to umbrella policies, then all household exclusions must be invalid in all umbrella policies due to Nevada's public policy as stated by this Court. Accordingly, the District Court erred in granting summary judgment.

DATED this 21st day of September 2020.

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CERTIFICATE OF COMPLIANCE

I 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 14 pt Times New Roman type style.

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 proportionally spaced, has a typeface of 14 points or more, and contains 4,616.

Finally, I hereby certify that I have read this appellate 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 Civil 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.

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 21st day of September 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September 2020, I electronically filed the **APPELLANT'S OPENING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the appellate eFlex NV Supreme Court filing system. The following participants in this case are registered users and will be served by the appellate eFlex NV Supreme Court filing system:

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