IN THE SUPREME COURT OF THE STATE OF NEVADA

FILIPPO SCIARRATTA, an individual, Appellant, vs. FOREMOST INSURANCE COMPANY GRAND RAPIDS MICHIGAN, a Michigan Corporation; MID-CENTURY INSURANCE, a California Corporation; and FARMERS INSURANCE EXCHANGE, a California inter-insurance exchange. Respondents.	Supreme Court No. 79604

Appeal from the Eighth Judicial District Court of the State of Nevada
Clark County District Court
The Honorable Nancy Allf, District Court Judge
District Court Case No. A-17-756368-C

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are the persons or entities as described in NRAP 26.1(a) that must be disclosed:

Respondent FARMERS INSURANCE EXCHANGE is a party to this action as the issuer of a policy of umbrella insurance to policyholder (and non-party) Cynthia Sciarratta.

Respondent MID-CENTURY INSURANCE COMPANY is a party to this action as issuer of a policy of automobile insurance to Appellant Filippo Sciarratta and non-party Cynthia Sciarratta.

Respondent FOREMOST INSURANCE COMPANY GRAND RAPIDS MICHIGAN is a party to this action as issuer of a policy of motorcycle insurance to Appellant Filippo Sciarratta.

Respondents were represented before the Eighth Judicial District Court and are currently represented on appeal by Gena L. Sluga and Cara L. Christian of Christian, Kravitz, Dichter, Johnson & Sluga, PLLC and David J. Feldman of The Feldman Firm, P.C.

These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

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DATED this 2nd day of November 2020.

Christian, Kravitz, Dichter, Johnson & Sluga, PLLC

By: */s/ Gena L. Sluga*

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I. STATEMENT OF THE ISSUE

Did the District Court commit reversible error when it granted summary judgment in favor of Farmers Insurance Exchange and upheld an unambiguous exclusion in a Personal Umbrella Liability Policy to which NRS 687B.147 did not apply?

II. STATEMENT OF THE CASE

This litigation arises out of a 2015 motorcycle accident in which Filippo Sciarratta was injured while riding as a passenger on his own motorcycle. It was a single-vehicle accident. Mr. Sciarratta's wife's cousin, Jonas Stoss, was driving at the time of the accident, and Sciarratta alleges that Mr. Stoss's negligence was the sole cause of the accident and that he bears all liability for that accident. Mr. Stoss had his own motorcycle liability policy issued by non-party Progressive Insurance. Progressive paid Mr. Sciarratta the $25,000 limits of that policy, but Mr. Stoss's own coverage did not sufficiently compensate Mr. Sciarratta for his injuries.

Upon learning that Mr. Stoss did not have sufficient insurance to fully compensate him for his injuries, Mr. Sciarratta presented his bodily injury claim to his insurers, Foremost Insurance Company Grand Rapids Michigan, Mid-Century Insurance Company and Farmers Insurance Exchange (collectively, the "Farmers Entities") for payment under any policy that might apply. The Farmers Entities

searched for available coverage under each of the three potentially applicable policies:

1) a Motorcycle Insurance Policy, including UM/UIM coverage, issued by Foremost Insurance Company Grand Rapids Michigan;
2) an Automobile Insurance Policy, including UM/UIM coverage, issued by Mid-Century Insurance Company; and
3) a Personal Umbrella Liability Policy issued by Farmers Insurance Exchange.

The Farmers Entities' coverage search was fruitful. They found $500,000 in liability coverage under the Motorcycle Policy. Even though Mr. Stoss was not named as an insured under that policy, his liability for the accident was covered by virtue of his status as a permissive user of the motorcycle. Foremost has paid the $500,000 limits of that policy to Mr. Sciarratta.

The Farmers Entities examined the UM/UIM coverage afforded under the Motorcycle Policy (limits of $50,000 per accident) and the Auto Policy (limits of $100,000 per accident). The Farmers Entities concluded that Mr. Sciarratta's injuries were not covered under the terms of those policies, but paid Mr. Sciarratta $15,000 under the Motorcycle Policy's UIM coverage, in recognition of Nevada's state

minimum coverage laws.[1] The Umbrella Policy, however, did not afford coverage for the loss, as it excluded damages "payable to any insured" or "whenever damages are due directly or indirectly to an insured."

Mr. Sciarratta disputed the Farmers Entities' positions. In sum, he asserted that NRS 687B.147 invalidated the Farmers Entities' coverage positions with respect to UIM coverage under the Motorcycle Policy, UIM coverage under the Auto Policy, and the Umbrella Policy. The Farmers Entities disagreed. The express terms of NRS 687B.147 make clear that it applies only to exclusions that limit "coverage for the *liability of any named insured* for bodily injury to another named insured."

Mr. Sciarratta previously had filed a personal injury lawsuit against Mr. Stoss; he amended that complaint to include claims against Foremost and Mid-Century sounding (in pertinent part) in breach of contract and insurance bad faith. Mr. Sciarratta did not state any claims against Farmers, the insurer that had issued the Umbrella Policy. The Farmers Entities counterclaimed for declaratory relief with respect to the obligations owed under the Foremost Motorcycle Policy, the Mid-Century Auto Policy, and the Farmers Insurance Exchange Umbrella Policy.

[1] At the time of Mr. Sciarratta's accident, Nevada's state minimum coverage amounts were $15,000 per person and $30,000 per accident. The current requirements set forth in NRS 485.185 ($25,000 per person, $50,000 per accident, and $20,000 for property damage) were not enacted until July 1, 2018.

In January 2019, the Farmers Entities moved for summary judgment on their counterclaims for declaratory relief, as well as Mr. Sciarratta's claims against Foremost and Mid-Century. In his response brief, Mr. Sciarratta alleged generally that he needed additional discovery before finalizing his response to the dispositive motion; he did not, however, file a formal motion pursuant to Nevada Civil Procedure Rule 56(f), nor did he provide the court with the requisite affidavit stating the reasons why denial or continuance of the motion for summary judgment was necessary, or what discovery was needed. Because he failed to file a procedurally appropriate request for continuance under Rule 56(f) before the District Court, any argument regarding additional discovery was waived.

Following dispositive motion briefing and oral argument, the District Court granted the Farmers Entities' motion for summary judgment on their Second Claim for Relief (Declaratory Judgment – Umbrella Policy). In the District Court's March 26, 2019 Order, the court found that NRS 687B.147 did not require coverage under that policy. The Court denied summary judgment with respect to the Motorcycle Policy and the Auto Policy, finding that NRS 687B.147 applied to invalidate coverage limitations under those policies. The Order states:

> **COURT FINDS** after review that the Umbrella Policy does "not cover damages: . . . Arising from liability . . . payable to any insured; or . . . whenever damages are due directly or indirectly to an insured."

> **COURT FURTHER FINDS** after review that the term "insured" is defined in the Umbrella Policy as "you [Cynthia Sciarratta]" and "your relatives," which definition includes Plaintiff.
>
> **COURT FURTHER FINDS** after review that, since Plaintiff is an "insured" under the Umbrella Policy, he is excluded from coverage in this matter since damages are due to him directly.
>
> **COURT FURTHER FINDS** after review that while Plaintiff argues that the above exclusion to the Umbrella Policy argued by Defendants is invalid under NRS 687B.147, such argument is belied by the decision in *State Farm Fire & Cas. Co. v. Repke*, No. 2:06:CV-0366JCM(RJJ), 2007 WL 7121693, at *5 (D. Nev. Feb. 27, 2007), which found that the Nevada "legislature . . . intend[ed] to exclude umbrella policies from the definition of "a policy of motor vehicle insurance covering a private passenger car" in NRS 687B.147." *See also State Farm Fire & Cas. Co. v. Repke*, 301 F.App'x 698, 699 (9th Cir. 2008).
>
> **COURT FURTHER FINDS** after review that the provisions of NRS 687B.147 do not invalidate the above exclusions under the Umbrella Policy.
>
> **THEREFORE, COURT FURTHER ORDERS** for good cause appearing and after review that the Motion for Summary Judgment is hereby **GRANTED** with respect to the Second Claim for Relief in the Counter/Cross Claim related to the Umbrella Policy.

Appellant's Appendix ("AA") at 476–77.

The Farmers Entities filed a Notice of Appeal from the Order, as they believe the Court misconstrued Nevada statutes when she pronounced the exclusions in the Motorcycle Policy and the Auto Policy to be invalid. AA at 617–19. Mr. Sciarratta also has filed an appeal from the ruling, asserting that he should be paid the limits of his own Umbrella Liability Policy. AA at 625–27. The parties were able to settle the

dispute at issue in the Farmers Entities' appeal concerning the Motorcycle and Auto Policies, but their dispute as to Umbrella Policy remains.

III. STATEMENT OF FACTS

On June 3, 2015, Appellant Filippo Sciarratta sustained injuries while riding as a passenger on his own motorcycle. AA at 333. It was a single-vehicle accident. Mr. Sciarratta's ex-wife's cousin, Jonas Stoss, was driving at the time of the accident, with Mr. Sciarratta riding behind him on the same bike. *Id.* Appellant Sciarratta alleges that Mr. Stoss negligently caused the accident, was the only at-fault party, and bears all liability for damages resulting from the accident. AA at 24–34.

Because Mr. Stoss's own insurance policy (issued by non-party Progressive Insurance) did not sufficiently compensate Mr. Sciarratta for his injuries, Mr. Sciarratta presented his claim for his injuries to his own insurers, Foremost Insurance Company Grand Rapids Michigan ("Foremost")[2] and Mid-Century Insurance Company ("Mid-Century")[3] for payment under any policy that might apply.

[2] Foremost had issued a policy to Filippo Sciarratta for the motorcycle involved in the subject accident: Motorcycle Insurance Policy No. 276-0074215814, with effective dates of May 13, 2015 to May 13, 2016. The Motorcycle Policy afforded $500,000 in liability coverage per accident, as well as first-party UM/UIM Coverage.

[3] Mid-Century issued an automobile liability policy to Filippo Sciarratta for a vehicle that was not involved in the subject accident. The parties have resolved all claims for coverage under the Mid-Century auto policy.

Mr. Sciarratta also demanded immediate payment of the $1 million liability limits of a Personal Umbrella Policy. Farmers Insurance Exchange ("Farmers") issued Personal Umbrella Policy No. 60521-70-05 ("the Umbrella Policy") to non-party Cynthia Sciarratta—Mr. Sciarratta's ex-wife. AA at 326. The Umbrella Policy was in effect from March 18, 2015 to May 5, 2016. *Id.* The Umbrella Policy was negotiated with, and issued to, policyholder Cynthia. *Id.* Mr. Sciarratta was uninvolved in the negotiation of the Umbrella Policy.

In March 2017, Appellant Sciarratta communicated a $1,515,000 time-limited demand to the Farmers Entities; his demand represented the $1,000,000 liability limits of the Farmers Umbrella Policy, the $500,000 liability limits of Foremost Motorcycle Insurance Policy No. 276-0074215814 ("the Motorcycle Policy") issued to Filippo Sciarratta, and (what he believed to be) the $15,000 bodily injury limits of Jonas Stoss's policy with Progressive Insurance (unrelated to Respondent entities). AA at 145, 147, 149.

The Farmers Entities examined the policies and promptly ascertained that Mr. Stoss was a permissive user of Mr. Sciarratta's motorcycle at the time of the accident. AA at 147. As such, he qualified as an insured under the terms of the Motorcycle Policy. *Id.* This allowed Farmers to offer the $500,000 limits of the motorcycle liability policy to Mr. Sciarratta in exchange for a release of Mr. Stoss, the insured party who allegedly was liable for Mr. Sciarratta's injuries. AA at 148.

The Farmers Entities also determined that Appellant Sciarratta was entitled to $15,000 in first-party underinsured motorist coverage under the Motorcycle Policy that he had not identified in his demand, but Farmers offered to him and paid. AA at 149.

Farmers was unable, however, to find coverage for Mr. Sciarratta's claims under the Umbrella Policy—especially since Cynthia expressly rejected underinsured motorist coverage under this policy, and instead elected coverage that was subject to applicable exclusions that rendered the policy inapplicable to Mr. Sciarratta's loss. AA at 149–50, 274. Mr. Sciarratta has never alleged that he was personally involved in procuring the Umbrella Policy, nor does the record reflect any such involvement.

Ms. Sciarratta's Umbrella Policy simply did not afford liability coverage for Mr. Stoss, the only party who had any potential liability for damages sustained in the accident.

The relevant exclusion in the Umbrella Policy states:

> We do not cover damages:
>
> . . .
>
> 23. Arising from liability:
>
> a. payable to any insured; or
> b. whenever damages are due directly or indirectly to an insured.

AA at 150. The following defined terms are relevant to the analysis of this exclusion:

i. DEFINITIONS

> In this policy, "you" and "your" mean the "named insured" in the Declarations and spouse if a resident of your household . . .

AA at 149.

Here, Cynthia Sciarratta was the named insured identified in the Declarations to the Umbrella Policy. *Id.* Filippo Sciarratta was, at that time, Cynthia's spouse and a member of her household. As such, the policy's references to "you" referred both to Cynthia and Filippo, rendering them "insureds" under the Umbrella Policy (which provided coverage to "you," as well as coverage for certain others, such as minors in the insureds' care, in specified contexts). AA at 149.

The exclusion, therefore, precludes coverage for any claim in which the damages are payable to (or due directly or indirectly to) an insured—like Filippo. Appellant Sciarratta has never argued that that the terms of the Umbrella Policy, as written, provide coverage for this claim. Rather, Sciarratta argues that Nevada statute and public policy prevent the policy from being applied in the manner that it was written.

Among Appellant's arguments in his opposition to the Farmers Entities' motion for summary judgment was the assertion that the Farmers Entities had provided doctored or incomplete copies of the insurance policies to non-party Cynthia Sciarratta. AA at 342. The factual support for this allegation consisted of a sworn declaration of counsel, Jordan Schnitzer. AA at 358–60. Mr. Sciarratta offered no affidavit from the policyholder, Cynthia Sciarratta, to support his allegation that

the Umbrella Policy was not provided to her prior to the loss. The record also lacks any affidavit or testimony from Mr. Sciarratta. Rather, Mr. Sciarratta's lawyer—who does not represent policyholder Cynthia Sciarratta—offered his own beliefs, based upon third-hand hearsay and supposition. The allegations of counsel, absent more, were insufficient to create a genuine issue of material fact.

Following Rule 54(b) certification of the District Court's Order, the Farmers Entities filed a Notice of Appeal on a now-resolved dispute with respect to the Motorcycle Policy and Mid-Century auto policy. AA at 617–19. Mr. Sciarratta cross-appealed on the instant issue as to applicability of the Umbrella Policy, AA at 625–27, and the Parties present all that remains of the dispute for the Court's review: whether Mr. Sciarratta—an "insured" as defined in the Umbrella Policy—is entitled to personally recover the liability limits of a policy that excludes claims for damages that are "payable to any insured" or "due directly or indirectly to an insured"?

IV. SUMMARY OF THE ARGUMENT

The unambiguous language of the Umbrella Policy precludes coverage for this loss. Appellant agrees that the Umbrella Policy includes an exclusion that, as written, precludes coverage for any claim in which the damages at issued would be payable (or due directly or indirectly) to an insured—like himself. The exclusion is permitted under Nevada law, as the Umbrella Policy is not a motor vehicle insurance policy and therefore is not subject to NRS 687B.147's conditions for limitations on

coverage for a household member of the named insured (*see State Farm Fire and Casualty Co. v. Repke* discussion, *infra*).

Moreover, this exclusion does not violate Nevada public policy (*see Progressive Gulf Insurance v. Faehnrich* discussion, *infra*). In his brief, Appellant borrows heavily from case law regarding the public policy in favor of uninsured and underinsured motorist coverage. These cases and this public policy, however, are irrelevant to the subject Umbrella Liability policy, which—at Ms. Sciarratta's request—did not include UM/UIM coverage.

Finally, Appellant asks this Court to set aside the grant of summary judgment in Farmers' favor due to a purported need for additional discovery before responding to Farmers' dispositive motion. Appellant waived this argument by failing to ask the District Court for additional time pursuant to Nevada Civil Procedure Rule 56(d), and he cannot ask this Court to grant him such relief after the fact. The District Court was in the best position to assess whether sufficient discovery had been exchanged before she ruled upon the parties' cross-motions for summary judgment. This Court should defer to that decision and find that Appellant's arguments based upon any perceived need for discovery have been waived.

The Umbrella Policy's liability coverage expressly excludes the precise category of damages at issue: those payable to an insured. Appellant has not presented any cognizable basis upon which the language of the insurance contract

can or should be judicially reformed. The sound ruling of the District Court should be upheld.

V. STANDARD OF REVIEW

The Nevada Supreme Court "reviews a district court's grant of summary judgment de novo." *Wood v. Safeway, Inc.*, 121 Nev. 724, 730, 121 P.3d 1026, 1029 (2005). A motion for summary judgment should be granted "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law." *Id.*; NRCP 56(c). "While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, the party bears the burden to do more than simply show there is some metaphysical doubt as to the operative facts in order to avoid summary judgment . . . .". *Wood*, 121 Nev. at 732, 121 P.3d at 1031 (internal citations and quotations omitted). De novo review does not defeat the general rule that "a point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Schuck v. Signature Flight Support of Nevada, Inc*., 126 Nev. 434, 436–38, 245 P.3d 542, 544–55 (2010) (rejecting the contention that a "brief, conclusory affidavit" was sufficient to satisfy NRCP 56(e) and demonstrate that there is a genuine issue for trial).

As to a mixed question of law and fact, the Court will give deference to the district court's findings of fact. *Hernandez v. State*, 124 Nev. 639, 647, 188 P.3d

1126, 1131–32 (2008) (abrogated on other grounds by *State v. Eighth Judicial Dist. Court in & for City. of Clark*, 134 Nev. 104, 107, 412 P.3d 18, 22 (2018)). With respect to the factual findings, the Court is "not a secondary trial court formed to retry the facts of a case and supersede the decision of the district court." *Shack v. Tr*., 373 P.3d 960 (Nev. 2011) (citing *Gardner v. Gardner*, 110 Nev. 1053, 1060, 881 P.2d 645, 649 (1994); *Pullman–Standard v. Swint*, 456 U.S. 273, 291–92, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982).

VI. ARGUMENT

The plain language of the Farmers Umbrella Policy precludes coverage for this loss. Appellant Sciarratta does not disagree. He does not argue that his claim is covered under the terms of the Umbrella Policy; he does not allege that the relevant language was ambiguous; and he does not offer an alternate reasonable interpretation of the exclusion at issue. The District Court upheld and enforced the terms of this insurance contact, finding in Farmers' favor on each of the several arguments supported its motion for summary judgment regarding the Umbrella Policy. Key among these were arguments grounded in the plain language and legislative history of NRS 687B.147, as well as the rationale applied by the U.S. District Court for the District of Nevada in *State Farm Fire & Casualty Company v. Repke*, No. 2:06:CV-0366JCM(RJJ), 2007 WL 7121693, at *5 (D. Nev. Feb. 27, 2007) ("*Repke I*"), aff'd 301 Fed. Appx. 698 (D. Nev. 2008) ("*Repke II*"), when it found that the Nevada

legislature excluded umbrella policies from the category of motor vehicle policies to which NRS § 687B.147 applies. The District Court's Order should be affirmed, and the Court may ground its decision to do so in any of Respondents' arguments. *Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.2d 1246, 1248 (2012) ("[T]his court will affirm the district court if it reached the correct result, albeit for different reasons.").

Appellant asks this Court to reject the ruling of the District Court and to ignore the clear terms of an insurance contact that he did not negotiate. He essentially asks to transform the Umbrella Policy into an underinsured motorist policy: first-party coverage payable directly to the insured when the at-fault party maintains insufficient liability coverage to compensate the insured for his damages. Cynthia Sciarratta was offered—and expressly rejected—underinsured motorist coverage in her Umbrella Policy. AA at 274. Without support in the policy itself in which to ground his request, Appellant turned to an inapplicable statute, an unarticulated "public policy," and a perceived need for more discovery that he failed to seek before the District Court.

A. NRS 687B.147 Does Not Apply to Umbrella Policies.

Nevada has a well-developed statutory plan to ensure that individuals who are injured in motor vehicle accidents have an adequate source of indemnification. Specifically, Nevada's Insurance and Financial Responsibility statutes (Nevada

Revised Statutes Chapter 485) require owners of motor vehicles registered in Nevada to continuously maintain insurance, self-insurance or security sufficient to satisfy up to $25,000 in tort liability to a single injured person ($50,000 in liability to multiple persons) injured due to the maintenance or use of their motor vehicles. *See* NRS 485.3091.

While Chapter 485 controls the ways in which motor vehicles must be insured, other portions of the Nevada Revised Statutes govern the ways in which insurers must issue the policies that cover those motor vehicles. *See* NRS 690B.016–690B.040, "Motor Vehicles," included in Title 57 "Insurance," Chapter 690B "Casualty Insurance."

For instance, NRS 690B.020 provides that any policy that insures against liability arising out of the ownership, maintenance or use of any motor vehicle include coverage for persons injured by uninsured or hit-and-run motor vehicles. NRS 687B.145(2) requires that insurers that sell insurance covering the "use of a passenger car" must offer to include uninsured and underinsured vehicle coverage with that policy. NRS 687B.145(3) similarly requires that insurance covering the use of "a passenger car" include an offer of $1,000 in coverage for reasonable and necessary medical expenses resulting from an accident with that vehicle. NRS 687B.147 makes clear that although automobile insurers may limit, reduce or exclude certain types of coverage, some limitations, reductions or exclusions must

be accompanied by a signed form in which the insured acknowledges informed consent to the same.

Among the myriad statutes that regulate automobile liability policies, not one applies to umbrella insurance.

- No Nevada case or other law has held that an umbrella insurer is restricted as to whom it may refer claimants for repairs or redress of damages. *But see* NRS 690B.016, regulating the kinds of body shops to whom "insurers of motor vehicles" can refer claimants.
- No Nevada case or other law has held that an arbitration provision in an umbrella insurance policy is void. *But see* NRS 690B.017, prohibiting binding arbitration clauses in motor vehicle liability policies.
- Nevada law does not require umbrella insurance policies to offer uninsured or underinsured motorist coverage or medical payments coverage in their policies *But see* NRS 690B.20, requiring motor vehicle polices to include offers of same.[4]
- No Nevada case or other law requires umbrella insurers to provide a "proof of insurance" card to their insured. *But see* NRS 690B.23, requiring motor vehicle liability insurers to provide suitable evidence of insurance to their insureds.
- No claimant who presents a pre-litigation claim to an umbrella liability insurer is forced to provide an irrevocable authorization to the insurer to obtain medical records and bills form the claimant's physicians. *But see* NRS 690B.024, allowing any insurer to whom a claim for damages under a "policy of motor vehicle insurance" is presented to require the claimant to provide written authorization to receive medical reports and records that "may not be revoked without cause."

[4]Although NRS 687B.145(5) makes clear that Nevada insurers need not offer uninsured or underinsured vehicle coverage in connection with an umbrella policy, Farmers did make such an offer to Cynthia Sciarratta. Cynthia rejected that offer, executed a written waiver of such coverage, and the umbrella policy's Declarations Page makes clear that no such coverage was included with the Umbrella Policy. AA at 274, 326.

Appellant asks this Court to enforce NRS 687B.147 against an umbrella liability insurer to invalidate an unambiguous exclusion. The request is meritless, as this statute is one of many that governs motor vehicle insurance policies—and *only* motor vehicle policies. The statute expressly limits its scope to that context, and this Court should not act unilaterally in expanding the statute's scope. "It is not within the purview of this court to infer legislative intent or go beyond the ordinary meaning of a statute absent an ambiguity in the statute which does not exist here." *Allstate Ins. Co. v. Pilosof*, 110 Nev. 311, 315, 871 P.2d 351, 354 (1994). Because a personal umbrella liability policy is not an auto policy, NRS 687B.147 is irrelevant to Appellant's claim.

In addition to the text of the statute itself, its legislative history underscores that it was designed to apply only to household exclusions in auto policies. Specifically, legislative history sheds light into the purpose and meaning of NRS 687B.147 by documenting its introduction and passage through the 65th Nevada legislature in 1989. NRS 687B.147 began as Assembly Bill 406 ("AB 406"). The impetus behind AB 406 was a February 2, 1989 letter from Attorney Kenneth Jordan of Carson City, Nevada to Assemblyman Robert Sader, who was then a member of the Assembly Judiciary Committee. The letter began:

> I would like to request the drafting of a bill that would make it illegal to provide a "household exception clause" in every motor vehicle liability insurance policy written or issued in Nevada.

(SUPP ER 0134). Assemblyman Robert Sader responded quickly to his constituent's request and submitted the proposed bill on March 21, 1989 (SUPP ER 0004). The bill stated:

MARCH 21, 1989

Referred to Committee on Commerce

SUMMARY—Prohibits clauses in policies of motor vehicle insurance which exclude members of insured's household or other named insured from coverage. (BDR 57-18)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to contracts of insurance; prohibiting clauses in policies of motor vehicle insurance which exclude members of the household of the named insured or another named insured from coverage for bodily injury; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 687B of NRS is hereby amended by adding thereto a new section to read as follows:

No policy of motor vehicle insurance may be delivered or issued for delivery in this state if it contains any 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.

The bill was read on the floor of the Assembly on March 21, 1989 and was referred to the Commerce Committee. (SUPP ER 0001). After Committee work, the bill passed the Assembly on April 17, 1989. (SUPP ER 0001). The Senate then received the bill and referred it to the Commerce and Labor Committee. The Senate made amendments, but none that expanded the proposed scope of the legislation. AB 406 passed in the Senate on June 29, 1989 and the governor signed it into law on July 5, 1989. From its inception, the bill exclusively pertained to motor vehicle

insurance. The scope of the insurance impacted by the new law remained consistent from the Assembly floor to the governor's desk. There is nothing in the statute's legislative history to support its application beyond its own express boundaries.

This Court has had only one previous opportunity to consider and apply NRS 687B.147: *Progressive Gulf Insurance Co. v. Faehnrich*, 327 P.3d 1061 (Nev. 2014). *Faehnrich* involved an accident in which a mother, driving a motor vehicle licensed in Mississippi and insured under a Mississippi policy, was in a collision that resulted in injury to her sons (who were riding as passengers). The case raised the question of whether Nevada's compulsory insurance law, which requires a minimum amount of liability coverage, would require some payment to the claimant sons.

This Court enforced the exclusion, noting that the NRS 687B.147 applied only to motor vehicle insurance for a private passenger car that was delivered in Nevada. The scope of the statute could not be expanded, and therefore did not apply to a policy that had been delivered in Mississippi. *Id.* at 176, 327 P.3d at 1067. The Court rejected claimants' suggestion that Nevada public policy required the Court to invalidate the policy's household exclusion. This Court disagreed, explaining that Nevada law regarding household exclusions changed when the statute went into effect in 1990 and that the statute "specifically authorizes household exclusions in Nevada motor vehicle insurance policies." *Id.* at 176, 327 P.3d at 1067. As such, Nevada public policy did not obligate this Court to apply it in any context beyond

that set forth in the statute itself. *See also Holper v. Ace Am. Ins. Co.*, 650 Fed. Appx. 357 (9th Cir. 2016) (refusing to apply 687B.147 to invalidate a household exclusion in a watercraft liability policy).

In *Faehnrich*, the Court refused to apply the statute, which applies only to Nevada motor vehicle policies, to a policy delivered outside the State of Nevada. Here, the Court must similarly refuse to apply the statute to a policy that is not a "policy of motor vehicle insurance covering a private passenger car."

1. The Nevada legislature distinguished umbrella insurance from motor vehicle insurance following *Delmue*'s holding regarding NRS 687B.145.

Appellant Sciarratta attempts to deviate from the plain language of Cynthia's umbrella liability policy by arguing that Farmers failed to comply with NRS 687B.147. Appellant relies upon *Estate of Delmue v. Allstate Ins. Co.*, 113 Nev. 414, 936 P.2d 326 (1997), the single case in which a Nevada court ever has applied a statute regulating motor vehicle insurance to a personal umbrella policy. Specifically, this Court interpreted the phrase "policy of insurance covering the use of a passenger car" from NRS 687B.145(2) to include all categories of insurance that could possibly provide motor vehicle liability insurance; based upon this construction of the phrase, the Court held that umbrella policies were subject to NRS 687B.145. *Id.* at 419.

The Nevada legislature responded immediately and amended the statutory scheme in a manner that prevent such overly broad construction in future cases. NRS 687B.145(5) now provides:

> An insurer need not offer, provide or make available uninsured or underinsured vehicle coverage in connection with a general commercial liability policy, an excess policy, an *umbrella policy* or other policy that does not provide primary motor vehicle insurance for liabilities arising out of the ownership, maintenance, operation or use of a specifically insured motor vehicle.

The Federal District Court explained the significance of this legislative response in *State Farm Fire and Cas. Co. v. Repke*, 2007 WL 7121693:

> [*Delmue*] would be controlling if the Nevada legislature had not taken immediate action to amend NRS 687B.145(B) after the *Delmue* decision. Later that year, the legislature amended NRS 687B.145(2) to exclude umbrella policies, thereby overturning the holding of *Delmue*. . . . 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.

The Ninth Circuit affirmed the District Court's holding that NRS 687B.147 does not apply to umbrella policies. 301 Fed. Appx. 698, 2008 WL 5054338. The rationale underlying this decision—namely, that the Nevada legislature did not intend that "policy of insurance covering the use of a passenger car" be interpreted so broadly as to include umbrella liability policies—remains undisturbed. *Repke II*, 2008 WL

5054338 at *5; *see also Ebiya by & through Garcia v. Safeco Ins. Co. of Illinois*, No. 215CV1923JCMVCF, 2016 WL 8737237, at *3 (D. Nev. June 17, 2016).

Appellant argues that the Farmers Entities are asking this Court "to fill in alleged legislative omissions" because the legislature amended 687B.145 without a corresponding amendment to 687B.147. He is mistaken. The Nevada legislature has demonstrated competence in regulating umbrella insurance when, indeed, that is its aim. *See, e.g.*, NRS 687B.440 ("An insurer offering **an umbrella policy** to an individual shall obtain a signed disclosure statement from the individual indicating whether the umbrella policy includes uninsured or underinsured vehicle coverage.").[5]

In sharp contrast to NRS 687B.440, NRS 687B.147 does not purport to apply to umbrella policies. The statute's scope is self-limiting: applicable to policies of insurance that 1) are issued in Nevada; and 2) insure the use of a passenger car. The only time a Nevada court mistakenly interpreted that phrase to include an umbrella policy, the legislature immediately amended 687B.145 to prevent further application of that construction. The legislative record bolsters the

[5] As noted above, Famers went above and beyond this requirement. It did not simply make a disclosure to Ms. Sciarratta regarding her Umbrella Policy. Farmers offered to include UM/UIM policy (which was not required under NRS 687B.145(5)). She rejected that offer and executed a written waiver of the offered first-party coverage. AA at 274.

limiting language of the statute to thwart application of its restrictions beyond the context of motor vehicle insurance.

2. Appellant erroneously cites *Serrett v. Kimber* for a proposition unsupported by Nevada law.

In the introduction to his argument urging an expansive interpretation of NRS 687B.147, Appellant states:

> 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)).

Opening Brief at 9.

A cursory review of *Serrett v. Kimber* reveals that the case includes neither the quoted language nor any citation to *Continental v. Murphy*. *Serrett* is irrelevant to this case, as it addresses stacking arguments related to uninsured and underinsured motorist insurance – a category of coverage that Cynthia Sciarratta declined in connection with the subject policy. The quoted language in Appellant's brief actually comes from *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138–39, 206 P.3d 572, 576 (2009), a case regarding uninsured motorist coverage. This Court stated:

> NRS 687B.145(2) and 690B.020 comprise Nevada's UM statutory scheme and are incorporated into all applicable Nevada auto insurance policies. Any auto insurance policy or provision that contravenes **this statutory scheme** is void and unenforceable.

Id. at 138–39, 206 P.3d at 576 (emphasis added) (internal citations omitted). In the unaltered quote, the *Fackett* Court's holding was limited to uninsured and underinsured motorist coverage, as indicated by the Court's reference to "**this** statutory scheme."

Although the erroneous citation made Appellant's edit harder to detect, review of *Fackett* itself reveals that the substitution of "a" for "this" in the quoted passage distorts the meaning in a significant way: suggesting that a failure to comply with *any* statute (rather than the Nevada UM statutory scheme) can render a policy void and unenforceable. Although slight, this omission converts the proposition from one purportedly announced by the Nevada Supreme Court into one for which there is no Nevada common law or statutory support.

This significant distinction was recognized by the U.S. District Court for the District of Nevada in *Brown v. State Farm Mut. Auto. Ins. Co.*, 2014 WL 12788990, at *4 (D. Nev. June 6, 2014). In *Brown*, State Farm denied an insured's underinsured motorist claim due to the insured's failure to provide the insurer with medical records and other information about her injuries. The Plaintiff insured argued—based entirely upon *Fackett*—that the policy's language regarding cooperation was not controlling and her conduct should instead be reviewed under NRS 690B.42.[6] *Id.* at

[6] NRS 690B.042 has been repealed since the *Brown* decision, but the statute governed the evidence that a claimant must provide to support an injury claim under

*4. More specifically, she argued that the policy's language was "not in sync" with the statute upon which she relied (NRS 690B.42) and should therefore be rendered unenforceable. The Court disagreed, quoting *Fackett's* "this statutory scheme" language and finding that the Court meant *only* to refer to NRS 687B.145(2) and 690B.020. Because NRS 690B.42 was not included within that statutory scheme, *Fackett* did not apply, 690B.42 could not invalidate the policy's terms and conditions, and State Farm was entitled to summary judgment. *Id.*

Here, just as the statute upon which plaintiff Brown relied, 687B.147 is not included within specific statutory scheme referenced in *Fackett. Fackett* does not apply, and there is no case in Nevada is suggest that the exclusion in the Umbrella Policy is "void or unenforceable" due to a purported failure to comply with 687B.147. This Court's holding in *Allstate v. Fackett* underscores the unique degree of protection provided by Nevada's UM statutory scheme—protection that Cynthia Sciarratta could have purchased from Farmers but rejected. No Court ever has relied upon NRS 687B.147 to invalidate any insurance provision, much less a provision in a category of insurance to which the statute does not purport to apply.

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a motor vehicle insurance policy. Its requirements were like those now set forth in NRS 690B.024.

B. The "payable to an insured" exclusion in the Umbrella Policy does not violate public policy.

Appellant seeks coverage for his injuries sustained in a motor vehicle accident under the Umbrella Policy issued to his former spouse, who had rejected the opportunity to purchase UM/UIM coverage with that Umbrella Policy. AA at 274. In the absence of the rejected UM/UIM protection, the claim is excluded from coverage. Appellant likens the exclusion in the Umbrella Policy to the similar "household exclusion," which has received statutory and Nevada Supreme Court treatment in the far more regulated context of motor vehicle insurance.

Appellant correctly characterizes the Court's decision in *Progressive Gulf Insurance v. Faehnrich*, 327 P.3d 1061, 1067 (Nev. 2014) as acknowledging a shift in Nevada public policy with respect to "household exclusions" in motor vehicle policies. Following that initial observation, however, he makes several unsupported assumptions about the status of those exclusions before *Faehnrich*, and about Nevada's public policy about household exclusions generally. Specifically, he argues that "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 Farmers to issue the alleged exclusion at issue." Opening Brief at 18, ll. 3-5. This, too, is wholly unsupported under Nevada law. Farmers needed no "statutory authority" for the household exclusion in the Umbrella Policy; no Nevada law ever has prohibited it.

The "household exclusion" is an exclusion frequently included in auto liability policies to exclude coverage where liability arises out of suits between members of the same household. Such exclusions aim to protect the insurer from the potential for fraudulent or irregular claims in a common situation in which a natural partiality exists between plaintiff and defendant. THE FAMILY-HOUSEHOLD EXCLUSION CLAUSE IN AUTO LIABILITY INSURANCE, 22 Wash. & Lee L. Rev. 97 (1965), https://scholarl commons.law.wlu.edu/wlulr/voI22/iss1/7.

Nevada case law is replete with discussion of the "household exclusion" prior to the Nevada legislature's adoption of 687B.147. *See, e.g., Federated Am. Ins. Co. v. Granillo,* 108 Nev. 560, 562, 835 P.2d 803, 804 15 (1992); *Farmers Ins. Exch. v. Young,* 108 Nev. 328, 331, 832 P.2d 376, 378 (1992); *Baker v. Criterion Ins. Co*., 107 Nev. 25, 27, 805 P.2d 599, 600 (1991); *Sotirakis v. United Service Auto. Ass'n*, 106 Nev. 123, 787 P.2d 788 (1990); *Estate of Neal v. Farmers Ins. Exch*., 93 Nev. 348, 349, 566 P.2d 81,82 (1977). Each of these cases involved motor vehicle liability insurance. Analysis of these cases reveals that Appellant's "public policy" argument rests upon a fundamental misunderstanding of the public policy of this state.

In *Federated Am. Ins. Co. v. Granillo,* 108 Nev. 560, 562–63, 835 P.2d 803, 804 (1992), this Court found that a household exclusion in a motor vehicle policy was invalid. This decision was not based upon a vague or unarticulated policy regarding all insurance policies, nor does it suggest that household exclusions are

inherently problematic. Rather, the household exclusion in *Granillo* was invalid because it violated public policy *as expressly set forth in* NRS 485.3091(1). Section 485.3091(1), included within Nevada's Financial Responsibility statutes, provides that a motor vehicle liability policy must include the statutory minimum coverage for the owner of the policy and any other person who uses the vehicle with the owner's permission. The household exclusion in *Granillo* was void because it violated this public policy as set forth in Nevada statute. This is appropriate, since this Court looks to Nevada statutes to determine Nevada public policy. *Faehnrich* at 175, 327 P.3d at 1066.

The holdings of other Nevada Supreme Court cases are in accord. *See Estate of Neal v. Farmers Ins. Exch.*, 93 Nev. 348, 566 P.2d 81 (1977)(household exclusion was void to the extent that it did not provide the minimum coverage required by statute, but was otherwise valid); *Sotirakis v. United Serv. Auto. Ass'n*, 106 Nev. 123, 128, 787 P.2d 788, 792 (1990) (household exclusion was valid where motor vehicle policy was issued in California, where Nevada's compulsory insurance law set forth in NRS 485.185 did not apply).

Appellant's public policy argument relies on the unsupported assertion that household exclusions are inherently voidable and can only be salvaged by strict adherence to statute. The opinions above demonstrate that this is not the case. Nevada Courts look to the Nevada Revised Statutes to determine public policy.

Before the adoption of NRS 687B.147, the Nevada cases that invalidated household exclusions did so to the extent that they failed to comport with Nevada's Financial Responsibility statutes. Because those statutes expressly do not apply to umbrella policies, there is no public policy to preclude enforcement of a household exclusion in an umbrella policy.[7]

C. Farmers' position is consistent with Nevada public policy.

Much of the decisional authority cited in Appellant's brief was developed in the context of motor vehicle liability policies or UM/UIM insurance. Those cases, as shaped by the relevant statutory schemes, reflect Nevada's public policy in favor of protecting accident victims. That public policy is far more limited, however, than Appellant would have this Court believe.

> Nevada has a strong public policy interest in assuring that individuals who are injured in motor vehicle accidents have a source of

[7] *See State Farm Fire & Cas. Co. v. Repke*, 2007 WL 7121693, at *5 (D. Nev. Feb. 27, 2007), aff'd, *State Farm Fire & Cas. Co. v. Repke*, 301 Fed. Appx. 698 (9th Cir. 2008):

> In NRS 485.055(1), the legislature defined a similar phrase 'motor vehicle liability policy" as "an owner's policy of liability insurance or an operator's policy of liability insurance issued by an insurer authorized to transact business in this state, to or for the benefits of the person named therein as insured." This broad definition is explicitly narrowed by subsection 2 to cover only the statutory minimum coverages "required by NRS 485.3091." This explains why subsection 1 refers to "an owner's policy" rather than "an owner's policies." The term "motor vehicle liability policy" refers only to basic automobile liability policies, such as the underlying prerequisite policies to the PLUP at issue. The definition of "motor vehicle liability policy" in NRS 485.055 clearly excludes umbrella policies.

> indemnification. Our financial responsibility law reflects Nevada's interest in providing at least minimum levels of financial protection to accident victims.

See Spencer v. Nevada Direct Ins. Co., 131 Nev. 1349 (2015), *quoting Hartz v. Mitchell*, 107 Nev. 893, 896, 822 P.2d 667, 669 (1991). Under the statute in place at the time of Appellant Sciarratta's accident, that "minimum level of financial protection" was $15,000 per injured person. NRS 485.210 (1995) (later amended by Laws 2015, c. 317, § 49, eff. Jan. 1, 2016, current version enacted by Laws 2017, c. 258, § 3, eff. July 1, 2018). On several occasions, this Court has held that exclusions that violated public policy were invalid only to the extent that they would deprive a claimant of the required state minimum coverage. *See Zobrist v. Farmers Ins. Exch.*, 103 Nev. 104, 106, 734 P.2d 699, 700 (1987)(finding that exclusion in automobile policy for owned but uninsured cars was void to the extent that it prevented payment of statutory minimum $15,000, but valid to restrict any payment in excess of $15,000); *see also Nelson v. California State Auto. Ass'n Inter-Ins. Bureau*, 114 Nev. 345, 956 P.2d 803 (1998) (finding similar exclusion only void as the statutory minimum $15,000 limits, but enforceable with respect to liability coverage in excess of $15,000 and enforceable to preclude stacking of UM coverages under motorcycle and automobile policies.).

This Court need not be concerned with *that* public policy in the context of Appellant's claim. Mr. Sciarratta collected $10,000 more than the requisite $15,000

in insurance from Mr. Stoss's own insurer, non-party Progressive Insurance. Mr. Sciarratta then collected $500,000 from Foremost under his Motorcycle Policy, $15,000 in additional UM/UIM insurance from Foremost, and most recently, an additional settlement from Mid-Century in exchange for a release under his Auto Policy. Even without the amount collected from Mid-Century, which was not part of the underlying record, Appellant already has collected more than 35x the $15,000 required by Nevada's public policy, as reflected in statute. That public policy cannot not be cited to invalidate an unambiguous term in the Cynthia Sciarratta's Umbrella Policy.

Other cases offer even more compelling support for the policy in favor of upholding the plain language of Farmers' policy. In *Baker v. Criterion Ins. Co.*, 107 Nev. 25, 26, 805 P.2d 599, 599–600 (1991), appellant Ruth Baker was injured when riding as a passenger in her own vehicle. The person driving appellant Baker's case was a permissive user who had no insurance policy of his own. He was, however, insured under Baker's policy with Criterion Insurance Company (Criterion) as a permissive user of her vehicle. Accordingly, Criterion paid Baker $15,000, which was the limit of the bodily injury coverage in her policy. *Id.* at 26, 805 P.2d at 599–600.

Factually, the earliest paragraphs of the *Baker* decision are similar to the case at bar. Here, Appellant Sciarratta was injured when riding as a passenger on his own

motorcycle. The person driving the motorcycle, Mr. Stoss, was a permissive user who had only $25,000 in liability insurance. Mr. Stoss was, however, insured under Sciarratta's Motorcycle Policy issued by Foremost as a permissive user of his bike. Accordingly, Foremost paid Sciarratta $500,000, which was the limit of the bodily injury coverage under the Motorcycle Policy (this was paid in addition to the $25,000 that Sciarratta collected from Stoss's own insurance). Foremost also paid Sciarratta an additional $15,000 under the UM/UIM coverage included with the Motorcycle Policy.

In that respect, Sciarratta's experience differed from Ms. Baker's. Like Sciarratta, Ms. Baker submitted a claim to Criterion for the $15,000 of uninsured/underinsured (UM/UIM) coverage under her vehicle's policy after she had collected the limits of her vehicle's liability policy. Unlike the Farmers Entities, who paid the additional $15,000 to Sciarratta, Criterion denied Ms. Baker's UM/UIM claim. This Court upheld that denial and confirmed that Ms. Baker was not entitled to the additional limits under her UM/UIM coverage. *Id.* at 26, 805 P.2d at 600.

The Nevada Supreme Court acknowledged NRS 687B.145, which required Criterion to offer UM/UIM coverage to Ms. Baker when she purchased her motor vehicle liability policy. *Id.* at 26, 805 P.2d at 600. The Court noted, however, that Nevada public policy (as reflected in NRS 687B.145) contemplated that UM/UIM

coverage would be made available when an insured sustained injury caused by the tortious involvement of a vehicle *other than her own*. Because Baker sustained injury in her own vehicle, her injury was not one in which Nevada law required that she collect the benefits of her UM/UIM coverage. *Id.* at 26–27, 805 P.2d at 600.

The Court was compelled by Criterion's arguments that permitting Baker to recover additional damages from her UM/UIM coverage would nullify the household exclusion in the policy. This Court noted that the Criterion policy included a household exclusion that precluded the owner of a policy from making a liability claim for benefits in excess of the $15,000/$30,000 minimum liability insurance required by statute. The household exclusion never applied in Baker's case, because she had procured only the minimum amount of insurance required by law, but *would have* applied if she had presented a claim for anything more than $15,000. "Baker should not be permitted to circumvent the household exclusion in her policy simply because she chose to purchase less coverage. Therefore, Baker may only recover up to $15,000 for her own injuries, and she may not stack the UM/UIM coverage of the same policy upon the benefits she has already received." *Id.* at 28, 805 P.2d at 601. In so holding, this Court interpreted the policy in a commonsense way that accounted for all relevant facts and circumstances and balanced the interests of insurer and insured.

Here, Appellant Sciarratta purchased the Foremost Motorcycle Policy under which Stoss was an insured permissive user. To the extent that the motorcycle was an "underinsured vehicle," Mr. Sciarratta himself was the only person who could have purchased more liability coverage for that vehicle. Regardless, the Farmers Entities paid him $15,000 in UM/UIM benefits under the motorcycle policy. The Farmers Entities also paid Mr. Sciarratta to resolve disputed claims under the Mid-Century Auto Policy. The only policy issued to either Filippo or Cynthia Sciarratta under which Appellant has not received compensation is the Farmers Umbrella Policy—which is subject to a valid and unambiguous exclusion that precludes liability coverage for first-party claims presented by insureds. This was the right result, an enforceable result, and a result that squares with the dickered deal Cynthia Sciarratta made with Farmers prior to the inception of her policy.

To be clear, Mr. Sciarratta is demanding payment is a personal umbrella liability policy *under which he is an insured*. This Court has recognized the proper role of a liability insurer. Liability insurance is "[t]hat type of insurance protection which indemnifies one from liability to third persons as contrasted with insurance coverage for losses sustained by the insured." *Allstate Ins. Co. v. Pilosof*, 110 Nev. 311, 313, 871 P.2d 351, 353 (1994), quoting BLACK'S LAW DICTIONARY 915 (6th ed. 1990). And umbrella liability insurance protects the insureds (Cynthia and Filippo Sciarratta) from liability in the event of a catastrophic loss in which a third-party's

damages exceeds the limits of the primary coverage. *See e.g. AMHS Ins. Co. v. Mut. Ins. Co. of Arizona,* 258 F.3d 1090, 1093 (9th Cir. 2001), *citing* 16 *Couch on Insurance* § 220:32 (3d ed.1995). Uninsured motorist coverage, on the other hand, is "[p]rotection afforded an insured by first party insurance against bodily injury inflicted by an uninsured motorist, after the liability of the uninsured motorist for the injury has been established.") *Pilosof,* 110 Nev. at 313, 871 P.2d at 353, *quoting* BLACK'S LAW DICTIONARY at 1532.[8]

Here, Cynthia Sciarratta rejected the opportunity to purchase UM/UIM coverage with her Umbrella Policy, affirmatively selecting (and paying premiums calculated for) a third-party liability policy with no excess first-party counterpoint. Appellant asks this Court to invalidate the "payable to an insured" exclusion in that Umbrella Policy despite the fact that 1) NRS 687B.147 does not apply to umbrella policies; 2) no Nevada public policy operates to void the exclusion; and 3) there was no reason for him to believe that Cynthia Sciarratta's Umbrella Policy, purchased to

[8] *See also* Int'l Risk Mgmt. Inst. (IRMI), "Glossary of Insurance and Risk Management Terms--First-Party Insurance," https://www.irmi.com/term/insurance-definitions/first-party-insurance (defining first-party insurance as "insurance applying to the insured's own property or person"). *Compare* IRMI, "Glossary of Insurance and Risk Management Terms--Third-Party Liability Coverage," https://www.irmi.com/term/insurance-definitions/third-party-liability-coverage (defining third-party liability coverage as "any type of insurance covering the legal liability of one party to another party").

protect her household from liability to third-parties, could substitute for the first-party coverage that she declined. His unsupported request should be denied.

D. Appellant waived any arguments regarding his need for additional discovery.

Appellant did not file a motion pursuant to Nevada Civil Procedure Rule 56(f)[9] when the Farmers Entities filed their motion for summary judgment with the District Court. Although Sciarratta's response to the Farmers Entities' dispositive motion included references to a general desire for more discovery, he did not formalize his request. This observation does not exalt form over substance. The flaw in Appellant's request was not in his failure to file a separate brief; rather, he failed to request Rule 56(f) relief by failing to provide the requisite sworn statement supporting his need for additional time. "NRCP 56(f) requires that the party opposing a motion for summary judgment and seeking a denial or continuance of the motion in order to conduct further discovery provide an affidavit giving the

[9] At the time that the parties briefed the dispositive motion to the District Court, a situation in which the nonmoving party needed additional facts before responding to a summary judgment motion was governed by Civil Procedure Rule 56(f). That rule has since been amended, and this situation would today be governed by Rule 56(d). Rule 56(d) modernizes the text of former Rule 56(f), consistent with the corresponding Federal Rule. The changes are stylistic and do not affect the holding in *Choy v. Ameristar Casinos, Inc*., 127 Nev. 870, 265 P.3d 698 (2011), which requires an affidavit to justify a request for a continuance of the summary judgment proceeding to conduct further discovery.

reasons why the party cannot present "facts essential to justify the party's opposition." *Choy v. Ameristar Casinos, Inc.*, 127 Nev. 870, 872, 265 P.3d 698, 700 (2011).

Nevada law is clear that "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v.* Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). This rule applies even to issues that are subject to a de novo standard of review. *Schuck v. Signature Flight Support of Nev., Inc*., 126 Nev. 434, 436, 245 P. 3d 542, 544 (2010) ("[A] de novo standard of review does not trump the general rule that '[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.'") (second alteration in original) (quoting *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)). Appellant did not include an affidavit to support the generalized complaints about discovery in his response to the Famers' Entities dispositive motion, and the District Court had no basis upon which to grant Appellant any stay of the briefing.

Even now, Appellant makes only vague references to discovery that he allegedly needed in order to retain an expert to discuss Appellant's "reasonable expectation" of coverage. Even if this argument had not been waived, it is specious. Appellant had a full year to communicate with his former spouse about her

"reasonable expectations" regarding the policy she purchased; Farmers certainly was in no position to provide Appellant any relevant information about Ms. Sciarratta's expectations. Moreover, her testimony alone would have been more compelling than that of any retained expert with respect to a "reasonable expectations" argument. In the states that recognize this interpretative doctrine, it is meant to protect the expectations of laypersons—not experts trained in insurance law. *See Allstate Ins. Co. v. Ellison*, 757 F.2d 1042, 1044 (9th Cir. 1985) (test for coverage is the reasonable expectation of a lay person."); *see also McClure v. Life Ins. Co. of N. Am.*, 84 F.3d 1129, 1135 (9th Cir. 1996). The argument was waived, and vague complaints to this Court regarding a wish for more time before summary judgment was awarded against him are insufficient to salvage Appellant's claims.

E. Appellant did not create a genuine issue of material fact in opposition to the Farmers Entities' motion for summary judgment.

The Umbrella Policy was written for, and issued to, policyholder Cynthia Sciarratta. Appellant's status as her ex-husband rendered him an insured at the time of the 2015 accident, but it did not render him the policyholder/purchaser to whom communications were made and materials delivered at the policy's inception. The Personal Umbrella Declaration Page reflects that Cynthia Sciarratta alone maintains Named Insured status. It is *her* receipt and knowledge of the policy materials and parameters of coverage that is relevant to Appellant's reasonable expectations-styled arguments, but Appellant offered no evidence at all that Cynthia received anything

(or failed to receive anything) that conflicted with her understanding of their bargained-for exchange.

Appellant submitted an affidavit of his counsel, Jordan Schnitzer, setting forth an advocacy position rather than testimony "made on personal knowledge" as required by NRCP Rule 56(c). In contrast, Farmers supplied the District Court with the affidavit of Kimberly Pikaart, Service Operations Supervisor in the Policy Support Operations department of Farmers Group, Inc., whose statement that the Umbrella Policy provided in connection with Farmers Entities' motion for summary judgment was a true and correct copy was made from personal knowledge. AA 246. She further avowed that the Umbrella Policy had been "issued to" Ms. Sciarratta. *Id.* Finally, Ms. Pikaart's affidavit included a true and correct copy of the UM/UIM rejection form executed by Ms. Sciarratta, through which she acknowledged that her Umbrella Liability Policy would not include any uninsured/underinsured vehicle coverage—evidencing an understanding of the Umbrella Policy's terms. *Id.* at 274. With this sworn testimony from a Farmers witness in the record, the non-compliant affidavit of Appellant's attorney did not create a fact question, and the District Court was well within its discretion under NRCP Rule 56(e) to rule in Farmers' favor.

The question on appeal is whether a genuine fact issue was been created by the pleading and proof offered before the trial court. *Scialabba v. Brandise Const. Co.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996). Appellant cannot cure the

underlying failure to secure *any testimony* from Cynthia Sciarratta (or, at the very least, Appellant's own sworn statement) to bolster the bare contention that she did not receive a copy of the exclusion until after the 2015 collision. Nevada law is clear that if the moving party satisfies its burden and supports its Motion as required by NRCP Rule 56, "the adverse party may not rest upon the mere allegations of his pleading, but must, by affidavit or otherwise, set forth facts demonstrating the existence of a genuine issue for trial." *Maine v. Stewart*, 109 Nev. 721, 727, 857 P.2d 755, 759 (1993) (internal citations omitted). "Otherwise, the opposing party has no duty to respond on the merits and summary judgment may not be entered against him." *Id.*

The allegations of counsel, absent more, were insufficient to create a genuine issue of material fact, and summary judgment was entered accordingly.

VII. CONCLUSION

The exclusion at issue is reasonable, unambiguous, and valid, and the Nevada legislature—a body that competently regulates umbrella coverage when that is, indeed, its aim—has limited NRS 687B.147's application to a category of coverage (motor vehicle insurance for a private passenger car) from which it has statutorily distinguished the instant policy. Appellant has not cited, and the Nevada legislature has not announced, a public policy in favor of protecting insureds' ability to collect the *liability* benefits of their personal umbrella policies. Respondents therefore

request that this Court affirm the District Court's judgment, thereby enforcing the bargained-for-exchange between Farmers and its policyholder: Cynthia Sciarratta.

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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 9,683 words.

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.

/ / /

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November 2020, I electronically filed the **RESPONDENTS' ANSWERING 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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