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 REPLY BRIEF

Jordan P. Schnitzer, Esq.
Nevada Bar #10744
THE SCHNITZER LAW FIRM
9205 West Russell Road, Suite 240
Las Vegas, Nevada 89148
Phone: (702) 960-4050
Facsimile: (702) 960-4092
Jordan@TheSchnitzerLawFirm.com

Attorney for Appellant
Filippo Sciarratta

TABLE OF CONTENTS

SECTION **PAGE NO.**

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

I. INTRODUCTION

Farmers argues that NRS 687B.147 does not apply to the exclusion at issue because no case or statute supports such a finding and the Legislature overruled *Delmue*. This argument is flawed as *Delmue* held that the language at issue clearly and unambiguously included umbrella policies. Farmers did not provide any Nevada authority on point demonstrating how *Delmue* was wrongly decided or how the Legislature overturned *Delmue*. The Legislature left the phrase at issue in *Delmue* and in this case ("a policy of insurance covering the use of a passenger car") untouched.

Ironically, many of Farmers arguments demand a holding in favor of Sciarratta because if the Legislature had the ability to amend the statute at issue in *Delmue* to remove umbrella policies, it surely had the capability and foresight to amend NRS 687B.147.

Farmers also fails to distinguish case law holding the exclusion is void per public policy if the statute allowing such exclusions does not apply to umbrella policies.

Furthermore, public policy demands, in fairness, that the insurer should provide a copy of exclusions to the insured in order for those exclusions to be enforceable. Farmers admittedly failed to provide a copy of the exclusion at issue to

the insureds until after this case was filed. Accordingly, the District Court erred as a matter of fact and law in granting summary judgment in favor of Farmers.

II. LEGAL ARGUMENT

A. *Delmue* Is Controlling

Farmers argues that *Delmue* is not controlling based on two separate arguments: other parts of the insurance statute that apply to automobile policies do not apply to umbrella policies and the Legislature "distinguished umbrella insurance from motor vehicle insurance following *Delmue*'s holding regarding NRS 687B.145." *Answering Brief* p. 20. These arguments fail and are not consistent with this Court's clear holdings.

i. The plain language of NRS 687B.147 includes umbrella policies

Farmers argues that other statutes in the insurance code indicate that "a policy of insurance covering the use of a passenger car" does not include umbrella policies. This position is in direct contradiction to this Court's holding in *Delmue* where this Court stated: "…'a policy of insurance covering the use of a passenger car,' does not distinguish between primary automobile coverage policies and umbrella policies…" *Estate of Delmue v. Allstate Ins. Co.*, 936 P.2d 326, 628 (Nev. 1997). Similarly, the insurer in *Delmue* made the exact same argument Farmers makes. The *Delmue* Court rejected Farmers contention: "Ironically, [the insurer's] argument favors [the insured]. If the legislature had the foresight to provide an express exception to excess

insurance coverage in NRS 485.055, then it only logical that the same would be provided in NRS 687B.145(2) if the legislature so intended." Furthermore, Farmer's specific examples fail as follows:

- Farmer's citation to NRS 690B.016 as an example of umbrella insurers being restricted on to whom it may refer claimants for repairs or redress of damages fails. This logic is erroneous as there is no case stating that NRS 690B.016 ***does not*** apply to umbrella insurers. If Farmers is claiming that it can refer an insured or a claimant to repair shops that are not licensed, then it is engaged in some significant bad faith practices. Furthermore, not only does NRS 690B.016 apply to "an insurer of motor vehicles", it also applies to "a policy of insurance." This makes sense as there may be claims for damage caused to a motor vehicle through property liability insurance that took place on real property. The clear meaning of "an insurer of motor vehicles" in NRS 690B.016 includes umbrella policies that incorporate motor vehicles as *Delmue* held. Accordingly, Farmers' argument fails.
- Farmers claims that NRS 690B.017 demonstrates that there are requirements for auto liability policies for arbitration that do not apply to umbrella policies fails. However, there has not been a case stating that umbrella policies are exempt from the requirements found in NRS 690B.017. The language in NRS 690B.017 is distinct from that found in NRS 687B.147, which is the exact language discussed in *Delmue*. However, the rationale in *Delmue* would require umbrella policies to be subject to the provisions of NRS 690B.017 to the extent they are a considered "liability" insurance (an issue not before the Court). Therefore, Farmers' argument here fails.
- Farmers argues that NRS 690B.023 (erroneously cited as NRS 690B.23 in Farmers' brief) indicates that NRS 687B.147 does not apply to umbrella policies. However, NRS 690B.023 only applies to insurance policies for liability as outlined in NRS 485.185. Nowhere in these two statutes does the legislature use the "a policy of insurance covering the use of a passenger car" as used in NRS 687B.147 and NRS 687B.145. Again, if umbrella policies are to be considered liability insurance (an issue not before this Court), then NRS 690B.023 would apply to umbrella policies. Furthermore, there is no case that holds umbrella policies are not subject to the requirements of NRS 690B.023. Accordingly, Farmers' attempt to use this as an example fails.

- Farmer's cites to NRS 690B.024 claiming that a claimant is not required to present an irrevocable authorization to the umbrella policy insurer. This logic is erroneous as there also is no case stating that NRS 690B.024 ***does not*** apply to umbrella insurers. Under *Delmue*, NRS 690B.024 would apply to umbrella policies that deal with auto claims as it specifically states, "a policy of insurance covering the use of a passenger car." Accordingly, Farmers' argument fails.

Farmers further argues that holding "a policy of insurance covering the use of a passenger car" includes umbrella policies is beyond the ordinary meaning of the statute. Yet, Farmers fails to provide any meaningful rationale to distinguish its argument from the one that the *Delmue* Court specifically rejected. Farmers wants this Court to bail it out from admittedly failing to comply with the requirement to ensure that the insured is aware of household exceptions contained in the policies.

Farmers argues a finding that NRS 687B.147's includes umbrella policies violates the legislative intent of the statute. As this Court highlighted in *Delmue*, as long as the statutory language is clear and unambiguous, "this court must not go beyond the plain language of the statute to determine its intent." *Delmue*, 936 P.2d at 328. The *Delmue* Court found that the phrase "a policy of insurance covering the use of a passenger car" was clear and unambiguous in its inclusion of umbrella policies. *Id.* at 328–29. Even if the Court were to look at the legislative history, it, ironically, supports the conclusion this Court made in *Delmue*. The clear legislative purpose of NRS 687B.147 was to protect insureds from the exact situation that happened here, the insurer failing to provide notice and copies of the household

exclusion to the insured and then wanting to enforce said exclusion against the insured without any meaningful notice of the exclusion.

Farmers argues the holding in *Faehnrich* requires a holding in its favor. However, as Farmers highlighted, *Faehnrich* dealt with a conflict of laws question and whether Nevada law applied. *Progressive Gulf Ins. Co. v. Faehnrich*, 327 P.3d 1061 (Nev. 2014). The *Faehnrich* Court determined that the parties chose Mississippi law and that the policy was delivered in Mississippi, not Nevada, thus, NRS 687B.147 did not apply. *Id.* The *Faehnrich* Court did not discuss the meaning of "a policy of insurance covering the use of a passenger car." *Id.*

Farmers failed to provide any substantive distinction to this Court on how "a policy of insurance covering the use of a passenger car" does not clearly and unambiguously include umbrella policies. There was not any meaningful distinction from *Delmue* provided by Farmers. Accordingly, under this Court's strong holding in *Delmue*, "a policy of insurance covering the use of a passenger car" in NRS 687B.147 includes umbrella policies. Therefore, the District Court erred as a matter of law when it sustained the household exclusion in the umbrella policy at issue.

ii. The Nevada Legislature did not change the definition of "a policy of insurance covering the use of a passenger car" after *Delmue*

Farmers argues the amendment to 687B.145 the Legislature enacted after the *Delmue* holding demonstrates that the Legislature overturned *Delmue* and that the

Delmue Court "mistakenly" made its holding. However, as previously argued, this argument fails to take into account how the Legislature amended NRS 687B.145. The Legislature amended NRS 687B.145:

> 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.

NRS 687B.145(5). The Legislature did not change the definition of "a policy of insurance covering the use of a passenger car". Indeed, the way the Legislature amended NRS 687B.145, it accepted the *Delmue* Court's holding. The clear and unambiguous definition of "a policy of insurance covering the use of a passenger car" was left untouched by the Legislature. Furthermore, as this Court highlighted in a similar argument that Farmers makes in this case: "If the legislature had the foresight to provide an express exception to [umbrella] insurance coverage in [NRS 687B.145], then it is only logical that the same would be provided in [NRS 687B.147] if the legislature so intended." *Estate of Delmue v. Allstate Ins. Co.*, 936 P.2d 326, 328 (Nev. 1997). Therefore, the District Court erred in granting summary judgment in favor of Farmers and this Court should hold that Farmers failed to comply with NRS 687B.147.

iii. The *Fackett* Court's holding applies in this case

Farmers correctly found a scrivener's error in Appellant's opening brief. To the extent this error has caused confusion, Appellant's counsel appreciates the Court's understanding and patience. Farmers is correct that Appellant meant to cite to *Allstate Ins. Co. v. Fackett*, 2016 P.3d 572 (Nev. 2009) instead of to *Serrett v. Kimber*, 874 P.2d 747, 751 (Nev. 1997) in regards to the quotation: "Any auto insurance policy or provision that contravenes [a] statutory scheme is void and unenforceable."

Farmers cites to an unreported Nevada Federal District Court decision to assert that even if NRS 687B.147 applies to umbrella policies, it does not invalidate the exclusion at issue here. In *Brown*, the Nevada Federal District Court held: "Plaintiff's assertion is based entirely on *Fackett*, a case which did not address statutory provisions in general or NRS 690B.042 in particular. Specifically, *Fackett* addressed NRS 687B.145(2) and 690B.020, which do not apply here." *Brown v. State Farm Mut. Auto. Ins. Co.*, 2014 WL 12788990, at *4 (D. Nev. June 6, 2014). The *Brown* court did not provide any analysis as to why *Fackett*'s rationale (that if an insurer fails to comply with the statute, the provisions of the policy that fail to comport with the statute are void) did not apply to the facts before it. Similarly, Farmers failed to provide anything more than mere conclusory

statements on claiming its admitted failure to comply with NRS 687B.147 did not void the household exclusion at issue.

If the Court follows Farmers request of not invalidating the household exclusion, it will make the words and purpose of NRS 687B.147 meaningless. Any insurer of "a policy of motor vehicle insurance" could ignore the clear directive from the Legislature without any repercussions whatsoever. Therefore, the Court should find that the household exclusion here is voided as it violates NRS 687B.147.

B. The Exclusion is Void as Matter of Public Policy

Farmers argues that Sciarratta "relies on the unsupported assertion that household exclusions are inherently voidable and can only be salvaged by strict adherence to statute." *Answering Brief* p. 28. However, Sciarratta specifically relied upon *Progressive Gulf Ins. Co. v. Faehnrich* stating: "[I]t [NRS 687B.147] changes Nevada from a state that invalidates household exclusions to a state that, by statute, expressly permits them." 327 P.3d 1061, 1067 (Nev. 2014).

Farmers cites to a number of cases claiming that the Court upheld household exclusions before the Legislature enacted NRS 687B.147. *Answering Brief* p. 27. NRS 687B.147 came into effect in 1989. All of the cases, with the exception of one, were decided ***after*** NRS 687B.147 came into effect and none of them discussed NRS 687B.147. *Federated Am. Ins. Co. v. Granillo*, 835 P.2d 803 (Nev. 1992) (finding the exclusion is valid only to the extent it comports with public policy); *Farmers Ins.*

Exch. v. Young, 832 P.2d 376 (Nev. 1992) (finding the exclusion is valid only to the extent it comports with public policy); *Baker v. Criterion Ins. Co*., 805 P.2d 599 (Nev. 1991) (holding the household exclusion did not apply because the plaintiff only purchased minimum insurance.); *Sotirakis v. United Service Auto. Ass'n*, 787 P.2d 788 (Nev. 1990) (finding Nevada law did not apply). In *Neal's Estate*, the only case cited by Farmers prior to 1989, the Court found that the household was void to the extent it "contravene[d] the statutory mandates of NRS ch. 698". *Estate of Neal v. Farmers Ins. Exch*., 566 P.2d 81,82 (Nev. 1977). Thus, all of the cases cited by Farmers stand for one proposition, an exclusion is void if does not comply with Nevada law.

Furthermore, the legislative history cited by Farmers supports the conclusion that in order for a household exclusion to be valid, it must comply with NRS 697B.147. If the exclusion at issue was otherwise valid, then the statute itself is meaningless. Since this Court in *Faehnrich* held that a household exclusion must comply with statutory requirements, and Farmers has admittedly failed to comply with NRS 687B.147 which outlines the requirements for a household exclusion to be valid, the Court should hold that the exclusion at issue is void as a matter of law.

In the event the statute does not apply to umbrella policies, then Nevada has held such exclusions invalid as a matter of public policy.

C. Farmers Position Is Not Consistent with Nevada Public Policy as It Does Not Argue It Provided the Exclusion to the Insureds Prior to the Loss, Thus, Voiding the Exclusion and Creating

Farmers did not dispute that they did not provide a copy of the policy to the insured before this litigation began. In fact, Farmers did not address this issue in anyway whatsoever. As a result, it is undisputed that the policy, including the exclusion, was never provided to the insured.

Farmers argues that *Baker v. Criterion Ins. Co.* demonstrates they are in compliance with Nevada's public policy. While the factual scenario found in *Baker* is similar to the one at hand, the legal issues are not. *Baker v. Criterion Ins. Co.*, 805 P.2d 599 (Nev. 1991). There, the issue was whether a "household exclusion" violated NRS 687B.145(2). *Id.* The *Baker* Court found that household exclusions "are only valid when the claim and coverage are in excess [of the amount] required by statute." *Id.* at 601. While the *Baker* Court did state that the plaintiff in that case should not be permitted to circumvent the household exclusion, such a holding does not apply here as the analysis there was whether the exclusion violated public policy as to providing the statutory minimum of coverage. *Id.*

Here, the issue is whether the NRS 687B.147 applies and if does not, whether it violates public policy to enforce an exclusion that was never provided to the insured. Farmers does not even address the issue of whether public policy voids the enforcement of the exclusion based upon their failure to provide the exclusion to the

insured. The public policy cited previously went completely unaddressed by Farmers—begging the question of whether Farmers was able to locate supporting their position.

Frankly, the Legislature has already established this public policy in NRS 687B.147, which requires "a policy of motor vehicle insurance", including umbrella insurances, to provide copies of the exclusion upon signing and upon renewal for said exclusions to be enforceable. The authority previously provided to this Court demonstrates a holding that NRS 687B.147 applies to umbrella policies is consistent with general public policy. To the extent that NRS 687B.147 does not apply here, the previous authority provided to the Court requires a holding that failure to provide an exclusion to an insured (commonly called a "household exclusion") voids said exclusion as a matter of law.

> [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 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) (emphasis added)

The bottom line is that Farmers does not argue it provided Cynthia Sciarratta or Sciarratta a copy of the Umbrella Policy. The evidence it has provided demonstrates that it did not provide a copy of the Umbrella Policy to Cynthia Sciarratta ***until after*** this case started. It now comes to this Court asking for it to enforce an exclusion that it admittedly did not provide to the insureds before the initiation of the suit. This is an unjust result as the insureds were unaware of the exclusion at issue until coverage was denied. Therefore, the Court should find that the exclusion at issue here is void as a matter of law.

D. Sciarratta Did Not Waive His Argument Regarding the Need for Additional Discovery

Farmers argues that Sciarratta waived his argument regarding the need for additional discovery because he failed to provide a sworn statement supporting the need for additional time under Rule 56(f). Farmers seems to have failed to adequately review the record as the affidavit to support Sciarratta's request under 56(f) is found in Exhibit A of his opposition. AA at 357–60.

Farmers argues that Sciarratta had sufficient time to obtain the evidence that he was missing. As can be seen in the record, Sciarratta was diligently trying to get the information he needed to move forward but was obstructed by Farmers' failure to comply with discovery. This is evidenced by the fact that the District Court issued an order compelling discovery from Farmers. AA at 482–84. Ironically, Farmers raises its current arguments for the time on appeal, thus, waiving their arguments.

AA at 408–10; *see Dolores v. State, Employment Security Division*, 416 P.3d 259, 262 (Nev. 2018) ("Issues not argued below are deemed to have been waived and will not be considered on appeal."). Therefore, the Court should find that the District Court erred in not granting a continuance under Rule 56(f).

E. There Was At Least A Genuine Issue of Material Fact and Farmers Was Not Entitled to Relief as A Matter of Law

Farmers argues that it demonstrated that there was no genuine issue of material fact and thus the burden shifted to Sciarratta to prove otherwise. This argument fails as Farmers did not prove that they actually delivered the Umbrella Policy with the household exclusion to the insureds. Their own evidence established that they had failed to provide a copy of the household exclusion to the insureds ***until after*** this case was filed. AA at 249. This prevented Farmers from meeting their burden and denying them relief as a matter of law.

To the extent that Farmers did meet their burden of demonstrating a lack of a genuine issue of material fact, Sciarratta was prevented from establishing a genuine dispute of material fact due to the need to conduct further discovery as outlined in his motion and declaration. AA at 337–39, 358. This included the materials compelled for production by the District Court, expert testimony, the deposition of Chris Sutter (the insurance agent who sold the Umbrella Policy), and the deposition of Cynthia Sciarratta. AA at 337–39, 358. Furthermore, Farmers did not meet its burden that it was entitled to relief as a matter of law for failure to provide a copy of

the household exclusion as required by NRS 687B.147 and under Nevada public policy. Therefore, the Court should find that Farmers was not entitled to summary judgment.

III. 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. 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. Finally, even if the exclusion was applicable, Farmers is precluded from enforcing it because it never provided the policy to its insured. Accordingly, the District Court erred in granting summary judgment in favor of Farmers.

DATED this 15th day of December 2020.

THE SCHNITZER LAW FIRM

BY: /s/ Jordan P. Schnitzer, Esq.
JORDAN P. SCHNITZER, ESQ.
Nevada Bar No. 10744

Attorney for Appellant
Filippo Sciarratta

CERTIFICATE OF COMPLIANCE

I certify that this Reply 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 3,554 words or exceed 15 pages.

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 15th day of December 2020.

THE SCHNITZER LAW FIRM

BY: /s/ Jordan P. Schnitzer, Esq.
JORDAN P. SCHNITZER, ESQ.
Nevada Bar No. 10744

Attorney for Appellant
Filippo Sciarratta

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of December 2020, I electronically filed the **APPELLANT'S REPLY 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:

Gena L. Sluga, Esq.
Cara L. Christian, Esq.
CHRISTIAN, KRAVITZ, DICHTER,
JOHNSON & SLUGA, PLLC
8985 Eastern Avenue, Suite 200
Las Vegas, NV 89123

David J. Feldman, Esq.
THE FELDMAN FIRM
8831 West Sahara Avenue
Las Vegas, NV 89117
Attorneys for Respondent, Foremost Insurance Company Grand Rapids Michigan, Mid-Century Insurance Company, and Farmers Insurance Exchange

By: Melisa A. Gabhart
An Employee of
THE SCHNITZER LAW FIRM