Case No. 83079

In the Supreme Court of Nevada

AUSTIN LEWIS, an individual,

Appellant,

vs.

MID-CENTURY INSURANCE COMPANY,

Respondent,

APPEAL

from the Second Judicial District Court, State of Nevada

The Honorable Kathleen M. Drakulich, District Judge

District Court Case No. CV20-01047

APPELLANT'S OPENING BRIEF

Graham Galloway (SBN 227)
Galloway & Jensen
222 California Avenue
Reno, NV 89509
(775) 333-7555
Attorneys for Appellant

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant Austin Lewis is a person.

Mr. Lewis has been represented in this litigation by Graham Galloway of Galloway & Jensen.

Dated this 21st day of October, 2021. GALLOWAY & JENSEN

By: /s/ *Graham Galloway*
Graham Galloway SBN 221
222 California Avenue
Reno, NV 89509
775.333.7555
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

STATUTES

OTHER AUTHORITIES

JURISDICTION

This Court has jurisdiction under NRAP 3A(b)(1). The district court granted summary judgment to defendant Mid-Century Insurance Company and denied plaintiff Austin Lewis' cross motion for partial summary judgment on June 8, 2021. (11 App. 137-143) The defendant filed a notice of entry of order on June 9, 2021, (12App.144-146) and Plaintiff Austin Lewis timely appealed on June 15, 2021 (13 App.147-148).

ROUTING STATEMENT

This matter does not fall under any category set forth in NRAP 17(a) or (b). This matter is based upon a breach of contract and the amount in controversy is $225,000.

ISSUES PRESENTED

1. Did the district court err in finding there were no genuine issues of material fact and the defendant was entitled to judgment as a matter of law?

2. Did the district court err in finding the insurance agreement

was unambiguous?

3. Did the district court err in denying the plaintiff's cross motion for partial summary judgment by failing to find the policy language was ambiguous?

4. Did the district court err in denying the plaintiff's cross motion for partial summary judgment by failing to find the insurance policy provided coverage to the plaintiff?

STATEMENT OF THE CASE

Austin Lewis appeals from an order of the district court granting Mid-Century Insurance Company's (Mid-Century) motion for summary judgment, and denying Austin Lewis' cross motion for partial summary judgment; the Honorable Kathleen Drakulich, District Judge, presiding.

Austin Lewis was riding an off road motorcycle off road when an underinsured motorist collided with him and caused him substantial bodily injuries. Lewis settled with the adverse driver's liability insurer for its policy limits of $15,000.00 and then presented a claim to Mid-Century for underinsured motorist benefits (UIM). The Mid-Century UIM limits are $250,000. When Lewis asked for the limits, Mid-Century asserted an "occupying" exclusion and only offered the statutory minimum limits of $25,000.

Mr. Lewis filed suit against Mid-Century alleging it had breached the insuring agreement by not offering him an appropriate amount for his injuries, and by improperly asserting the "occupying" exclusion to step down the policy limits. Mid-Century denied breaching the insurance agreement, and filed a motion for summary judgment asking

the district court to find its exclusion limited Mr. Lewis' coverage to $25,000. Mr. Lewis opposed this motion and filed his own motion for partial summary judgment asking the district court to find the UIM limits were $250,000, or in the alternative, the Mid-Century policy was ambiguous and the exclusion should not be applied to the facts of Mr. Lewis' claim.

The district court found the Mid-Century policy and exclusion were not ambiguous and the exclusion applied to Mr. Lewis' claim. The district court also denied Mr. Lewis' cross motion for partial summary judgment on the question of whether the exclusion was ambiguous and therefore unenforceable. Mr. Lewis appealed this order.

STATEMENT OF FACTS

A. THE CRASH

On October 26, 2019, Austin Lewis was riding his off road motorcycle on a track at what is called the Sand Pits OHV Park just outside of South Lake Tahoe, California. Mr. Lewis was travelling in the proper direction on the track when he went over a large jump. At the same time, Joshua Brackett, driving a Ford Mustang, entered the

track and began driving in the wrong direction. Mr. Brackett drove to the jump and stopped just as Mr. Lewis came off the jump. Mr. Lewis was unaware of Mr. Brackett's presence and his motorcycle landed on top of Mr. Brackett's Mustang. (6 App 60-65) Mr. Lewis sustained four fractured vertebrae as a result of crashing into the Mustang windshield. He also sustained a fractured sternum and a collapsed lung. (6 App 50) Mr. Lewis' medical expenses are currently $113,477. (6 App50) Mr. Lewis also missed a substantial amount of work as a loader at UPS.

Mr. Brackett was insured through Financial Indemnity Company for the California statutory minimum liability limits of $15,000. (6 App 67) Mr. Lewis accepted Mr. Brackett's policy limits and then presented a claim for underinsured motorist benefits (UIM) to his insurer, Mid-Century. Mr. Lewis' UIM limits with Mid-Century are $250,000 per occurrence. (9 App 86) Mid-Century, in response to the claim, asserted an occupying exclusion that limits the UIM benefits for this matter to the Nevada statutory minimum limits of $25,000. (6 App69-71)

Mr. Lewis believes the exclusion does not apply to the facts of this matter, or in the alternative, the policy language is ambiguous and the exclusion is unenforceable.

B. THE MID-CENTURY POLICY LANGUAGE

The relevant portions of the Mid-Century policy are set forth in Part II of the contract entitled **UNINSURED MOTORIST.**[1] The UM language is as follows:

> **PART II-UNINSURED MOTORIST**
>
> **COVERAGE C- UNINSURED MOTORIST COVERAGE**
>
> We will pay all sums which an **insured person** is legally entitled to recover as **damages** from the owner or operator of an **uninsured motor vehicle** because of **bodily injury** sustained by the **insured person.** The **bodily injury** must be caused by an **accident** and arise out of the ownership, maintenance or use of the **uninsured motor vehicle.**
>
> **Additional Definitions Used In This Part Only**
>
> As used in this part:
>
> 1. **Insured person** means:
> a. You or a **family member.**
> b. Any other person while **occupying** the car described in the Declarations, an **additional car,** a **replacement car,** or a **substitute car.**
> c. Any person for **damages** that person is entitled to recover because of **bodily injury** to an **insured person** as described in a. and b. above.
>
> But, no person shall be considered an **insured person** if the person uses a vehicle without having sufficient reason to believe that the use is with permission of the owner.
>
> 2. **Motor vehicle** means a land motor vehicle or a trailer but does not mean vehicle:

[1] In *Hall v. Farmers Insurance Exchange*, 105 Nev. 19, 786 P.2d 884 (1989), the Court, interpreting NRS 687B.145(2), held underinsured motorist coverage (UIM) was a built in component of uninsured motorist coverage (UM).

a. Operated on rails or crawler-treads.
b. Designed principally for use off public roads, including, but not limited to, dune buggies, go-carts, all terrain vehicle of two or more wheels, mini-bikes, farm tractors and other farm equipment, stock cars and all other racing cars, and all other vehicles of similar characteristics.
c. Used as a residence or office.
3. **Uninsured motor vehicle** means a **motor vehicle** which is:
a. Not insured by a **bodily injury** liability bond or policy at the time of the **accident.**
b. A hit-and-run vehicle whose operator or owner has not been identified and which strikes:
(1) You or any **family member.**
(2) A vehicle **occupied** by an **insured person.**
c. Insured by a **bodily injury** liability bond or policy at the time of the **accident** but the Company becomes insolvent or denies coverage for a reason other than because of an intentional act(s) of the owner or operator.
d. Insured by a **bodily injury** liability bond or policy at the time of the **accident** which provides coverage in amounts less than the **damages** which the **insured person** is legally entitled from the owner or operator of that vehicle.

Uninsured motor vehicle, however, does not mean a vehicle:

a. Insured under the liability coverage of this policy.
b. Owned by or furnished or available for regular use by you or any **family member.**
c. Owned or operated by a self-insured as contemplated by any financial responsibility law, or similar law.
d. Owned by a governmental unit or agency.
e. Operated by a person who intentionally causes the **accident** or **occurrence** and whose liability insurance coverage is denied because of an intentional act exclusion.

Exclusions

1. This coverage shall not apply to the benefit of any insurer or self-insurer under any Workers' Compensation law, or directly to the benefit of the

United States, or any **state** or any political subdivision.
2. This coverage does not apply to punitive or exemplary **damages.**
3. This coverage does not apply to **bodily injury** sustained by a person:
a. If that person or the legal representative of that person makes a settlement with or takes a judgment against any other person or entity without our written consent.
b. While **occupying your insured car** when used to carry persons or property for a charge. This exclusion does not apply to shared-expense car pools.
c. During active participation in any organized or agreed-upon racing or speed contest or demonstration or in practice or preparation for any such contest.
4. This coverage does not apply while **occupying** any vehicle owned by you or a **family member** for which insurance is not afforded under this policy or through being struck by that vehicle. This exclusion only applies to those **damages** which exceed the minimum limits of liability required by Nevada law for **Uninsured Motorist** coverage.

The exclusion relied upon by Mid-Century reads as follows:

4. This coverage does not apply while **occupying** any vehicle owned by you or a **family member** for which insurance is not afforded under this policy or through being struck by that vehicle. (5 App 35)

Mr. Lewis, on the other hand, relies upon the definitional language set forth under the heading **Additional Definitions Used In This Part Only**:

2. **Motor vehicle** means a land motor vehicle or a trailer but does not mean a vehicle:

a. Operated on rails or crawler-treads.

b. Designed principally for use off public roads, including, but limited to, dune buggies, go-carts, all terrain vehicles of two or more wheels, mini-bikes, farm tractors and other farm equipment, stock cars and all other racing cars, and all other vehicles of similar characteristics. (5 App 34)

SUMMARY OF ARGUMENT

The district court, in its order granting Mid-Century summary judgment, determined the occupying exclusion was not ambiguous and applied because Mr. Lewis was occupying a vehicle he owned that was not insured under the policy. Mr. Lewis believes the district court erroneously failed to find the dirt bike was not a vehicle as defined by the contract, and therefore the occupying exclusion does not apply. Alternatively, Mr. Lewis contends the definition of "motor vehicle" and the absence of a definition for "vehicle" in the UM/UIM portion of the policy, creates an ambiguity which renders the occupying exclusion unenforceable.

STANDARD OF REVIEW

The standard of review of an order granting summary judgment is de novo and without deference to the findings of the district court. *Wood v. Safeway, Inc.*, 121 Nev. 724. 121 P.3d 1026 (2005). When

reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in the light most favorable to the nonmoving party. *Id.* at 1029. This standard applies to all issues in this appeal.

ARGUMENT

A. THE LEWIS DIRT BIKE BY DEFINITION IS NOT A VEHICLE AND NOT SUBJECT TO THE OCCUPYING EXCLUSION

Mid-Century argues the Lewis dirt bike was a "vehicle', and because it was owned by Mr. Lewis and not insured under the subject policy, the occupying exclusion applies to limit Mr. Lewis' underinsured motorist's claim. Curiously, there is no definition of "vehicle" in the policy. The general definition section for the policy sets forth various definitions, but all utilize the word "car". There are definitions for "private passenger car", "utility car and "additional car", but no definition for the term "vehicle". (5 App 30).

Part II of the policy, which is entitled Uninsured Motorist, contains a separate section captioned **Additional Definitions Used In**

This Part Only. There the term "motor vehicle" is defined and specifically excludes Mr. Lewis' dirt bike from the definition of a motor vehicle:

> 2. **Motor vehicle** means a land motor vehicle or trailer but does not mean a vehicle:
>
> b. Designed principally for off public roads, including, but not limited to, dune buggies, go-carts, all terrain vehicles of two or more wheels.....

The Lewis dirt bike is an off road vehicle. As such, it is not a motor vehicle for purposes of the UIM coverage under the Mid-Century policy. If the dirt bike is not a vehicle, Mr. Lewis cannot be occupying a vehicle for purposes of the Mid- Century exclusion. The exclusion relied upon by Mid-Century only applies if Mr. Lewis is occupying an owned vehicle that is not insured under the policy. Here, the dirt bike, according to the definition set forth in the portion of the policy expressly dealing with UM/UIM claims, is not a vehicle. Mr. Lewis' dirt bike is a motorcycle (arguably a two wheel all terrain vehicle as well), that is designed principally (in this case exclusively) for use off public roads. By definition the exclusion does not apply, and the step down or limitation of the UIM limits is not activated

Mid-Century argued in the district court that Mr. Lewis could not

use the UM/UIM section definition of motor vehicle because it was not a term used in the exclusion.(8 App 100) First, the definition of motor vehicle set forth in Part II applies to all of Part II, including the fourth exclusion relied upon by Mid-Century. There is no limiting language; the definition does not say it only applies to the coverage and not to the exclusions. The definition applies to the exclusion, as it does to all of the provisions of Part II.

Secondly, if the definition of motor vehicle does not apply, how is the term vehicle that is used in the exclusion to be defined? Is the insured to you use the definition commonly associated with the word? *Merriam- Webster* defines vehicle to be:

> 1 : a means of carrying or transporting something // planes, trains, and other *vehicles*: such as
>
> a : **MOTOR VEHICLE**
>
> b : a piece of mechanized equipment

Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/vehicle. Accessed 14, Oct. 2021

The common everyday definition of vehicle includes the term motor vehicle, which the Mid-Century UM/UIM section defines to not

include Mr. Lewis' off road motorcycle. Mid-Century attempts to ignore the definition of motor vehicle, and argued in the district court it only applies to the definition of the uninsured vehicle. There is no language in the definition of motor vehicle that restricts is application to the definition of an uninsured vehicle. If Mid-Century wants to use a different definition of vehicle other than what is contained in the policy, or as defined by *Merriam-Webster*, than it is simply laying the foundation for Appellant's next argument, that an ambiguity exists in the policy language which renders the exclusion unenforceable.

B. MID-CENTURY'S LANGUAGE FOR UNDERINSURED MOTORIST COVERAGE IS AMBIGUOUS

As detailed above, the Mid-Century policy does not define the word "vehicle". The policy does define "motor vehicle" in the definitional section applicable to the UM/UIM coverage. Mid-Century, though, argues this definition somehow does not apply because the term "motor vehicle" does not appear in the exclusion. So this begs the question: how is an insured to know what is meant when the word "vehicle" is used in the occupying exclusion?

Implicit in Mid- Century's position is the term "vehicle", as set forth in the occupying exclusion, is broadly defined and includes off road vehicles such as Mr. Lewis' dirt bike. But nowhere is there language in the insurance agreement that says the term "vehicle" is to be more broadly interpreted to mean something more than a motor vehicle. Mid-Century has created an ambiguity by not defining "vehicle. It defined additional car, replacement car, private passenger car, motor vehicle and uninsured motor vehicle, but it never defines just the plain word vehicle. Yet it now says vehicle means something other than motor vehicle, and it simply ignores the definition it has set forth in its policy.

Fundamental tenets of insurance law govern the Court's interpretation of the insurance contract language involved in this matter. An insurance policy is a contract of adhesion and should be interpreted broadly, affording the greatest possible coverage to the insured.

In *Benchmark ins. Co. v. Sparks*, 127 Nev. 407, 254 P.3d 617 (2011), this Court stated:

"... insurance policies are contracts of adhesion. That is, the policies are drafted by the insurers and are offered to the policyholder without any opportunity for the policy holder to negotiate the policy's terms. Thus, in order for an insurer to effectively limit its contractual obligations, the insurance policy must unambiguously convey the insurer's intent to do so. It follows that any ambiguity or uncertainty in the insurance policy must be construed against the insurer and in favor of the insured. "(internal quotations and citations omitted).

This Court also stated:

" We interpret an insurance policy from the perspective of one not trained in the law or in insurance, with the terms of the contract viewed in their plain, ordinary and popular sense. And we consider the policy as a whole to give reasonable and harmonious meaning to the entire policy." *Century Sur. Co. v. Casino W., Inc.,* 130 Nev. 395, 329 P.3d 614 (2014) (internal quotations and citations omitted).

And in *Rubin v. State Farm Mut. Auto. Ins .Co.,* 118 Nev 299, 303-304, 43 P.3d 1018 (2002), this Court held "A seemingly clear policy can be rendered ambiguous when applying the policy to the facts leads to

multiple reasonable interpretations.

Finally, the Court has held clauses providing coverage are broadly construed to afford the insured the greatest possible coverage, while exclusions are interpreted narrowly to limit their application, and once again afford the insured the greatest amount of protections. *Century Sur. Co. v. Casino W., Inc.,* 130 Nev. 395, 329 P.3d 614 (2014) quoting *Nat'l Union Fire Ins. Co. of the State of Pa., Inc., v. Reno's Exec. Air, Inc.,* 100 Nev. 360, 365, 682 P.2d 1380 (1984).

In the instant matter, when the exclusion put forth by Mid-Century is read by itself, it appears to be unambiguous. It uses the term vehicle, and if this is given a broad interpretation, seems to suggest Mr. Lewis's dirt bike is excluded from the UIM coverage. On the other hand, if the exclusion is read in conjunction with the UM/UIM definition of motor vehicle, a question arises as to whether the dirt bike is an excluded vehicle. Mr. Lewis believes the definition for motor vehicle that is set forth in the UM/UIM section of the policy applies to all provisions of the UIM coverage, including the exclusions. Mid-Century, on the other hand, argues some other definition of vehicle applies to the exclusion. Thus, there are two competing interpretations

that by definition, create an ambiguity.

In *Powell v. Liberty Mut. Fire Ins. Co.,* 127 Nev.156, 252 P.3d 668 (2011), this Court ruled that if an insurer wants to exclude coverage it must:

"(1) Write the exclusion in obvious and unambiguous language in the policy.

(2) Establish that the interpretation excluding coverage is the only interpretation of the exclusion that can be fairly made, and

(3) Establish that the exclusion clearly applies to this particular case."

Again, the exclusion, by itself, seems clear. The question then becomes is the exclusion still clear once read with the other policy language, in particular, the definition of motor vehicle found in UM/UIM section. That definition is not limited to the coverage portion of the policy or in any other fashion. Mid-Century argues since it is not used in the exclusion it does not apply. But Mid-Century has not defined what vehicle means anywhere in the policy, let alone in the UIM section. Is the typical unsophisticated insured (Mr. Lewis was 22

years old at the time of the crash), going to know Mid-Century believes there is a difference between a motor vehicle and a vehicle? Could Mid-Century have defined what it meant by using the word vehicle? Is the *Merriman-Webster* definition of vehicle that defines it as a motor vehicle not applicable to the exclusion? Is the use of the term motor vehicle so similar to the word vehicle an insured is not going to appreciate the difference? The answers to these questions lead to only one conclusion, the exclusion, once read with the definitions in the UIM section, are susceptible to differing interpretations. Mid-Century cannot establish its interpretation is the only one that can be fairly made.

The Wisconsin Court of Appeals addressed a fact pattern similar to the instant one in *Ruenger v. Soodsma*, 281 Wis.2d 228, 695 N.W. 840 (2005). In *Ruenger* the insured was operating a skip loader on the side of a highway when she was hit by an underinsured motorist. While the majority of the case discusses other policy language, the insurer asserted an occupying exclusion that the Court addressed. The skip loader was not listed as a covered or insured auto, and the insurer denied UIM benefits on that basis. The Wisconsin Court of Appeals initially determined the occupying exclusion was unambiguous by itself,

but when read with all of the UIM coverage provisions, an ambiguity arose. The Court found the exclusionary clause did not clearly inform the insured there would be no coverage if she was not occupying a covered auto. The occupying clause language in *Ruenger* was similar to the Mid-Century clause language, except in *Ruenger* the clause read there was no coverage if the insured was occupying a non covered auto versus the Mid-Century exclusion where the is no coverage for an owned vehicle .

If the insurance policy has ambiguous terms, the Court has to interpret the policy against the drafter. *Powell*, 127 Nev. at 156, 252, P.3d at 672.

C. THE DISTRICT COURT IMPROPERLY CONSIDERED PAROLE EVIDENCE

Mid-Century, in its opposition to Mr. Lewis' cross motion for partial summary judgment, referred to a policy of insurance issued by Foremost Insurance Company that provided certain coverages to Mr. Lewis. (8 App 98) The Foremost policy is parole evidence that cannot be used to interpret the terms of Mid-Century's policy. Mid-Century

argued it was appropriate to consider the Foremost policy because of Mr. Lewis' expectations, but as set forth in Lewis' reply in support of the cross motion for summary judgment, Foremost does not offer UM/UIM for motorcycles. (10App 113, 120-136)

Moreover, the longstanding rule of interpreting insurance contracts is that if an ambiguity in the contract exists, the ambiguity is construed against the insurer. *Benchmark Ins. Co. v. Sparks*, 127 Nev. 407, 254 P.3d 667 (2011). The reference to the Foremost policy is inappropriate, factually incorrect and undercuts the rule of construing ambiguities against the insurer. The district court should not have considered the Foremost policy.

CONCLUSION

The district court erred in entering summary judgment for Mid-Century, and in denying Mr. Lewis' cross motion for partial summary judgment. Mid-Century was not entitled to judgment as a matter of law. Its occupying exclusion does not apply to the facts of this case, or in the alternative, the exclusion, when read in conjunction with the definition of motor vehicle set forth in the UM/UIM portion of the

policy, creates an ambiguity that should have been construed against the enforcement of the Mid-Century exclusion. Mr. Lewis requests this Court set aside the district court's summary judgment for Mid-Century, and direct the district court to enter partial summary judgment in favor of Mr. Lewis as sought in Mr. Lewis' cross motion for partial summary judgment.

Dated this 21st day of October, 2021. GALLOWAY & JENSEN

By: /s/ *Graham Galloway*

Graham Galloway SBN 221
222 California Avenue
Reno, NV 89509
775.333.7555
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, type-face, and type-style requirements of NRAP 31(a)(4)-(6) because it was prepared in Microsoft Word 2007 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NARP 32(a)(7)(C), it contains 4,532 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 21st day of October, 2021. GALLOWAY & JENSEN

By: /s/ *Graham Galloway*

Graham Galloway SBN 221
222 California Avenue
Reno, NV 89509
775.333.7555
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on October 21st, 2021, I submitted the foregoing APPELLANT'S OPENING BRIEF for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

TODD ALEXANDER
LEMONS, GRUNDY & EISENBERG
6005 PLUMAS STREET, SUITE 300
RENO, NV 89519
775.786.6868
Attorneys for Respondent

Dated this 21st day of October, 2021.

/s/ *Yennifer Sanchez*
Yennifer Sanchez