IN THE SUPREME COURT OF THE STATE OF NEVADA

AUSTIN LEWIS, an individual,

Appellant,

vs.

MID-CENTURY INSURANCE CO.,

Respondent.
_____/

Supreme Court Case No. 83079

District Court Case No. CV20-01047

RESPONDENT'S ANSWERING BRIEF

Todd R. Alexander
Nevada Bar No. 10846
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno, Nevada 89519
(775) 786-6868; (775) 786-9716 (fax)
tra@lge.net

Attorneys for Respondent

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record for Respondent MID-CENTURY INSURANCE COMPANY, certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made so the justices of the Supreme Court or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of respondent's stock: Mid-Century Insurance Company is 100% owned in different shares by Farmers Insurance Exchange, Truck Insurance Exchange and Fire Insurance Exchange (the "Exchanges"). The Exchanges are each a reciprocal of inter-insurance exchange owned by their respective policyholders. The ownership breakdown is as follows:

- 80% by Farmers Insurance Exchange;
- 12.5% by Fire Insurance Exchange; and
- 7.5%by Truck Insurance Exchange.

2. Names of all law firms whose attorneys have appeared for respondent (including proceedings in the district court) who are expected to appear in this court:

Lemons Grundy & Eisenberg

///

///

3. If using a pseudonym, the litigant's true name: None.

DATED: November 19, 2021.

/s/ Todd R. Alexander

Todd R. Alexander, Esq.
Nevada Bar No. 10846
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, Nevada 89519
(775) 786-6868; (775) 786-9716 (fax)
tra@lge.net

Attorneys for Respondent

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases **Page(s)**

I.

INTRODUCTION AND SUMMARY OF ARGUMENT[1]

This is an appeal from the district court's entry of summary judgment in favor of Respondent Mid-Century Insurance Company ("Mid-Century") in an insurance coverage dispute. Appellant Austin Lewis ("Lewis") argues that the district court erred in concluding that his family's Mid-Century insurance policy, which covered only his family's four automobiles, did not provide uninsured/underinsured ("UM/UIM") motorist coverage for an injury sustained while riding an off-road motorcycle that was not insured under the Mid-Century policy.

While Lewis was riding his 2017 KTM 250XS dirt bike on an off-road track near South Lake Tahoe, a third party, Joshua Brackett ("Brackett"), drove his Ford Mustang onto the track. Lewis went off a jump and landed on top of Brackett's Mustang and was injured. Unfortunately, Brackett carried only California's statutory minimum policy limit of $15,000. Lewis accepted Brackett's policy limit and then asserted a UM/UIM claim against Mid-Century, even though his dirt bike was not insured under the Mid-Century policy and was instead insured by a different company under a separate insurance policy.

///

[1] For ease of reading, this Introduction does not include citations to the Appendix. Citations to the Appendix are included in the ensuing sections of this brief.

Importantly, the Mid-Century policy was written for the Lewis family's four automobiles, not including the dirt bike. Moreover, the UM/UIM provision of the Mid-Century policy excludes UM/UIM coverage for an injury sustained while occupying a vehicle owned by the Lewis family but not insured under the policy.

Despite the applicable exclusion, and in accordance with this Court's holding in *Zobrist v. Farmers Ins. Exchange*, 103 Nev. 104, 734 P.2d 699 (1987), Mid-Century offered Lewis Nevada's statutory minimum coverage of $25,000. Lewis rejected Mid-Century's offer and instead filed suit against Mid-Century. As discussed below, *Zobrist* is indistinguishable from this case in any material way and should remain controlling law in Nevada.

The parties filed competing summary judgment motions in the district court. Attempting to get around the applicable policy exclusion, Lewis tried to inject ambiguity where no such ambiguity existed. Lewis pointed to the term "motor vehicle," a defined term in the Mid-Century policy, which does not include vehicles designed principally for off-road use. The district court appropriately noted, however, that the defined term "motor vehicle" is not used in the applicable exclusion.

The district court correctly concluded that there is no ambiguity or question as to whether Lewis's dirt bike constituted a vehicle that was not insured under the Mid-Century policy. Thus, UM/UIM coverage under the Mid-Century policy was

not applicable to Lewis's dirt bike accident. The district court's ruling should be affirmed in its entirety.

II.

ISSUES PRESENTED

1. Whether the district court correctly determined that the applicable exclusion in the UM/UIM provision of the Mid-Century insurance policy is unambiguous and excludes UM/UIM coverage for injuries incurred while riding an off-road motorcycle that is not insured under the policy.

III.

STATEMENT OF FACTS

A. The underlying accident

The facts surrounding Lewis's dirt bike accident have never been in dispute. As stated in the Opening Brief, Lewis was riding his off-road motorcycle on a dirt track near South Lake Tahoe when Joshua Brackett inexplicably drove his Ford Mustang onto the track. (AOB 2-3).[2] Lewis went off a jump and landed on top of Brackett's Mustang and was injured. (AOB 3).

Unfortunately, Brackett carried only the California statutory minimum insurance policy limits of $15,000. (AOB 3). Lewis's 2017 KTM 250XS

[2] Citations to Appellant's Opening Brief use the acronym "AOB." Citations to the Joint Appendix use the acronym "JA."

motorcycle was insured through a separate insurance company but did not carry UM/UIM coverage. (JA 69).

Lewis asserted a UM/UIM claim to his family's automobile insurer, Mid-Century. (AOB 3). The only vehicles insured under the Lewis family's Mid-Century policy are the following: (1) a 2013 Audi A7 Quattro; (2) a 2007 Chevrolet Colorado; (3) a 2018 Ford F350; and (4) a 1997 Ford F150. (JA 45). Lewis's dirt bike was not insured under the Mid-Century policy. (JA 45).

Because Lewis was injured while riding his off-road motorcycle, a vehicle for which insurance is not afforded under the Mid-Century policy, Lewis's UM/UIM claim was denied under an applicable exclusion in the policy (discussed below). (AOB 3; JA 69-71). In accord with this Court's holding in *Zobrist v. Farmers Ins. Exchange*, 103 Nev. 104, 734 P.2d 699 (1987), Lewis was offered Nevada's statutory minimum insurance coverage of $25,000. (AOB 3; JA 69-71). Lewis rejected the offer and proceeded with the underlying lawsuit.

B. <u>The relevant provisions of the Mid-Century insurance policy</u>

The UM/UIM provision of the Mid-Century policy contains the following exclusion:

> 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.

(JA 35). The term "vehicle," used in the first sentence of the applicable exclusion, is not defined in the Mid-Century policy. (See, generally, JA 28-43).

In a separate part of the UM/UIM provision of the Mid-Century policy, the term "motor vehicle" is defined as follows:

> **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 not 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.
> c. Used as a residence of office.

(JA 34). Importantly, the defined term "motor vehicle" is not used in the applicable exclusion. Instead, it is used only in the policy's definition of what constitutes an "Uninsured motor vehicle." (JA 34).

The gist of the underlying lawsuit and this appeal is Lewis's contention that the undefined term "vehicle," used in the first sentence of the applicable exclusion, is ambiguous. (AOB 7). By pointing to the separately defined term "motor vehicle," which is not used in the applicable exclusion, Lewis contends that his 2017 KTM 205XS motorcycle should not be considered a "vehicle" under the terms of the policy. (AOB 7).

///

///

C. The parties' competing summary judgment motions

Mid-Century filed its summary judgment motion on March 3, 2021. (JA 20-25). In its motion, Mid-Century simply pointed out that Lewis was riding an off-road motorcycle owned by the Lewis family but not insured under the Mid-Century policy. (JA 22-23). Accordingly, Mid-Century showed, UM/UIM coverage under the policy was plainly and unambiguously excluded by the applicable policy exclusion. (JA 23).

On March 16 and 17, 2021, Lewis filed an opposition to Mid-Century's motion, followed by a cross-motion for partial summary judgment. (JA 49-56; JA 94-96). Lewis argued that the Mid-Century policy's definition of the term "motor vehicle" and lack of a definition for the term "vehicle" created an ambiguity in the applicable exclusion, despite the fact that the exclusion does not contain the term "motor vehicle." (JA 51-55).

Mid-Century filed a reply in support of its summary judgment motion on March 25, 2021. (JA 98-102). In the reply, Mid-Century pointed out that "[n]o reasonable person believes that he or she is insured by his or her automobile insurance policy for bodily injuries sustained while riding an off-road motorcycle, unless the policy is specifically written for that off-road vehicle." (JA 99). Mid-Century further showed that Lewis was asking the district court "to unreasonably misinterpret the policy language in such a manner as to convey UM/UIM coverage

any time he is occupying any off-road vehicle, even though no off-road vehicles were insured under the policy." (JA 100).

Also in the reply brief, Mid-Century analyzed and applied a persuasive case from the Court of Appeals of Wisconsin, *Hahn v. Harleysville Ins. Co.*, 356 Wis.2d 830, 2014 WL 4187508 (Wis. App. 2014) (Unpublished dispositions of the Wisconsin appellate courts issued on or after July 1, 2009 may be cited for persuasive value). (JA 100-102). *Hahn* is directly on point, and it deals with an insurance policy exclusion extremely similar to the one at issue here. *Hahn* will be addressed in greater detail in the Argument section, below.

D. <u>The district court's ruling</u>

On June 8, 2021, the district court issued its *Order (1) Granting Defendant's Motion for Summary Judgment; and (2) Denying Plaintiff's Cross-Motion for Partial Summary Judgment*. (JA 137-142). The district court noted that "[t]he pertinent exclusion contained in the Policy explicitly states, '[T]his 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.'" (JA 141). The district court correctly determined that "uninsured motorist coverage under the Policy is excluded pursuant to the undisputed facts of this case—namely, that Mr. Lewis was driving a KTM motorcycle at the time of the accident, which was owned by the Lewis family, but not otherwise insured under the Policy." (JA

141).

The district court found no merit in Lewis's argument that the definition of "motor vehicle" somehow applies to the word "vehicle" used in the applicable exclusion. (JA 142). The district court appropriately noted that "'motor vehicle' is a defined term, and that term is not utilized in the exclusion." (JA 142). Accordingly, the district court correctly granted summary judgment in favor of Mid-Century. (JA 142).

IV.

ARGUMENT

A. Standard of Review

A district court's order granting summary judgment is subject to *de novo* review. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

B. This case is materially indistinguishable from *Zobrist*.

In *Zobrist v. Farmers Ins. Exchange*, 103 Nev. 104, 734 P.2d 699 (1987), this Court squarely addressed the issue presented in this case. In *Zobrist*, the insured had a policy through Farmers Insurance Exchange, which insured several of the insured's cars and had an uninsured motorist limit of $500,000. 103 Nev. at 105, 734 P.2d at 699. The insured was injured when he collided with another car while driving his dune buggy, which was not insured under the Farmers policy. *Id*. The insured received the policy limit of $15,000 from the driver of the other car. *Zobrist*, 103

Nev. at 105, 734 P.2d at 699.

The parties in *Zobrist* disputed the amount of UM/UIM coverage available to the insured under the Farmers policy. *Id*. The insured argued that Nevada law required Farmers to provide coverage up to his $500,000 policy limit regardless of whether he was driving a vehicle that was specifically excluded in his policy. *Id*. at 106, 734 P.2d at 700. Farmers argued that, because the insured was driving a vehicle not covered under his Farmers policy, it was only required to provide coverage up to the state's statutory minimum of $15,000. *Id*.

The district court granted summary judgment in favor of Farmers and the Nevada Supreme Court affirmed. *Id*. This Court concluded that "Farmers' exclusion of vehicles not insured under the policy is void to prevent payment of the statutory minimum ($15,000) but valid to restrict payment in any amount in excess thereof." *Id*. "This conclusion," the Court stated, "balances state policy to provide minimum coverage to all persons with the reality of the need to pay a premium for insurance coverage." *Id*. (emphasis added).

There was no question in *Zobrist* as to whether the insured's dune buggy constituted a "vehicle." The same can be said for this case. There is no question that Lewis's off-road motorcycle is in fact a vehicle. Lewis simply wants to have his Mid-Century policy unreasonably misread in an effort to create an ambiguity where none exist.

In this case, just as in *Zobrist*, Mid-Century offered Lewis Nevada's statutory minimum coverage of $25,000, even though he was riding his dirt bike that was not insured under the Mid-Century policy. Contrary to the balance of state policy set forth in *Zobrist*, the Lewis family did not pay Mid-Century a premium for coverage while riding the dirt bike. Instead, Lewis's dirt bike was insured by a different insurance company, but he did not carry UM/UIM coverage under that separate policy.

The reasoning and holding in *Zobrist* should be applied here. Because Lewis was riding a motorcycle owned by his family but not insured by Mid-Century, the applicable exclusion in the Mid-Century policy should be considered "valid to restrict payment in any amount in excess" of the statutory minimum. *Zobrist*, 103 Nev. at 106, 734 P.2d at 700.

C. The applicable exclusion is unambiguous, and it excludes UM/UIM coverage in this case.

Whether a contract is ambiguous presents a question of law. *Margrave v. Dermody Props.,* 110 Nev. 824, 827, 878 P.2d 291, 293 (1994). A contract is ambiguous if its terms may reasonably be interpreted in more than one way, but ambiguity does not arise simply because the parties disagree on how to interpret their contract. *Anvui, L.L.C. v. G.L. Dragon, L.L.C.,* 123 Nev. 212, 215, 163 P.3d 405, 407 (2007); *Parman v. Petricciani,* 70 Nev. 427, 430–32, 272 P.2d 492, 493–94 (1954) (concluding that summary judgment was appropriate because

the interpretation offered by one party was not reasonable and that, therefore, the contract contained no ambiguity) (*abrogated on other grounds by Wood v. Safeway, Inc.,* 121 Nev. 724, 121 P.3d 1026 (2005)). Rather, "an ambiguous contract is 'an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning.'" *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013) (quoting *Hampton v. Ford Motor Co.,* 561 F.3d 709, 714 (7th Cir. 2009).

As noted above, there is no question that Lewis's motorcycle is in fact a vehicle. Just because the term "vehicle" used in the applicable exclusion is not defined in the policy does not render it ambiguous. Lewis's attempt to call into question whether his motorcycle is a "vehicle" is not reasonable. When one party's proffered contractual interpretation is not reasonable, it does not give rise to an ambiguity. *Parman*, 70 Nev. at 430–32, 272 P.2d at 493–94.

Lewis should not be permitted to use a separately defined term, which is not even used in an applicable policy exclusion, in an effort to introduce ambiguity into that exclusion. A similar tactic was attempted in *Hahn v. Harleysville Ins. Co.*, 356 Wis.2d 830, 2014 WL 4187508 (Wisc. App. 2014). In *Hahn*, the claimant sued for underinsured motorist coverage when her husband died in an automobile accident while driving his Kawasaki Mule, an all-terrain vehicle that was not insured under the couple's Harleysville insurance policy. *Hahn*, 2014 WL 4187508, * 1. The only

vehicles insured under the Hahns' policy were a Dodge Ram and a Chrysler Town & Country. *Id*. The UM/UIM endorsement in the policy at issue in *Hahn* contained an exclusion very similar to the one at issue in this case. It stated:

> We do not provide Underinsured Motorists Coverage for "bodily injury" sustained:
> 1. By an "insured" while "occupying", or when struck by, any motor vehicle owned by that "insured" which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle.

Id. at *2. Citing this exclusion (referred to by the court as the "drive other cars" exclusion), the insurer in *Hahn* denied UM/UIM coverage. *Id*.

The plaintiff in *Hahn*, just like Lewis in this case, argued that the exclusion is ambiguous because it was questionable whether the Kawasaki Mule should be considered a "motor vehicle." *Id*. at *3. Contrary to the plaintiff's argument, the *Hahn* Court held that "[t]he meaning of the exclusion is plain:

> an insured is only entitled to receive UIM benefits if he or she is involved in an automobile accident while driving a vehicle for which a premium was paid. There is no other way to read the exclusion. Applying the plain language of the exclusion to the undisputed facts yields only one conclusion: there is no UIM coverage for Hahn. It is undisputed that Edward was driving his Kawasaki Mule when he was struck by an automobile. It is also undisputed that the policy lists only the Dodge Ram and the Chrysler Town & Country as covered vehicles—not the Mule. It is further undisputed that the only vehicles for which premiums were paid were the Ram and the Town & Country—not the Mule. The Mule was not listed on the policy. Because

> the Mule was not listed on the policy and because Edward was driving the Mule when he was struck, there is no coverage under the policy.

Hahn, 2014 WL 4187508, * 3.

The argument as to whether the Kawasaki Mule should be considered a "motor vehicle" was determined by the court to have been illogical. *Id*. The court held that it was clear that the vehicle the decedent was driving at the time of the accident "was not listed on the policy and had no premium associated with it." *Id*. As the *Hahn* Court put it: "We fail to see, given the clear language of the policy and these undisputed facts, how a reasonable insured would have understood him or herself to have coverage for circumstances in which coverage simply was not bargained for." *Id*. Stated differently, "no reasonable insured would think there was coverage for an unlisted vehicle for which no premium had been paid." *Id*. at *5.

Just like the policy in *Hahn*, the Mid-Century policy at issue in this case did not insure the Lewis family's off-road motorcycle. The Lewis family did not pay a premium to Mid-Century associated with the off-road motorcycle. As noted above, the motorcycle was insured under a separate policy with a separate insurance company, but the Lewis family did not have UM/UIM coverage under that separate policy.

Also, just like the exclusion at issue in *Hahn*, the applicable exclusion in this case is unambiguous. It reads, in pertinent part, "This [UM/UIM] coverage does not apply while occupying any vehicle owned by you or a family member for which

insurance is not afforded under this policy…." There is only one reasonable way that exclusion can be interpreted. Thus, it is not ambiguous.

As the district court correctly concluded, "uninsured motorist coverage under the Policy is excluded pursuant to the undisputed facts of this case—namely, that Mr. Lewis was driving a KTM motorcycle at the time of the accident, which was owned by the Lewis family, but not otherwise insured under the Policy." (JA 141). Although Lewis argued that the definition of the separate term "motor vehicle" should be injected into the applicable exclusion to create an ambiguity, the district court appropriately noted that "'motor vehicle' is a defined term, and that term is not utilized in the exclusion." (JA 142). The district court's ruling should be upheld in its entirety.

V.

CONCLUSION

Lewis was injured while riding his off-road motorcycle, a vehicle which was not insured under his family's Mid-Century policy. In such circumstances, UM/UIM coverage is expressly and unambiguously excluded under the Mid-Century policy. In accordance with this Court's holding in *Zobrist*, Lewis should be

///

///

///

limited to Nevada's statutory minimum insurance coverage of $25,000. The district court's ruling should be affirmed.

DATED this 19th day of November 2021.

/s/ Todd R. Alexander

LEMONS, GRUNDY & EISENBERG
Todd R. Alexander (Bar #10846)
6005 Plumas Street, Third Floor
Reno, Nevada 89519
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 3,208 words.

3. 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 appellate procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to 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: November 19, 2021.

/s/ Todd R. Alexander

Todd R. Alexander, Esq.
Nevada Bar No. 10846
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, Nevada 89519
(775) 786-6868; (775) 786-9716 (fax)
tra@lge.net

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that the within ***Respondent's Answering Brief*** was filed electronically with the Nevada Supreme Court on the 19th day of November 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Graham Galloway, Esq.
Galloway & Jensen
222 California Ave.
Reno, Nevada 89509
Attorneys for Appellant

/s/ Susan G. Davis
Susan G. Davis