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 REPLY BRIEF

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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 20th day of December, 2021. GALLOWAY & JENSEN

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I.

ARGUMENT

Mid-Century has an obligation to draft an unambiguous insurance contract. In using two very similar terms "vehicle" and "motor vehicle", and failing to define “vehicle”, Mid-Century has created ambiguity in its contract, particularly in view of its position that the two terms are somehow different.

When one hears the word vehicle, what does one think? You think of a car, a bus, a truck or even a motorcycle, all vehicles with a motor. You do not think of a boat. You do not think of an airplane. You do not think of a bicycle. You think of motor vehicles. Yet Mid-Century now argues a vehicle is not a motor vehicle and this distinction should be used to deny Austin Lewis the full underinsured motorist limits of the policy issued to him and his parents.

In the Mid-Century policy "motor vehicle" is defined, yet "vehicle" is nowhere defined or distinguished from the term motor vehicle. How is it that motor vehicle is defined, but not vehicle? And more importantly, how is the average insured, in this case a 22 year old

freight loader for UPS, to know there is a difference between motor vehicle and vehicle. Mid-Century, by defining one term and not defining the other, when they are commonly used interchangeably in every day speech, has created an ambiguity that prevents it from now denying the full underinsured motorist benefits to Austin Lewis.

A. Mid-Century has created a contextual ambiguity in its contract by not properly defining the term vehicle.

Mid Century drafted the subject insurance contract without any input from Austin Lewis. The contract of insurance, essentially an adhesion contract, sets forth numerous definitions. The policy, in fact, sets forth at least 26 separate definitions. Yet the one word Mid-Century relies upon to limit its coverage, vehicle, is nowhere defined in the policy. On the other hand, motor vehicle, a term substantially similar, if not in reality identical to the term vehicle, is defined. Which is the crux of this case. Are the terms vehicle and motor vehicle so similar as to be one and the same, or at a minimum, so similar the average insured such as Austin Lewis would not know the difference, and Mid-Century has thereby created an ambiguity that is to be construed against it as the drafter of the insurance contract?

A provision in an insurance contract is ambiguous "if it is reasonably susceptible to more than one interpretation." *Benchmark Ins. Co. v. Sparks*, 127 Nev. 407, 254 P.3d 617 (2011). In the instant case, Mid-Century contends Mr. Lewis' argument that the terms motor vehicle and vehicle are so similar as to be indistinguishable is not a reasonable interpretation of the policy language, and therefore no ambiguity arises. The difference in these terms, however, must be viewed from the perspective of the average insured, and can the average insured be held to know the difference between these terms? Are not the terms one and the same? Would not the average insured think the term vehicle, as used in an insurance policy covering one's motor vehicle, mean just that, a motor vehicle? Is it unreasonable to say that vehicle and motor vehicle are one and the same? When one thinks of the term vehicle one does not think boat, plane, train or bicycle. One thinks of a motor vehicle, a car, truck, bus, or in this case a motorcycle.

Mid-Century, by the defining the term motor vehicle in Coverage C, and then later using the term vehicle in the exclusion section of Coverage C, has created an ambiguity. The ambiguity is not so much in the terms themselves, but the usage of both terms in the

underinsured motorist coverage (Coverage C), with one term not being defined. On the one hand, as argued by Mid-Century, the exclusion at issue says the uninsured motorist coverage does not apply when an insured is occupying any vehicle owned by the insured but not insured under the policy. On the other hand, Mid-Century, in the definitions section of Coverage C, which applies to the whole section including the exclusions, provides Austin Lewis' dirt bike is not a motor vehicle for purposes of Coverage C. Both terms apply to the exclusion, contrary to Mid-Century's suggestion, and as a result an ambiguity arises, even though the term motor vehicle is not directly or specifically used in the exclusion. An insured, such as Austin Lewis, could reasonably read Coverage C and be confused by the distinction between motor vehicle and vehicle now being put forth by Mid-Century. Coverage C begins by stating his dirt bike is not a motor vehicle, and then later in the exclusions uses a slightly different but substantially similar term, vehicle, that is used to deny him full benefits.

It is not unreasonable to define vehicle the same as motor vehicle, and in the context of the particular underinsured motorist coverage provisions, two reasonable interpretations exist that give rise to an

ambiguity. The terms by themselves are understandable, but when the policy is read as a whole, a contextual ambiguity occurs.

B. *Zobrist* does not address the specific issue in this matter.

Mid-Century cites to the Court's decision in *Zobrist v. Farmers Ins. Exchange*, 103 Nev. 104, 734 P.2d 699 (1987), to say it is indistinguishable from the present case, therefore the present case has no merit. The simple response to that is the Court in *Zobrist* did not address the specific controversy raised by Austin Lewis in this matter relating to the ambiguity created by using the terms vehicle and motor vehicle in the underinsured motorist section of the policy. Mid-Century correctly cites *Zobrist* for the general proposition an insurer may restrict underinsured motorist coverage in excess of the statutory minimum, but *Zobrist* did not address the issue raised by Lewis concerning the terms vehicle and motor vehicle. As such, this matter is not the same as what the Court addressed in *Zobrist*, and *Zobrist* does not in and of itself resolve the instant appeal.

C. Mid-Century's reliance upon an unpublished opinion from a Wisconsin court is misplaced

Mid-Century cites to an unpublished decision of the Wisconsin Court of Appeals to support its position the exclusionary language of its contract does not provide extended coverage to Austin Lewis because he was occupying an owned vehicle not listed on its policy. Much like the analysis of the *Zobrist* case above, the Wisconsin Court of Appeals decision in *Hahn v. Harleysville Ins. Co.*, 356 Wis.2d 830, 855 N.W.2d 720 (2014), is distinguishable because of the unique language of the Mid-Century policy in the instant matter. The policy in *Hahn* did not contain a definition for "motor vehicle" such as the one in the Mid-Century policy where Austen Lewis' dirt bike is specifically defined to not be a vehicle. If the dirt bike is not a vehicle, then the Wisconsin Court's analysis does not apply. If the dirt bike is not a vehicle, then Lewis was not occupying a vehicle that falls within the exclusionary language, regardless of the premiums paid, any risk/ underwriting analysis or the fact the bike was not listed as an insured vehicle.

The better Wisconsin Court of Appeals decision that is more analogous to the present case is *Ruenger v. Soodsma*, 695 N.W. 2d 840 (WI App 2005). *Ruenger*, a published opinion of the Wisconsin Court of Appeals, dealt with numerous challenges to an insurer's denial of UIM

coverage under several different policies. The Wisconsin court's discussion about reduction clauses is not germane to this appeal, but the court's holding with respect to an occupying exclusion goes to the central issue involved in this matter.

Jeanna Ruenger was operating a skip loader clearing snow around her mail box when an automobile driven by Seymour Soodsma struck the skip loader. Ms. Ruenger had both personal and business polices with Rural Mutual Insurance Company. The declarations section of the business policy stated:

> Item Two---Schedule Of Coverages And Covered Autos: This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those "autos" shown as covered 'autos."

The Rural policy listed uninsured motorist coverage as one of the coverages subject to the above language. The only vehicle listed as a covered auto was a Chevrolet pickup. The skip loader was not listed as an auto and no premium was charged for it. The Rural policy also contained an occupancy clause similar to one set forth in the Mid-Century policy in this case: "This insurance does not apply to...bodily injury sustained by ... you while 'occupying' or when struck by any

vehicle owned by you that is not a covered 'auto' for Underinsured Motorists Coverage under this Coverage Form."

Even though the language in *Ruenger* seems more explicit in not covering a non insured auto, the Wisconsin Appeals Court agreed with Ms. Ruenger the policy was ambiguous when the occupying language was read in conjunction with the definition of auto which the court found did not include the skip loader.[1] The court stated:

> *"W*e also agree with Ruenger that the declarations do not unambiguously provide that there is UIM coverage for the named insured only if that insured is occupying the covered auto. Item Two of the declarations plainly tells the insured that UIM coverage applies only to an auto that is a covered auto. However, it is clear from the definition of 'auto' that a skid loader is not an auto. Item Two does not plainly tell a named insured that he or she does not have UIM coverage if he or she is not occupying *any* auto when the injured by an underinsured motorist. Thus, when Item Two is read in conjunction with the coverage section of the UIM endorsement, a reasonable named insured could understand that he or she would have UIM coverage for injuries caused by an underinsured motor vehicle while the named insured is operating his or her skid loader." Id. at 849.

In *Ruenger,* the court found an ambiguity when the general coverage declarations were read in conjunction with the definition of an

[1] The court in Ruenger did not quote or provide the definition of auto; it simply declared the definition of auto did not include the skip loader.

auto. Even though the skip loader was not listed as an owned vehicle and there was no separate premium paid for the skip loader, the Wisconsin court found an ambiguity when the occupying exclusion was read in the conjunction with the definition of what constituted an auto.[2] Here, the Mid-Century definition contained in the underinsured motorist section of the policy specifically states Mr. Lewis' dirt bike is not a motor vehicle. When that definition is read in conjunction with the occupying exclusion, a reasonable insured such as Mr. Lewis, could understand he had UIM coverage while occupying his dirt bike.

II. CONCLUSION

When the occupying exclusion relied upon by Mid-Century is read in conjunction with the definition of motor vehicle found in the underinsured motorist section of the Mid-Century policy, an ambiguity arises. Mid-Century asks the Court to simply look at the exclusion, but when all of the policy language is considered in context, a reasonable insured such as Austin Lewis could understand he had underinsured

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[2] Mid-Century refers to a separate policy of insurance on the motorcycle, but as Mid-Century knows full well, its sister company, Foremost, did not offer UIM coverage for dirt bike. See Plaintiff's Reply In Support Of Plaintiff's Cross-Motion For Partial Summary Judgment (10 App 6-7).

motorist coverage for the dirt bike when he was struck at the off road vehicle park. The definition of motor vehicle specifically excludes his bike from being a motor vehicle, and therefore the exclusion relied upon by Mid-Century does not apply. Mid- Century argues the exclusion uses a different term, vehicle versus motor vehicle, but once again, if the policy is read as a whole, the two terms are so similar a reasonable insured would not necessarily know the terms were different, if there really is any difference, particularly when the term vehicle is nowhere defined in the policy.

The ambiguity created by Mid-Century has to be construed against it as the drafter of the contract, and this Court should rule the district court erroneously granted summary judgment in favor of Mid-Century, and instead, should have granted Mr. Lewis' motion for partial summary judgment.

Dated this 20th day of December, 2021. GALLOWAY & JENSEN

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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 2,613 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 20th day of December, 2021. GALLOWAY & JENSEN

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CERTIFICATE OF SERVICE

I certify that on December 20th, 2021, I submitted the foregoing APPELLANT'S REPLY BRIEF for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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