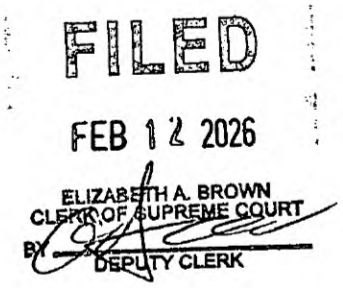
IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF ZERO LLC, A DOMESTIC LIMITED LIABILITY COMPANY; AND CAPITOL VELOCITY, LLC, A DOMESTIC LIMITED LIABILITY COMPANY,
Appellants,
vs.
FARMERS INSURANCE EXCHANGE, AN ENTITY DOING BUSINESS IN NEVADA,
Respondent.

No. 89050



ORDER OF AFFIRMANCE

This is an appeal from a district court judgment, pursuant to a jury verdict, in an action for insurance bad faith, breach of contract, and related claims. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Respondent Farmers Insurance Exchange insured the office building owned by appellants State of Zero LLC and Capitol Velocity, LLC. Appellants' building flooded when water flowed up and out of the toilets on the property. Appellants' insurance policy provides coverage for "Water Damage" that is caused by "the breaking apart or cracking of any part of a system or appliance (other than a sump system including its related equipment and parts) containing water or steam." An endorsement to the policy provides coverage for damage from water that backs up or overflows from a sewer. Farmers found that part of the loss from the flooding was covered only by the policy's sewer backup endorsement, which was limited to $5,000. Appellants sued, contending that its loss was covered by the water damage provision of the policy and was not limited by the sewer

backup endorsement. At trial, the district court rejected appellants' proposed jury instruction, which stated Farmers bore the burden of proving the loss fell within the policy's sewer backup coverage, and instead instructed the jury that appellants bore the burden of proving the loss was covered under the insurance policy. Farmers prevailed at trial on a jury verdict. On appeal, appellants challenge the rejection of their proposed jury instruction and argue that attorney misconduct warrants a new trial.

Jury instructions

Appellants argue the district court abused its discretion in rejecting a modified version of Nevada's model jury instruction 11.3 regarding the burden of proof in establishing the applicability of insurance policy exclusions. We review a district court's decision to refuse a jury instruction for an abuse of discretion. *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 237, 416 P.3d 249, 253 (2018). An insured bears the burden of establishing that there has been "a loss apparently within the terms of the policy," whereas "the burden is on the insurer to show that such loss was produced by a cause which is excepted from the coverage." *Nat'l Auto. & Cas. Ins. Co. v. Havas*, 75 Nev. 301, 303, 339 P.2d 767, 768 (1959).

Here, the district court rejected the proposed instruction because Farmers had not raised an exclusion as an affirmative defense. Rather, Farmers argued at trial that the flooding did not qualify as water damage under the main body of the policy and to that end presented facts that supported an alternative theory of causation for the flooding. Appellants nevertheless characterize the sewer backup coverage in the endorsement as an exclusion from the water damage coverage and contend that it was therefore Farmers' burden to prove that the endorsement

applied to their loss. But this contention would improperly shift the burden to Farmers to prove that the loss is covered under the policy. Furthermore, for the sewer backup endorsement to function as an exclusion in this case, Farmers would have needed to concede that the flooding was covered under the water damage provision but was otherwise limited by the sewer backup endorsement. *See Progressive N. Ins. Co. v. Hall*, 709 N.W.2d 46, 52 (Wis. 2006) ("[An exclusion] is a provision that eliminates coverage under a particular policy where, were it not for the exclusion, coverage would have existed under that policy."). Farmers did not concede that the flooding was water damage and therefore did not use the sewer backup endorsement as an exclusion to appellants' water damage claim.

Because the sewer backup coverage was not used as an exclusion to limit coverage under the water damage policy at trial, a jury instruction that Farmers had the burden to prove the sewer backup coverage applied to the flooding was inapplicable to the facts of the case. *Zurich Am. Ins. Co.*, 137 Nev. at 657, 497 P.3d at 630. Appellants' proposed jury instruction regarding exclusions was therefore legally erroneous. *Cutler v. Pittsburg Silver Peak Gold Mining Co.*, 34 Nev. 45, 57, 116 P. 418, 423 (1911) ("[W]here instructions are framed without reference to the issues or evidence, and erroneous under the facts of the case, they should not be given."). Thus, the district court did not abuse its discretion in rejecting the proposed instruction and no relief is warranted on this ground. *See Skender v. Brunsonbuilt Constr. & Dev. Co., LLC*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) ("The district court has broad discretion to settle jury instructions." (alteration and internal quotation marks omitted)).

Attorney misconduct

Appellants also argue that Farmers committed sufficiently egregious attorney misconduct during closing arguments to merit a new trial. We review de novo whether an attorney's comments constitute misconduct. *See Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1078 (2009). A new trial may be granted for objected-to and sustained attorney misconduct in closing arguments if the objecting party can demonstrate "that the misconduct was so extreme that the objection and admonishment were ineffective in removing the misconduct's effect." *Grosjean*, 125 Nev. at 365, 212 P.3d at 1079. Repeated or persistent misconduct "might not be curable" via objection and admonishment. *Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970, 981 (2008). As a result, we must "focus on the context in which the challenged comments arose" to determine whether the comments amount to misconduct. *Capanna v. Orth*, 134 Nev. 888, 891, 432 P.3d 726, 731 (2018).

During closing arguments, Farmers asserted twice that appellants failed to demonstrate the water that flooded appellants' building was not sewage backup while noting that it was appellants' burden generally to prove coverage existed for the loss. The district court sustained appellants' objections and admonished the jury that appellants were not required to disprove Farmers' theory. These statements were part of Farmers' larger argument at closing that appellants failed to prove the loss resulted from a break or crack in a water system and thus covered as water damage under the main policy.

Appellants argue Farmers committed misconduct on two grounds: (1) by shifting the burden of proof to appellants to prove coverage for the loss and (2) by suggesting appellants must disprove Farmers' theory

of the loss. As to the first ground, counsel for Farmers did not commit misconduct in arguing the burden to prove coverage lay with appellants because, as discussed above, the burden of proof regarding coverage remained with appellants. As to the second ground, the district court's unequivocal admonishment cured any potential misconduct. *Grosjean*, 125 Nev. at 365, 212 P.3d at 1079. Further, appellants have failed to prove the misconduct was sufficiently extreme to merit a new trial. *Cf. Lioce*, 124 Nev. at 27, 174 P.3d at 987 (determining counsel's advocacy for jury nullification in closing sufficient grounds for a new trial).[1] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Bell

_____, J.
Stiglich

_____, J.
Cadish

cc: Chief Judge, Eighth Judicial District Court
Department 26, Eighth Judicial District Court
Eleissa C. Lavelle, Settlement Judge
Maier Gutierrez & Associates
The Feldman Firm, P.C.
Eighth District Court Clerk

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[1]Appellants argue for the first time in their reply brief that the district court violated the law-of-the-case doctrine in overruling appellants' third objection relating to the burden of proof during closing argument. Because issues not raised in an opening brief are deemed waived, we will not consider these arguments. *Bongiovi v. Sullivan*, 122 Nev. 556, 569 n.5, 138 P.3d 433, 443 n.5 (2006); *see also* NRAP 28(a)(8).