IN THE SUPREME COURT OF THE STATE OF NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY Appellant, v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; ROOF DECK ENTERTAINMENT, LLC, D/B/A MARQUEE NIGHTCLUB, Respondents.	)	Supreme Court No: 81344 District Court Case No: A758902

APPELLANT'S OPENING 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(1), and must be disclosed:

The Travelers Companies, Inc., which is publicly held, is the 100% owner of appellant St. Paul Fire and Marine Insurance Company.

The attorneys who have appeared on behalf of appellant/respondent in this Court and in district court are:

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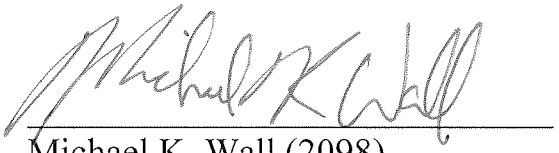
These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 1 day of March, 2021.

HUTCHISON & STEFFEN, PLLC



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JURISDICTIONAL STATEMENT

This is an appeal from two separate orders of the district court, both entered on May 27, 2020, granting defendant National Union Fire Insurance Company's ("National Union") and Roof Deck Entertainment, LLC, dba the Marquee Nightclub's ("Marquee") separate motions for summary judgment.[1] AA 2901; 2920. The district court denied plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") motion for summary judgment against Aspen Specialty Insurance Company ("Aspen"), and granted in part and denied Aspen's counter-motion for summary judgment. AA 2937-44. The district court later denied Aspen's renewed motion for summary judgment AA 3405. The case is proceeding against Aspen below.

The district court certified each of the separate judgments in favor of National Union and Marquee as final pursuant to NRCP 54(b). AA 2918; 2935. These orders are therefore appealable as final judgments. NRAP 3A(b)(1). *Id.* Separate notices of entry of the two judgments were served by St. Paul on May 27, 2020. AA 2946; 2957. St. Paul's timely notice of appeal was filed on June 12, 2020. AA 3342. NRAP 4(a).

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[1]In the district court documents, National Union is often referred to by its parent company's acronym, AIG, by which it is commonly known in the insurance community, and Roof Deck is generally referred to by its dba Marquee Nightclub, or just Marquee.

ROUTING STATEMENT

This appeal raises issues of first impression in Nevada, which have statewide importance. We suggest this Court should retain this appeal. *See* NRAP 17(a)(11) (cases raising issues of first impression) and NRAP 17(a)(12) (matters of statewide public importance).

St. Paul, by subrogation to the rights of its insured, Cosmopolitan, has sued two separate insurance companies involved in underlying litigation for insurance bad faith damages. This Court has never addressed the merits of such a claim under Nevada law (with respect to a primary or excess carrier), but the district court reasoned that given the opportunity, this Court would hold that a cause of action of insurance bad faith may be asserted by an excess insurer against a primary insurer, but not necessarily by an excess insurer against another excess insurer. As a result, the district court granted summary judgment to National Union, but denied summary judgment to Aspen. This distinction drawn by the district court is insupportable.

St. Paul contends that the reasoning that led to denial of summary judgment to Aspen should have led to the same result with respect to excess insurer National Union: An insurance company, primary or excess, that tortiously breaches its duty to its policyholder to settle is liable for all resulting damages, and that claim can be pursued by a paying insurer via subrogation.

This appeal presents a novel issue of law. The existence, or non-existence, of a cause or action in Nevada should be addressed by this Court, preferably *en banc*.

St. Paul also sued Marquee, the entity that caused the personal injury in the underlying action, on theories of contribution and indemnity, contractual and statutory. The summary judgment in favor of Marquee also presents novel issues for this Court's consideration.

STATEMENT OF THE CASE

These are separate appeals (docketed as one) from separate orders granting summary judgment, each of which is certified as final pursuant to NRCP 54(b). Eighth Judicial District Court, Clark County, Department XXIV, the Honorable Gloria Sturman, District Judge.

INTRODUCTION AND SUMMARY OF ARGUMENT

On April 8, 2012, employees of Marquee severely beat and injured a patron, David Moradi, who was a successful hedge fund manager with a proven history of substantial income. The victim suffered debilitating brain damage.

The victim sued Marquee and Cosmopolitan. The sole basis for liability against Cosmopolitan was that it owned the property on which Marquee operated, and was vicariously liable for the acts of Marquee's employees. The parties in the *Moradi* action were:

Party	Status	Description
David Moradi	Underlying Plaintiff	
Roof Deck Entertainment, LLC, dba Marquee Nightclub ("**Marquee**")	Underlying Defendant	**Nightclub operator:** Marquee owned and operated the nightclub located in The Cosmopolitan known as the Marquee Nightclub; it was held liable for the violent acts of its employees.
Nevada Restaurant Venture 1, LLC ("**Nevada Restaurant**")	Not an Underlying Defendant	**Nightclub owner:** Cosmopolitan leased the nightclub space in its hotel to its subsidiary Nevada Restaurant which, in turn, entered into a Nightclub Management Agreement with Marquee to operate the nightclub
Nevada Property 1, LLC ("**Cosmopolitan**")	Underlying Defendant	**Hotel owner:** owned and operated the hotel and casino known as The Cosmopolitan of Las Vegas. It was held liable, derivatively for the acts of Marquee, purely as the owner of the hotel, with a nondelegable duty to invitees.

Aspen as primary carrier for Marquee, and National Union as excess carrier for Marquee, each accepted the tender by Cosmopolitan as an additional insured

under both the Aspen and National Union policies. Aspen and National Union defended the action by appointing a single set of attorneys to represent both Marquee and Cosmopolitan, despite the obvious conflict of interests.[2] Although Aspen and National Union were repeatedly informed by their attorneys that the potential verdict in the case might exceed $100 million dollars, they inexplicably rejected an offer of judgment of $1.5 million, forcing the case to trial based on dubious defenses.[3] A joint jury verdict of $160.5 million was returned against Marquee and Cosmopolitan.

With that, Aspen agreed to pay a confidential amount and National Union agreed to pay a confidential amount. Their insured, Cosmopolitan, faced the

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[2]While National Union had no duty to defend, it exercised its right to associate and eventually took over the defense, using a single set of attorneys to represent Marquee and Cosmopolitan. The conflict was either ignored or accepted by National Union. National Union was aware of a $1.5 million offer of judgment, and chose not to accept it under circumstances where refusal of the offer was bad faith.

[3]National Union may argue there were reasons to push the case to trial, but these would be defenses to the claims asserted by St. Paul, not a reason to disallow St. Paul's claims at the starting gate. The issue as to the strength, or weakness, of St. Paul's claims is not before this Court. The district court determined that no cause of action exists, and that is the only issue properly before this Court.

National Union may also point the finger at Aspen, but any such cross-claims should have been asserted in district court. Discovery was not permitted by the court; all that was before the district court was the pleadings and argument. Relative fault as between Aspen and National Union should have been–and should still be–resolved in the action below.

balance of a multi-million judgment.

In order to get Cosmopolitan out of harm's way, The Zurich Insurance Company ("Zurich") paid a confidential amount and St. Paul paid a confidential amount to Moradi on behalf of Cosmopolitan. Had Aspen and National Union met their obligations to Cosmopolitan to provide it an un-conflicted defense, to reasonably pursue settlement on its behalf, and to indemnify it from the damages caused by their breaches of those duties, Cosmopolitan would not have found itself on the wrong side of a $160.5 million joint judgment, and Zurich and St. Paul would not have had to pay millions to resolve that liability.

The insurance policies at issue can been illustrated like this:

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National Union Fire Insurance Company of Pittsburgh, PA ("**National Union**" or "**AIG**") Named Insured: Marquee ***Add. Insured: Cosmopolitan*** Limits: $25 million Excess	St. Paul Fire and Marine Insurance Company ("**St. Paul**") Named Insured: Cosmopolitan Limits: $25 million Excess
Aspen Specialty Insurance Company ("**Aspen**") Named Insured: Marquee ***Add. Insured: Cosmopolitan*** Limits: $1 million Coverage A; $1 million Coverage B; $2 million Aggregate (district court ruled $1 million exposed.)	Zurich Insurance Company ("Zurich") Named Insured: Cosmopolitan Limits: $1 million

Based upon the payment made by St. Paul, St. Paul thereafter stepped into the shoes of Cosmopolitan as a subrogee and brought causes of action against Marquee for indemnity and contribution, and against Aspen and National Union for breach of contract and bad faith.

In response to St. Paul's claims, National Union did its best to confuse the district court, and it succeeded. It argued that there were "two separate towers of insurance," and National Union was therefore unaccountable for the tens of millions of dollars of harm it caused its insured, Cosmopolitan. However, from

Cosmopolitan's perspective, there was a *single* "tower" of insurance. Cosmopolitan was an insured under *all* of the policies at issue. St. Paul's claims are brought as the subrogee of Cosmopolitan, based on Aspen's and National Union's breach of duties owed to their insured, Cosmopolitan. This case is based on National Union's tortious breach of obligations owed by National Union to its insured, Cosmopolitan. St. Paul is subrogated to Cosmopolitan's right to recover damages from National Union. The district court misunderstood the nature of St. Paul's claim and erred by entering judgment against St. Paul in favor of National Union.

St. Paul is also subrogated to Cosmopolitan's rights against Marquee. Those claims against Marquee were standard claims for contribution and indemnity between parties, Marquee and Cosmopolitan, who suffered a joint liability based solely on the actions of one of them, Marquee. St. Paul paid Cosmopolitan's way out of that exposure. As a result, St. Paul was entitled to recover against Marquee as Cosmopolitan's subrogee. The district court once again misunderstood the basis of St. Paul's claims and incorrectly reached its decision in favor of Marquee.

STATEMENT OF THE ISSUES

I. As to National Union: Whether the district court erred when it found that National Union, an excess insurer, did not owe its insured Cosmopolitan a duty to reasonably settle a catastrophic injury claim which, if breached, could support an equitable subrogation cause of action for damages by St.

Paul, another excess insurer for Cosmopolitan, which was compelled to pay millions as a result of National Union allegedly failing to act reasonably in settlement.

II. As to Marquee: Whether the district court erred when it found that St. Paul, as subrogee of Cosmopolitan, could not pursue Marquee for statutory subrogation–contribution under NRS 17.225, and express indemnity via subrogation, for some or all of St. Paul's multi-million dollar settlement payment, even though Cosmopolitan's liability was solely derivative of the acts of Marquee.

The district court erred in both respects in its decision on these issues. This Court should reverse the two summary judgments and allow the case to proceed against National Union and Marquee.

STATEMENT OF FACTS

I. Underlying Facts

The facts underlying this case are generally undisputed; it is only the application of the law to these facts that is at issue. The facts in this section are taken directly from National Union's motion for summary judgment.[4] AA 1576-77.

This action arises out of an underlying bodily injury action captioned *David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan.* AA 453 (FAC ¶ 6). Moradi alleged that on April 8, 2012, he went to the Marquee Nightclub located within the Cosmopolitan to socialize with friends, where he was beaten by

[4]Edited for grammar and style.

Marquee employees, whose conduct was allegedly ratified, encouraged and countenanced by Cosmopolitan, resulting in bodily injuries. AA 453 (FAC ¶ 6-7). Moradi filed a complaint against Cosmopolitan and Marquee on April 4, 2014, asserting causes of action for assault and battery, negligence, intentional infliction of emotional distress, and false imprisonment. AA 453-54 (FAC ¶ 8-10, Exhibit A). Moradi alleged that, as a result of his injuries, he suffered past and future lost wages/income. Moradi sought general damages, special damages and punitive damages. *Id.* (¶ 9, Exhibit A).

During the course of the underlying action, Moradi alleged that Cosmopolitan, as the owner of the casino where Marquee was located, faced exposure for breaching its nondelegable duty to keep patrons safe, including Moradi. AA 454 (FAC ¶ 13.) The district court in *Moradi* held, as a matter of law, that Cosmopolitan "had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers," and that Marquee and Cosmopolitan can be jointly and severally liable. AA 2096 (RJN, Ex. 5.); *see* AA 1556-58 (Transcript, decision of Judge Johnson in Moradi, 14:13-16:25).

On April 26, 2017, after a five-week trial, the jury in the underlying action issued a special verdict, finding that Moradi established his claims for assault, battery, false imprisonment and negligence against Marquee and Cosmopolitan, jointly, and that the actions of the employees of Marquee were a legal cause of

injury or damage to Moradi . The jury awarded compensatory damages of $160.5 million. (FAC, Ex. C.)[5] After the verdict and during the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. AA 463 (FAC ¶ 66). National Union, St. Paul, Aspen and Zurich accepted the settlement demand and resolved the underlying action with the confidential contributions set forth in the first amended complaint filed by St. Paul under seal. *Id.* (FAC ¶ 67-70). The settlement was funded entirely by the various insurance carriers for the entities at issue. No defendant in the underlying case contributed any money toward the settlement.

II. Some Additional Background Facts

The foregoing facts come directly from National Union's motion below.

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[5]Below, Marquee argued incorrectly that because the jury found liability of Cosmopolitan and Marquee to be joint and several, Cosmopolitan is guilty of committing intentional torts, and, based on this faulty premise, that indemnity is not available to Cosmopolitan because it is a wrongdoer. This contention was unsupported and incorrect. Cosmopolitan's liability was purely derivative, based on the legal conclusion that a property owner is vicariously liable for the acts of its agents and parties considered to be its agents as a matter of law. That Cosmopolitan is jointly and severally liable to Moradi for his injuries based on the legal relationship between Cosmopolitan and Marquee has no bearing on the liability between Cosmopolitan and Marquee for purposes of indemnity law, express or implied. The suggestion makes a mockery of indemnity law. Any agent may argue, "you are liable to a third party for my actions because I am your agent, so I cannot owe you indemnity regardless of contract or actual fault, because you are guilty of my actions." That sophistry finds no support in logic or law. Moreover, it is a disingenuous for Marquee to suggest that this issue existed where it raised no objection to being defended jointly by the same defense counsel appointed to defend Cosmopolitan.

The following facts are disputed to whatever extent National Union will dispute them, but are supported by the record.

Marquee and Cosmopolitan tendered the *Moradi* action to Aspen and National Union. Aspen–which had a duty to defend both insureds–and National Union–which exercised its right to associate in the defense of both insureds–each decided to provide a joint defense to both Marquee and Cosmopolitan, despite obvious conflicts. For example, Cosmopolitan's only exposure was as the landowner, *i.e.*, its liability was based on premises liability, not on actual wrongdoing. AA 1556-58 (Transcript, decision of Judge Johnson in *Moradi*, 14:13-16:25). Absent a conflicted defense, Cosmopolitan would have cross-complained against Marquee for indemnity.

Even though the district court in *Moradi* ruled that Marquee and Cosmopolitan could be found to be jointly and severally liable, neither Aspen nor National Union ever sought nor procured a conflict waiver from Cosmopolitan. AA 1210 (Derewetzky Decl., ¶ 6).[6]

Aspen and National Union paid a confidential amount collectively on behalf of Marquee and Cosmopolitan to resolve the claims against those parties. Zurich

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[6]Aspen provided a single set of attorneys to represent Cosmopolitan and Marquee jointly, despite the fact that Cosmopolitan was entitled to be indemnified by Marquee pursuant to contract, thus improperly waiving Cosmopolitan's rights. *Id.*

and St. Paul, in turn, were forced to pay, collectively, to resolve the remaining claim against Cosmopolitan. AA 463 *Id.*

The district court in *Moradi* denied Cosmopolitan's motion for summary judgment, finding that Cosmopolitan had a nondelegable duty to exercise reasonable care so as not to subject others to an unreasonable risk of harm. AA 2385 (Derewetzky Decl. ¶ 25). Accordingly, Cosmopolitan was found jointly and severally liable with Marquee to Moradi but only because it was vicariously liable for Marquee's acts. *Id.*

As early as November 13, 2015, a year and a half before the verdict, the defense counsel appointed and controlled by Aspen to defend Marquee and Cosmopolitan warned Aspen of the potential for a catastrophic verdict of $310 million in compensatory damages, and he predicted a defense verdict only 3 out of 10 times, *i.e.*, he predicted a 70 percent chance of plaintiff prevailing. AA 1211 (Derewetzky Decl. ¶ 7, Exh 17).

On or about December 10, 2015, Moradi served a formal, written statutory Offer of Judgment for $1.5 million. AA 1211 (Derewetzky Decl. ¶ 8, Exh 18). Aspen rejected the offer. Aspen did not inform either St. Paul or Cosmopolitan of opportunities to settle before the offers expired. AA 2385 (Derewetzky Decl. ¶ 28). National Union also rejected this $1.5 million offer, AA 2472, as well as a later offer to settle for $26 million (the amount of the combined Aspen and

National Union limits), which Moradi presented on November 2, 2016, and, again, on March 9, 2017, shortly before trial commenced. AA 2474; 2479. Rather than accept settlement offers within their limits that would have protected both of their insureds, Marquee and Cosmopolitan, Aspen and National Union did the opposite. They rejected their settlement opportunities, put their own interests ahead of their insureds, and unreasonably gambled at trial. Aspen and National Union lost their gamble spectacularly, and subjected their insureds to a runaway verdict. AA 2551 (verdict).[7]

Having lost its bet, National Union claimed its exposure was capped at the $25 million limits of the National Union policy. National Union insisted that protecting Cosmopolitan from the runaway verdict was now St. Paul's problem. AA 2386 (Derewetzky Decl. ¶ 31). But it was National Union that exposed Cosmopolitan to the runaway verdict by failing to avail itself of earlier opportunities to use its limits to protect both of its insureds, opportunities that were never presented to St. Paul.[8] AA 2585 (Derewetzky Decl., ¶ 32); AA 2474;

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[7]These facts are alleged in the complaint and the affidavits supporting St. Paul's oppositions below. They must be considered true at this stage of these proceedings. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (when reviewing a motion for summary judgment, the evidence and any reasonable inferences drawn from it must be viewed in a light most favorable to the nonmoving party).

[8]On February 13, 2017, St. Paul received its first notice of the April 8, 2012 incident involving Moradi and its first notice of the 2014 suit. The case proceeded

2479.

Yet, with a joint and several judgment hanging over Cosmopolitan's head, St. Paul–not National Union–stepped in to protect Cosmopolitan, reserving its right to seek reimbursement as Cosmopolitan's subrogee, from Aspen and National Union. *Id.*

III. The Insurance Policies

As illustrated in the chart contained in the Introduction, Zurich issued a primary policy of insurance in favor of Cosmopolitan. AA 1730. The Zurich policy contains limits of $1,000,000 each occurrence and $2,000,000 in the general aggregate.

St. Paul issued a commercial umbrella liability policy in favor of Cosmopolitan (hereinafter the "St. Paul Excess Policy"). AA 1891. The St. Paul Excess Policy contains limits of $25,000,000 for each occurrence, subject to a $25,000,000 general aggregate.

Aspen issued a primary policy of insurance in favor of Marquee, with limits of $1,000,000 each occurrence and $2,000,000 general aggregate. AA 1954. National Union issued a commercial umbrella policy to Marquee (the "National Union Excess Policy"). The National Union Excess Policy provides limits of $25,000,000 for each occurrence, subject to a $25,000,000 general aggregate.

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to trial in late March 2017.

AA 1668.

The pivotal undisputed fact, which is included in the district court's finding, is that **Cosmopolitan qualified as an additional insured for the *Moradi* action under both the Aspen and the National Union policies.** AA 2906 (FAC 26; 32). National Union argued that it owed no duty to settle to St. Paul because it had no contract with St. Paul, but it never denied that it owed a duty to settle to its insured, Cosmopolitan. AA 2870 (Transcript at 31). Neither the district court nor National Union appears to appreciate the significance of this undisputed fact. Indisputably, Cosmopolitan was an insured under the National Union Excess Policy, as well as every other policy at issue in this action.

IV. Procedural Facts

On July 25, 2017, seeking to recover the money it was forced to contribute to the ultimate settlement to satisfy a verdict that should never have been entered, St. Paul filed its complaint, as a subrogee of Cosmopolitan, to recover: (a) from Marquee, the wrongdoer; and (b) from Aspen and National Union, the insurance carriers that mishandled the defense.

On September 26, 2017, St. Paul filed a redacted complaint, omitting the confidential settlement sums. AA 1.

On December 4, 2017, National Union and Marquee, acting through the same counsel, filed separate motions to dismiss. AA 15; 96. National Union

argued that St. Paul could not hold National Union accountable because Nevada had not expressly recognized a cause of action by one insurer against another for bad faith failure to settle. AA 26.

For its part, Marquee argued that a contract between it and Nevada Restaurant, identified as "the owner," was binding on Cosmopolitan, and that the contract contained a waiver of subrogation clause, and a clause excluding coverage for amounts covered by insurance, so St. Paul could not be subrogated to the rights of Cosmopolitan. AA 109. These are the primary arguments in this case.

On December 13, 2017, Aspen also moved to dismiss, parroting the arguments of National Union.[9] AA 119.

On January 26, 2018, St. Paul filed separate oppositions to National Union's and Marquee's motions to dismiss. AA 269; 283. On February 6, 2018, National Union and Marquee filed replies. AA 305; 379. A hearing was conducted on these two motions on February 13, 2018. AA 399.

On March 21, 2018, the district court entered an order denying Marquee's motion to dismiss without prejudice. AA 446. On that same date, the district court entered an order granting in part and denying National Union's motion to

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[9] Each motion to dismiss, and later dispositive motions, were supported by separate declarations of counsel and exhibits, all of which have been included in the Appendix.

dismiss, while allowing St. Paul leave to amend. AA 449.[10]

On April 25, 2018, St. Paul filed its amended, redacted complaint. AA 452. The amended complaint contains more detail regarding the underlying action and the insurance policies, and it raised claims against Aspen and National Union by subrogation for breach and bad faith breach of the insurance policies, and for equitable estoppel. AA 453-70. The amended complaint, by subrogation, seeks contribution and express contractual indemnity against Marquee. AA 471-73. The complaint also asserts a claim for equitable contribution against National Union. AA 476. The amended complaint did not assert any cause of action under the Unfair Claims Practices Act, as the original complaint had.

On June 25, 2018, Aspen, National Union and Marquee each filed new, separate, motions to dismiss. AA 479; 624; 715. Aspen's motion raised new issues that are not before this Court, because the action against Aspen remains pending below. AA 479. National Union's motion and Marquee's motions made essentially the same arguments they had asserted in their first motion to dismiss. AA 624; 715.

On August 15, 2018, St. Paul filed separate oppositions to each motion to dismiss. AA 847; 893; 911. Replies, supplements and motions to strike were filed.

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[10]Aspen's motion was withdrawn by stipulation. AA 442.

On October 30, 2018, the district court conducted a hearing on the motions to dismiss, but issued no oral decision. AA 1044. On February 28, 2019, the district court issues a minute order denying the motions based on the parties' references to documents outside the pleadings, and the rigorous standard applicable at the motion to dismiss stage. AA 1099. A written order denying the motions to dismiss "for the reasons set forth in this Court's Minute Order" was entered on July 1, 2019. AA 1101.

On July 10, 2019, National Union, Marquee and Aspen filed separate answers to St. Paul's amended complaint. AA 1106; 1130; 1154. Because they had the same counsel, Marquee and National Union filed no cross-claims.

On August 29, 2019, St. Paul filed a motion for partial summary judgment against Aspen. AA 1209. The motion sought a declaration of the amount of coverage available under the Aspen policy, an issue that is not yet ripe for appeal. *Id.*

On September 13, 2019, National Union and Marquee filed separate motions against St. Paul for summary judgment.[11] AA 1443; 1569. With minor differences not particularly relevant here, the motions for summary judgment raised the same claims that had been raised in the motions to dismiss. *Id.*

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[11]A great deal of time was consumed in the motion practice, and there were delays in entry of orders. The case never got to the discovery stage because of the motions. No discovery has been conducted in this case.

On September 19, 2019, Aspen opposed St. Paul's motion for partial summary judgment, and included a counter-motion for summary judgment. AA 2099. Aspen relied on the same arguments from the prior motions for summary judgment.

St. Paul filed opposition to the motions for summary judgment on September 27, 2019, AA 2314; 2346, and to Aspen's counter-motion on October 2, 2019. AA 2651.

On October 8, 2019, the district court conducted a hearing on St. Paul's motion for partial summary judgment against Aspen, and Aspen's counter-motion for summary judgment. AA 2753. On October 15, 2019, the district court conducted a hearing on National Union's and Marquee's motions for summary judgment. AA 2840. At that hearing, National Union argued that because it and St. Paul were excess carriers in "separate towers of insurance," St. Paul had no right of recovery against it:

> MS. KELLER: So, no Nevada State Court case has ever recognized this or even recognized subrogation between any two insurers.[12] More importantly, no case in any jurisdiction has ever recognized subrogation between two excess carriers on the same level in different

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[12]The subrogation is not "between carriers." St. Paul is subrogated to the rights of Cosmopolitan. The subrogation is between a carrier and its insured, which could not be more common. The claim is between an insured and its carrier, which also could not be more common.

> towers.[13] So if the Court denies the motion for summary judgment, this Court, I guess would be the first in the nation to recognize such a possibility. And I think it's pretty clear what the policy reasons are against it and why we haven't even found a case nationwide where anyone has even asked for that. We haven't found a case where an excess insurer in a different tower has even asked for subrogation against an excess in a different tower.

AA 2866-67.

National Union then argued that subrogation between an excess carrier in one tower is allowed only *against a primary carrier* in another tower. The district court observed that the complaint was based on Apen's and National Union's failure to accept a reasonable offer of judgment, and suggesting the viability of such a claim, counsel for National Union responded as follows:

> MS KELLER: And if they were excess coming after primary they'd be right. The Colony case that they cite, which is the only Nevada case. It's not really a Nevada State Court case, but a federal case, that was the case where a district court, for the first time that we could find in Nevada, did find the ability to subrogate between two insurance carriers, but one was primary, and one was excess.[14]

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[13]The level of the carriers is irrelevant. The identity of the parties is irrelevant. The only relevant question is whether, absent St. Paul's satisfaction of the debt, Cosmopolitan would have a claim against National Union.

[14]The issue is not whether the insurers are primary or excess; the issue is whether the subrogor (Cosmopolitan) has a claim against the defendant (National Union) that its subrogee (St. Paul) can assert. It defies reason to shield National Union's for the consequences of its bad faith, while allowing such claims to proceed against Aspen. Both carriers had the same opportunities to settle and both violated their duties to the insured, Cosmopolitan. National Union pointed a finger at Aspen, the primary carrier which breached its duty to defend, but having made the decision to associate and control the defense, National Union likewise

AA 2868. The district court's decision in favor of National Union and against St. Paul was based on this legally irrelevant distinction.

Counsel for National Union then argued:

> "St. Paul can't sue National Union for breach of contract. They didn't have a contract. National Union and St. Paul had no contract. . . . National Union did not owe St. Paul a duty to settle."

AA 2870. This argument is fundamentally flawed because St. Paul is not suing National Union based on any contract between the two of them. Rather, St. Paul, as subrogee, and standing in the shoes of Cosmopolitan, is suing National Union for National Union's breach of obligations owed to its insured, Cosmopolitan, under the National Union Umbrella Policy. St. Paul can enforce that duty by subrogation.

The district court then concluded, incorrectly, that St. Paul's claim was akin to a third-party bad faith claim, and third party bad faith claims are not allowed in Nevada:[15]

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breached its duty to Cosmopolitan by providing Cosmopolitan with a conflicted and flawed defense and failing to settle. There is no legally relevant difference between Aspen's and National Union's obligations to Cosmopolitan.

[15]"District Court: Instead of bad faith, they're calling it indemnity or subrogation. But that's Nevada policy." AA 2872 ln. 8. This erroneous statement by the district court underlies its entire decision. A first-party bad faith claim asserted by another through assignment or subrogation is still a first party claim, not a third-party claim.

THE COURT: Well, isn't it a well-established principal in Nevada that there's no third party bad faith, which is essentially what they're trying to create here?

MS. KELLER: Yes.

THE COURT: That if this were a car accident, you -- and you were injured in the car accident and I was the person who had the insurance company, you could not sue my insurance company for bad faith?

MS. KELLER: Correct.

THE COURT: It's not your insurance company.

MS. KELLER: Right.

THE COURT: Same thing they're trying to create here, is a right to sue somebody else's insurance company.

AA 2871-73.

It is evident from this colloquy that the court did not apprehend that National Union was Cosmopolitan's insurance company. St. Paul's subrogation claim was Cosmopolitan's claim against National Union. This was not a third party bad faith claim. It was a first party bad faith claim. This misunderstanding formed the basis of the district court's decision.

In reaching its decision, the district court stated:

> I understand the argument that it boils down to this question of well, do we have two towers or one tower here. With all due respect, I believe we have two separate towers of insurance. These are totally separate towers, and I appreciate you don't like my analogy to third-party bad faith, but that's essentially what it is. You can't sue somebody else's insurance company. They don't owe you any duty.

AA 2885, ln. 17. Based on this flawed reasoning, the district court granted both National Union's and Marquee's motions for summary judgment. AA 2886-87.[16]

On May 14, 2020, the district court entered three separate orders: (1) Granting and denying summary judgment to Aspen (not the subject of this appeal), AA 2937; (2) granting summary judgment in favor of National Union, AA 2901; and (3) granting summary judgment in favor of Marquee. AA 2920. The National Union and Marquee orders were certified as final pursuant to NRCP 54(b). AA 2918; 2935. Notice of entry of each order was served on May 27, 2020. AA 2946; 2957. St. Paul's notice of appeal was filed timely on June 12, 2020. AA 3342.

Aspen thereafter renewed its motion for summary judgment. AA 2997. The district court, finding a difference between a claim via subrogation against a primary carrier, and a similar one against an excess carrier, denied Aspen's motion. AA 3403. St. Paul's claims against Aspen remain pending.

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[16]Marquee's arguments had nothing to do with its insurer's "towers of insurance" arguments, but the district court granted that motion because "[i]t was set up as two completely separate towers. So for that reason, I'm granting both the motions and denying the counter-motion." AA 2887, ln. 18. Even under the court's reasoning, which was faulty, judgment for Marquee does not logically follow.

DISCUSSION

I. Standard of Appellate Review

Summary judgment is appropriate when, after a review of the record viewed in a light most favorable to the nonmoving party, there remain no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. NRCP 56; *see Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *Anderson v. Baltrusaitis*, 113 Nev. 963, 964, 944 P.2d 797, 798 (1997).

On appeal, this Court applies the same standards as the district court, and reviews the district court's determination *de novo*. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005).

> This court reviews a district court's grant of summary judgment *de novo*, without deference to the findings of the lower court. Summary judgment is appropriate and "shall be rendered forthwith" when the pleadings and other evidence on file demonstrate that no "genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." This court has noted that when reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.

Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

II. St. Paul Is Properly Subrogated to Cosmopolitan's Rights Against National Union.

"Nevada law recognizes the existence of an implied covenant of good faith and fair dealing in every contract." *Pemberton v. Farmers Insurance Exchange*, 109 Nev. 789, 792-93, 858 P.2d 380, 382 (1993). This includes insurance

policies. *Pulley v. Preferred Risk Mut. Ins. Co.*, 111 Nev. 856, 859, 897 P.2d 1101, 1103 (1995).

In California, based on the covenant of good faith, an insurer that fails to accept a reasonable offer of settlement within the insurer's policy limits when there is a substantial likelihood of recovery in excess of those limits may be guilty of bad faith. *Id.*; *Safeco Ins. Co. of America v. Parks*, 170 Cal. App. 4th 992, 1006 (2009). The covenant of good faith runs between the excess or primary insurer and the insured. *See Diamond Heights Homeowners Assn. v. Nat'l Am. Ins. Co.*, 227 Cal. App. 3d 563, 578 (1991) ("Any insurer, whether excess or primary, in conducting settlement negotiations, is subject to an implied duty of good faith and fair dealing which requires it to consider the interests of the insured equally with its own and evaluate settlement proposals as though it alone carried the entire risk of loss."). *Am. Alternative Ins. Corp. v. Hudson Specialty Ins. Co.*, 938 F. Supp. 2d 908, 915-916 (C.D. Cal. 2013) (same). This Court has also taken a broad approach to defining the duties of an insurer, and allowing bad faith claims where an insurer fails to protect an insured. *See Allstate Ins. Co. v. Miller*, 125 Nev. 300, 307, 212 P.3d 318, 323 (2009).

These general principles apply whether a claim is brought by the insured directly, or by another insurer via subrogation, enforcing the insured's rights.

A. The Legally Irrelevant "Two Towers" Characterization

The district court was distracted by National Union's graphic characterization which placed St. Paul into a "tower" of insurance distinct from the tower illustrating the Aspen and National Union policies. The district court overlooked its own, uncontested finding of fact that Cosmopolitan was an insured under both the Aspen and the National Union policies, regardless of the towers of coverage. AA 2964 (FAC ¶ 32).

National Union and Aspen each owed Cosmopolitan coverage with respect to the underlying action. Aspen owed Cosmopolitan a duty to defend and National Union voluntarily assumed the defense. Both breached their defense duties. Both breached their duties to settle on behalf of Cosmopolitan, which resulted in a verdict that exceed their policy limits by many millions of dollars. As a result, Cosmopolitan had the right to sue both of them, just like any other insured has the right to sue its insurer for breach, and bad faith breach, of its obligations under an insurance policy.

This case is not defined by placing St. Paul in a "second tower." It is defined by the two breaches which took place in the left hand "tower" of the illustration, and by Cosmopolitan's right to hold its own insurers accountable for their actions and omissions. When St. Paul protected Cosmopolitan from the disaster caused by National Union's and Aspen's handling of the claim, St. Paul

was subrogated to and took on Cosmopolitan's recovery rights.

In sum, National Union's "two tower" characterization profoundly confused the district court. St. Paul's claims against National Union and Marquee are based on theories of subrogation. When St. Paul paid Cosmopolitan's damages, for whatever reason, St. Paul stepped into the shoes of Cosmopolitan. St. Paul can sue anyone who either contractually or equitably should be required to bear the loss, including Cosmopolitan's own excess carrier, which is National Union. St. Paul, as subrogee of Cosmopolitan, can pursue Cosmopolitan's claims against its own excess carrier, which is National Union. This is not new law. It is application of established subrogation principles in a new situation.

B. The Law of Subrogation

The doctrine of subrogation has been an integral part of the law for over three centuries. M. L. Marasinghe, "An Historical Introduction to the Doctrine of Subrogation: The Early History of the Doctrine I," 10 Val. U. L. Rev. 45, 48 (1975); *see also*, M. L. Marasinghe, "An Historical Introduction to the Doctrine of Subrogation: The Early History of the Doctrine II," 10 Val. U. L. Rev. 275 (1976).

"Subrogation is not a cause of action in and of itself;" it is an equitable remedy that allows one party to assert the cause of action of another. 73 Am. Jur. 2d Subrogation § 75; *Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 742, 923 A.2d 971, 1005 (2007), aff'd, 403 Md. 367, 942 A.2d 722 (2008); *Konkel v.*

Acuity, 2009WI App 132, 19, 321 Wis. 2d 306, 322, 775 N.W.2d 258, 265. When one person, including an insurer, pays for an injury to another caused by a third party, that person may step into the injured party's shoes and recover the cost of the injury from the wrongdoer. *Id.* This allows the burden of the loss to be placed on the party that caused it, where it belongs. 73 Am. Jur. 2d Subrogation § 2; *Kim v. Lee*, 145 Wash. 2d 79, 88, 31 P.3d 665, 669 (Wash. 2001).

Given the effectiveness of subrogation in placing the burden of wrongdoing where justice demands it belongs–on the wrongdoer–courts have held that it should be liberally and expansively applied, even in situations where it has not been applied before.

> Subrogation, as a doctrine, is not fixed and inflexible nor is it static, but rather, it is sufficiently elastic to meet the ends of justice. Furthermore, the doctrine is not constrained by form over substance, nor is it within the form of a rigid rule of law. Thus, the mere fact that the doctrine has not been previously invoked in a particular situation is not a prima facie bar to its applicability.
>
> The doctrine of subrogation embraces all cases where, without it, complete justice cannot be done. Grounded upon this premise, there is no limit to the circumstances that may arise in which the doctrine may be applied, particularly if applying the doctrine will provide the most efficient and complete remedy which can be afforded.

73 Am. Jur. 2d Subrogation § 7 "Flexibility and Scope"; *see also, e.g., Gearing v. Check Brokerage Corp.*, 233 F.3d 469, 472 (7th Cir. (Ill.) 2000); *Smith v. Clavey Ravinia Nurseries*, 329 Ill. App. 548, 552, 69 N.E.2d 921, 923 (Ill. App. Ct. 1946);

Atlanta Int'l Ins. Co. v. Bell, 438 Mich. 512, 521, 475 N.W.2d 294, 298 (1991); *W. Sur. Co. v. Loy*, 3 Kan. App. 2d 310, 313, 594 P.2d 257, 260 (1979); *Fenly v. Revell*, 170 Kan. 705, 711, 228 P.2d 905, 909 (1951).

C. Nevada's Long History of Enforcing Subrogation Rights

Nevada has long applied subrogation expansively and flexibly. While subrogation originated in the insurance context, the first opportunity this Court had to apply it was with regard to a refinanced mortgage. *Laffranchini v. Clark*, 39 Nev. 48, 153 P. 250, 251 (1915).[17] Although no prior Nevada opinion on point existed, this Court concluded that subrogation should be broadly permitted:

> "Subrogation is, in point of fact, simply a means by which equity works out justice between man and man. Judge Peckham says, in *Pease v. Egan*, 131 N. Y. 262, 30 N. E. 102, that 'it is a remedy which equity seizes upon in order to accomplish what is just and fair as between the parties;' and the courts incline rather to extend than to restrict the principle, and the doctrine has been steadily growing and expanding in importance."

Id. at 252.

Subrogation should be applied expansively to promote justice. It should not

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[17]This Court commented on the propriety of subrogation as early as 1879, in *Quilled v. Quigley*, 14 Nev. 215, 217 (1879), noting that a surety had not been deprived of its right of subrogation, and in *Revert v. Henry*, 14 Nev. 191, 197 (1879), observing that a surety that paid a claim subrogated to rights against responsible third party parties. Thus, even then, this court was familiar with and accepted the concept, which is unsurprising given it had existed for over a century in the insurance and surety contexts, even though this court had not yet had a chance to apply the doctrine.

be limited to allow wrongdoers to profit from their wrongs. This Court stated: "Subrogation . . . applies to a great variety of cases, and is broad enough to include every instance in which one party pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter . . . ." *Id.* This Court had no trouble extending subrogation to the mortgage context.

Nevada courts adhere to these same principles today. As recently as 2010, this Court stated that Nevada courts have "full discretion" to apply subrogation as an equitable remedy "based on the facts and circumstances of each particular case." *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538-39 (2010); *see also, Zhang v. Recontrust Co., N.A.*, 405 P.3d 103 (Nev. 2017); *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368-69, 252 P.3d 206, 208 (2011); *NAD, Inc. v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, 115 Nev. 71, 76, 976 P.2d 994, 997 (1999).

In 2012, *Laffranchini* was cited favorably by this Court in *In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 573, 289 P.3d 1199, 1209 n.8 (2012), where this Court observe that Nevada "has recognized the doctrine of equitable subrogation in a variety of situations" including workers compensation (*AT&T Technologies, Inc. v. Reid*, 109 Nev. 592, 855 P.2d 533 (1993)), negotiable instruments (*Federal Ins. Co. v. Toiyabe Supply*, 82 Nev. 14, 409 P.2d 623

(1966)), sureties (*Globe Indem. v. Peterson-McCaslin*, 72 Nev. 282, 303 P.2d 414 (1956)) and mortgages (*Laffranchini v. Clark*, 39 Nev. 48, 153 P. 250 (1915))." In addition to these contexts, this Court held that a developer and general contractor's builders risk insurer may subrogate against a subcontractor when the subcontractor was required to indemnify and provide additional insured coverage to the developer and general contractor. *Lumbermen's Underwriting All. v. RCR Plumbing, Inc.*, 114 Nev. 1231, 1232, 969 P.2d 301, 302 (1998). These were all specific areas where this Court had not previously spoken, but it did not matter, because the general doctrine of subrogation is well-established in Nevada, and that doctrine applies beyond any specific context.

National Union breached its duty to Cosmopolitan by failing to settle within its policy limits. It rejected reasonable settlement opportunities, resulting in a catastrophic judgment of $160.5 million. Absent St. Paul paying on Cosmopolitan's behalf, Cosmopolitan faced a multi-million dollar uninsured judgment. St. Paul paid, and in so doing, obtained Cosmopolitan's rights to sue National Union (and Aspen) for recovery.

National Union's assertion that allowing subrogation here is without precedent is incorrect. Equity demands accountability and there is no precedent in Nevada law for the immunity National Union seeks. The path is well-worn for this Court to allow St. Paul, as Cosmopolitan's subrogee, to hold National Union

accountable for the tremendous harm it caused by recklessly mishandling Cosmopolitan's defense and settlement negotiations.

D. The District Court's Distinction Between Primary and Excess Carriers Is Baseless.

Cases allowing an excess carrier to proceed against a lower level carrier are legion. Litig. & Prev. Ins. Bad Faith § 7:9 ("The courts are all but unanimous in holding that a paying excess carrier, as subrogee of the insured's rights, may maintain an action against a primary carrier for the latter's bad faith, excess liability resulting from breach of its settlement duties, or defense duties, or both. The vehicle used has largely been that of equitable subrogation."); *see, e.g., National Sur. Corp. v. Hartford Cas. Ins. Co.*, 493 F.3d 752, 757 n.2 (6th Cir. 2007) (explaining subrogation between primary and excess insurers is the "overwhelming majority" rule and citing cases from twenty-seven jurisdictions in support).

Nevertheless, National Union urged the district court to apply a distinction between primary and excess carriers, arguing that to do otherwise would lead to endless litigation and instability of settlements.[18] The parade of horribles that has

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[18]The argument that the right of settlement will be affected if an insurance company sues an insurance company is a scarecrow. Insurance companies throughout the country sue insurance companies for allocation of post-settlement losses. The settlement remains as to the parties affected by it (the insureds), so the integrity of the settlements is unaffected. No court has ever expressed a concern that post-settlement, equitable litigation between insurance carriers should be

not materialized in the excess versus primary arena will not arise where two excess insurers are involved. Excess carriers sue primary carriers in subrogation regularly, but this has not brought the settlement process to a screeching halt, nor has it resulted in endless litigation, though this right has existed for years throughout the country.

National Union offered no case law below in support of these confusing arguments. In stark contrast, the premise of St. Paul's claims are simple: An insurance company (National Union) has breached its duty to its insured (Cosmopolitan) and caused the insured damages. The party that cleans up that mess (St. Paul) acquires the insured's rights against the offending insurance company through subrogation. Many times the offending carrier is a primary insurer that breaches its duty to settle, harming the insured and, thereby, its excess insurer. But not always. An excess insurer can breach its duty to settle–as National Union did here–and find itself liable to the insured and, through subrogation, its other insurers, at any level. This issue was discussed in *Am. Alternative Ins. Corp. v. Hudson Specialty Ins. Co.*, 938 F.Supp. 2d 908, 916 (C.D. Cal. 2013):

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curtailed to promote settlements. Indeed, the opposite would be the case. An excess carrier is far more likely to participate in a settlement where its rights of indemnity and contribution are protected than it would be if the settlement is final, regardless of the equities between the carriers. Litigating equities between carries after settlement promotes, rather than discourages, settlements.

The California courts have not limited equitable subrogation recovery to excess insurers; primary insurers may also bring a claim under this theory of liability. In *Diamond Heights*, the court found that the primary insurer could proceed on an equitable subrogation theory against the excess insurer where the excess insurer arbitrarily vetoed a reasonable settlement and forced the primary insurer to proceed to trial and bear the full costs of defense. *Diamond Heights*, 227 Cal. App. 3d at 580. The court reasoned that "[a] contrary rule would impose the same unnecessary burdens upon the primary insurer and the parties to the action, among others, as does the primary insurer's breach of its good faith duty to settle. . . . [I]t imperils the public and judicial interests in fair and reasonable settlement of lawsuits." *Id.* at 580-81 (internal quotation omitted). Similarly in *Sequoia Ins. Co. v. Royal Ins. Co. of America*, 971 F.2d 1385 (9th Cir. 1992), the Ninth Circuit, applying California law, found that "equity and public policy require[] that [equitable subrogation] claims be heard defensively" and held that there was a triable issue as to which insurer breached its duty to settle. *Id.* at 1392. *See also Kelley v. British Commercial Ins. Co.*, 221 Cal. App. 2d 554, 563, 34 Cal. Rptr. 564 (1963) (rejecting the theory that appellant "owed no duty of good faith toward its insured because it occupied the position of a secondary or excess carrier and took no active part in the defense of the Kelley action").

. . . .

[T]he theory of equitable subrogation rests on the principle that each insurer owes a duty of good faith and fair dealing to its insured. *See Sequoia*, 971 F.2d at 1392. This principle applies equally to excess and primary insurers. *See Nw. Mut. Ins.*, 76 Ca. App. 3d at 1048 (acknowledging "the duty of the excess insurer to settle within the limits of its own policy"). Thus, if an excess insurer, like a primary insurer, fails to accept a reasonable settlement offer within its policy limits, it may be liable to the other insurer for any excess liabilities. This parallel liability insures that the "burden for a loss [is] on the party ultimately liable or responsible for it and by whom it should have been discharged." *Fireman's Fund Ins.*, 65 Cal. App. 4th at 1296.

An excess insurer can breach its settlement duties as easily as a primary insurer. When harm resulting from that breach has been absorbed by a different insurer, the performing insurer is entitled to bring a recovery claim, via subrogation, against the breaching insurer, whatever the "level" of the two insurers. The two insurers, for example, can both be excess insurers. *See, e.g., Central Illinois Public Service Co. v. Agricultural Ins. Co.*, 378 Ill. App. 3d 728 (2008) (excess insurer had claim for bad faith failure to settle against other excess insurer that exerted control over the litigation). The point is that when a wrongful refusal to settle has caused harm to an insured, the breaching insurer is liable to make it right.

National Union has repeatedly asserted that subrogation between two insurance carriers has not been recognized in Nevada. What National Union apparently means is that no Nevada case has addressed a subrogating carrier's right to sue another carrier on theories of bad faith. Subrogation is, however, well-established in Nevada. Any person or entity who is subrogated to the rights of any other person or entity may sue any person or entity on any claim the subrogor has or had against the other person or entity. There is nothing in the subrogation jurisprudence of Nevada which adopts the limitations urged by National Union. Cases based on indemnity or contribution claims between insurance carriers are irrelevant because they are based on the existence or

nonexistence of a claim of one carrier based on its own rights against another. No such claim is at issue here. St. Paul is subrogated to the claims of Cosmopolitan. If Cosmopolitan has claims against National Union or Marquee–including bad faith claims–St. Paul, as subrogee, can assert them. The district court was confused by concepts of who is bringing the suit and whose rights are being enforced, but this Court should not be. As stated at the argument on one of the motions:

> What National Union is saying is subrogation doesn't exist. Well, the Supreme Court in *AT&T Technologies v Reed*, 109 Nevada 592, says: "Subrogation is a basic accomplish to accomplish fairness and justice between the parties."[19] It's a very basic concept. What National Union is suggesting and what they're doing is they're saying: well, we've never seen a case with these two parties. It's as if you were to say there's never been a negligence case between two flight attendants, so it must not be allowed."

AA 427, ln. 18.

E. St. Paul's Equitable Subrogation Claims Are Supported By Nevada Law.

When an insurer breaches its duty to settle a claim against its insured, it is liable to the insured for all damages caused by that breach, even amounts in excess of the insurance company's policy limits. *See, e.g., Colony Ins. Co. v. Colorado*

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[19]The case actually says: "Generally, subrogation is an equitable doctrine created to 'accomplish what is just and fair as between the parties.' *Laffranchini v. Clark*, 39 Nev. 48, 55, 153 P. 250, 252 (1915)." *AT & T Techs., Inc. v. Reid*, 109 Nev. 592, 595, 855 P.2d 533, 535 (1993). The doctrine is not new; this application of it is not novel.

Cas. Ins. Co., 2018 WL 3312965 (D. Nev. July 5, 2018).

In *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2016 WL 3360943 (D. Nev. June 9, 2016) ("Colony I"), and *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2018 WL 3312965 (D. Nev. July 5, 2018) ("Colony II"), the court concluded that Nevada law supports equitable subrogation by an excess carrier against a primary carrier for bad faith failure to settle.

In *Colony I*, a primary auto insurer rejected settlement demands within its limits. The case later settled in excess of primary limits with the participation of the excess carrier. The excess carrier sued the primary carrier through equitable subrogation for the sum it paid based on bad faith failure to settle. The primary carrier argued that Nevada had not recognized the right of an excess carrier to do so. The court rejected this contention:

> [E]quitable subrogation is "an equitable remedy that requires the court to balance the equities based on the facts and circumstances of each particular case. Subrogation's purpose is to 'grant an equitable result between the parties.' This court has expressly stated that district courts have full discretion to fashion and grant equitable remedies." *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 245 P.3d 535, 538 (Nev. 2010) (internal citations omitted).

Colony I, at *3.[20]

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[20]National Union conceded below that *Colony* is a classic application of subrogation, but attempted to distinguish *Colony* from this case because liability in *Colony* was clear. AA 2868, ln. 16. Liability could not be more clear in this case. Agents of Marquee beat a patron, causing more than $100 million of brain damage. Even were liability defenses available, and strong enough to warrant

This case is comparable to *Colony I*. St. Paul, as Cosmopolitan's subrogee, is suing National Union for the excess judgment resulting from National Union's bad faith failure to settle. As in *Colony I*, St. Paul has a right of subrogation under Nevada law. *See also, Riverport Ins. Co. v. State Farm*, 2019 WL 4601511, at *8 (D. Nev. Sept. 20, 2019) (following *Colony* to permit equitable subrogation, but denying relief because additional insured carrier did not cover the loss, and its named insured was not responsible for the loss).

National Union did not and cannot cite any cases from any jurisdiction that expressly prevent subrogation between carriers. This is because such a rule makes no sense. To preclude subrogation would be to reward wrongdoers, and to undermine settlement and the insurance industry. There is no Nevada public policy in favor of such things.

F. St. Paul's Equitable Subrogation Claims Are Supported By The Law of Other States.

By granting National Union's motion against St. Paul, the district court rejected the super-majority rule which, to date, has been adopted by twenty-nine other jurisdictions. *See National Sur. Corp. v. Hartford Cas. Ins. Co.*, 493 F.3d 752, 757 n.2 (6th Cir. 2007) (subrogation between insurers is the "overwhelming

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pushing a case with catastrophic damages to trial when an offer to settle for a minimal amount, relatively speaking, was on the table, that is a defense to the claims that must be presented below. It is not a basis to argue that the cause of action itself does not exist.

majority" rule, citing cases from twenty-seven jurisdictions); *see also* two subsequent cases joining the crowd: *Preferred Prof'l Ins. Co. v. Doctors Co.*, 419 P.3d 1020 (Colo. 2018); *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818 (Mo. 2014). Alabama is the only jurisdiction to reject the majority rule. *Fed. Ins. Co. v. Travelers Cas. & Sur. Co.*, 843 So. 2d 140, 145-46 (Ala. 2002). Nonetheless, the district court, in effect, assumed that this Court would follow the sole outlier, Alabama, and rejected St. Paul's claim.

For example, in *In re Farmers Texas Cty. Mut. Ins. Co.*, No. 04-19-00180-CV, 2019 WL 2605630, at *6 (Tex. App. June 26, 2019), the court in Texas stated:

> [O]ur prior decisions in *Stowers* and *Ranger County* imposed clear duties on the primary carrier to protect the interests of the insured. The primary carrier should not be relieved of these obligations simply because the insured has separately contracted for excess coverage. In this situation, where the insured has little incentive to enforce the primary carrier's duties, the excess carrier should be permitted to do so through equitable subrogation.

Id., see Am. Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480, 482-83 (Tex. 1992) (recognizing the right of an excess carrier to sue a primary for bad faith failure to settle the claim of an insured on a theory of equitable subrogation, and collecting many cases from around the country reaching same conclusion); *see also, Preferred Prof'l Ins. Co. v. The Doctors Co.*, 2018 COA 49, 14, 419 P.3d 1020, 1023, reh'g denied (May 3, 2018) (under Colorado law, an excess insurer

may sue a primary by equitable subrogation for bad faith); *Ace Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 2 Cal. App. 5th 159, 167, 206 Cal. Rptr. 3d 176, 181 (2016) ("Equitable subrogation allows an insurer that paid coverage or defense costs to be placed in the insured's position to pursue a full recovery from another insurer who was primarily responsible for the loss."); *St. Paul Fire & Marine Ins. Co. v. Liberty Mut. Ins. Co.*, 135 Haw. 449, 453, 353 P.3d 991, 995 (2015) (noting that the majority of jurisdictions recognize a cause of action based on equitable subrogation by an excess carrier against a primary carrier, and applying the remedy "broadly" in Hawaii); *Perera v. U.S. Fid. & Guar. Co.*, 35 So. 3d 893, 900 (Fla. 2010) ("Under the doctrine of equitable subrogation, an excess insurer has the right to maintain a cause of action for damages resulting from the primary carrier's bad faith refusal to settle the claim against their common insured."). (citations omitted); *Ranger Ins. Co. v. Travelers Indem. Co.*, 389 So. 2d 272, 276 (Fla. Dist. Ct. App. 1980) (stating that the remedy of equitable subrogation is available in Florida by an excess carrier against a primary carrier and rejecting argument that there must be privity of contract between the carriers); *Great Am. Ins. Co. of New York v. Fed. Ins. Co.*, No. M200900833COAR3CV, 2010 WL 1712947, at *5 (Tenn. Ct. App. Apr. 28, 2010) (equitable subrogation between carriers allowed in Tennessee); *United Nat. Ins. Co. v. Providence Washington Ins. Co.*, No. 05CV1798A, 2008 WL 2745218, at *3 (Mass. Super. 2008) (noting

general rule that an excess insurer has a claim against a primary based on equitable subrogation); *Fireman's Fund Ins. Co. v. Cont'l Ins. Co.*, 308 Md. 315, 320-21, 519 A.2d 202, 205 (1987) (recognizing that the majority of jurisdictions recognize the right of an excess carrier to sue a primary carrier for bad faith on theory of equitable subrogation; citing cases from California, Minnesota, New Hampshire, New Jersey, Ohio, and Florida). And the list goes on and on.

Each of these decisions from other states rely on the strong policy considerations that compel equitable subrogation to address the very wrong that exists in this case.

> The public has a strong interest in the prompt and reasonable settlement of lawsuits. If the presence of an excess insurer in the case relieves the primary insurer of a duty to settle, the primary insurer has no incentive to settle the suit within its policy limits. This disincentive to settle obviously would lead to increased insurance and litigation costs. *Valentine v. Aetna Ins. Co.*, 564 F.2d 292, 296-97 (9th Cir.1977); *Reserve Ins. Co., supra*, 238 N.W.2d at 864-65.

Fireman's Fund Ins. Co. v. Cont'l Ins. Co., 308 Md. 315, 320-21, 519 A.2d 202, 205 (1987).

G. National Union's Contention That Subrogation Fails Because Cosmopolitan Has No Damages Is Contrary to the Nature of Subrogation.

National Union asserted that St. Paul cannot assert a claim by subrogation to the rights of Cosmopolitan because Cosmopolitan suffered no loss. It argues that St. Paul's subrogation claims fail because Cosmopolitan paid no damages out of

its own pocket. In other words, National Union posits that because St. Paul stepped up and protected the mutual insured, Cosmopolitan, from National Union's bad faith and Marquee's wrongful conduct, they get away with it.

National Union's argument ignores the fundamental nature of subrogation. Subrogation was introduced into the common law because of, not despite, the fact that an insurer paid damages on behalf of its insured. *Mason v. Sainsbury*, 3 Doug. 61, 99 Eng. Rep. 538 (1782). Modern cases are in accord. *See, e.g., Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co.*, 182 Cal. App. 4th 23, 105 Cal. Rptr. 3d 606 (2010); *Troost v. Estate of DeBoer*, 155 Cal. App. 3d 289, 294, 202 Cal. Rptr. 47, 50 (Ct. App. 1984) ("Payment by the insurance company does not change the fact a loss has occurred."); *Maryland Cas. Co. v. Acceptance Indem. Ins. Co.*, 639 F.3d 701, 706 (5th Cir. 2011) (the law "does not bar contractual subrogation simply because the insured has been fully indemnified."); *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 307 (5th Cir. 2010) (same). The essence of subrogation is that the insurer pays the insured's damages, thereby protecting the insured, and gaining the right to pursue whoever caused the damages. If the insurer paying to protect the insured eliminated the right to pursue subrogation, subrogation would not exist. As bluntly explained by one court:

> Under Cleveland's view, no insurer could ever state a cause of action for subrogation in order to recover amounts it paid on behalf of its insured, because of the very fact that it had paid amounts on behalf of its insured. Not only is this illogical, it contradicts decades of cases

> consistently holding that an insurer may be equitably subrogated to its insured's indemnification claims.

Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co., 182 Cal. App. 4th 23, 34 (Cal. 2010).

Below, respondents cited and misrepresented *California Capital Ins. Co. v. Scottsdale Indem. Ins. Co.*, 2018 WL 2276815 (Cal. Ct. App. May 18, 2018), which is unpublished and uncitable in California courts. In that case, the insurer did not assert a cause of action against another insurer based on subrogation. Rather, after Scottsdale breached its duty to settle, resulting in an excess judgment, it was sued by California Capital under an assignment.

The court held that California Capital could not pursue the assigned claims because the insureds sustained no damages. The court also held that even if California Capital had asserted a subrogation claim, it would have failed because California Capital did not have equitable superiority. To the court, there would therefore be no equitable reason to shift the loss to the other carrier, since both were in breach. However, St. Paul's claims are based on subrogation, not assignment. Additionally, St. Paul has equitable superiority over National Union. National Union (and Aspen), not St. Paul, caused the excess judgment. National Union is in breach and in bad faith; St. Paul is not.[21]

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[21]Even if *Capital* did say what National Union says it does, it would be wrong, because subrogation presupposes the insurer paid the loss and protected

National Union also cited *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Tokio Marine & Nichido Fire Ins. Co.*, 233 Cal. App. 4th 1348, 1362 (2015). This is an example of a case where the court misunderstood the fundamental nature of subrogation, as was later explained by a California federal court in *Pub. Serv. Mut. Ins. Co. v. Liberty Surplus Ins. Corp.*, 2017 WL 3601381 (E.D. Cal. Aug. 22, 2017), the only case to have ever cited *Tokio*. In rejecting *Tokio*, the court relied on *Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co.*, 182 Cal. App. 4th 23, 105 Cal. Rptr. 3d 606 (2010), reasoning:

> When Interstate sued Cleveland for breach of contract as its insured's subrogee, Cleveland demurred on grounds, inter alia, that because Interstate had fully compensated the indemnitee, it could not sue for subrogation on the indemnitee's behalf. The Interstate court squarely rejected this contention, stating that "Cleveland's insistence that [the insured] suffered no loss because Interstate paid [the insured's employee], and Interstate therefore suffered no loss because it stands in the shoes of its insured, is circular and erroneous." *Id.* at 35, n.3. As the Court observed, if Cleveland's "illogical" contention were accepted, "no insurer could ever state a cause of action for subrogation in order to recover amounts it paid on behalf of its insured, because of the very fact that it had paid amounts on behalf of its insureds." *Id.* at 34. In the court's view, that would contradict "decades of cases consistently holding that an insurer may be equitably subrogated to its insured's indemnification claims." *Id.*

Pub. Serv. Mut. Ins. Co. v. Liberty Surplus Ins. Corp., 2017 WL 3601381 (E.D.

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the insured. Here, National Union left Cosmopolitan exposed to an excess judgment.

Cal. 2017).[22]

This Court should not be misled by National Union's "no damages" argument. St. Paul's payment does not obviate its right to subrogation. It establishes it.

III. Nevada Also Permits Contractual Subrogation Against National Union.

A. Contractual Subrogation Is Available Here.

In addition to having Cosmopolitan's rights to sue National Union via equitable subrogation, St. Paul also had contractual subrogation rights under the St. Paul Excess Policy. Contractual subrogation is based on an agreement of the contracting parties granting one the right to pursue reimbursement from the responsible third party in exchange for payment of a loss. 73 Am. Jur. 2d Subrogation § 4; *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 646 (Tex. 2007). Contractual subrogation is governed by the terms of the contract. 73 Am. Jur. 2d Subrogation § 4. ("A contractual subrogation clause expresses the parties' intent that subrogation should be controlled by agreed contract terms, not external rules imposed under the common law." *Puente v. Beneficial Mortg. Co. of Indiana*, 9 N.E.3d 208 (Ind. Ct. App. 2014)).

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[22]Part of the reason the *Tokio* court held the insured suffered no damages was because there was no excess judgment. Some cases suggest that an excess judgment is necessary for bad faith exposure. *See J.B. Aguerre, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 59 Cal. App. 4th 6, 13, 68 Cal. Rptr. 2d 837, 841 (1997). There was an excess verdict in this case.

The St. Paul Excess Policy states: "If any Insured has rights to recover from any other person or organization all or part of any payment we have made under this policy, those rights are transferred to us." AA 1916; *see also* AA 457 (FAC 42; "The St. Paul Policy contains a subrogation provision which transfers all of Cosmo's rights of recovery against any other person or organization to St. Paul for all or part of any payment made by St. Paul under the St. Paul Policy.").

Both types of subrogation may exist independently and simultaneously alongside each other, *i.e.*, they are not mutually exclusive, and the non-existence of one does not preclude the other. 73 Am. Jur. 2d Subrogation § 3; *Roberts v. Total Health Care, Inc.*, 109 Md. App. 635, 648, 675 A.2d 995, 1001 (1996), aff'd, 349 Md. 499, 709 A.2d 142 (1998); *Phillips v. State Farm Mut. Auto. Ins. Co.*, 73 F.3d 1535, 1538 (10th Cir. 1996). Thus, a party may assert claims for equitable and contractual subrogation simultaneously where it has grounds to do so, as St. Paul has done here.

One significant difference between equitable and contractual subrogation is that "a subrogee invoking contractual subrogation can 'recover without regard to the relative equities of the parties'" or before the insured has been made whole. *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 647 (Tex. 2007); *see, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Riggs Nat. Bank of Washington, D.C.*, 646 A.2d 966, 971 (D.C. 1994) ("the superior equities doctrine, although applicable to

equitable subrogation claims, has no application in cases of conventional subrogation and assignment.").

While National Union rejects *Colony*'s holding that Nevada law supports equitable subrogation, it embraces that court's position that in some situations a contractual subrogation claim cannot be maintained, and asserts this is such a situation.

In fact, the *Colony* court was incorrect when it held Nevada does not permit contractual subrogation. Nevada generally permits contractual subrogation, and it has only barred it in the limited context of med-pay cases, as was explained by this Court in *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005). *In Canfora*, this Court enforced a contractual subrogation clause. This Court first cited the principal that Nevada courts will not rewrite unambiguous contracts, and then concluded:

> In this case, the language in the subrogation clause could not be more plain. The clause unequivocally provides that when an employee receives the same benefits from the plan and a negligent third party, the recipient "must reimburse the plan for the benefits provided." Since the subrogation clause is unambiguous, the Canforas are bound by the terms of the document.

Canfora v. Coast Hotels & Casinos, Inc., 121 Nev. 771, 776, 121 P.3d 599, 603 (2005).

In other words, this Court enforced the subrogation clause because it is not in the business of revising contracts. It distinguished a prior case called *Maxwell*

v. Allstate Ins. Companies, 102 Nev. 502, 506 (1986), which held contractual subrogation was not available in the med-pay context as a matter of public policy as reflected in NRS 41.100 because of concerns the insured would not be fully compensated. *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 778 (2005) ("We have previously prohibited an insurer from asserting a subrogation lien against medical payments of its insured as a matter of public policy."). However, "where an insured receives 'a full and total recovery,' *Maxwell* and its public policy concerns are inapplicable." *Id.* In other words, this Court held that where the insured is fully compensated, contractual subrogation is permitted.

There is no public policy reason to protect National Union from paying for the consequences of its bad faith. St. Paul is entitled to pursue contractual, as well as equitable, subrogation of Cosmopolitan's claims against National Union.

B. St. Paul's Subrogation Claims Are First Party Claims.

The district court ruled that St. Paul's subrogation claims were claims based on third party bad faith, which is not allowed in Nevada.[23] AA 2871-73. The district court believed Cosmopolitan was suing National Union in National Union's capacity as Marquee's insurance company, *i.e.*, for third party bad faith,

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[23]"District Court: Instead of bad faith, they're calling it indemnity or subrogation. But that's Nevada policy." AA 2872 ln. 8. This obviously erroneous statement by the district court underlies its entire decision. A first-party bad faith claim asserted by another through assignment or subrogation is still a first party claim, not a third-party claim.

which St. Paul agrees is not permitted. The district court's belief was, however, unfounded. St. Paul asserted claims as Cosmopolitan's subrogee against National Union in National Union's capacity as Cosmopolitan's own insurance company. This is ordinary first party bad faith. Nevada has long recognized an insured's right to sue its own insurance company for bad faith.

C. St. Paul's Subrogation Claims Are Not Premised On Any Contract Between National Union and St. Paul.

National Union argued, and the district court agreed, that St. Paul could not bring a contractual subrogation claim against National Union unless St. Paul had contracted with National Union directly. That is incorrect. St. Paul is pursuing a claim as Cosmopolitan's subrogee against National Union based on the contractual obligations National Union owed to its insured, Cosmopolitan. St. Paul has stepped into the shoes of Cosmopolitan with respect to the National Union Excess Policy, and is entitled to the contractual rights of Cosmopolitan against National Union. St. Paul does not need to have a separate contract with National Union in order to pursue a subrogation claim.

Subrogation to a contractual right arises when one party (St. Paul) has the right to subrogate to the contractual right of another (Cosmopolitan) against a third party (National Union).[24] The contractual right is between the injured party

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[24]Contractual subrogation, on the other hand, is where one party subrogates to the right it has by contract with a second party to assert a claim against a third,

(subrogor) and the party who caused injury, not between that party and the subrogee. If St. Paul had a contract with National Union, St. Paul would have simply sued for breach of that contract, not subrogation to the contractual rights of Cosmopolitan as an insured under the National Union Excess Policy.

As authority, St. Paul cites every subrogation case to have ever been decided, including those cited above in its explanation of the fundamental nature of subrogation. National Union cites nothing in opposition, because its arguments are contrary to the nature of subrogation.

Fireman's v. Maryland's, 21 Cal. App. 4th 1586, 26 Cal. Rptr. 2d 762 (1994), which National Union misunderstands, analyzed whether the insured's release of one carrier precluded other carriers from asserting claims against the released carrier. The court concluded that the other carriers could not proceed via subrogation because the insured had given up its contractual rights, *i.e.*, the other carriers no longer had any rights left to subrogate to. As the carriers had no contracts with each other, there was no legal conduit remaining to assert a claim.

In contrast, Cosmopolitan never released National Union. St. Paul is therefore properly subrogated to Cosmopolitan's breach of contract and bad faith claims. If there are no consequences for bad faith, then there is nothing to prevent

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which the second has irrespective of the contract between the first and second. The lack of a contract between St. Paul and National Union is irrelevant to both contractual subrogation and subrogation to a contractual right.

its recurrence. If this Court denies St. Paul's subrogation rights, it rewards National Union for its bad faith conduct and punishes St. Paul for protecting a mutual insured. That cannot be the right answer. It is contrary to the equitable principals for which subrogation was created.[25]

IV. St. Paul Is Also Entitled To Seek Equitable Contribution Against National Union.

National Union also attacked St. Paul's cause of action for equitable contribution by arguing that (1) this Court has not recognized it, and (2) there can be no equitable contribution because National Union's policy is exhausted.

Although it is true that this Court has not addressed the duty of an insurer to contribute to an insured's defense by another insurer, Nevada federal courts have repeatedly concluded that this Court will recognize such a claim.[26] *See, e.g.,*

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[25]The equities favor Cosmopolitan and its subrogee St. Paul. Marquee caused the underlying loss. Marquee's employees assaulted the underlying plaintiff. Cosmopolitan was found liable based only on a non-delegable duty as a landowner. National Union admitted this in its own motion: ("The Court held as a matter of law that Cosmo, as owner of the property, 'had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers. . .'"). AA 1577 (Motion at 3, ln. 10-15). There is no doubt that Marquee was primarily liable, and Cosmopolitan was only vicariously liable in this case.

[26]*Ardmore Leasing Corp. v. State Farm Mut. Auto. Ins. Co.*, 106 Nev. 513, 796 P.2d 232 (1990), involved a claim for equitable contribution wherein State Farm sought contribution from a leasing company and its insurer. The trial court granted summary judgment in favor of State Farm. This Court reversed, but on the grounds that there were triable issues of fact that precluded summary judgment. This Court did not suggest that the cause of action for contribution was improper under Nevada law.

Great American Ins.Co. of New York v. North American Specialty Ins. Co., 542 F.Supp.2d 1203, 1211 (D. Nev. 2008). As another court noted:

> [T]his Court may turn to California law for guidance, which is what the Nevada Supreme Court often does when faced with issues of first impression. *Id.* (citing *Volvo Cars of North America, Inc. v. Ricci*, 137P.3d 1161, 1164 (Nev. 2006)). In California, "here two or more Carrier Defendants provide primary insurance on the same risk for which they are both liable for any loss to the same insured, the insurance carrier who pays the loss or defends a lawsuit against the insured is entitled to equitable contribution from the other insurer or Carrier Defendants, without regard to principles of equitable subrogation." *Travelers Cas. and Sur. Co. v. American Intern. Surplus Lines Ins. Co.*, 465 F.Supp.2d 1005, 1026 (S.D. Cal. 2006) (quoting *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal.App.4th 1279, 1289 (Cal. App. 1 Dist. 1998)). Equitable contribution "is the right to recover, not from the party primarily liable for the loss, but from a co-obligor who shares such liability with the party seeking contribution." *Id.*

Admiral Ins. Co. v. Illinois Union Ins. Co., 2010 WL 11579447, at *3 (D.Nev. May 24, 2010).

National Union's argument that exhaustion of its policy bars contribution highlights another aspect of National Union's bad faith. National Union insured both Marquee and Cosmopolitan, and it had the same duties to both. California Courts have consistently upheld the principle that good faith requires that the insurer give equal consideration to all insureds. *Lheto v. Allstate Ins. Co.*, 31 Cal.App.4th 60, 75 (1994) (insurer's disbursement of entire policy limit on behalf of additional insured did not discharge its obligations to the named insured; rather it constituted a breach of contract); *see also Strauss v. Farmers Insurance*

Exchange, 26 Cal.App.4th 1017, 1021-1022 (1994) (same). Under these principles, National Union's unified defense of Marquee and Cosmopolitan, and its mishandling of settlement discussions, undercuts its exhaustion defense. Paying its limits does not bar an equitable contribution claim against it, or any of St. Paul's other claims.

V. St. Paul Is Also Entitled to Pursue Marquee.

A. Cosmopolitan Did Not Waive Subrogation Rights.

The district court entered summary judgment against St. Paul in favor of Marquee, on both causes of action against it: (1) Statutory Subrogation - Contribution Per NRS 17.225, and (2) Subrogation - Express Indemnity. The district court's reasoning was based in large part on the impact of the Management Agreement, to which neither St. Paul nor Cosmopolitan was a party.[27]

The court's judgment against St. Paul was inconsistent with a host of facts, including:

- Cosmopolitan was not a party to the Management Agreement; the parties were Marquee, as the nightclub operator, and Nevada Restaurant Venture 1, LLC ("Nevada Restaurant"), as the nightclub owner. AA 2398 (Appendix, Ex. A, p. 2, introductory paragraph, and paras. A, D, and E; pp. 15-17).

  The version of the Management Agreement in the public record, and

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[27]The district court's oral ruling was based on the towers of insurance issue, a non-issue as to Marquee, AA 2886-87, but its written order relies on arguments based on the Management Agreement. AA 2920

thus in the Appendix to this appeal, is redacted; a complete version was filed under seal. Although not reflected in the version in the Appendix, the Management Agreement identifies:

> Marquee is defined as "Operator."
> Nevada Restaurant is defined as "Owner."
> Cosmopolitan is defined as "Property Owner."
> AA 2398 (Appendix, Ex. A, pp 2, 15-17).

> For a contact to bind a party, that party must agree to it. *See generally, May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). A waiver of subrogation applies only to a party that agreed to it.

- Cosmopolitan only agreed to be bound by a few specified paragraphs of the agreement, none of which bears on this dispute. AA 2408 (signature line).

> The signature line where Cosmopolitan executed the Management Agreement states:
>
> Acknowledged and agreed to be bound solely with respect to the provisions of Sections 3.3, 3.4, 3.5.3, 3.8, 4.1, 4.6, 6.1, 8.6, 8.8.1, 9.10, 10.2, 13.2, 14.1.7, 14.1.8, 14.2.3, 15.2, 35, 39.1 and 39.2
>
> AA 2410.

- The waiver of subrogation provision in the Management Agreement (which appears in section 12.2.6), relied upon by Marquee, is not one of the sections Cosmopolitan agreed to be bound by; it has no bearing on St. Paul's claims against Marquee. AA 2406.[28]

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[28]A waiver of subrogation applies only to a party that agreed to it. 73 Am. Jur. 2d Subrogation § 73 ("Such [subrogation] waivers only apply to parties who had agreed to such a waiver, and a waiver of subrogation clause cannot be enforced beyond the scope of the specific context in which it appears."); *see, e.g., Willis Realty Assocs. v. Cimino Const. Co.*, 623 A.2d 1287, 1289 (Me. 1993): *Gulf Ins. Co. v. Quality Bldg. Contractor, Inc.*, 58 A.D.3d 595, 597, 871 N.Y.S.2d 366,

- Marquee argued that Cosmopolitan was bound by the Management Agreement by virtue of the provisions of an unexecuted form lease, attached to the Management Agreement, but there was no evidence that any of the parties had agreed to the terms of that document. AA 1462.

- Under the Management Agreement, Marquee was obligated to indemnify Nevada Restaurant–as well as Cosmopolitan, as a third party beneficiary–for the *Moradi* loss, AA 2406 (¶ 13.1): The exception to Marquee's indemnity obligation for matters covered by insurance required from Cosmopolitan did not apply because there was no such insurance requirement from Cosmopolitan.

  The indemnity provision in Section 13.1 of the management agreement applies to "the negligence or misconduct of Operator (Marquee) . . . not otherwise covered by the insurance required to be maintained hereunder." AA 2406 (Appendix, Ex A, p 63). Cosmopolitan was not required to maintain insurance under the management agreement. Therefore, the limitation in the indemnity provision does not apply to St. Paul and the policy it issued.

Thus, Cosmopolitan had contractual rights against National Union, to which St. Paul subrogated. These were not waived by the Management Agreement.

In the alternative, Marquee argued that if Cosmopolitan is not bound by the Management Agreement as a party, it is bound as an intended third party

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368 (2009); *St. Paul Fire & Marine Ins. Co. v. FD Sprinkler Inc.*, 76 A.D.3d 931, 932, 908 N.Y.S.2d 637, 639 (2010) ("The subcontractors, who are neither signatories nor parties to the main contract between the owner and the general contractor, cannot avail themselves of the waiver-of-subrogation clause contained therein."); *Fortin v. Nebel Heating Corp.*, 12 Mass. App. Ct. 1006, 1007, 429 N.E.2d 363, 364 (1981) (waiver of subrogation in contract between owner and general contractor did not extend to subcontractor who was not a party to that agreement).

beneficiary. Marquee relied on cases stating that a third party beneficiary, in attempting to enforce a contract to its benefit, is bound by the terms of the contract. *See Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 604-05 (2005); *Gibbs v. Giles*, 96 Nev. 243, 246-247, 607 P.2d 118, 120 (1980). This is true to the extent a third party beneficiary attempts to enforce a contract to its benefit; it is bound by the defenses in the contract. This is not true for the purpose of imposing a waiver of rights on a nonparty to a contract. Marquee and Nevada Restaurants cannot agree to waive Cosmopolitan's rights. Marquee's contrary argument was incorrect.

B. Marquee Owes A Duty To Indemnify St. Paul.

Marquee committed intentional torts.

Cosmopolitan was "at most an alleged passive tortfeasor," with no active role in any aspect of the operations of the Marquee Nightclub. AA 2524-25 (Marquee Trial Brief, 4:26-5:1); AA 2530-31 (Marquee Reply Trial Brief, 3:15-24, 4:27-5:3); AA 2539 (Marquee Opposition 5:20-6:4). Despite this lack of control or management, the trial court held that Cosmopolitan was legally vicariously liable for the conduct of Marquee by virtue of a finding of a nondelegable duty as the property owner, and therefore jointly liable. AA 1556-58 (Transcript, decision of Judge Johnson in *Moradi*, 14:13-16:25). In light of this ruling, Cosmopolitan's joint liability was based solely on its vicarious liability for Marquee's acts, and

nothing more.

Trial testimony by a Marquee representative was consistent with this:

Q. Who controls the day-to-day operations at the Marquee?

A. Roof Deck Entertainment, LLC.

Q. Who exercises actual control over hiring, training, and supervising the employees, including the security staff?

A. Roof Deck Entertainment, LLC.

AA 2548 (Transcript, 134:22-135:3).

Marquee argued (and the district court ruled) that the jury found Cosmopolitan liable for intentional tort. Marquee equates the term "liable for" with the term "guilty of," and argues that a finding of joint and several liability means that both parties are guilty of intentional wrongdoing. But parties with primary and vicarious liability are frequently jointly and severally liable to an injured party. That does not change which party actually committed the intentional acts. Nothing in the verdict suggests otherwise.

Based on these facts, Cosmopolitan was entitled to indemnity from Marquee, as a third party beneficiary under the Management Agreement, and/or by equitable indemnity. The indemnity provision in the Management Agreement states:

> 13.1 By Operator. Operator [Marquee] shall indemnify, hold harmless and defend Owner [Nevada Restaurant] and its respective parents, subsidiaries and Affiliates and all of each of their respective

> officers, directors, shareholders, employees, agents, members, managers, representatives, successors and assigns ("Owner Indemnitees") from and against any and all Losses to the extent incurred as a result of (i) the breach or default by Operator of any term or condition of this Agreement, or (ii) the negligence or willful misconduct of Operator or any of its owners, principals, officers, directors, agents, employees, Staff, members, or managers ("Operator Representatives") and not otherwise covered by the insurance required to be maintained hereunder.

AA 2406. The indemnity promise from Marquee to Nevada Restaurant extended to Cosmopolitan, as a related entity. The exception to that obligation, for a loss "not otherwise covered by the insurance required to be maintained hereunder," does not apply because the Management Agreement did not obligate Cosmopolitan to procure its own insurance.

Marquee argued that Section 12.2.3 of the Management Agreement defined "Owner Insured Parties" to include Cosmopolitan. AA 2406. But that provision did not require Cosmopolitan or any other "owner insured party" to provide insurance to anyone. Section 12.2.3 required only that "Owner Insured Parties," including Cosmopolitan and other nonparties to the contract, be "named as additional insureds on all [Marquee] policies." Who was required to provide insurance policies was covered in other parts of the agreement.

"Owner Policies" were defined as those policies Nevada Restaurant was required to purchase, *id.*, AA 2404-05, Section 12.1, and "operator policies" were those Marquee was required to provide. *Id.*, Section 12.2. The subparagraphs of

these sections provided what policies were "required to be maintained" under the Management Agreement. *Id.* Cosmopolitan was not required to maintain any policy under the Management Agreement.

Being named an additional insured on a policy issued pursuant to a contract to which it was not party did not bind Cosmopolitan to the contract, to the waiver of subrogation rights in the contract, or to any limitation on recovery of damage not based on the policies at issue in the contract.

Thus, Marquee owed–and it still owes–Cosmopolitan a defense and indemnity under the Management Agreement. St. Paul was and is entitled to bring that claim against Marquee via subrogation. The district court erred by ruling otherwise.

C. St. Paul Can Maintain a Claim For Contribution Against Marquee.

St. Paul's claim based on the Nevada contribution statute was also valid. Contribution is a creature of statute. *Doctors Co. v. Vincent*, 120 Nev. 644, (2004). NRS 17.225 provides:

> 1. [W]here two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.
>
> 2. The right of contribution exists only in favor of a tortfeasor who has paid more than his or her equitable share of the common liability, and the tortfeasor's total recovery is limited to the amount paid by the tortfeasor in excess of his or her equitable share. No tortfeasor is

> compelled to make contribution beyond his or her own equitable share of the entire liability.

Marquee acted both with negligence and willful misconduct. Cosmopolitan became jointly liable vicariously. Cosmopolitan was entitled to pursue Marquee under its statutory contribution obligation, to which right St. Paul is subrogated.

Marquee argued that statutory contribution claims are never available when a contractual indemnity provision exists in a contract, even if that provision does not apply. It argued that the indemnity clause in the Management Agreement precludes all equitable contribution. This argument finds no support in the statutory scheme.

NRS 17.225 creates a right of contribution between joint tortfeasors. This equitable right of contribution is limited in NRS 17.265 by the recognition that NRS 17.255 does "not impair any right of indemnity under existing law," equitable or contractual. Instead, "[w]here one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution." *Id.* The recognition that one cannot recover the same debt by both indemnity and contribution is clarified by the phrase, "the indemnity obligor is not entitled to contribution from the obligee for any portion of his or her indemnity obligation." In other words, an indemnitor cannot circumvent its contractual indemnity obligation by seeking contribution from the very party it agreed to indemnify.

Nothing in NRS 17.265 suggests that a tortfeasor with no obligation to another tortfeasor liable for the same debt cannot collect whatever is due by equitable and/or contractual indemnity, and at the same time collect any amount not available by indemnity by equitable contribution. The statute does not say that indemnity and contribution rights cannot coexist, or that if any indemnity right exists, all contribution rights are extinguished. More importantly, the statute does not preclude alternative causes of action in a pleading, such that if indemnity is found, it precludes contribution to the extent of the indemnity, but if indemnity is found not to exist, the equitable remedy of contribution may be had. *See Van Cleave v. Gamboni Const. Co.*, 101 Nev. 524 (1985) (NRS 17.265 "merely provides that no contribution exists where indemnity exists.").

Marquee's argument should have been rejected for at least two reasons: (1) Cosmopolitan did not have an indemnity agreement with Marquee; Cosmopolitan's status of as a third party beneficiary of this provision did not bar Cosmopolitan, and thereby St. Paul, from relying upon Nevada statute; and (2) if Marquee's indemnity promise does not apply, then it does not operate to bar Cosmopolitan's rights under the statute; the contribution statute is an alternative basis of recovery, here supporting 100% recovery because the wrongful acts were those of Marquee, not Cosmopolitan.

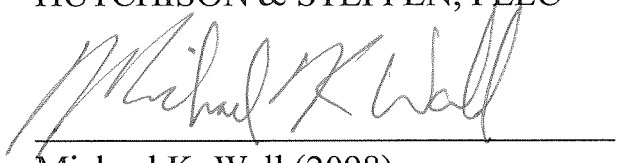
The trial court erred by entering judgment in favor of Marquee and against St. Paul on the statutory claim, as well as the contract claim.

CONCLUSION

This Court should reverse the district court's summary judgments against St. Paul in favor of National Union and Marquee.

DATED this 1 day of March, 2021.

HUTCHISON & STEFFEN, PLLC



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ATTORNEY'S CERTIFICATE

1. I 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 it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman font.

2. I further certify that this brief complies with the 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 15,378.

3. Finally, I 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 a reference to the page 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 the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 1 day of March, 2021.

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the ***APPELLANT'S OPENING BRIEF*** *was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list.*

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