Case No. 83144

In the Supreme Court of Nevada

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Appellant,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; and ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB,

Respondents.

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APPEAL
from the Eighth Judicial District Court, Clark County
The Honorable GLORIA STURMAN, District Judge
District Court Case No. A-17-758902-C

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NRAP 26.1 DISCLOSURE

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

National Union Fire Insurance Company of Pittsburgh, PA. is a direct wholly owned subsidiary of AIG Property Casualty U.S., Inc., which is a wholly owned subsidiary of AIG Property Casualty Inc., which itself is a wholly owned subsidiary of American International Group, Inc., a publicly-held corporation. No individual, parent entity, or publicly held entity owns 10% or more of the stock of American International Group, Inc.

Roof Deck Entertainment, LLC, is a limited liability company.

Andrew D. Herold and Nicholas B. Salerno of Herold & Sager, and Jennifer Lynn Keller and Jeremy Stamelman of Keller/Anderle LLP represented National Union and the Marquee in the district court and have appeared in this Court. National Union and the Marquee are represented in this Court by Daniel F. Polsenberg, Joel D. Henriod, and Abraham G. Smith of Lewis Roca Rothgerber Christie, LLP.

Dated this 2nd day of August, 2021.

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By: */s/ Abraham G. Smith*

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JURISDICTION

Respondents National Union Fire Insurance Company of Pittsburgh, PA. and Roof Deck Entertainment, LLC (the Marquee) do not dispute this Court's jurisdiction.

ROUTING STATEMENT

National Union and the Marquee agree that the Supreme Court should retain this case. St. Paul's novel theory of liability against a co-excess insurer has never been recognized in Nevada or any other jurisdiction. Such a departure from accepted principles of insurance law could be contemplated, if at all, only by the Supreme Court. NRAP 17(a)(12).

PRINCIPAL ISSUES PRESENTED

1. *The Marquee.* In its agreement with the Marquee, the Cosmopolitan's subsidiary executed a subrogation waiver and agreed (a) that a liability "reimbursed by insurance" is not a "loss" at all, and (b) that the Marquee is not required to indemnify losses "otherwise covered by the insurance" called for in the agreement. Attached to that agreement was a lease representing that the Cosmopolitan itself would

carry the insurance policies called for in the agreement. Even though St. Paul's policy contains the required subrogation waiver, and even though insurance covered a settlement of all claims against the Cosmopolitan for its own tortious conduct, can St. Paul nonetheless subrogate to a claim of indemnity or contribution against the Marquee?

2. *National Union.* Should this Court for the first time recognize a claim of equitable subrogation among co-excess insurers in the circumstance that both provided equal levels of coverage and had the right to participate in the defense and settlement of the underlying claim?

STATEMENT OF THE CASE

This is an appeal from summary judgment by the Honorable Gloria Sturman, District Judge of the Eighth Judicial District Court, Clark County.

When David Moradi claimed injuries at the Marquee nightclub on the Cosmopolitan's property, the Cosmopolitan did not have to pay a dime for its defense or, ultimately, contribute anything to a settlement of the claims against it. Instead, the nightclub's primary insurer, Aspen Specialty Insurance Company, accepted a defense obligation for the Marquee, and along with the nightclub's excess carrier, National Union Fire Insurance Company of Pittsburgh, paid half of the settlement. The Cosmopolitan's insurers contributed nothing to the defense but paid the other half of the settlement.

Now, however, the Cosmopolitan's excess carrier, St. Paul Fire & Marine Insurance Company, wants to evade the obligations under its policy and pay nothing, reaping a multimillion-dollar windfall from the nightclub and its carriers. St. Paul sued the Marquee and both of its insurers. Even though the Cosmopolitan's subsidiary had executed a subrogation waiver and agreed any indemnity obligation applied only to

"losses" unreimbursed by insurance, St. Paul alleged that it was subrogated to the Cosmopolitan's rights of indemnity and contribution against the Marquee. And even though St. Paul and National Union were in separate coverage towers, with neither excess to the other, St. Paul alleged that it owed nothing toward the settlement and that National Union was liable for the full amount through novel theories of subrogation among co-excess insurers and equitable contribution.

The district court granted summary judgment to both the Marquee and National Union. Among other, independent grounds, the district court enforced the subrogation waiver and declined to recognize a cause of action among co-excess insurers where the insurer seeking reimbursement was not equitably superior.

The district court certified its orders as final under NRCP 54(b),[1] and St. Paul appealed.

STATEMENT OF FACTS

This appeal arises from a dispute among insurers over payment of a personal-injury settlement.

[1] Claims against Aspen remain in the district court.

A. Moradi's Personal-Injury Suit

1. Moradi Sues the Marquee and the Cosmopolitan

David Moradi, a former hedge-fund manager, alleges that, on a trip to Las Vegas in 2012, he was beaten by employees of the Marquee Nightclub in the Cosmopolitan hotel, causing permanent injuries. (3 App. 453, ¶ 7.)

On April 4, 2014, Moradi sued the owner and operator of the nightclub, Roof Deck Entertainment ("Marquee"), and the owner and operator of the hotel, Nevada Property 1, LLC ("Cosmopolitan"). (3 App. 453, ¶ 8.)

2. The Defendants Had Primary and Excess Liability Insurance

Each defendant had a separate tower of general liability insurance: The Marquee was insured by Aspen Special Insurance Company (primary up to $1 million per occurrence) and National Union Fire Insurance Company of Pittsburgh (excess up to $25 million). (3 App. 454-55, ¶¶ 15-18; 3 App. 456, ¶¶ 30-31; 9 App. 1608; 10 App. 1954-55; 15 App. 2984, ¶¶ 21-22.) The Cosmopolitan was insured by Zurich American Insurance Company (primary up to $1 million) and St. Paul Fire & Marine Insurance Company (excess up to $25 million). (3 App. 458,

¶ 40, 43; 8 App. 1481; 9 App. 1730; 15 App. 2984, ¶¶ 19-20; AOB 15.) The Cosmopolitan was an additional insured under the Aspen and National Union policies. (15 App. 2984, ¶ 22.) The St. Paul excess policy provides that if the Cosmopolitan waives its rights to recover payment for certain damages, St. Paul likewise waives its right to recover that payment. (8 App. 1517; 15 App. 2984, ¶ 23.)

3. St. Paul Does Not Participate in the Defense

Aspen accepted its obligation to defend both defendants; National Union also exercised its right to participate in the litigation. (12 App. 2430, 2482, 2502; 15 App. 2982-83, ¶ 12.) According to St. Paul, the Cosmopolitan did not notify St. Paul of Moradi's suit until February 13, 2017, five weeks before the six-week trial began. (3 App. 462, ¶ 62.)[2]

[2] St. Paul apparently blames National Union for the alleged failure to notify St. Paul earlier, despite no citation to such an obligation on the part of National Union. (AOB 14.) National Union cannot speak to St. Paul's correspondence with the Cosmopolitan, its brokers or others who might have known or had a duty to disclose Mr. Moradi's lawsuit. (*Cf.* 8 App. 1485, 1503.) Despite the transparent incompleteness of St. Paul's presentation, the question of when and from whom St. Paul first caught wind of Mr. Moradi's claim is irrelevant to the question of whether National Union legally had any greater rights or responsibilities to participate in the litigation than St. Paul, another excess insurer at the same level of coverage.

St. Paul also alleges that it did not receive notice of settlement offers both before and after this date. (3 App. 462, ¶¶ 63-64.) After becoming aware of the suit and claimed damages "of $1-3 BILLION" (12 App. 2477), St. Paul did not exercise its right to participate in the litigation, contribute to the defense, or participate in any settlement discussions until after the verdict on compensatory damages. (3 App. 465, ¶ 80.)

4. Moradi Offers to Settle Before a Verdict on Punitive Damages

Before trial, the district court held that the Cosmopolitan as owner of the property "has 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. (8 App. 1556.)

On April 26, 2017, the jury awarded Moradi $160.5 million in compensatory damages and indicated its intention to award punitive damages. (13 App. 2551.)

During the punitive-damages phase, Moradi offered to settle the claims against both parties. (3 App. 463, ¶ 66; 15 App. 2962, ¶ 9.)

5. The Defendants' Insurers Fund the Settlement

In a confidential settlement agreement, Moradi's demand was accepted through payment by the four insurance companies. (15 App. 2962, ¶ 10.) National Union and St. Paul contributed equal amounts. (15 App. 2962, ¶ 11.) Neither the Marquee nor the Cosmopolitan had to contribute anything toward litigation costs or toward the settlement. (15 App. 2962, ¶ 11.)

B. St. Paul Sues Marquee and its Insurers

St. Paul then sued Marquee, Aspen, and National Union under theories of subrogation, contribution, express indemnity, and estoppel, seeking to recoup its entire settlement payment. (1 App. 1; 3 App. 452.) The district court granted summary judgment to Marquee and National Union. (15 App. 2957, 2978.)

C. The Claims Against the Marquee

1. St. Paul Sues the Marquee for Contribution and Indemnity

St. Paul asserted two claims against the Marquee: First, St. Paul alleged that it was subrogated to the Cosmopolitan's contribution rights

against the Marquee. (3 App. 471-72.) According to St. Paul, the Marquee alone caused Moradi's injuries; the Cosmopolitan was just vicariously liable, so St. Paul had paid more than the Cosmopolitan's equitable share. (3 App. 471, ¶¶ 117-18.) Second, St. Paul alleged that it was subrogated to the Cosmopolitan's indemnification rights; had the Marquee indemnified the Cosmopolitan, St. Paul would not have needed to contribute to the settlement. (3 Ap.. 472-73, ¶¶ 127.)

2. The Nightclub Management Agreement Requires a Waiver of Subrogation

The Cosmopolitan leased the nightclub location to its subsidiary, Nevada Restaurant Venture 1, LLC ("NRV1"), which in turn entered into a nightclub management agreement with the Marquee. (R. App. 4, 12 App. 2398.)

The agreement requires both NRV1 and the Marquee to maintain insurance (R. App. 65-67, 12 App. 2404-06, § 12), and requires each to indemnify the other for losses "incurred as a result of" its own "negligence or willful misconduct" "and not otherwise covered by the insurance required to be maintained hereunder" (R. App. 67-68, 12 App. 2406-07, § 13). "Losses" under the agreement are liabilities "not reim-

bursed by insurance." (R. App. 13, § 1.) Both NRV1's and the Marquee's insurance policies "shall contain a waiver of subrogation" against NRV1, the Cosmopolitan, and the Marquee. (R. App. 67, 12 App. 2406, §§ 12.2.3, 12.2.6.)

3. The Cosmopolitan's Lease Requires the Cosmopolitan to Obtain Insurance

Attached to the nightclub management agreement is the Cosmopolitan's lease with NRV1.[3] (R. App. 109, 12 App. 2413.) The lease provides that the Cosmopolitan "will carry and maintain" "[a]ll insurance required to obtained by [NRV1] under section 12.1" of the nightclub management agreement. (R. App. 112, § 1(h); R. App. 124, § 17.2.) (NRV1 has an identical obligation in the lease to "carry and maintain"

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[3] The "Lease" is defined in the recitals to the nightclub management agreement:

> Prior to (or concurrently with) the execution of this Agreement, [Cosmopolitan] or its Affiliate, as landlord, and [NRV1], as tenant, has (or will) enter [*sic*] into a certain lease agreement in the form attached hereto as Exhibit "D" whereby [NRV1] will lease the Premises from [Cosmopolitan] (the "**Lease**").

(R. App. 5, 12 App. 2399, Recital C.) References to the "Lease" appear throughout the nightclub management agreement, including in provisions to which the Cosmopolitan expressly agreed to be bound. (*E.g.*, R. App. 62, § 9.10; R. App. 93.)

this insurance. (R. App. 124, § 17.2.)

4. St. Paul's Excess Policy Contains the Required Waiver of Subrogation

In accordance with these requirements, St. Paul's excess policy contains an endorsement providing that if the Cosmopolitan has "agreed in a written contract[] to waive [its] rights to recovery of payment for damages for Bodily Injury, Property Damage, Personal Injury or Advertising Injury," St. Paul "agree[s] to waive [its] right of recovery for such payment." (8 App. 1517 (boldface omitted).)

5. The District Court Grants the Marquee Summary Judgment

Because of these agreements and St. Paul's endorsement of the subrogation waiver provision to its policy, the district court granted summary judgment to the Marquee. (15 App. 2980.)

The district court held that the required waiver of subrogation in St. Paul's policy barred both of St. Paul's subrogation claims against the Marquee. (15 App. 2990-92.)

Citing extensive authorities, the district court noted that subrogation waivers are "universally enforced." (15 App. 2991, ¶ 9 (citing *Davlar Corp. v. Superior Court*, 62 Cal. Rptr. 2d 199, 201-02 (Cal. Ct.

App. 1997); *Lloyd's Underwriters v. Craig & Rush, Inc.*, 32 Cal. Rptr. 2d 144, 146-49 (Cal. Ct. App. 1994); *Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc.*, 86 Cal. Rptr. 3d 715, 718-20 (Cal. Ct App. 2008); *Commerce & Indus. Ins. Co. v. Orth*, 458 P.2d 926, 929 (Or. 1969); *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 831 P.2d 724, 728 (Wash. 1992); *Amco Ins. Co. v. Simplex Grinnell LP*, No. 14-cv-890 GBW/CG, 2016 WL 4425095, *7 (D. N.M. Feb. 29, 2016).)

The district court also considered how the nightclub management agreement required such waiver, including as to the Cosmopolitan as one of the "Owner Insured Parties" required to maintain insurance. (15 App. 2990, ¶¶ 3-5 (citing 12 App. 2406, §§ 12.2.3, 12.2.6.)

> 3. Pursuant to Section 12.2.6 . . . the insurance policies required under the NMA [Nightclub Management Agreement] must "contain a waiver of subrogation against the Owner Insured Parties and [Marquee] and its officers, directors, officials, managers, employees and agents and the [Marquee] Principals" as defined in the NMA.
>
> 4. Section 12.2.3 of the NMA defines "Owner Insured Parties" to include the Owner (NRV1), the Project Owner (Cosmopolitan), the landlord and tenant under the Lease (also Cosmopolitan and NRV1), their respective parents, subsidiaries, affiliates, and other related persons and entities.
>
> 5. Section 12.2.6 of the NMA also provides that the

> waiver of subrogation requirement applies to both "Operator Policies" and "Owner Policies."
>
> 6. "Operator Policies" are defined as Marquee's insurance policies, while "Owner Policies" are defined in section 12.2.5 as insurance maintained by any "Owner Insured Parties."

(15 App. 2990, ¶¶ 2-6.)

And St. Paul's policy in fact contained the required waiver:

> The intent of the parties to the NMA to waive subrogation rights for losses paid by insurance proceeds is clear and unambiguous as expressed in Section 12.2.6 of the NMA. To find otherwise would be inconsistent with the terms of the NMA and the Waiver of Rights of Recovery Endorsement contained within the St. Paul Excess Policy.

(15 App. 2990-91, ¶¶ 7-8, 10.)

The district court carefully considered and rejected St. Paul's counterarguments. Even as it sought to assert rights and enforce the Marquee's obligations under the nightclub management agreement, St. Paul argued that a limitation in that agreement—the subrogation waiver requirements—did not apply "because Cosmopolitan, as the Project Owner, only agreed to be bound with respect to certain provision of the NMA, which did not include the subrogation waiver provision contained in 12.2.6 of the NMA." (15 App. 2991, ¶ 11.) But as the district court held, the Cosmopolitan was bound by the terms of the nightclub

agreement, under the terms of its own lease as attached to that agreement:

> This argument fails because it ignores that Section 17.2 of the Lease attached as Exhibit D to the NMA delegated NRV1's insurance requirements under the NMA to Cosmopolitan. Section 17.2 of the Lease provides that Cosmopolitan shall procure "all insurance required to be obtained by" NRV1 under Section 12.1 of the NMA. . . . Thus, Cosmopolitan assumed NRV1's obligation to provide the insurance as required by Section 12.1 of the NMA . . . including the waiver of subrogation obligation set out in Section 12.2.6. Regardless of whether Cosmopolitan agreed to be bound by the subrogation waiver provision contained in 12.2.6 of the NMA or assumed NRV1's insurance obligations under the NMA, the clear intent of the parties to the NMA was to waive any claims for losses against each other that were paid by insurance proceeds including claims against the Owner Insured Parties (as defined in NMA), which includes Cosmopolitan.

(15 App. 2991-92, ¶ 11 (citation omitted).)

And although St. Paul argued that the Cosmopolitan is not a party to the nightclub management agreement, the district court found that the Cosmopolitan was bound as a third-party beneficiary seeking indemnity under the nightclub management agreement:

> St. Paul is pursuing subrogation claims by attempting to step into Cosmopolitan's shoes as a third-party beneficiary of the NMA and the intent of the parties to the NMA was to waive such subrogation rights.

(15 App. 2992, ¶ 12 (citing *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)).)

The district court also barred St. Paul's claims for three "separate and independent reason[s]" (15 App. 2992, 2994, 2995, ¶¶ 14, 22, 26):

First, St. Paul could not be subrogated to the Cosmopolitan's indemnity rights because the indemnity obligation in the nightclub management agreement only pertained to losses "not reimbursed by insurance." (15 App. 2993, ¶¶ 15-16.) Here, it was undisputed that insurance covered both the cost of Cosmopolitan's defense and its share of the settlement, so the Cosmopolitan never incurred a "loss" that the Marquee was required to indemnify:

> 19. The exclusion of insurance payments from the definition of "Losses" in Section 1 of the NMA and the indemnity provision set out in Section 13.1 expressly limits any purported indemnity obligation by Marquee to Cosmopolitan to uninsured losses. ([8 App. 1456, 1458-59] UF 18, 20.)
>
> 20. Cosmopolitan's defense in the underlying action and its joint-and-several liability for the verdict and resulting settlement were paid for by insurance. Thus, there is no uninsured loss for which Cosmopolitan could pursue indemnity against Marquee.

(15 App. 2993, ¶¶ 19-20.)

Second, St. Paul could not be subrogated to any right of contribution because, as an intentional tortfeasor, the Cosmopolitan had no such right: NRS 17.255 bars intentional tortfeasors from seeking contribution. (15 App. 2994, ¶ 23.) Yet while "Cosmopolitan had its own obligation pursuant to the nondelegable duty to keep patrons of The Cosmopolitan Hotel & Casino safe," the jury found it "jointly liable with Marquee for the intentional tort claims of assault, battery, and false imprisonment." (15 App. 2994, ¶¶ 24-25.) So under NRS 17.255, Cosmopolitan was an intentional tortfeasor barred from seeking contribution. (*Id.*)

Third, no contribution right existed because the parties had instead contracted for express indemnity. (15 App. 2995, ¶¶ 26-29.) Because the Marquee had agreed to indemnify only the Cosmopolitan's losses not paid by insurance, the Marquee could not be liable under a contribution theory:

> Given the existence of the contractually bargained for right to indemnity set out in Section 13 of the NMA, Cosmopolitan has no statutory or equitable right to contribution under Nevada common law or the Uniform Contribution Act pursuant to NRS 17.265. St. Paul asserts the contribution claim is permitted because it is an alternative theory of recovery in the event the express indemnity claim does not prevail. However,

> a contribution theory of recovery is not permitted when a contract for express indemnity exists to govern the obligations of the respective parties. Accordingly, St. Paul cannot pursue a contribution claim against Marquee based on the alleged subrogation principles as a matter of law.

(15 App. 2995, ¶ 29.)

D. The Claims Against National Union

1. St. Paul Sues National Union for Contractual and Statutory Breaches, Estoppel, and Contribution

St. Paul asserted four "claims" against National Union: In two subrogation claims, St. Paul alleged that National Union had breached both (1) its contractual obligations to defend and indemnify the Cosmopolitan under the National Union policy issued to the Marquee and (2) its statutory obligation to settle within policy limits before trial. (3 App. 466-71.) According to St. Paul, National Union mishandled the defense of the Moradi action and had an irreconcilable conflict in failing to assert the Cosmopolitan's indemnity rights against the Marquee. (3 App. 461, ¶ 59.) St. Paul also claimed that, in electing not to participate in the defense or settlement negotiations, St. Paul had relied on Aspen's and National Union's representations that their coverage was primary to the Cosmopolitan's tower, and that these carriers are now estopped

from arguing that St. Paul had an obligation to resolve the Moradi action. (3 App. 475, ¶ 134.) Finally, St. Paul sought equitable contribution for having "incurred amounts in excess of its equitable share," while asserting National Union paid nothing for the Cosmopolitan even though both St. Paul and National Union contributed the identical amount of policy limits to the settlement.[4] (3 App. 476, ¶ 138.)

2. The Policies' Provisions for "Other Insurance"

The St. Paul excess policy for the Cosmopolitan addresses its position vis-à-vis the scheduled Zurich policy and other insurance:

> If Other Insurance applies to damages that are also covered by this policy, this policy will apply excess of and shall not contribute with, that Other Insurance, whether it is primary, excess, contingent or any other basis. However, this provision will not apply if the Other Insurance is specifically written to be excess of this policy.

(8 App. 1504, ¶ L (boldface omitted).)

The National Union excess policy for the Marquee likewise addresses other insurance: National Union's coverage begins "in excess of

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[4] St. Paul has abandoned its estoppel claim on appeal. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived.").

the Retained Limit" (9 App. 1675, ¶ I.A), which is the combined limits of all scheduled insurance policies (the Aspen policy) and "Other Insurance," a term carrying nearly the same definition as in the St. Paul policy:

> If other valid and collectible insurance applies to damages that are also covered by this policy, this policy will apply excess of the Other Insurance. However, this provision will not apply if the Other Insurance is specifically written to be excess of this policy.

(9 App. 1690, ¶ L (boldface omitted); 9 App. 1696, ¶ Z.)

St. Paul does not contend that either policy, negotiated and purchased by separate entities in otherwise separate towers of insurance, was specifically written to be excess of the other.[5] The only policy provisions relevant to that consideration are the provisions for "other insurance."

National Union provided coverage to both the Marquee (as its named insured) and the Cosmopolitan (as an additional insured) under a reservation of rights. (12 App. 2482, 2502.)

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[5] *See generally* AOB 44 (basing argument on equitable superiority on who supposedly "caused the excess judgment," not the policy provisions).

3. The District Court Grants National Union Summary Judgment

The district court granted National Union summary judgment:

First, the district court barred St. Paul's claim for subrogation to the Cosmopolitan's claim for a breach of the statutory duty to settle. (15 App. 2969-71.) St. Paul and National Union are co-excess carriers in separate coverage towers. (15 App. 2969, ¶ 4.) And according to the district court, the Nevada Supreme Court has not recognized an equitable subrogation claim between insurers, and "no jurisdiction, let alone Nevada, recognizes an equitable subrogation claim between excess carriers in separate towers of coverage." (15 App. 2969, ¶¶ 3-4.) Given the separation between the two towers and the near identity of the two policies' "other insurance" provisions, "neither policy shall be excess to the other." (15 App. 2970, ¶ 10.)

> 8. The St. Paul Excess Policy is a general excess policy over scheduled underlying insurance and applicable other insurance providing coverage to the insured, Cosmopolitan. The scheduled underlying insurance to the St. Paul Excess Policy is the Zurich Primary Policy.
>
> 9. The National Union Excess Policy is also a general excess policy over scheduled underlying insurance and applicable other insurance providing coverage to the insured Cosmopolitan. The scheduled underlying insurance to the National Union Excess Policy is the Aspen Primary Policy.

> 10. Based on the aforementioned discussions herein, the St. Paul Excess Policy and the National Union Excess Policy contain nearly identical "other insurance" provisions. When two policies contain such language, neither policy shall be excess to the other. *See Everest Nat. Ins. Co. v. Evanston Ins. Co.*, No. 2:09-cv-2077-RLH-PAL, 2011 WL 534007 at *3 (D. Nev. Feb. 8, 2011) (ruling that judgment and defense costs were to be shared equally between insurers that contained the same amounts of limits and both contained Other Insurance clauses providing they were excess to other available insurance); *CSE Ins. Group v. Northbrook Property & Cas. Co.*, 29 Cal. Rptr. 2d 120, 121-23 (Cal. Ct. App. 1994); *Century Surety Co. v. United Pac. Ins. Co.*, 135 Cal. Rptr. 2d 879, 884-85 (Cal. Ct. App. 2003).
>
> 11. The St. Paul Excess Policy is not excess to the National Union Excess Policy with regard to any coverage provided to Cosmopolitan. Both St. Paul and National Union had independent obligations to Cosmopolitan, both discharged those obligations by settlement of the Underlying Action, both had the same limits of insurance, and neither is in an equitably superior position to the other.

(15 App. 2970-71, ¶¶ 7-11.)

Because St. Paul is neither excess nor equitably superior to National Union, it has no claim for subrogation. (15 App. 2971, ¶ 12.)

Second, the district court dismissed the subrogation claim to the Cosmopolitan's breach-of-contract claim on the same grounds, reasoning that even if such a claim existed,[6] St. Paul could not bring it because it

[6] The district court again reiterated that "the Nevada Supreme Court

was not excess to National Union. (15 App. 2971, ¶ 15.)

To the extent St. Paul was relying on the contractual provision of subrogation in the St. Paul policy in an attempt to subrogate to the rights of Cosmopolitan under the National Union Policy, the district court rejected that theory, too. (15 App. 2971-72, ¶ 16.) The district court relied on *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, No. 2:12-cv-01727-RFB-NJK, 2016 WL 3360943 at *6 (D. Nev. June 9, 2016), which allowed an equitable subrogation claim between insurers but not a contractual subrogation claim. (*Id.*) "In the insurance context, contractual subrogation generally is not applied by an excess insurer against a primary insurer, but between an insurer and a third-party tortfeasor." (*Id.*)

The court further held that Cosmopolitan had suffered no "actual loss" governed by contract because National Union had not denied the Cosmopolitan any benefits under the policy—insurance covered both the defense and settlement of the Moradi action—so there was no breach-of-contract damages to which St. Paul could subrogate:

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has never recognized the viability of an equitable subrogation claim between insurers, and this Court is unwilling to do so in the first instance." (15 App. 2971, ¶ 14.)

> 20. . . . In the insurance context, damages for breach of an insurance policy are based on the failure to provide benefits owed under the policy. *Morris v. Paul Revere Life Ins. Co.*, 135 Cal. Rptr. 2d 718, 726 (Cal. Ct. App. 2003); *Avila v. Century Nat'l Ins. Co.*, No. 2:09-cv-00682-RCJ-GWF, 2010 WL 11579031 (D. Nev. Feb. 10, 2010).
>
> 21. Here, St. Paul alleges that National Union breached its obligations to Cosmopolitan under the National Union Excess Policy and seeks extra-contractual damages for such breach. However, it is undisputed that Cosmopolitan's defense and indemnity in the Underlying Action were fully paid for by insurers. The damages sought by St. Paul are not contract damages suffered by Cosmopolitan due to any failure to provide policy benefits, but are instead an attempt to recoup extra-contractual damages to reimburse St. Paul for the money it was required to pay under its policy in discharge of its separate obligation to Cosmopolitan.

(15 App. 2972-73, ¶¶ 20-21.) The district court recognized that National Union's had satisfied its indemnity obligation up to the exhaustion of its policy limit:

> It is undisputed that Cosmopolitan was indemnified by National Union when it exhausted its policy limit by participating in the settlement of the Underlying Action. Cosmopolitan's defense in the Underlying Action was funded entirely by insurers. Accordingly, Cosmopolitan suffered no contract damages as a matter of law and, as such, has no viable claim for breach of contract against National Union. As Cosmopolitan has no viable claim for breach of contract against National Union, neither does St. Paul under subrogation principles as it holds no greater rights than Cosmopolitan.

(15 App. 2973, ¶ 22.)

The district court also analyzed in depth the similarities between this case and *California Capital Insurance Co. v. Scottsdale Indemnity Insurance Co.*, 2018 WL 2276815, at *4 (Cal. Ct. App. May 18, 2018). In that case, California Capital sued a co-insurer, "alleging its named insureds were additional insureds under the defendant insurer's policy" and that the "defendant insurer breached its policy" and its "obligations of good faith." (15 App. 2973-74, ¶ 23.) But California Capital "had no cause of action for breach of contract or breach of the covenant of good faith and fair dealing because the insureds had sustained no damage," so "the insureds had no viable claims to assign to California Capital." (*Id.*) And California Capital had no direct claims because "both insurers provided primary coverage for the loss." (*Id.*) So, too, with St. Paul:

> Like the plaintiff insurer in *California Capital*, St. Paul is not a party to the National Union Excess Policy and has no direct cause of action against National Union for breach of contract or breach of the covenant of good faith and fair dealing. Both St. Paul and National Union had independent obligations to Cosmopolitan, and both insurers discharged those obligations by settlement of the Underlying Action. As such, neither insurer is in an equitably superior position as to the other. Further, given the cost of Cosmopolitan's defense and the post-verdict settlement was fully funded by insurers in the Underlying Action, Cosmopolitan

> has no contract damages for policy benefits against National Union. Therefore, Cosmopolitan has no viable breach-of-contract claim for St. Paul to step into its shoes to pursue against National Union. Accordingly, St. Paul's Fourth Cause of Action For Subrogation – Breach of The AIG Insurance Contract fails as a matter of law.

(15 App. 2973-74, ¶¶ 23-24.)

Third, the district court barred the claim for equitable contribution because National Union had exhausted its limits, which was the most it agreed to pay by contract on the Marquee's behalf for the Cosmopolitan's benefit. (15 App. 2974-75, ¶¶ 25-29.) As the district court recognized, a claim for contribution cannot exceed the carrier's policy limit:

> Given the National Union Excess Policy is exhausted, National Union has no further obligation under the policy. *See Everest Indem. Ins. Co. v. Aventine-Tramonti Homeowners Ass'n*, No. 2:09-cv-01672-RCJ-RJJ, 2012 WL 870289 at *3 (D. Nev. Mar. 14, 2012) (concluding that "once the [limits are] reached, the insurer's duties under the policy are extinguished"); *Deere & Co. v. Allstate Ins. Co.*, 244 Cal. Rptr. 3d 100, 112 (Cal. Ct. App. 2019) (holding that "[a] 'policy limit' or 'limit of liability' is the maximum amount the insurer is obligated to pay in contract benefits on a covered loss." (internal quotation marks omitted))

(15 App. 2975, ¶ 28.)

Fourth, the district court barred St. Paul's attempt to assert an affirmative claim for estoppel. (15 App. 2975-76, ¶¶ 30-33.) St. Paul sought to prevent National Union from asserting the obvious legal claim: that St. Paul, as an insurer for a defendant in the underlying personal injury case, owed its insured the same obligations as every other insurer of the defendants, to defend and attempt to reasonably resolve the Moradi action. (3 App. 473-75, ¶¶ 130-35.) But the district court noted that St. Paul's remaining actions had failed for reasons unrelated to St. Paul's proposed estoppel. (15 App. 2976, ¶ 33.)

E. St. Paul Appeals from the Certified Judgment

Because the district court's rulings were based on the application of law and undisputed facts, the district court rejected St. Paul's request for additional discovery under NRCP 56(d) and instead certified the summary judgment for the Marquee and National Union as final under NRCP 54(b). (15 App. 2976-77, ¶¶ 37-38; 15 App. 2995-96, ¶¶ 30-31.)

St. Paul appealed the certified judgments.[7]

[7] The pending claims against Aspen are not part of the district court's NRCP 54(b) certification or this appeal.

SUMMARY OF THE ARGUMENT

St. Paul's vision of subrogation has little to do with the interests of its insured. The Cosmopolitan paid for a St. Paul policy that specifically included a waiver of subrogation. Yet St. Paul wants to disregard that waiver. The Cosmopolitan also agreed that it would not pursue the Marquee, its premier nightclub, for insured claims. Yet St. Paul wants to disregard that contract to pursue the Marquee.

And in pursuing National Union, St. Paul all but omits the central feature of a subrogation claim—the requirement of equitable superiority. That is the feature that runs throughout the cases on which St. Paul itself relies in the jurisdictions that have recognized equitable subrogation among insurers. But one excess insurer who decided not to exercise its right to participate in the litigation (St. Paul) is not equitably superior to another excess carrier at the same level in a different tower who did exercise that right (National Union).

St. Paul's concept of contribution is similarly untethered: where all parties have exhausted their policy limits, St. Paul is not entitled to a refund from National Union, who equally contributed to the settlement.

Although a proper case might present the question whether to adopt a theory of equitable subrogation or contribution in the manner some states have, this Court should await a case where the insurer has actually met the requirements of those claims as adopted in other jurisdictions. St. Paul did not, so the question whether to adopt such a theory in Nevada is purely academic. Under any theory, St. Paul is not aggrieved and has no claim.

ARGUMENT[8]

PART ONE:

THE MARQUEE

I.

THE WAIVER OF SUBROGATION BARS ALL CLAIMS

The district court correctly mapped the path from the waiver of subrogation in St. Paul's policy to the required waiver in the nightclub

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[8] **Standard of review:** An order granting summary judgment draws *de novo* review. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). This Court will affirm, however, even if the district court reached the right result for the wrong reason. *Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012).

management agreement.

The Cosmopolitan procured its policy with St. Paul subject to a waiver of subrogation. That waiver was activated with the insurance requirements of the nightclub management agreement, which state that the "Owner Policies . . . *shall contain* a waiver of subrogation against the . . . Operator [i.e., Marquee]." (R. App. 67, 12 App. 2406, § 12.2.6.) And although the Cosmopolitan claims that it was not a "party" to all provisions of the nightclub management agreement, it was a signatory,[9] and it knew that the lease attached to that agreement obligated the Cosmopolitan to carry and maintain its lessee's insurance required by that agreement. Specifically, § 17.2 of that lease obligates the Cosmopolitan to "carry and maintain all insurance required under paragraph 1(h)," which in turn refers to "[a]ll insurance required to be obtained by

[9] While St. Paul crows that the Cosmopolitan's signature line does not refer to the insurance or waiver-of-subrogation provisions, this makes sense. The Cosmopolitan's commitment to maintain insurance for NRV1 under the lease was independent of its obligations to the Marquee under the nightclub management agreement. That lease as presented to the parties in that agreement, however, defines the Cosmopolitan's insurance obligation by incorporating the terms of the nightclub management agreement. St. Paul never denied that the Cosmopolitan procured its policy to satisfy the insurance requirements of the nightclub agreement or the lease.

Owner [i.e., Nevada Restaurant] under Section 12.1 of the RMA [i.e., the Nightclub Management Agreement between Nevada Restaurant and Marquee]."[10] (R. App. 124, § 17.2; R. App. 111, 12 App. 2415.)

There is no dispute that Cosmopolitan maintained the policies that it was required to maintain. Whether the lease was then unexecuted is irrelevant, because it was the lease that was presented to all signatories as representing the obligations that the Cosmopolitan would fulfill. To fulfill that obligation, the insurance had to comply with the requirement in § 12.2.6 to contain a waiver of subrogation. It did, and the waiver bars St. Paul's claims.[11]

II.

THE SUBROGATED CLAIMS ARE MERITLESS

Independently, even if there were no enforceable waiver of subrogation, the Marquee would still not be liable under theories of indemnity or contribution.

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[10] Section 12.2.6 includes a reciprocal requirement by which Marquee waives subrogation claims that otherwise could be asserted against Cosmopolitan. (R. App. 67, 12 App. 2406, § 12.2.6.)

[11] Apart from the question of whether the subrogation waiver binds the Cosmopolitan, St. Paul raises no other objection to its enforcement. (AOB 54-57.)

A. Unless the Insured Has a Valid, Assignable Cause of Action, the Insurer Cannot Subrogate

In the insurance context, subrogation is a way for an insurer to "be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss which the insurer has both insured and paid." *Fireman's Fund Ins. Co. v. Md. Cas. Co.*, 77 Cal. Rptr. 2d 296, 302 (Ct. App. 1998); *see also St. Paul Fire & Marine Ins. Co. v. Employers Ins. Co. of Nev.*, 122 Nev. 991, 997 n.13, 146 P.3d 258, 262 n.13 (2006) ("Insurance companies, guarantors and bonding companies generally have the right to step into the shoes of the party whom they compensate and sue any party whom the compensated party could have sued." (quoting BLACK'S LAW DICTIONARY 1427 (6th ed. 1990))); 16 COUCH ON INSURANCE § 222:24.

Key to an equitable subrogation claim is the validity of the insured's underlying claim:

> (1) the insured suffered a loss for which the defendant is liable, either as the wrongdoer whose act or omission caused the loss or because the defendant is legally responsible to the insured for the loss caused by the wrongdoer;
>
> (2) the claimed loss was one for which the insurer was not primarily liable;
>
> (3) the insurer has compensated the insured in

> whole or in part for the same loss for which the defendant is primarily liable;
>
> (4) the insurer has paid the claim of its insured to protect its own interest and not as a volunteer;
>
> (5) the insured has an *existing, assignable cause of action* against the defendant that the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer;
>
> (6) the insurer has suffered damages caused by the act or omission upon which the liability of the defendant depends;
>
> (7) justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer; and
>
> (8) the insurer's damages are in a liquidated sum, generally the amount paid to the insured.

Fireman's Fund Ins. Co. v. Md. Cas. Co., 65 Cal. App. 4th 1279, 1292 (Cal. Ct. App. 1998)) (paragraphing and emphasis added), *quoted in Colony Ins. Co. v. Colo. Cas. Ins. Co.*, 2:12-CV-01727-RFB-NJK, 2016 WL 3360943, at *4–5 (D. Nev. June 9, 2016). If the insured has not suffered a loss to support a claim, or the claim is otherwise barred, there is nothing to subrogate.

B. <u>There Is No Indemnifiable Loss</u>[12]

St. Paul claims indemnity under the Marquee's nightclub management agreement with Cosmopolitan's subsidiary, NRV1. But under

[12] St. Paul repeatedly accuses Aspen and National Union of "appointing a single set of attorneys to represent both Marquee and Cosmopolitan,

that agreement, a liability "reimbursed by insurance" is not a "loss" at all, and because the Marquee is not required to indemnify losses "otherwise covered by the insurance" described in the agreement, the Marquee never had an indemnity obligation to the Cosmopolitan.

Here, the Cosmopolitan experienced no loss at all that would trigger the Marquee's indemnity obligation. To get around that, St. Paul suggests that "the Cosmopolitan was not required to maintain insurance under the management agreement" (AOB 56), so the insurance

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despite the obvious conflict of interests." (AOB 5.) The supposedly "obvious conflict" is that these attorneys did not assert the Cosmopolitan's cross-claim for indemnity against the Marquee. Significantly, St. Paul has not pointed to any record of having objected to the supposed conflict during the Moradi action or shown how the Cosmopolitan would not have suffered the same loss. (*See* AOB 12, 15, 22 n.14 (discussing the alleged conflict and St. Paul's reservation of rights, but indicating no place in the record where the conflict was timely raised during the Moradi action). It was only in the context of the instant recovery action that St. Paul has alleged the existence of a conflict.

But even if preserved, the asserted conflict is baseless. It would scarcely have helped to have two jointly and severally liable defendants pointing fingers at one another—especially because, as the district court found, the Cosmopolitan had a non-delegable duty to protect its patrons. (8 App. 1556.) Insofar as the Cosmopolitan suffered no unreimbursed loss, there simply was no conflict of interest associated with the joint representation of these parties that resulted in any damage to the Cosmopolitan. (*See* R. App. 67-68, 12 App. 2406-07, § 13; R. App. 13, § 1.)

that it did procure would not count for purposes of the indemnity provision. But regardless of whether the nightclub management agreement *itself* bound the Cosmopolitan to procure that insurance, the Cosmopolitan represented in the attached lease that it would carry and maintain NRV1's insurance obligation. (R. App. 124, § 17.2.) St. Paul does not deny that its policy for the Cosmopolitan was the insurance procured to satisfy the requirements of the lease and the nightclub management agreement.

As the district court found, St. Paul cannot in one breath seek to hold the Marquee liable based on duties it assumed under its nightclub management while at the same time disclaiming the defenses that the Marquee has under that agreement: "a third-party beneficiary takes subject to any defense arising from the contract that is ascertainable against the promise." *Gibbs v. Giles*, 96 Nev. 243, 246-247, 607 P.2d 118, 120 (1980). (15 App. 2992, ¶ 12.) Here, those defenses included the limitation on what constitutes a loss and what indemnity obligation it owed to the Cosmopolitan.

Regardless, National Union's own policy—which unquestionably

was one of the policies "required to be maintained" under the agreement, covered the Cosmopolitan's liability. While St. Paul complains that this payment was on behalf of the Marquee only, St. Paul ignores the legal effect of that payment: as the Cosmopolitan was jointly and severally liable with the Marquee, the Cosmopolitan received a dollar-for-dollar offset for National Union's equal contribution to the settlement. NRS 101.040; *cf.* NRS 17.245(1).[13] The Cosmopolitan's joint and several liability for a hypothetical judgment based on the verdict would have been reduced by the full, policy-limit amount that National Union paid on Marquee's behalf—even if Cosmopolitan had not settled.

In other words, once Moradi received National Union's contribution, the Cosmopolitan's obligation to Moradi was reduced by the same amount.

And just as important, the tricks that St. Paul plays with the "re-

[13] *See also, e.g.*, *W. Techs., Inc. v. All-Am. Golf Ctr.*, 122 Nev. 869, 872-73, 139 P.3d 858, 860 (2006) (recognizing that, to prevent "excess recovery by the plaintiff," a jury award of damages will be offset by settlement amounts paid by other parties); *see generally Elyousef v. O'Reilly & Ferrario, LLC,* 126 Nev. 441, 444, 245 P.3d 547, 549 (2010) ("a plaintiff can recover only once for a single injury").

quired to be maintained hereunder" descriptor do not apply to the separate definition of "loss" within the agreement, which simply exclude a liability "reimbursed by insurance." (R. App. 13, § 1.) St. Paul's and National Union's payments satisfied that definition, keeping the Cosmopolitan from experiencing an indemnifiable "loss." That is, after all, the intent of the indemnity provision, the repeated exceptions for insurance coverage, and the additional-insured requirements—to protect the Cosmopolitan from losses that *it* has to pay, not to create liability for its subsidiary's business partner when their respective insurers already protected the Cosmopolitan from loss.

C. St. Paul Has No Contribution Claim

1. Contribution Does Not Supplement the Parties' Indemnity Provision

Moreover, because the parties contractually allocated their rights via indemnity, the Cosmopolitan never had a right to contribution. *See* NRS 17.265; *cf. Nissan N. Am., Inc. v. Cont'l Auto. Sys., Inc.*, No. 3:19-CV-00396, 2019 WL 4820477, at *7 (M.D. Tenn. Oct. 1, 2019) (interpreting the parallel provision in Tennessee's Uniform Contribution Against Tortfeasors Act and requiring the plaintiff to "delete its claims for contribution" when there was an applicable indemnity agreement). Just

because the parties contracted for an indemnity provision that is not as broad as St. Paul would like is no reason to disregard that agreement in search of a more sweeping statutory alternative. It makes no sense to suggest that because the parties limited their contractual indemnity rights to unreimbursed losses, losses paid by insurance proceeds can be pursued under an alternative subrogated theory of contribution. Such a finding would be contrary to NRS 17.265, which precludes a claim for contribution when the parties have contracted for indemnity.

2. The Cosmopolitan Did Not Have a Right of Contribution as an Intentional Tortfeasor

Regardless, the statutory contribution claim also fails under the plain language of the Uniform Contribution Against Tortfeasors Act, NRS 17.225 *et seq*. It is undisputed that Moradi's claim against the Cosmopolitan was for intentionally tortious conduct, for which the jury found it found jointly and severally liable with Marquee. A joint intentional tortfeasor is barred as a matter of law from asserting a contribution claim. NRS 17.255.

Without citing applicable authority, the opening brief suggests (at 58) that joint and several liability does not equate to a finding that Cosmopolitan should be treated as if it were a joint intentional tortfeasor.

To the contrary, when, as here, "one or more parties is held liable solely because of the tortious acts of another actor, the factfinder should treat the actor and all such vicariously liable parties as a single entity." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 13 cmt. d (2000).

In addition, the Cosmopolitan's liability was not solely vicarious in the manner of an employer liable for an employee's torts. Rather, the Cosmopolitan was jointly and severally liable because it is responsible for protecting patrons on its property and, according to Moradi, had failed in that nondelegable duty.

PART TWO:

NATIONAL UNION

III.

ST. PAUL HAS NO SUBROGATION CLAIM AGAINST NATIONAL UNION, A CO-EXCESS INSURER THAT PAID ITS FULL POLICY LIMITS

Nevada has never adopted equitable subrogation of a contribution claim among insurers. 16 COUCH ON INSURANCE § 107.17 (discussing the "conflict of authority"). But even if this Court adopts such a claim in the abstract, St. Paul cannot assert it here.

St. Paul disparages the district court for its supposedly "fundamentally flawed" view of the case—that an excess insurer cannot "subrogate" to its insured's claims against another excess insurer at the same level, albeit in a different coverage tower. According to St. Paul, "[t]he 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." (AOB 21 n.13.)

But that is wrong. In reducing its argument to whether the "Cosmopolitan would have a claim," St. Paul ignores its own logical leap in which it simply assumes that *St. Paul* gets to scoop up that claim. That is why St. Paul never disputes that the "other insurance" clauses in its and National Union's policies cancel one another out, making them co-excess insurers at the same level, with identical rights to participate in the defense and identical obligations to indemnify. It is precisely because St. Paul and National Union are on the same plane—one is not equitably superior to the other—that St. Paul's claim fails. Both had a responsibility to their insured, both contributed to the settlement of Cosmopolitan's claim, and neither can assert what amounts to a claim

of bad faith against one another.

A. St. Paul Cannot Be Equitably Superior to National Union

This Court has never recognized a claim of equitable subrogation among insurers. It should not do so in the circumstances of this case.

Equitable subrogation "arises when one party has been compelled to satisfy an obligation that is ultimately determined to be the obligation of another." *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, No. 2:12-cv-01727-RFB-NJK, 2016 WL 3360943, at *3 (D. Nev. June 9, 2016). The opening brief does not cite record evidence that would, even when viewed in the light most favorable to St. Paul, support a conclusion that as between National Union and St. Paul, National Union paid less than it should have.

1. A Subrogating Insurer Must Ordinarily Be Excess to the Insurer It Is Suing

Conceding that subrogation has never been applied to support the claims here, St. Paul nevertheless argues that it should be allowed here based on a vague notion of "equity" and the fact that subrogation has been applied outside the insurance context. (AOB 30-33.)

The problem is that St. Paul is not simply asking this Court to apply ordinary subrogation principles to a new context. Rather, it is asking this Court to *disregard* the principles that have consistently delineated the equities in a claim between insurers.

The hallmark of such a claim, in jurisdictions where it exists,[14] is the equitable superiority of the plaintiff insurer. *Fireman's Fund Ins. Co. v. Md. Cas. Co.*, 65 Cal. App. 4th 1279, 1292 (Cal. Ct. App. 1998) (listing as an essential element of a subrogation claim that "justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer"), *quoted in Colony Ins. Co. v. Colo. Cas. Ins. Co.*, 2:12-CV-01727-RFB-NJK, 2016 WL 3360943, at *4–5 (D. Nev. June 9, 2016).

But equitable superiority is not some general notion of who behaved better. The subrogation claim that some courts recognize is specifically a claim by an excess insurer against a carrier at a lower level of

[14] *See* 16 COUCH ON INSURANCE § 222:18 (discussing cases adopting this view, along with "contrary authority"); *accord id.* § 107:17 (discussing the "conflict of authority"); *Greater N.Y. Mut. Ins. Co. v. N. River Ins. Co.*, 85 F.3d 1088, 1094 (3d Cir. 1996) (distinguishing subrogation to the insured's rights from a direct duty of good faith from the primary to the excess carrier)

coverage in the tower: if the would-be insurer subrogee is not excess to the other insurer, it does not have the equitable upper hand, and equitable indemnity is unavailable. *Alkali Co. v. Bankers Indem. Ins. Co.* 103 F.2d 345 (2d Cir. 1939). *See generally* C. C. Marvel, Annotation, *Right to Subrogation, as Against Primary Insurer, of Liability Insurer Providing Secondary Insurance*, 31 A.L.R.2d 1324 (1953). "No such claim exists between two equal-level insurers." *AMHS Ins. Co. v. Mut. Ins. Co. of Ariz.*, 258 F.3d 1090, 1100 (9th Cir. 2001).

Indeed, most of the cases cited by St. Paul are precisely so limited.

- *Cent. Ill. Pub. Serv. Co. v. Agric. Ins. Co.*, 880 N.E.2d 1172, 1175 (2008) (cited at AOB 36): "[A]n underlying excess insurer can be liable to a supplemental excess carrier."[15]
- *Nat'l Sur. Corp. v. Hartford Cas. Ins. Co.*, 493 F.3d 752, 755 (6th Cir. 2007) (cited at AOB 39-40): "[A]n excess insurer may recover against a primary insurer under the doctrine of equitable subrogation . . . ."

[15] St. Paul cites this case for the broader proposition that equitable subrogation exists where "two insurers, for example, can both be excess insurers" (AOB 36), ignoring the specific holding recognizing such an action only in favor of the excess carrier with the higher layer.

- *Preferred Prof'l Ins. Co. v. The Doctors Co.*, 419 P.3d 1020, 1025 (Colo. Ct. App. 2018) (cited at AOB 40): "[T]he primary insurer should be held responsible to the excess for improper failure to settle . . . ."
- *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 831 (Mo. 2014) (cited at AOB 40): Equitable subrogation "has been used by an excess insurer to recover from a primary insurer a portion of the insured's settlement that the primary insurer was obligated to pay under its policy."
- *Am. Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 483 (Tex. 1992) (cited at AOB 40): "[A]n excess carrier may bring an equitable subrogation action against the primary carrier."[16]
- *St. Paul Fire & Marine Ins. Co. v. Liberty Mut. Ins. Co.*, 353 P.3d 991, 995 (Haw. 2015) (cited at AOB 41): "[E]quitable

[16] St. Paul also quotes what it calls "the court" in *In re Farmers Texas County Mut. Ins. Co.*, 604 S.W.3d 421 (Tex. App. 2019), *mandamus conditionally granted*, 19-0701, 2021 WL 1583878 (Tex. Apr. 23, 2021). The quote is actually from Chief Justice Marion's dissent, but we will spot St. Paul this mistake because the dissent itself quotes the Texas Supreme Court's majority opinion in *American Centennial*.

subrogation in this context permits an excess insurer to hold a primary insurer to its obligation to the insured."

- *Perera v. U.S. Fid. & Guar. Co.*, 35 So. 3d 893, 900 (Fla. 2010) (quoted at AOB 41): "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.'" (Citation omitted.)
- *Ranger Ins. Co. v. Travelers Indem. Co.*, 389 So. 2d 272, 274 (Fla. Dist. Ct. App. 1980): "[A]n excess insurer is entitled to maintain an action against the primary insurer under the circumstances presented here."
- *Great Am. Ins. Co. of N.Y. v. Fed. Ins. Co.*, M2009-00833-COA-R3-CV, 2010 WL 1712947, at *5 (Tenn. Ct. App. Apr. 28, 2010) (cited at AOB 41): The court's citations each address when an "excess carrier had a viable claim against the primary carrier based on the equitable right of subrogation."
- *United Nat'l Ins. Co. v. Providence Wash. Ins. Co.*, No. 05CV1798A, 2008 WL 2745218, at *3 (Mass. Super. June 20,

2008): "[A]n excess insurer has a claim based on equitable subrogation but no right to a direct action against the primary insurer." (Citation omitted.)

- *Fireman's Fund Ins. Co. v. Cont'l Ins. Co.*, 519 A.2d 202, 205 (Md. 1987) (cited at AOB 42): "The majority of jurisdictions that have considered the issue allow an excess carrier to sue a primary carrier for bad faith refusal to settle within the primary policy limits."

"And the list goes on and on." (AOB 42.)

Although sometimes it is unclear whose policy is primary and whose is excess, this Court has adopted a bright-line rule: "the 'other insurance' clause contained in one policy of insurance [is] null and void when it conflicts with a similar clause contained in another policy of insurance." *Travelers Ins. Co. v. Lopez*, 93 Nev. 463, 468, 567 P.2d 471, 474 (1977) (adopting *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 341 P.2d 110, 119 (Or. 1959) (holding that conflicting clauses self-annihilate "regardless of the nature of the clause")). In the subrogation context, both insurers' excess or "other insurance" clauses are "treated as mutually repugnant and the loss is pro rated between the insurers." 15

COUCH ON INSURANCE § 219:47.[17] This is especially clear here, where National Union is not even in the same coverage tower as St. Paul.

That outcome is consistent with well-established public policy, which "disfavors 'escape' clauses, whereby coverage purports to evaporate in the presence of other insurance." *CSE Ins.*, 23 Cal. App. 4th at 1845. After all,

> [i]t must be remembered that the reciprocal rights and duties of several insurers who have covered the same event do not arise out of contract, for their agreements are not with each other. Their respective obligations flow from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden.

CSE Ins., 23 Cal. App. 4th at 1844-45 (citation, internal quotation marks, and alterations omitted).

[17] Because those two umbrella policies both afford coverage only after exhaustion of underlying insurance, "the courts will force both carriers to prorate, in derogation of the policy language." *CSE Ins. Grp. v. Northbrook Prop. & Cas. Co.*, 23 Cal. App. 4th 1839, 1842-43 (1994); *accord Century Sur. Co. v. United Pac. Ins. Co.*, 109 Cal. App. 4th 1246, 1257 (2003) (recognizing that when "two or more primary insurers' policies contain excess 'other insurance' clauses purporting to be excess to each other, the conflicting clauses will be ignored and the loss prorated among the insurers on the ground the insured would otherwise be deprived of protection").

2. St. Paul Is Not Excess of National Union, So It Is Not Equitably Superior to Assert Subrogation

Here, the two clauses cancel each other out. Each provides that if other insurance "applies to damages that are also covered by this policy, this policy will apply excess of" the other insurance. (8 App. 1504, ¶ L; 9 App. 1690, ¶ L.) The written policies, neither of which is specifically written to be excess of the other, are unambiguous and are the sole evidence of the insurers' intent.

St. Paul seeks to disregard that rule by improperly relying on National Union's alleged mishandling of the litigation, which is a component of *every* subrogated bad-faith action; and the Marquee's indemnity obligation to the Cosmopolitan, which did not exist because insurance covered all losses. This Court rightly adopted the simple *Lamb-Weston* superiority rule that "avoids arbitrariness in the selection of conflicting clauses," "discourages litigation between insurers," and encourages uniformity. *See Lopez*, 93 Nev. at 468, 567 P.2d at 474.

3. The Separate Towers Explain, in this Case, Why St. Paul and National Union Are at the Same Level

St. Paul rails against the so-called "'two tower' characterization," but it is St. Paul that misunderstands its application. According to St.

Paul, "[w]hen 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." (AOB 28.)

But St. Paul forgets that National Union, too, "paid Cosmopolitan's damages" by contributing—at an equal level—to the settlement of the Cosmopolitan's liability. The "two towers" are significant because they explain *why* St. Paul is not equitably superior to National Union: Had the Cosmopolitan itself procured multiple excess policies, it and the insurers may well have agreed at which level each kicked in, so that one carrier's layer rested comfortably atop the other in the same tower. But because Cosmopolitan had excess coverage both through its own tower and as an additional insured under the Marquee's tower, neither National Union nor St. Paul had agreed who was excess of the other. *Lopez* makes it easy: neither is.

4. St. Paul Is Not in the Position of a Primary Insurer Seeking Defenses Costs

What might at first appear to be an exception to the rule in certain California cases is actually just another application of it. But that

application shows why St. Paul still has no equitable claim against National Union.

a. A PRIMARY INSURER CAN RECOUP DEFENSE COSTS FROM AN EXCESS CARRIER THAT REFUSES TO SETTLE

In a few cases, California courts have extended equitable subrogation to let "primary carriers . . . sue excess carriers when excess carriers fail to reasonably settle underlying claims that result in excess defense costs." *Fin. Pac. Ins. Co. v. U.S. Fire Ins. Co.*, No. CV-19-7938 PSG (AGRx), 2020 WL 2748317, at *2 (C.D. Cal. Mar. 11, 2020). In this situation, after an excess carrier unreasonably vetoes a settlement within excess limits, the further cost of defense is itself treated as quasi-"excess liability," one that is borne by the primary rather than the excess carrier. *Am. Alternative Ins. Corp. v. Hudson Specialty Ins. Co.*, 938 F. Supp. 2d 908, 917 (C.D. Cal. 2013).[18] Under the reasoning of these

[18] Several of these cases draw on *Diamond Heights Homeowners Assn. v. Nat'l Am. Ins. Co.*, a case that itself did not involve equitable subrogation but that adopted the rule that "a primary insurer may negotiate a good faith settlement of a claim in an amount which invades excess coverage, and that the primary insurer may enter into such settlement binding upon the excess insurer without the excess insurer's consent." 277 Cal. Rptr. 906, 915 (Ct. App. 1991). The court essentially put the excess carrier to an ultimatum: faced with an offer within excess limits, either tender a defense of the action or prove that a settlement is unreasonable.

cases, the primary insurer is equitably superior to the excess insurer with respect to defense costs after the within-limits offer because the primary insurer in its separate layer would face those costs only as the result of an unreasonable rejection of settlement. *SRM, Inc. v. Great Am. Ins. Co.*, 798 F.3d 1322, 1327–29 (10th Cir. 2015). "[T]he excess insurer does not have the absolute right to veto arbitrarily a reasonable settlement and force the primary insurer to proceed to trial, bearing the full costs of defense." *Diamond Heights*, 277 Cal. Rptr. at 916.

In other words, the excess carrier cannot simply drag out the litigation, requiring the primary carrier incur ever more defense costs as a consequence of the excess carrier's refusal to settle.

b. ST. PAUL IS NOT A PRIMARY CARRIER SEEKING DEFENSE COSTS

Even these cases have their limits. *See id.* (citing 14 COUCH ON INSURANCE §§ 200:41 & 42 to state "that excess insurers are not obligated to participate in defense of insured until primary policy limits are exhausted, even if claim amount exceeds primary limits").

Regardless, this Court need not decide whether to go so far because those primary-versus-excess cases do not apply here. St. Paul is not in the shoes of a primary carrier bearing defense costs it should not

have, while some hypothetical carrier in an excess layer above St. Paul refuses to settle. Indeed, St. Paul elected not to exercise its right to participate in the defense, so it incurred no defense costs at all, and did not incur any expenses under the policy until it indemnified its insured.

Through all of this, St. Paul remained at an equal coverage level to National Union, with Aspen as the primary carrier. Those roles never switched. National Union did not become a "primary" carrier merely by associating counsel into the defense of the Marquee and the Cosmopolitan. By the same token, St. Paul in standing on the sidelines never became a "primary" carrier either, and never acquired any right under *Diamond Heights* to claim that it was exposed to excess costs because of National Union's alleged failure to settle.

The cited cases do not apply.

5. St. Paul Is Not Equitably Superior for Declining to Participate in the Litigation

In a single sentence without citation, St. Paul asserts that "St. Paul has equitable superiority over National Union." (AOB 44.) The justification? "National Union (and Aspen), not St. Paul, caused the excess judgment." (AOB 44.) It recalls St. Paul's earlier intuition (likewise without citation) that "[t]he party that cleans up that mess (St.

Paul) acquires the insured's rights against the offending insurance company through subrogation."

This is unreasoned.

First, Aspen's position is irrelevant to the discussion of any rights or obligations between St. Paul and National Union. St. Paul may be equitably superior to Aspen, but not because Aspen "caused the excess judgment," which as St. Paul hints has more to do with liability for bad faith than the question of St. Paul's standing for subrogation.

Second, who purportedly "caused" the excess judgment does not determine equitable superiority among excess insurers. In fact, Aspen was obligated to defend the litigation, and National Union exercised its right to participate—the same right that St. Paul had. But before the exhaustion of Aspen's—and Zurich's—primary policies, National Union was not required to contribute or settle for its policy limits. If there was a "mess," it was not one that St. Paul was powerless to prevent, but rather one contributed to by St. Paul through its inaction when faced with a potentially substantial claim against its insured. And as discussed below, National Union and St. Paul equally contributed to the Cosmopolitan's settlement.

B. There Are No Contract Damages

St. Paul asserts a subrogation claim based on National Union's alleged breach of the insurance contract. But there are no contract damages to support such a claim: National Union already exhausted its contractual liability in paying its policy limits toward the settlement.

First, there is no dispute that National Union was neither contractually nor otherwise legally required to pay more than its policy limit. *E.g., Everest Indem. Ins. Co. v. Aventine-Tramonti Homeowners Ass'n*, No. 2:09–cv–01672–RCJ–RJJ, 2012 WL 870289, at *3 (D. Nev. Mar. 14, 2012) (recognizing that once an insurance policy's limits are paid, "the insurer's duties under the policy are extinguished"). National Union paid those limits.

Second, while St. Paul asserts without support that this payment was on behalf of the Marquee only, St. Paul ignores the legal effect of that payment: as the Cosmopolitan was jointly and severally liable with the Marquee, the Cosmopolitan received a dollar-for-dollar offset for National Union's settlement contribution. NRS 101.040; *cf.* NRS

17.245(1).[19] The Cosmopolitan's joint and several liability for a hypothetical judgment based on the verdict would have been reduced by the full, policy-limit amount that National Union paid on Marquee's behalf—even if Cosmopolitan had not settled.

In other words, once Moradi received National Union's settlement contribution, the Cosmopolitan's obligation to Moradi was reduced by the same amount. A subrogated claim for contractual damages would not get St. Paul any more than what National Union already paid.

C. There Was No Excess Judgment

An excess judgment against the insured is an essential element of a claim arising out of the duty to defend and settle a third-party claim because the insured cannot suffer any damages until an excess judgment is entered.[20]

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[19] *See also, e.g.*, *W. Techs., Inc. v. All-Am. Golf Ctr.*, 122 Nev. 869, 872-73, 139 P.3d 858, 860 (2006) (recognizing that, to prevent "excess recovery by the plaintiff," a jury award of damages will be offset by settlement amounts paid by other parties); *see generally Elyousef v. O'Reilly & Ferrario, LLC,* 126 Nev. 441, 444, 245 P.3d 547, 549 (2010) ("a plaintiff can recover only once for a single injury").

[20] *See Belanger v. Geico Gen. Ins. Co.*, 623 F. App'x 684, 688 (5th Cir. 2015) ("'[N]umerous courts in other jurisdictions have squarely addressed the issue, and have repeatedly held that an excess judgment is a prerequisite to an action for bad faith failure to settle a claim against

A number of courts have even held that if the insurer promptly pays an excess judgment or posts an appeal bond, there is no bad faith claim.[21]

This Court need not go that far in this case because no excess judgment was ever entered. But the point remains: the Cosmopolitan

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an insured within the policy limits.'" (quoting *Mathies v. Blanchard*, 959 So.2d 986 (La. Ct. App. 2007))); *Mercado v. Allstate Ins. Co.*, 340 F.3d 824, 827 (9th Cir. 2003); *Romstad v. Allstate Ins. Co.*, 59 F.3d 608, 611 (6th Cir. 1995); *A.W. Huss Co. v. Cont'l Cas. Co.*, 735 F.2d 246, 253 (7th Cir. 1984); *Zurich Am. Ins. Co. v. U.S. Eng'g Co.*, 2011 WL 13234385, at *3 (W.D. Mo. Sept. 21, 2011); *Amoco Oil Co. v. Reliance Ins. Co.*, 1998 WL 187336, at *4 (W.D. Mo. Apr. 14, 1998); *Taylor v. State Farm Mut. Auto. Ins. Co.*, 913 P.2d 1092, 1095 (Ariz. 1996); *Cont'l Ins. Co. v. Superior Court*, 43 Cal. Rptr. 2d 374, 383 n.11 (Ct. App. 1995); *Finkelstein v. 20th Century Ins. Co.*, 14 Cal. Rptr. 2d 305, 306 (Ct. App. 1992); *Connelly v. State Farm Mut. Auto. Ins. Co.*, 135 A.3d 1271, 1277-76 & nn. 17-18 (Del. 2016); *State ex rel. Am. Home Ins. Co. v. Seay*, 355 So.2d 822, 824 (Fla. Ct. App. 1978); *Allstate Ins. Co. v. Campbell*, 639 A.2d 652, 659 (Md. Ct. App. 1994); *Crabb v. Nat'l Indem. Co.*, 205 N.W.2d 633, 638 (S.D. 1973); *Jarvis v. Farmers Ins. Exchange*, 948 P.2d 898, 902 (Wyo. 1997).

[21] *Kricar, Inc. v. Gen. Accident, Fire & Life Assurance Corp., Ltd.*, 542 F.2d 1135, 1136 (9th Cir. 1976); *Fid. & Cas. Co. of N.Y. v. Cope*, 462 So.2d 459, 461 (Fla. 1985); *DiBlasi v. Aetna Life & Cas. Ins. Co.*, 542 N.Y.S.2d 187, 195 (N.Y. App. Div. 1989); David R. Anderson & John W. Dunfee, *No Harm, No Foul: Why a Bad Faith Claim Should Fail When an Insurer Pays the Excess Verdict*, 33 TORT & INS. L.J. 1001, 1002-03 (1998) ("[I]f the insurer protects the policyholder from the excess verdict, the insurer should be allowed to 'guess' wrong by rejecting a below-limits settlement without suffering debilitating bad faith litigation with the policyholder.").

did not have a bad-faith or breach-of-contract claim relating to the underlying litigation because no judgment, much less an excess judgment, was ever entered against it.

St. Paul concedes that many (though not all) courts require at least an excess judgment to sustain a claim of subrogation, even if the insured need not come out-of-pocket or face collection proceedings. *See J.B. Aguerre, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 68 Cal. Rptr. 2d 837, 841 (Ct. App. 1997) (cited at 46 n.22); *see also RLI Ins. Co. v. CNA Cas. of Cal.*, 45 Cal. Rptr. 3d 667, 674 (Ct. App. 2006) ("a judgment in excess of the policy must be entered before there can be a claim for breach of the primary insurer's duty to settle").

Yet St. Paul brushes this aside with the footnote observation that "[t]here was an excess *verdict*." (AOB 46 n.22 (emphasis added).) Just as a "a settlement agreement on its own [does not] stand[] in the place of a judgment," *Nalder v. Eighth Judicial Dist. Court*, 136 Nev. 200, 204–05, 462 P.3d 677, 683 (2020), so, too, a bare verdict on compensatory damages is not a judgment. The distinction is important because an insured is not even constructively exposed to a verdict. *See also* NRCP 62(a) (providing, at the time, an automatic stay without bond of

any money judgment for ten judicial days).

Here, the Cosmopolitan was never held jointly and severally liable in an excess judgment. In fact, no judgment was ever entered on the verdict because a settlement, which the Cosmopolitan did not fund, emerged during the trial.

D. St. Paul's Boilerplate Subrogation Clause Does Not Create Contractual Subrogation Against a Co-Excess Insurer

St. Paul's contractual subrogation claim fares no better. St. Paul itself admits that the *Colony Insurance* case on which it otherwise relies is unhelpful because, in Nevada, "a contractual subrogation claim cannot be maintained." *See Colony Ins. Co. v. Colorado Cas. Ins. Co.*, No. 2:12-cv-01727-RFB-NJK, 2016 WL 3360943, at *6 (D. Nev. June 9, 2016).

As *Colony Insurance* notes, contractual subrogation generally applies "between an insurer and a third party tortfeasor." *Id.* (citing *21st Century Ins. Co. v. Superior Court*, 213 P.3d 972, 976 (Cal. 2009)). Most subrogation clauses "are general and add nothing to the rights of subrogation that arise as a matter of law." *Id.* (quoting *Progressive W. Ins. Co. v. Yolo Cnty. Superior Court*, 37 Cal. Rptr. 3d 434, 441 (Ct. App.

2005)). St. Paul does not dispute that its subrogation provision is general in this way. (*See* AOB 47.)

St. Paul argues, however, that contractual subrogation applies regardless of equitable superiority "or before the insured has been made whole." (AOB 47.) But this Court has rejected that position, holding that "[u]nless it is explicitly excluded, the make-whole doctrine operates as a default rule that is read into insurance contracts." *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 777, 121 P.3d 599, 604 (2005).

And here, National Union's position as a co-excess insurer is not merely some kind of technical hurdle to an equitable claim around which St. Paul's subrogation boilerplate can maneuver. Rather, it goes to the heart of what St. Paul claims are National Union's breaches of the insurance contract and bad faith. Any duty to direct the litigation and settle *before* Aspen and Zurich tendered their primary policy limits would arise only if National Union, too, were a primary insurer. But it was not. National Union insured the Cosmopolitan at the same level as St. Paul, with equal responsibilities to indemnify; the Cosmopolitan would have a claim against National Union only if it had an equal claim

against St. Paul, because both tendered their policy limits at the same time.

IV.

ST. PAUL HAS NOT PAID MORE THAN ITS PRO RATA SHARE

A. Contribution Is Unavailable Because National Union Contributed Equally to the Cosmopolitan's Settlement and Exhausted the National Union Policy

Unlike equitable subrogation, equitable contribution "apportion[s] costs among insurers that share the same level of liability on the same risk as to the same insured." *Travelers Cas. & Sur. Co. v. Am. Equity Ins. Co.*, 113 Cal. Rptr. 2d 613, 620 (Ct. App. 2001) (quoting *Md. Cas. Co. v. Nationwide Mut. Ins. Co.*, 97 Cal. Rptr. 2d 374 (Ct. App. 2000)). The policy goal "is to apportion a loss between two or more insurers who cover the same risk, so that each pays its fair share and one does not profit at the expense of the others." *Fireman's Fund Ins. Co. v. Md. Cas. Co.*, 77 Cal. Rptr. 2d 296, 306 (Ct. App. 1998).

As with equitable subrogation, this Court has never recognized a claim for equitable contribution among insurers.

But it is unnecessary to decide that question here because St. Paul has not stated such a claim. The point of contribution is to distribute

equitably the insured's loss "in direct ratio to the portion each insurer's coverage bears to the total coverage provided by all the insurance policies." *Great Am. Ins. Co. of N.Y. v. N. Am. Specialty Ins. Co.*, 542 F. Supp. 2d 1203, 1211–12 (D. Nev. 2008) (quoting *Fireman's Fund Ins. Co. v. Md. Cas. Co.*, 77 Cal. Rptr. 2d 296, 304 & n.4 (Ct. App. 1998)). Because the insurer seeking contribution is not asserting the rights of the insured, *cf.* NRS 17.275, the question of bad faith is beside the point.

And here the *pro rata* allocation is simple: both St. Paul and National Union insured the same risk at the same time at the same policy limits. So while St. Paul in theory could have sought contribution up to the policy limits of National Union (had St. Paul paid *more* than half of the liability and had National Union not exhausted its policy), where both insurers exhausted their identical policy limits, neither has a contribution claim against the other. *See Deere & Co.*, 244 Cal. Rptr. 3d at 112; *Aventine-Tramonti Homeowners Ass'n*, 2012 WL 870289 at *3.

As discussed, contrary to St. Paul's objection, National Union's matching settlement contribution reduced the Cosmopolitan's obligation just as much as St. Paul's identical contribution did.

B. There Is No Contribution for Contract-Based Claims

In addition, contribution is unavailable for a claim that is, as here, based on the failure to perform a contractual obligation. NRS 17.225(1) creates a right to contribution only for liability in tort. St. Paul's redacted first amended complaint states no claim that sounds in tort. Even "[l]iability for bad faith is strictly tied to the implied-in-law covenant of good faith and fair dealing arising out of an underlying contractual relationship." *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 511, 780 P.2d 193, 197 (1989).[22]

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[22] To the extent that St. Paul bases any claim on National Union's purported bad faith, the claim remains a contract-based claim. *Shaw v. CitiMortgage, Inc.*, 201 F. Supp. 3d 1222, 1254 (D. Nev. 2016) ("Generally, a breach of the implied covenants [of good faith and fair dealing] is a contract-based claim"). A claim for breach of those implied covenants will be recognized as a tort claim only "in rare and exceptional cases." *Id.* at 1254 (quoting *Max Baer Prods., Ltd. v. Riverwood Partners, LLC*, No. 3:09-cv-00512-RCJ-RAM, 2010 WL 3743926, at *5 (D. Nev. Sept. 20, 2010)). A bad faith claim "does not arise simply from a particularly egregious or willful breach of a contract." *Max Baer*, 2010 WL 3743926, at *5. Instead, a tort claim for breach of the implied covenant of good faith and fair dealing requires a "special relationship" between the contracting parties. *Shaw*, 201 F. Supp. 3d at 1254. "A special relationship is characterized by elements of public interest, adhesion, and fiduciary responsibility." *Baer*, 2010 WL 3743926, at *5; *see also Shaw*, 201 F. Supp. 3d at 1254. St. Paul's first amended complaint does not allege that something resembling a fiduciary or other special relationship was created by any contract relevant to this case.

St. Paul's attempt to characterize its claim as one for "equitable" contribution does not alter the outcome. That is because St. Paul has no right of recovery given that National Union has paid its policy limits, which means that National Union has no obligation to contribute anything more. *E.g.*, *Everest Indem.*, 2012 WL 870289, at *3 (recognizing that "the insurer's duties under the policy are extinguished" once an insurance policy's limits are paid). Under no authority is National Union required to pay any amount beyond its policy limits, whether as a matter of purported equitable contribution or any other theory.

PART THREE:

THE RECORD

V.

ST. PAUL'S CLAIMS AGAINST BOTH NATIONAL UNION AND THE MARQUEE FAIL FOR LACK OF FACTUAL SUPPORT IN THE RECORD

St. Paul's subrogation claims assume that (1) both National Union and the Marquee are responsible for mishandling the Cosmopolitan's defense in the *Moradi* case, and (2) both National Union and the Marquee are responsible for subjecting Cosmopolitan to an unreasonable settlement when reasonable settlement opportunities were available

but disregarded. National Union's motion for summary judgment addressed whether the Cosmopolitan suffered any monetary injury attributable to National Union, and thus, whether the Cosmopolitan has any claim to which St. Paul can be subrogated. (8 App. 1576.) Further, both National Union and the Marquee addressed the material facts relevant to St. Paul's claims. (8 App. 1454-61, 1582-85.)

A. A Party Facing Summary Judgment Cannot Just Rely on the Complaint

It is well-settled that a defendant may obtain summary judgment based solely on the absence of material facts in the record that are sufficient to support a plaintiff's claim. *E.g., Cuzze v. Univ. & Cmty. Coll. Sys.*, 123 Nev. 598, 602–03, 172 P.3d 131, 134 (2007) (relying on *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). At that point, the nonmoving party may not rest on mere allegations in its complaint. *E.g., Garvey v. Clark County*, 91 Nev. 127, 130, 532 P.2d 269, 271 (1975) (concluding that appellants' reliance on allegations of their complaint was insufficient to avoid summary judgment); *see also Cuzze*, 123 Nev. at 603, 172 P.3d at 134 (stating that nonmoving party's opposition to sum-

mary judgment "must transcend the pleadings"). Instead, the nonmoving party must come forward with competent evidence that, if believed, would create a jury issue. *E.g., Osborn v. Richardson-Lovelock, Inc.,* 79 Nev. 71, 74, 378 P.2d 521, 522 (1963) ("The opposing affidavit of the defendants' counsel was accordingly clearly incompetent to raise an issue of fact which would bar summary judgment"); *see also Cuzze*, 123 Nev. at 603, 172 P.3d at 134 (referring to "affidavit or *other admissible* evidence" (emphasis added)).

B. St. Paul Improperly Rests on its Allegations without Record Evidence

The opening brief ignores those well-settled principles. Instead, the opening brief assumes erroneously (at 14 n.7), that "facts alleged in the complaint . . . must be considered true at this stage of these proceedings," when the contrary is true. *E.g., Garvey*, 91 Nev. at 130, 532 P.2d at 271. Further, the opening brief's reliance (at 14 n.7) on "the affidavits supporting St. Paul's oppositions below" is misplaced because those affidavits consisted exclusively of statements from two lawyers who lacked first-hand knowledge and, thus, were not competent to testify.[23]

[23] National Union and Marquee both objected to consideration of those

The record here, even when viewed in the light most favorable to St. Paul, is without any evidence of an admissible type that St. Paul's claims—regarding either the purported insufficiency of the defense or the supposed unreasonableness of the settlement—has any basis in fact. And St. Paul's opening brief on appeal provides no record citation to any such evidence. No record evidence supports a conclusion that but for National Union's or the Marquee's conduct, the Cosmopolitan would (or even could) have fared better than it did under the terms of the settlement agreement into which it entered.[24]

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affidavits. (13 App. 2710; 14 App. 2794.)

[24] The opening brief effectively refutes itself (at 14 n.7) by relying on *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005). Contrary to the opening brief's contention that "facts alleged in the complaint . . . must be considered true," *Wood*, which affirmed summary judgment, recognizes that a party opposing summary judgment "may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue." 121 Nev. at 731, 121 P.3d at 1030-31. And, the opening brief's contention that St. Paul's affidavits must be considered for the truth of what they assert ignores that, because the affiants could not offer testimony based on personal knowledge, the district court would have committed error by considering them. *E.g., Adamson v. Bowker*, 85 Nev. 115, 450 P.2d 796 (1969) (affirming summary judgment: recognizing that on summary judgment, "[t]he trial court may not consider hearsay or other inadmissible evidence"); *see also Schneider v. Cont'l Assur. Co.*, 110 Nev. 1270, 1273, 885 P.2d 572, 574 (1994) (concluding that, on sum-

In short, St. Paul's responses to the National Union and Marquee summary judgment motions failed for lack of proof sufficient to create a jury issue regarding either of the two asserted facts that are indispensable to the success of St. Paul's claim. For that reason alone, without regard to the other reasons discussed throughout this brief, summary judgment was warranted. *E.g.*, *Cuzze*, 123 Nev. at 604, 172 P.3d at 135 (plaintiffs "failed to introduce admissible evidence of specific facts showing that a genuine factual issue exists for trial").[25]

VI.

ST. PAUL DISTORTS THE DISTRICT COURT'S LEGAL REASONING

Nearly absent from St. Paul's brief is any discussion of the district court's written orders. Aside from a handful of procedural references (AOB 1, 24) and the undisputed facts regarding the named insureds

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mary judgment, the district court erred by relying on inadmissible evidence).

[25] St. Paul attempted to undertake discovery in the proceeding below, but the district court denied the request. (15 App. 2976.) St. Paul has elected not to appeal that decision. (AOB 8-9 (identifying issues on appeal).) For purposes of this appeal, therefore, St. Paul has waived consideration of that issue. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (stating that "[i]ssues not raised in an appellant's opening brief are deemed waived").

(AOB 16, 27), St. Paul disregards the orders.

Instead, St. Paul's brief is littered with references to what it calls the "district court's oral ruling" (AOB 54 n.27), in which St. Paul twists the district court's questions and colloquy with counsel as a grand misunderstanding that "formed the basis of the district court's decision." (AOB 23. *See generally* AOB 20-24.) So, for example, when St. Paul argues that

> [t]he 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 . . .

(AOB 49), St. Paul is not referring to any actual ruling in the written order; it is citing a back-and-forth (not even the district court's ruling) in the transcript. (AOB 49 & n.23 (citing 14 App. 2872).)

Of course, St. Paul knows that "[t]he district court's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are ineffective for any purpose." *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 688-89, 747 P.2d 1380, 1382 (1987). But it relies almost exclusively on the transcript anyway because no such "misunderstanding" appears in the written order that the Court entered.

(*E.g.*, AOB 54 n.27 (acknowledging the written order's reliance on the nightclub management agreement).)

While transcripts can certainly be helpful in understanding the proceedings below and the district court's reasoning—particularly if the written order is sparse or unclear—out-of-context questions and comments in the transcript do not supersede the court's written reasoning or have any bearing on the district court's ultimate decision. This is particularly so here, where the district court's thoroughly reasoned written orders merely apply legal principles to undisputed facts. There is no need to root around for the "real" reason underpinning the district court's decision. This Court's review is already *de novo*, and "[t]his court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason." *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010).

In any event, the district court's written findings and conclusions of law reflect a clear grasp of the relevant legal issues at the hearing, an understanding further refined with a full presentation of authorities and alternative bases for relief in the court's written order, as National Union has set forth above. As evidenced in that order, the district court

demonstrates a clear understanding of who insured whom and the extraordinary and unprecedented nature of the subrogation and contribution claims St. Paul was trying to assert.

CONCLUSION

Because the district court correctly granted summary judgment, this court should affirm.

Dated this 2nd day of August, 2021.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 13,986 words.

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

Dated this 2nd day of August, 2021.

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CERTIFICATE OF SERVICE

I certify that on August 2, 2021, I submitted the foregoing "Respondents' Answering Brief" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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