Case No. 81344

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.

MOTION TO STRIKE PORTIONS OF REPLY BRIEF *and* MOTION FOR LEAVE TO RESPOND TO SUPPLEMENTAL AUTHORITY

Respondents National Union Fire Insurance Company of Pittsburgh, PA. and Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ask this Court to strike from appellant St. Paul Fire & Marine Insurance Company's reply brief arguments that were not raised in the opening brief.

Respondents also seek leave to address appellant's citation to *Zurich Am. Ins. Co. v. Aspen Specialty Ins. Co.*, 2:20-CV-01374-APG-DJA, 2021 WL 3489713 (D. Nev. Aug. 6, 2021), an unpublished case decided after the answering brief. That case does not apply on its own terms,

but regardless misrepresents the California rule that it predicts would apply in Nevada.

MOTION TO STRIKE

A. Improper New Issues in Reply Should Be Stricken

"Issues not raised in an appellant's opening brief are deemed waived." *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011). In fact, to raise new issues on reply violates NRAP 28(c). *See Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (citing NRAP 28(c)). "Briefs that are not in compliance" with NRAP 28 "may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees or other monetary sanctions." NRAP 28(j).

St. Paul itself leans hard into a misplaced waiver argument against respondents, forgetting that the rules for waiver work differently for respondents than appellants. *Recontrust Co. v. Zhang*, 130 Nev. 1, 9–10, 317 P.3d 814, 819 (2014). As discussed immediately below, St. Paul has invited a strict application of waiver principles to its own forfeited positions, including on the critical questions of St. Paul's equitable superiority, its claim for estoppel, and the enforceability of the

Marquee's subrogation waiver.

B. The New Argument about Equitable Superiority Is Forfeited

1. If Equitable Subrogation Among Insurers Exists, an Essential Element is Equitable Superiority

If this Court creates a claim of equitable subrogation among insurers, a cardinal element of such a claim 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).

2. St. Paul Largely Ignored Equitable Superiority in the Opening Brief

Yet in the opening brief, St. Paul largely ignored this element. It advanced just one argument in one paragraph for its equitable superiority—that "National Union (and Aspen), not St. Paul, caused the excess judgment." (AOB 44.) St. Paul did not contest that, under the usual analysis of equitable superiority, both St. Paul and National Union are co-excess insurers at equal coverage levels.

3. St. Paul Improperly Raised New—and Unsupported—Arguments in Reply

In reply, St. Paul for the first time argues that National Union is *not* a co-excess insurer. The support for this new argument is likewise

novel—that under section 12.2.5 of the nightclub management agreement,

> [a]ll insurance coverages maintained by [Marquee] shall be **primary** to any insurance coverage maintained by any Owner Insured Parties (the "Owner Policies"), and any such Owner Policies shall be in **excess** of, and not contribute towards, such [Marquee] Policies."

(ARB 14-15 (quoting 12 App. 2406, at § 12.2.5 (emphasis in ARB)).) This means, St. Paul says, that even the National Union "excess" policy is in fact primary to St. Paul's excess policy. In a nod to the argument's novelty, St. Paul cites no case holding that a contract between the insureds controls a priority-of-coverage dispute between the insureds' carriers.

Had St. Paul raised this in the opening brief, National Union would have soundly refuted it. Under the prevailing view, properly applied by the district court,[1] superiority disputes are resolved by reference to the policies themselves, and the general principles governing the interpretation and enforcement of those policies. *See, e.g.*, *Travelers Cas. & Surety Co. v. American Equity Ins. Co.,* 93 Cal. App. 4th 1142,

[1] Where there is no controlling Nevada law, this Court should give deference to the district court's application of the prevailing view. Certainly, St. Paul cannot argue otherwise for the first time in its reply brief.

1157-1158 (2001). And here, National Union's policy does not bow to the nightclub management agreement to which it is not a party. Instead, it is expressly "in excess of" all scheduled insurance policies (9 App. 1675, ¶ I.A) and "Other Insurance," defined as follows:

> 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.) In other words, the other insurance policy must "specifically" indicate its superiority to National Union's policy when both policies provide coverage at the same level of risk. St. Paul's policy does not. Instead, it mirrors National Union's "Other Insurance" clause[2]—a circumstance that annihilates both clauses and makes them co-excess insurers with identical superiority

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[2] The language in St. Paul's policy is nearly identical:

> 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).)

and coverage obligations. *Travelers Ins. Co. v. Lopez*, 93 Nev. 463, 468, 567 P.2d 471, 474 (1977) (cited at RAB 43-44).

This was precisely the analysis that the district court undertook. (15 App. 2970-71, ¶¶ 7-11.)[3] So although St. Paul elected not to contest this point in the opening brief, it was no surprise to St. Paul that National Union emphasized it in the answering brief. (RAB 38-45.)

Indeed, National Union relied on St. Paul's acquiescence to this point, as the answering brief explains:

> 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.

(RAB 18 (citing AOB 44 and the narrow argument that equitable superiority is based on who "caused the excess judgment," not the policy provisions).)

C. St. Paul Waived Its Estoppel Claim

Forewarned that it had waived its estoppel claim (RAB 16 n.4), St.

[3] *Id.* ¶ 10 ("[T]he 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." (citing cases).

Paul makes a half-hearted effort to revive it, arguing that "St. Paul was not permitted the opportunity to conduct meaning for discovery on that claim." (ARB 17.) St. Paul neither disputes that it abandoned the claim in the opening brief nor explains why the waiver should be excused. And on the merits, just as it failed to do at the district court level, St. Paul does not articulate what specific discovery it needs, as NRCP 56(d) requires. *Sciarratta v. Foremost Ins. Co.*, 137 Nev., Adv. Op. 32, 491 P.3d 7, 12–13 (2021).

St. Paul seems to recognize that this claim is a loser, certainly as a standalone, but St. Paul wants to keep aloft the broader notion that summary judgment was premature, so everything should just go back down to the district court for further development and discovery. This Court's waiver rules are clear, however: this forfeited claim should not be considered at all.

D. St. Paul Waived its New Arguments for Invalidating the Subrogation Waiver

1. Against the Marquee, St. Paul Cannot Invoke the Canon of Construction Disfavoring Insurers

Also new in reply is St. Paul's argument for invalidating the

waiver of subrogation in the nightclub management agreement, a provision that forecloses the claims against the Marquee. Oddly, St. Paul as an insurer invokes the canon that ambiguous provisions in an insurance policy are construed against the insurer in favor of the insured as if the same public policy considerations at play in an insurance setting apply to sophisticated parties to a private contract. (ARB 26.) St. Paul itself concedes that the rule does not actually apply because the nightclub management agreement is not an insurance contract drafted by insurance companies. St. Paul nonetheless strains to couch its argument as one the Cosmopolitan would make against Marquee's insurers (the supposed beneficiaries of the waiver of subrogation).

The argument is waived.

Regardless, the argument tears at its first weakness: subrogation does not benefit insureds; it benefits insurance companies. The Cosmopolitan has no interest in tossing aside the express provisions of the nightclub management agreement just to preserve a subrogation right that benefits only its carrier, not the Cosmopolitan.

Not surprisingly, undersigned counsel found no case applying this rule of construction to invalidate a subrogation waiver. The rule has,

however, been used to prevent insurers like St. Paul from *escaping* such a waiver. *See Lloyd's Syndicate 457 v. FloaTEC, L.L.C.*, 921 F.3d 508, 517–18 (5th Cir. 2019) (applying the rule that "ambiguous clauses are construed against the insurer" to uphold a district court's decision that a subrogation waiver barred the insurer's claims); *see also John L. Mattingly Const. Co., Inc. v. Hartford Underwriters Ins. Co.*, 999 A.2d 1066, 1079 (Md. 2010).

2. St. Paul Cannot Argue that Subrogation Waivers Are Invalid for Intentional Torts

Also new is St. Paul's argument that because the Marquee's conduct was intentional, the Marquee cannot "escape indemnity and equitable contribution." (ARB 29.) Although confusing, the argument apparently rests on the public policy precluding parties from indemnifying one another's intentional torts. St. Paul should have raised the issue in the opening brief if it wanted this Court to consider it. That failure forfeits St. Paul's right to do so in reply.

The novel argument is especially dubious because it confuses waivers of subrogation with direct indemnity, concepts that have different legal purposes and policies. Even if direct indemnity claims were

unavailable for intentional torts, that would not bar a subrogation waiver of those kinds of claims where the loss is covered by insurance. That is because unlike indemnity or a liability waiver, a subrogation waiver does not leave the injured party without recovery. *See St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply*, 409 F.3d 73, 84–87 (2d Cir. 2005). The permissible extent of a subrogation waiver is thus coextensive with the extent of the insurable risk, which here included all of the acts of which the Cosmopolitan and the Marquee were accused.

MOTION FOR LEAVE TO RESPOND TO SUPPLEMENTAL AUTHORITY

Much of St. Paul's reply relies on a recent unpublished decision from Nevada's federal court, *Zurich Am. Ins. Co. v. Aspen Specialty Ins. Co.*, 2:20-CV-01374-APG-DJA, 2021 WL 3489713 (D. Nev. Aug. 6, 2021). There, the district court purports to apply California law in refusing to dismiss on a FRCP 12(b)(6) motion to dismiss a subrogation claim between co-primary insurers. National Union could not address this case because it was decided after the answering brief. Despite some superficial similarities, the case is different in critical respects. And the district court misapplies the California authorities that it predicts will form the basis for Nevada's jurisprudence in this area.

If this Court considers the *Zurich* case, National Union asks for the opportunity to address the case in supplemental briefing.

A. *Zurich v. Aspen* Did Not Involve a Claim Between Co-Excess Insurers or a Waiver of Subrogation

On its face, there is no question that *Zurich* involves some similar facts: an underlying lawsuit by guests who claimed to be attacked by Marquee employees. 2021 WL 3489713, at *1. The primary policies appear similar, too: on Aspen's policy, the Marquee is the named insured,

and the Cosmopolitan is an additional insured. *Id.* The Cosmopolitan also has its own primary CGL policy with Zurich. *Id.* When the plaintiffs offered to settle within Aspen's $1 million limits, Zurich demanded that Aspen settle, but Aspen refused. *Id.* The lawsuit later settled for $1.4 million, with Zurich and an excess carrier contributing more than $412,000. *Id.*

The district court predicted that this Court "would allow equitable subrogation between insurance companies when appropriate." *Id.* at *3. And in that case, even though, "by Zurich's alleged facts, both Zurich and Aspen were primary insurers for The Cosmopolitan under their respective policies," Aspen might still be "primarily liable" within the meaning of California's equitable subrogation test because that test refers to "the party primarily *responsible* for causing the loss," not necessarily "an insurer who has primary *coverage*." *Id.* at *4 (emphasis added). "If this element applies in Nevada, and if that is its proper meaning, then Zurich has plausibly alleged that Aspen is the party ultimately responsible for increasing the overall settlement amount through its bad faith conduct."[4]

[4] The *Zurich* court also allowed the contractual subrogation claim based

Nonetheless, the district court did not address our case, a dispute solely between co-*excess* insurers, not *primary* insurers.

B. *Zurich* Misconstrues California Law, and this Court Should Not Adopts its Flawed View of "Responsibility" for a Loss

More fundamentally, *Zurich* simply misread California law, and the district court even admitted its own insecurity.

1. The Zurich *Court Was So Uncertain that It Encouraged Certification*

Although it is understandable why St. Paul leans on this decision, issued just days after our answering brief, St. Paul ignores the broader principle animating this FRCP 12(b)(6) ruling: a general hesitancy to dismiss claims absent direction from the Nevada Supreme Court. *See id.* at *5 ("The facts may later demonstrate that either subrogation is not warranted or, if it is, that Aspen is entitled to offsets for equitable

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on (1) the subrogation provision in the Cosmopolitan's insurance policy and (2) the viability of Zurich's equitable subrogation claim, which sets the ceiling on recovery for contractual subrogation. *Id.* at *6. Relying solely on Zurich's complaint, the decision does not discuss whether there was a waiver of subrogation.

contribution or subrogation in the other direction. But accepting the allegations as true as I must at this stage, I deny Aspen's motion to dismiss the equitable subrogation claims.").

In fact, the court invited the parties to consider certification to this Court—a move that would essentially just put those parties where we are now:

> The parties raise numerous novel issues of Nevada law. They should consider whether, and at what stage of this case, certification of legal issues to the Supreme Court of Nevada may be appropriate.

Id. at *7.

2. Zurich *Is Wrong: Primary Liability Is a Distinct Element from the Justice of Shifting the Loss*

Zurich's key error lies in conflating two elements of equitable subrogation: the requirement that "the claimed loss was one for which the insurer was not primarily liable" and, separately, 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." *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1292 (Ct. App. 1998).

In *Zurich*, the court suggest that "'primarily *liable'* refers to the party primarily responsible for *causing* the loss"—i.e., solely whose actions were unjustified, as opposed to whose policy would answer first as a matter of priority. 2021 WL 3489713, at *3–4. According to that definition, Aspen might be "primarily liable" because it is "ultimately responsible for increasing the overall settlement amount through its bad faith conduct." As a consequence, the *Zurich* court's discussion of the separate element of whether "justice requires that the loss be entirely shifted" collapses into the same analysis: "but for Aspen's bad faith conduct, Zurich would not have had to pay that amount to settle." *Id.* at *5.

This contradicts how those elements are actually applied in the California cases. Indeed, although the "justice" element may take into account a party's bad-faith conduct in causing a loss, the "primarily liable" element addresses an entirely different question: as a matter of priority, does the defendant's policy answer *before* the plaintiffs, or do they cover the same risk at the same level? California has consistently limited equitable subrogation claims to carriers that do not share the same level of risk. In *American States Insurance Co. v. National Union Fire Insurance Co. of Hartford*, for instance, the court held that equitable

subrogation does not apply between two primary carriers because each primary carrier cannot be primarily liable in comparison to the other when they both provide primary coverage. 135 Cal. Rptr. 3d 177, 185 (Ct. App. 2011). The court's conclusion in *American States* rests on the plaintiff insurer's failure to meet two elements: that "the claimed loss was one for which the insurer was not primarily liable" and "the insurer has compensated the insured in whole or in part for the same loss for which the defendant is primarily liable."[5]

That is why equitable subrogation is not available between carriers—whether primary or excess—that insure the same level of risk. There was no need for the *Zurich* court to concoct a contrary meaning of "primarily liable."

And that is why the *Zurich* court cannot identify any cases doing what it is purporting to allow.

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[5] In addition, "where there are several policies of insurance on the same risk and the insured has recovered the full amount of its loss from one or more, but not all, of the insurance carriers, the insured has no further rights against the insurers who have not contributed to its recovery." *Id.* Because subrogation rights are purely derivative, in that situation where the insured has no right of recovery, there is no assignable cause of action to which the insurer can subrogate. *Id.*

3. Zurich *Is Wrong: Equitable Superiority Is Liability for the Underlying Loss, Not an Insurer's Handling of a Claim*

A second point of confusion infects *Zurich*, too: it conflates its alleged "loss" with the prejudgment "*settlement*" of the loss among insurers. The case *Zurich* cites, *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1296 (Ct. App. 1998) requires the plaintiff insurer to show that the defendant is primarily responsible for the *loss*. Subsequent cases make clear that the loss referred to is the "underlying loss"—the event for which liability insurance steps in to defend and indemnity. *Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co.*, 105 Cal. Rptr. 3d 606, 619 (Ct. App. 2010) (citing *Patent Scaffolding Co. v. William Simpson Constr. Co.*, 256 Cal. App. 2d 506 (Ct. App. 1967) and *Pylon, Inc. v. Olympic Ins. Co.*, 77 Cal. Rptr. 72 (Ct. App. 1969)). It is the fire or the automobile accident or the burglary—or here, the alleged security failures inside the Marquee Nightclub at the Cosmopolitan. A third-party active wrongdoer may be primarily responsible for that loss, such that a primary carrier could subrogate to the insured's claim against that third party.

This also dovetails with the view of equitable subrogation as derivative of the insured's rights. An insured could itself bring a claim against the responsible third party.[6]

In *Zurich*, however, the court conflated this responsibility for the underlying loss with responsibility for errors that increase the settlement amount:

> If this element applies in Nevada, and if that is its proper meaning, then Zurich has plausibly alleged that Aspen is the party *ultimately responsible for increasing the overall settlement amount* through its bad faith conduct.

2021 WL 3489713, at *4 (D. Nev. Aug. 6, 2021). That is not the proper meaning.

That is why, although allegations of bad faith by insurers are legion, no case supports the novel remedy St. Paul seeks here.

C. Supplemental Briefing Is Necessary

Whether by distinguishing *Zurich* or disregarding it, this Court

[6] Vis-à-vis an excess carrier, the primary insurer may be primarily responsible for the loss by virtue of the policies' priority. But the insured would not have a claim against any excess carrier who alone or in combination with other excess carriers together protected the insured against exposure for the loss.

should not be the first to manufacture an equitable subrogation claim that an insured could never raise and would just result in substantially increased and vexatious litigation between insurance companies: a fight among co-equal insurers who had equal coverage obligation and who both in fact contributed equally to the settlement to protect the insured from excess liability.

If this Court is inclined to consider *Zurich* as authority, respondents request a reasonable opportunity to respond in supplemental briefing along the lines indicated in this motion.

Dated this 4th day of March, 2022.

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CERTIFICATE OF SERVICE

I certify that on March 4, 2022, I submitted the foregoing "Motion to Strike Portions of Reply Brief and Motion for Leave to Respond to Supplemental Authority" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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