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.

Electronically Filed
Mar 31 2022 05:02 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

REPLY BRIEF ON "MOTION TO STRIKE PORTIONS OF REPLY BRIEF AND MOTION FOR LEAVE TO RESPOND TO SUPPLEMENTAL AUTHORITY"

Appellant St. Paul Fire & Marine Insurance Company apparently misunderstood the purpose of respondents' two motions. St. Paul complains that respondents are trying to keep this Court from considering Judge Gordon's unpublished ruling in *Zurich Am. Ins. Co. v. Aspen Specialty Ins. Co.*, 2:20-CV-01374-APG-DJA, 2021 WL 3489713 (D. Nev. Aug. 6, 2021). Far from it. *Zurich* is not the subject of respondents' motion to strike; rather, it is the subject of respondents' second motion: for leave to address this supplemental authority. The motion to strike takes aim solely at improper *arguments* raised for the first time in reply. As St. Paul's opposition confirms, each of the arguments was in fact waived by its omission from the opening brief. And with respect to *Zurich*, St. Paul offers neither a substantive defense nor a single case to defend this outlier decision.

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REPLY BRIEF ON MOTION TO STRIKE

A. The Waiver Rule for Omitted Arguments Is Rooted in the Court's Longstanding Policy of Fairness and Concern for Judicial Administration

St. Paul cites *Huckabay Props. v. NC Auto Parts* as "prescrib[ing]" this Court's "policy to evaluate cases on the merits, and not use form as a means of ignoring arguments." (Opp. 2-3 (citing 130 Nev. 196, 198, 322 P.3d 429, 430 (2014)).) Actually, in dismissing Huckabay's appeal, this Court *rejected* the notion that this general policy overrides "countervailing policy considerations." *Id.*

> Thus, a party cannot rely on the preference for deciding cases on the merits to the exclusion of all other policy considerations, and when an appellant fails to adhere to Nevada's appellate procedure rules, which embody judicial administration and fairness concerns, or fails to comply with court directives or orders, that appellant does so at the risk of forfeiting appellate relief.

Id. at 203–04, 322 P.3d at 433–34.

This Court has long cautioned appellants about failing to raise or cogently argue issues in the opening brief. Here, St. Paul flouted that rule repeatedly, to the prejudice of respondents—who could not anticipate or respond to the new and improper arguments. In the interest of fairness and judicial administration, this Court should hold St. Paul to the rules and strike the new arguments in reply.

B. Argument on Equitable Superiority Is New and Improper

Rather than assert a good-faith mistake or excuse for having failed to address issues in the opening brief, St. Paul tries to gaslight this Court and respondents, insisting that "St. Paul's Argument About Equitable Superiority Is Not New"

(Opp. 4) and that "Respondents' claim that 'St. Paul for the first time [in the Reply] argues that National Union is not a co-excess insurer' is false." (Opp. 5.) St. Paul cites just two sentences on page 50 of the opening brief, which make the uninteresting points that subrogation involves "stepp[ing] into the shoes of" an insured and that an *equitable* subrogation claim need not be based upon a contract between the subrogation plaintiff and the subrogation defendant. Yet nowhere in those excerpts or anywhere else in the 15,378-word brief does St. Paul remotely hint that National Union is in fact *not* a co-excess insurer—and that the nightclub management agreement (to which National Union is not a party) somehow proves it.

C. St. Paul Abandoned its Estoppel Claim

St. Paul's estoppel argument in reply is not an "expansion" on any argument in the opening brief. St. Paul claims to have "highlighted its estoppel argument in the Opening Brief" (Opp. 6), but musters just one paltry citation drawn from the statement of facts, in which St. Paul simply recites the causes of action in its amended complaint (AOB 18). That recitation is consistent with St. Paul's decision to abandon the claim on appeal.

St. Paul also claims to have "highlighted the overwhelming need for discovery in at least one footnote" (Opp. 6), faint praise so damning that it would be humorous but for its disgraceful purpose: to excuse St. Paul's ambush in reply and allow it to saddle National Union with a multi-million-dollar liability. Even now, St.

Paul cannot cogently explain its estoppel claim or the relevance of a footnote discovery request. *See Nev. Indep. v. Whitley*, 138 Nev., Adv. Op. 15, at 6 n.2 (Mar. 24, 2022) (declining to consider arguments without "salient authority"). The cited footnote merely states the fact that "[n]o discovery has been conducted" (AOB 19 n.11) without so much as mentioning NRCP 56(d) *or* estoppel—much less articulating the specific discovery St. Paul would have conducted to sustain its claim, as NRCP 56(d) requires. *Sciarratta v. Foremost Ins. Co.*, 137 Nev., Adv. Op. 32, 491 P.3d 7, 12–13 (2021).[1]

D. St. Paul's Argument about Construing the Subrogation Waiver Against the Marquee Is New

St. Paul does not dispute that its topsy-turvy argument about construing a subrogation waiver in favor of St. Paul (an insurer) against the Marquee (National Union's insured) appears nowhere in the opening brief. (Opp. 6-7.) Instead, St. Paul points back to its admittedly "general[]" discussion of the subrogation waiver. (Opp. 7.)

St. Paul now chides National Union for its "failure to address" an argument St. Paul never made. (Opp. 7.) Yet National Union was careful to point out the limited nature of St. Paul's objection:

> Apart from the question of whether the subrogation waiver

[1] The word "discovery" appears just one other time in the opening brief, in an unrelated context. (AOB 5 n.3.) There, St. Paul suggests that because "all that was before the district court was the pleadings and argument," any allocation of fault between National Union and Aspen would have to be resolved on remand. Neither footnote cites any authority whatsoever.

> binds the Cosmopolitan, St. Paul raises no other objection to its enforcement. (AOB 54-57.)

(RAB 28 n.11.) National Union had not addressed St. Paul's novel canon of construction only because St. Paul never raised it.[2]

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

St. Paul does not dispute that its attempt to invalidate the subrogation waiver as analogous to indemnifying intentional torts is new to the reply. Instead, St. Paul retreats to the fuzzy notion that it had argued that "Marquee committed intentional torts." (Opp. 7.) But as St. Paul admits, the opening brief raised this only to suggest that Marquee owed the Cosmopolitan indemnity—*not* to argue that the subrogation waiver itself is invalid. And even in reply, St. Paul cited no authority holding that an insurer can evade a subrogation waiver whenever the subrogation defendant has committed an intentional tort.

Indeed, St. Paul's attempt to blur the line between direct indemnity claim and subrogation appears deliberate. The presumption in indemnity runs one way: absent an express provision, indemnity does not cover "the indemnitee's own negligence." *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127

[2] As discussed in the motion to strike, no authority supports the notion that an *insurer* may invoke the canon of construing insurance contracts against insurers to escape a valid subrogation 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).

Nev. 331, 339, 255 P.3d 268, 274 (2011). But for subrogation, the presumption is the opposite: in the context of a lease, absent an express provision ultimately requiring the tenant to bear losses attributable to its negligence, the landlord's insurance is presumed to be "obtained for the mutual benefit of both parties," such that "the tenant stands in the shoes of the insured landlord for the limited purpose of defeating a subrogation claim." *Safeco Ins. Co. v. Capri*, 101 Nev. 429, 431, 705 P.2d 659, 660 (1985) (internal quotation marks omitted).

Thus, while St. Paul rushes to brand the Marquee an intentional tortfeasor, that irrelevant label does not confer on St. Paul any subrogation rights. In fact, the waiver of subrogation is consistent with the Marquee's and NRV1's view of indemnity: the parties agreed to indemnify each other for losses "not otherwise covered by the insurance required to be maintained hereunder." (RAB 7-8 (quoting R. App. 67-68, 12 App. 2406-07, § 13).) "Losses" are limited to liabilities "not reimbursed by insurance." (*Id.* (quoting (R. App. 13, § 1).)

The indemnity cases that St. Paul cites in reply do not alter the presumption that it cannot subrogate to claims against a nightclub operating on its insured's property—the Marquee and NRV1 are the Cosmopolitan's co-insureds for purposes of defeating subrogation. Nor do those cases prohibit parties from waiving subrogation in precisely the way they did here. This Court should not entertain St. Paul's new argument in reply.

REPLY BRIEF ON MOTION FOR LEAVE TO RESPOND TO SUPPLEMENTAL AUTHORITY

A. This Court Can Consider Respondents' Motion and Order Supplemental Briefing after Oral Argument, as Necessary

St. Paul concedes that respondents are entitled to respond to the *Zurich* decision. (Opp. 8.) While respondents prepared their motion before they learned of the order setting oral argument, the parties agree that this Court may proceed with the oral argument as scheduled. If necessary, additional briefing may be ordered after argument.

B. St. Paul Attacks Strawmen Rather than Confront the Actual Distinctions and Weaknesses in *Zurich*

St. Paul misrepresents respondents' arguments about the *Zurich* case, reducing them to more easily dismissible strawmen.

1. Even if this Court Recognized Equitable Subrogation Among Insurers, St. Paul Has Not Established the Elements for that Claim

St. Paul pretends as though respondents' distinction—that *Zurich* did not involve a dispute between co-excess insurers at the same level—disappears once the Court elects to recognize equitable subrogation at all. St. Paul simply assumes that as between itself and National Union, both of whom insured the Cosmopolitan at the same level of excess coverage, St. Paul gets to "step[] into Cosmopolitans' [*sic*] shoes" and sue National Union. (Opp. 9.) But National Union's contribution was equally necessary to protect the Cosmopolitan: had National Union not paid its

policy limits to settle the claim, the Cosmopolitan would have suffered an "excess verdict." So by St. Paul's logic, National Union would have just as much right to step into the Cosmopolitan's shoes to sue St. Paul. This path to madness is precisely why an excess insurer can seek subrogation only against the insurer who is *primarily* liable on the risk—not against a co-excess insurer at the same level. (*See* RAB 38-46 and citations.)

2. Even if this Court Recognizes Equitable Contribution, St. Paul and National Union Already Paid Equal Shares on their Common Obligation

St. Paul accuses respondents of conflating equitable subrogation with equitable contribution, yet does not say how. (Opp. 11.) Neither doctrine has been recognized in Nevada—and is indeed contrary to the exclusive statutory remedy for contribution in NRS 17.225, which St. Paul concedes does not apply—but regardless St. Paul does not seem to grasp that equitable contribution is the mechanism for one insurer to recover against another insurer on the same risk at the same level. Here, this Court need not decide whether to recognize an equitable contribution claim because the common burden between National Union and St. Paul was already distributed equally, by both insurers' payment of their identical policy limits. *See Zurich Am. Ins. Co. v. S.-Owners Ins. Co.*, 248 F. Supp. 3d 1268, 1290 (M.D. Fla. 2017) (cited at Opp. 11).

C. St. Paul Does Not Defend *Zurich*'s Errors

St. Paul acknowledges that the *Zurich* decision was based on the hesitancy

of Judge Gordon to dismiss claims as part of a preliminary 12(b)(6) challenge to the pleadings, which on this point alone distinguishes that decision from the district court's decision made at the summary judgment stage after allowing St. Paul leave to amend its complaint and the production of the operative insurance policies and nightclub agreement. (Opp. 10.)

Most tellingly, St. Paul cannot defend *Zurich* on its merits. St. Paul simply cites to *Zurich* itself and contends that Judge Gordon was more definitive in his ruling than he actually purported to be. St. Paul does not even attempt to dispel the errors that respondents identified in their motion, errors that put Judge Gordon far outside the mainstream. That is rather the point. Respondents presented the published California authority that Judge Gordon was purporting to apply, and showed how Judge Gordon had misread that authority and did not seem to appreciate that co-excess carriers cannot pursue equitable subrogation against one another under California law as the district court found here. (Mot. 14-17 (citing, among other cases, *Am. States Ins. Co. v. Nat'l Union Fire Ins. Co. of Hartford*, 135 Cal. Rptr. 3d 177, 185 (Ct. App. 2011)).) Respondents even pointed out that *Zurich* remains an outlier because "the *Zurich* court cannot identify any cases doing what it is purporting to allow." (Mot. 16.)

Where *Zurich* itself cites no authority adopting its position, St. Paul cannot simply cite to *Zurich* as the authoritative exegesis on California law. If this Court is

inclined to adopt California law, it should look to those cases—not *Zurich*'s misinterpretation.

Dated this 31st day of March, 2022.

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CERTIFICATE OF SERVICE

I certify that on March 31, 2022, I submitted the foregoing "Reply Brief on '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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