IN THE SUPREME COURT OF THE STATE OF NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Appellant. v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; ROOF DECK ENTERTAINMENT, LLC, D/B/A MARQUEE NIGHTCLUB, Respondents.	Docket No. 81344 District Court Case No. A-17-17-58902-C

APPELLANT'S PETITION FOR REHEARING

from Order of Affirmance Issued on December 8, 2022

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INTRODUCTION

Appellant St. Paul Fire & Marine Insurance Company (Appellant St. Paul) petitions this Court pursuant to Nevada Rule of Appellate Procedure (NRAP) 40 to rehear the unpublished Order of Affirmance issued by a four-justice majority of this Court on December 8, 2022 (Cadish, E., and Stiglich, L., JJ., concurring in part and dissenting in part).

Underlying this case was a $160.5 million jury verdict that arose from personal injuries sustained by a patron of Respondent Roof Deck Entertainment d/b/a the Marquee Nightclub (the Marquee) at the Cosmopolitan Hotel & Casino in Las Vegas (the Cosmopolitan) on April 8, 2012. The primary and excess insurance carriers for the Marquee were Aspen Specialty Insurance Company (Aspen) and Respondent National Union Fire Insurance Company (National Union), respectively.

Without notice to or consultation with Appellant St. Paul, who was the excess insurance carrier for the Cosmopolitan, Aspen and Respondent National Union chose to reject a pre-trial offer of judgment of $1.5 million. This decision resulted in Appellant St. Paul—the excess insurance carrier for the Cosmopolitan—being compelled to later pay damages far in excess of $1.5 million to settle the lawsuit.

Issues presented in this appeal were complex and of first impression in Nevada. Yet, this Court's decision leaves Appellant St. Paul Insurance without a viable remedy to address the harm it has suffered.

As a threshold matter, it is relevant to recognize that this Court's decision avoids addressing a fundamental issue—whether equitable or contractual subrogation may be pursued as a remedy by an excess insurance carrier against another excess insurance carrier. The right to pursue equitable subrogation by an excess insurance carrier is a majority rule that has been embraced by at least 29 other jurisdictions—only Alabama has adopted an alternative view. *See* Appellant's Opening Brief, at 39-42. Left unaddressed, Nevada will remain an outlier in its excess insurance subrogation jurisprudence.

Yet, the ramifications of the Court's decision are even more startling because it is contrary to the foundations of subrogation law. The Court's decision rests on the proposition that there are no damages to which an insurer can subrogate anytime it protects its policyholder and settles a liability, as Appellant St. Paul did here. *See* Order of Affirmance, at 4-5. This premise ignores the fundamental nature of subrogation law. Subrogation was introduced into the common law because of, not despite,

the fact that an insurer paid damages on behalf of its insured. If an insurer paying to protect an insured eliminated the right to pursue subrogation, subrogation would cease to exist. *See* Appellant's Opening Brief, at 42-46. This Court's decision to the contrary appears to leave Nevada alone, essentially negating the existence of subrogation.

Respectfully, Appellant St. Paul submits that the majority decision by this Court overlooked and/or misapprehended both material facts and law in its Order of Affirmance. Based on the reasons set forth below, Appellant St. Paul respectfully requests that this Court rehear and reconsider its decision to affirm in this appeal.

REHEARING SHOULD BE GRANTED

NRAP 40(c) provides that rehearing of an *en banc* decision is appropriate either

> (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
>
> (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

Here, rehearing is warranted on five independent, yet interrelated, grounds: (1) this Court misapprehended the nature of subrogation law; (2)

this Court erred in concluding that Appellant St. Paul could not show damages to subrogate because it settled the underlying lawsuit "before excess-judgment exposure"; (3) this Court erred in concluding that exhaustion of policy limits by Appellant St. Paul in settling the underlying lawsuit extinguished a claim for damages by the Cosmopolitan against Respondent National Union; (4) this Court erred in concluding that the Cosmopolitan suffered no bad faith damages that Appellant St. Paul could subrogate; and (5) this Court erred in failing to address the significance of Respondent National Union's deployment of conflicted legal counsel to jointly defend the Marquee and the Cosmopolitan.

Each ground for rehearing will be addressed below.

1. This Court Misapprehended the Nature of Subrogation Law.

This Court concluded on page 5 of its Order of Affirmance that Appellant St. Paul could not demonstrate damages to subrogate because it settled the underlying lawsuit pending against the Cosmopolitan. However, this decision is contrary to well-settled principles and policies of subrogation law. At least 29 of 30 jurisdictions have recognized the rights of an excess insurer to sue in subrogation in cases like this one, with only Alabama—and now Nevada—on the other side. *See* Appellant's Opening Brief, at 39-42.

Of even greater concern is this Court's decision that there are no damages subject to subrogation when an insurer pays money on behalf of an insured would mean that there is never subrogation in Nevada. Nothing in this Court's Order of Affirmance indicates that it intended to shift Nevada's law so drastically and so far from other jurisdictions.

The Court's rationale that the Cosmopolitan has no damages to subrogate has dire consequences. By concluding that Appellant St. Paul forfeited its ability to maintain a subrogation action due to the fact that it contributed to the settlement of the underlying lawsuit against the Cosmopolitan, this Court is penalizing Appellant St. Paul for protecting its insured. This Court's decision creates a disincentive to prompt settlement for insurers, which is contrary to well-settled insurance policy and judicial economy. It turns subrogation law upside down. The dissent correctly recognized this Court's decision advances an untenable proposition. *See* Order of Affirmance, at 13 (Cadish, E., and Stiglich, L., JJ., concurring in part and dissenting in part). Insurers may be left without legal recourse. Litigation may increase. Insureds may be left exposed. On this basis alone, Appellant St. Paul respectfully submits rehearing is warranted.

2. This Court Erred in Concluding that Appellant St. Paul Could Not Show Damages to Subrogate Because It Settled the Underlying Lawsuit "Before Excess-Judgment Exposure."

As noted above, this Court concluded on page 5 of its Order of Affirmance that Appellant St. Paul could not demonstrate damages to subrogate because it settled the lawsuit after the jury reached its verdict but "before excess-judgment exposure." On this basis—the very timing of the settlement—this Court determined that the Cosmopolitan "did not suffer damages" for Appellant St. Paul to subrogate. *Id.* In reaching this determination and to support its proposition, this Court cited to the California Court of Appeals case *Safeco Ins. Co. of Am v. Superior Court of Contra Costa Cty.*, 84 Cal. Rptr. 2d 43, 46 (Ct. App. 1999) for the holding that a cause of action for bad faith settlement "arises only after a judgment has been rendered in excess of the policy limits." *Id.* However, this Court's reliance upon *Safeco Ins.* for this broad proposition is in error.

Over a decade after being issued, the holding in *Safeco Ins.* was clarified and limited by the California Court of Appeals in the subsequent decision *Ace American Ins. Co v. Fireman's Fund Ins. Co.*, 206 Cal. Rptr. 3d 176, 189 (Ct. App. 2016), which recognized that the holding *Safeco Ins*. and other similar cases were dependent upon their particular facts.

The California Court of Appeals proceeded to recognize in *Ace American Ins.* that "the purpose behind the statements requiring a judgment in an underlying lawsuit is simply to ensure that a plaintiff has a reliable basis for alleging that damages have resulted from the insurer's alleged breach of the duty to settle within policy limits." *Id.* at 188.

While a judgement is one way of determining reliable evidence of damages, the California Court of Appeals in *Ace American Ins.* reasoned that "it does not follow that a judgment is the *only* manner by which an insured or subrogee may prove damages resulting from an unreasonable failure to settle within policy limits." *Id.* (emphasis in original). The Court of Appeals thereafter held the following:

> An excess judgment *is not* a required element of a cause of action for equitable subrogation or breach of the duty of good faith and fair dealing; where the insured or excess insurer has actually contributed to an excess settlement, the plaintiff may allege that the primary insurer's breach of the duty to accept reasonable settlement offers resulted in damages in the form of the excess settlement.

Id. at 195 (emphasis added). Accordingly, and based upon the subsequent clarification and limitation of the *Safeco Ins.* decision by *Ace American Ins.*, this Court's reliance upon *Safeco Ins.* and determination that Appellant

St. Paul's decision to settle the underlying lawsuit on behalf of the Cosmopolitan post-jury verdict, yet prior to judgment being entered, was dispositive of its ability to subsequently pursue damages against Respondent National Union under a subrogation theory was based upon a misapprehension of law and fact. It is a conclusion that should be revisited by this Court.

3. This Court Erred in Concluding that Exhaustion of Policy Limits by Appellant St. Paul to Settle the Underlying Lawsuit Extinguished a Claim for Damages by the Cosmopolitan.

This Court concluded on page 5 of its Order of Affirmance that any claim for damages by the Cosmopolitan against Respondent National Union was extinguished when Appellant St. Paul, along with the other insurance carriers, settled the underlying lawsuit. This Court proceeded to reason that the settlement eliminated any claim for damages or loss by the Cosmopolitan by which Appellant St. Paul could subrogate. However, this Court misapprehended its holding in *Century Sur. Co. v. Andrew*, 134 Nev. 819, 432 P.3d 180 (2018), in reaching its conclusion.

As observed by the dissent, *see* Order of Affirmance, at 14 n.6 (Cadish, E., and Stiglich, L., JJ., concurring in part and dissenting in part), this Court's opinion in *Andrew*, 134 Nev. at 825-26, 432 P.2d at 185-86,

supports the proposition that exhaustion of policy limits "*does not* automatically foreclose an insured's damages." (Emphasis in original). While this Court cites to *Andrew* in the Order of Affirmance in the majority decision, it proceeds to misapply its holding to the facts of this appeal. *See* Order of Affirmance, at 4-5. Pursuant to *Andrew*, exhaustion of policy limits does not forgo a subsequent damages action. Accordingly, the fact that Appellant St. Paul contributed to settling the underlying lawsuit on behalf of the Cosmopolitan does not under *Andrew* extinguish the ability of the Cosmopolitan to maintain a bad faith or contract damages claim against Respondent National Union. This Court erred in its conclusion.

4. <u>This Court Erred in Concluding that the Cosmopolitan Suffered No Bad Faith Damages for Appellant St. Paul to Subrogate.</u>

This Court concluded on page 5 of its Order of Affirmance that Appellant St. Paul's contribution to the post-trial settlement of the underlying lawsuit nullified any damages claims by the Cosmopolitan and, therefore, Appellant St. Paul had no valid subrogation claims against Respondent National Union.

Yet, in reaching its conclusion, this Court stated that Appellant St. Paul and Respondent National Union were "equal-level insurers" and defined the phrase as "insurers that provide the same type of coverage to

a *mutual insured,* such as two excess insurers." (Emphasis added). *See* Order of Affirmance, at 3 n.3.

However, Appellant St. Paul and Respondent National Union were not 'equal-level insurers' providing coverage to a single 'mutual insured.' While Appellant St. Paul was obligated to provide excess insurance coverage to the Cosmopolitan *only*, Respondent National Union was obligated to provide excess insurance coverage to *both* the Marquee and the Cosmopolitan. In other words, Appellant St. Paul and Respondent National Union were not on an 'equal-level' covering a 'mutual insured.' Respondent National Union had conflicted duties and loyalties to two separate and distinct insured entities; whereas, Appellant St. Paul did not. Appellant St. Paul's sole loyalty was to the Cosmopolitan.

The existence of this conflict and the divided loyalties by Respondent National Union between two of its insured is crucial to resolution of this appeal and the context of the damages analysis. As more fully set forth below, Respondent National Union's deployment of conflicted defense counsel to jointly represent adverse parties prevented one its insureds, the Cosmopolitan, from asserting crossclaims against another one of its insured, the Marquee, under the management agreement.

Essentially, Respondent National Union immunized one insured, the Marquee, from contractual rights enjoyed by its other insured, the Cosmopolitan. Without the crossclaims, Respondent National Union avoided defending an indemnity crossclaim by the Cosmopolitan against the Marquee. The loss of the Cosmopolitan's crossclaim against the Marquee is an actionable damage that Appellant St. Paul suffered.

Additionally, the unilateral rejection of the $1.5 million pre-trial offer of judgment by Respondent National Union caused Appellant St. Paul to later contribute an amount far in excess of the initial offer of judgement. The difference in the amount between what Appellant St. Paul would have paid under the pre-trial offer of judgment and what it ended up paying (but for Respondent National Union's conduct) is also a loss it has suffered. Respondent National Union benefited from the settlement to have St. Paul pay part of the Marquee's joint and several liability and avoid any further exposure to the Cosmopolitan's indemnity rights.

This Court's decision not only ratifies Respondent National Union's reckless conduct; but, as noted by the dissent, it embraces a new and problematic precedent in Nevada whereby an excess insurance carrier may be compelled to forego the right of subrogation if it steps up to proactively

contribute to settle a claim against an insured. *See* Order of Affirmance, at 12-13 (Cadish, E., and Stiglich, L., JJ., concurring in part and dissenting in part). This Court erred in its conclusion.

5. This Court Erred in Failing to Address the Significance of Respondent National Union's Reliance on Conflicted Legal Counsel.

Nowhere in this Court's Order of Affirmance is there recognition of the fact and significance of the conflicted legal counsel that was deployed by Respondent National Union in this case. *See, e.g.*, Appellant's Opening Brief, at 5 n.2, 12 n.6 and Appellant's Reply Brief, at 2, 4, 6, 8, 17. Existence of this fact appears overlooked.

Underscoring this entire matter is the failure of Respondent National Union to adequately represent the interests of the Cosmopolitan at the initial stages of litigation. Failure to address the significance of this conflict and Respondent National Union's joint defense of the Marquee and the Cosmopolitan ignores the fact that Respondent National Union created and maintained an intractable conflict of interest that sacrificed the interests of its additional insured, the Cosmopolitan, in favor of its named insured, the Marquee.

Certainly, conflicted counsel could not file a crossclaim against their own client. This circumstance ultimately forced the Cosmopolitan,

through its excess insurance carrier Appellant St. Paul, to later pay the remaining balance of the post-jury verdict settlement.

The net effect from conflicted counsel was that Appellant St. Paul paid the balance of the Marquee's liability under the post-jury verdict settlement, which could have been offset by the Cosmopolitan's lost indemnity claim had Respondent National Union deployed conflict free counsel. At a minimum, Appellant St. Paul should be entitled to discovery over the decision-making process by Respondent National Union.

CONCLUSION

For the reasons discussed above, this Court misapprehended and/overlooked relevant and material facts and law in its Order of Affirmance issued in this appeal on December 8, 2022. Rehearing pursuant to NRAP 40(c) is appropriate. Respectfully, Appellant St. Paul requests that its Petition be granted and this matter be reheard.

Dated this 23rd day of December, 2022.

HUTCHISON & STEFFEN, PLLC

By: */s/ Joseph C. Reynolds*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: The petition has been prepared in a proportionally spaced typeface using Microsoft Word 2016, Century Schoolbook, 14 points.

I further certify that this petition complies with the type-volume limitations of NRAP 32(a)(7) because, it is proportionally spaced, has a typeface of 14 points, and contains 2,977 words.

I hereby certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(c)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relief on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedures.

Dated this 23rd day of December, 2022.

HUTCHISON & STEFFEN, PLLC

By: */s/ Joseph C. Reynolds*

Joseph C. Reynolds (Bar No. 8630)
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CERTIFICATE OF SERVICE

I certify that this APPELLANT'S PETITION FOR REHEARING was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

Dated this 23rd day of December, 2022.

By: */s/ Madelyn Carnate-Peralta*
an Employee of
HUTCHISON & STEFFEN PLLC