IN THE SUPREME COURT OF THE STATE OF NEVADA

ASPEN SPECIALTY INSURANCE COMPANY,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; and THE HONORABLE GLORIA STURMAN, DISTRICT JUDGE, DEPT. 26,

Respondents,

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

Real Parties in Interest.

Supreme Court Case No.

Related to Nevada Supreme Court Case No. 81344

District Court Case No. A-17-758902-C

PETITION UNDER NRAP 21 FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF PROHIBITION

Michael M. Edwards, Esq., NBN 6281
Derek Noack, Esq., NBN 15074
Stephanie D. Bedker, Esq., NBN 14169
MESSNER REEVES LLP
8945 W. Russell Road, Suite 300
Las Vegas, Nevada 89148
Telephone: (702) 363-5100
Facsimile: (702) 363-5101

Attorneys for Petitioner
Aspen Specialty Insurance Company

CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Petitioner, Aspen Specialty Insurance Company, through its undersigned counsel, makes the following corporate disclosure statement:

The following are the names of all associations, firms, partnerships, corporations, and other artificial entities that either are related to Aspen Specialty Insurance Company as a parent, subsidiary, or otherwise, or have a direct or indirect pecuniary interest in the outcome in the case:

1) Aspen American Insurance Company. Petitioner Aspen Specialty Insurance Company ("Petitioner") is a wholly owned subsidiary of Aspen American Insurance Company, a corporation. Aspen American Insurance Company's pecuniary interest in the outcome in the case is indirect through its ownership of Petitioner.

2) Aspen U.S. Holdings, Inc. Aspen American Insurance Company is a wholly owned subsidiary of Aspen U.S. Holdings, Inc., a Delaware corporation. Aspen U.S. Holdings, Inc.'s pecuniary interest in the outcome in the case is indirect through its ownership of Aspen American Insurance Company, which, in turn owns Petitioner.

3) Aspen (UK) Holdings Limited. Aspen U.S. Holdings, Inc. is wholly owned by Aspen (UK) Holdings Limited, a U.K. corporation. Aspen (UK) Holdings

Limited's pecuniary interest in the outcome in the case is indirect through its ownership of Aspen U.S. Holdings, Inc., which, in turn, owns Aspen American Insurance Company, which, in turn owns Petitioner.

4) Aspen Insurance Holdings Limited. Aspen (UK) Holdings Limited is wholly owned by Aspen Insurance Holdings Limited, a Bermuda exempted limited liability. Aspen Insurance Holdings Limited's pecuniary interest in the outcome in the case is indirect through its ownership of Aspen (UK) Holdings Limited, which, in turn, owns Aspen U.S. Holdings, Inc., which, in turn, owns Aspen American Insurance Company, which, in turn owns Petitioner.

5) Highlands Holdings Limited. Aspen Insurance Holdings Limited is wholly owned subsidiary of Highlands Holdings, Ltd., a Bermuda exempted company. All of the ordinary shares of Highlands Holdings, Ltd. are, directly or indirectly, owned by certain investment funds managed by subsidiaries of Apollo Global Management, LLC, a Delaware limited liability company ("AGM"). Class A units and certain preferred shares of AGM are publicly traded on the New York Stock Exchange ("APO"). AGM's pecuniary interest in the outcome in the case is indirect through its control of Highlands Holdings, Ltd. which, in turn, owns Aspen Insurance Holdings Limited, which in turn owns Aspen (UK) Holdings Limited, which, in turn, owns Aspen U.S. Holdings, Inc., which, in turn, owns Aspen American Insurance Company, which, in turn, owns Petitioner.

Petitioner has been represented by the following law firm in the proceedings below:

MESSNER REEVES LLP

DATED this 17 day of November, 2021.

MESSNER REEVES LLP

Michael Edwards, Esq., NBN 6281
Derek Noack, Esq., NBN 15074
Stephanie Bedker, Esq., NBN 14169
8945 W. Russell Road, Suite 300
Las Vegas, NV 89148
Telephone: (702) 363-5100
Facsimile: (702) 363-5101
Attorneys for Petitioner
Aspen Specialty Insurance Company

VERIFICATION

The undersigned declares under penalty of perjury that he is counsel for ASPEN SPECIALTY INSURANCE COMPANY and has read the attached Petition for Writ of Mandamus, or in the Alternative, Petition for Writ of Prohibition, and that the factual assertions therein are true of his own knowledge, or supported by exhibits contained in the Appendix filed herewith, and that as to such matters so supported, he believes them to be true. This verification is made pursuant to NRS 15.010.

The documents contained in Petitioner's Appendix, filed herewith, are true and correct copies of the pleadings and documents they are represented to be in the Appendix and as cited herein.

DATED this 17 day of November, 2021.

MESSNER REEVES LLP

MICHAEL M. EDWARDS
Nevada Bar No. 6281

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

NEVADA STATUTES AND RULES

PETITIONER, ASPEN SPECIALTY INSURANCE COMPANY ("Petitioner" or "Aspen") presents its Petition for Writ of Mandamus or, in the Alternative, Petition for Writ of Prohibition ("Petition").

STATEMENT OF RELIEF SOUGHT

This Petition requests the Supreme Court to issue a writ of mandamus, or alternatively, writ of prohibition, directing the District Court to vacate its October 9, 2020 Order, denying Petitioner's Renewed Motion for Summary Judgment, or that the District Court be mandated to issue an order granting Petitioner's Renewed Motion for Summary Judgment.

The Petitioner raises significant issues of first impression in Nevada of whether equitable and contractual subrogation claims exist between insurance carriers that are situated in separate towers of insurance coverage. Following a settlement in an underlying action, Real Party in Interest, St. Paul Fire & Marine Insurance Company ("St. Paul") – an excess carrier for its insured – raised subrogation claims against insurance providers residing in a separate tower of insurance coverage, including Petitioner, based upon the insurers' purported failure to settle the underlying action within their respective policy limits on behalf of their additional insured.

On May 14, 2020, the District Court granted summary judgment in favor of Real Party in Interest, National Union Fire Insurance Company of Pittsburgh, PA

("National Union" or "AIG"), finding that subrogation claims between insurers have not been recognized in Nevada between two insurance carriers in separate towers of coverage.[1] In spite of this ruling, the District Court subsequently denied Petitioner's similarly-based Renewed Motion for Summary Judgment, allowing St. Paul's subrogation claims to proceed against Petitioner on the theory that Petitioner's position as a primary carrier was fundamentally different than that of National Union, an excess carrier.

By determining that such claims are cognizable in Nevada, the District Court manifestly abused its discretion. Nevada has never recognized the existence of subrogation claims between insurers in separate towers of coverage, nor has any other jurisdiction. Accordingly, the District Court's denial of Petitioner's Renewed Motion for Summary Judgment was a manifest abuse of discretion; this Court should issue appropriate writ relief to remedy the District Court's action.

ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding, as this case presents issues of first impression on matters involving Nevada common law regarding whether the Nevada Supreme Court will recognize equitable or contractual subrogation claims as between separate insurance carriers situated in separate towers

[1] St. Paul appealed the District Court's Order as to National Union, which is currently before the Nevada Supreme Court in Case No. 81344.

of insurance coverage. NRAP 17(a)(11). The legal theories of liability at issue have never been recognized in Nevada or in any other jurisdiction. Therefore, Petitioner posits that the Supreme Court should retain this writ petition.

STATEMENT OF ISSUES PRESENTED

I. Whether a claim for *equitable subrogation* exists in Nevada when brought by an excess insurer against a primary insurer that is situated in a separate tower of insurance coverage.

II. Whether a claim of *contractual subrogation* exists in Nevada when brought by an excess insurer against a primary insurer that is situated in a separate tower of insurance coverage.

III. Whether an equitable subrogation claim for bad faith failure to settle may be brought by an excess insurer against an insurer for an additional insured where the additional insurer defended and indemnified its additional insured to policy limits in settlement, and the excess carrier had independent obligations to the insured.

IV. Whether an excess carrier may pursue a contractual subrogation claim against an insurer for an additional insured where the insured was defended and fully indemnified to policy limits.

STATEMENT OF RELEVANT FACTS

A. The Underlying *Moradi* Litigation

1. Moradi Sues Marquee and Cosmopolitan for Personal Injuries.

This matter involves a dispute among multiple insurers concerning the settlement for their respective insureds from the underlying personal injury action, captioned *David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al*., District Court Clark County, Nevada, Case No. A-14-698824-C ("Underlying Action").

In the Underlying Action, Plaintiff David Moradi ("Moradi") alleged that on April 8, 2012, he was a patron at Marquee Nightclub located within The Cosmopolitan Hotel, when he was beaten by Marquee employees, whose conduct was allegedly ratified by The Cosmopolitan. (I App. 2, ¶¶ 6-7).[2] Moradi filed the Underlying Action against Nevada Property 1, LLC ("Cosmopolitan") and Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee"), asserting causes of action for assault and battery, negligence, intentional infliction of emotional distress, and false imprisonment. (*Id.* at ¶¶ 8-10).

[2] Given the procedural posture of the District Court's rulings, for purposes of this Petition only, Aspen does not dispute certain allegations by St. Paul in its FAC, as cited herein.

2. Marquee and Cosmopolitan Each Have Primary and Excess Insurance Carriers, Providing Two Towers of Insurance Coverage.

Four separate insurance companies provided coverage to Marquee and Cosmopolitan for damages related to the claims asserted in the Underlying Action. Aspen Specialty Insurance Company ("Petitioner" or "Aspen") was the primary insurer for Marquee (with a policy limit of $1 million per occurrence), and National Union Fire Insurance Company of Pittsburgh, PA ("National Union") was Marquee's excess insurer (with a policy limit of $25 million). (*Id.* at ¶¶ 15, 30; XII App. 1757-59, ¶¶ 24-41); *see also* XVI App. 2208-2325 (Aspen Policy); XVIII App. 2388-2448 (National Union Policy)). Non-Party Zurich American Insurance Company ("Zurich") was the primary insurer for Cosmopolitan (with a policy limit of $1 million), and St. Paul Fire & Marine Insurance Company ("St. Paul") was Cosmopolitan's excess insurer (with a policy limit of $25 million). (I App. 6, 12, ¶¶ 40, 69; XII App. 1755-56, ¶¶ 14-23; *see also* XVII App. 2326-87 (St. Paul Policy); XVIII-XIX App. 2449-2608 (Zurich Policy)).

Thus, the two sets of insurers provided two separate towers of coverage on behalf of their respective insureds within the Underlying Action. Aspen (as primary coverage for Marquee) and National Union (as excess coverage for Marquee) comprised the Marquee tower of insurance coverage for the Underlying Action. Zurich (as primary coverage for Cosmopolitan) and St. Paul (as excess coverage for Cosmopolitan) comprised the Cosmopolitan tower of insurance coverage for the

Underlying Action. The separate relationships of the insurance companies with their respective insureds in the two towers of coverage are illustrated below:

MARQUEE TOWER	COSMOPOLITAN TOWER
National Union Fire Insurance Company of Pittsburgh, PA (Excess)	St. Paul Fire & Marine Insurance Company (Excess)
Aspen Specialty Insurance Company (Primary)	Zurich American Insurance Company (Primary)

3. Aspen and National Union Participate in the Defense.

Cosmopolitan was named an as additional insured under both the Aspen and National Union policies issued to Marquee with respect to certain liability for personal injuries arising out of the ownership, maintenance, or use of the leased premises by Marquee, subject to specified limitations. (I App. 4-6, ¶¶ 24, 33; *see also* XVI App. 2266-69; XVI App. 2195-2201). St. Paul's 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. (*See* XVII App. 2363).

The Aspen Commercial General Liability Policy (the "Aspen Policy") allowed for additional insureds, "as required by written contract signed by both parties prior to a loss," but "only with respect to their liability as mortgagee, assignee, or receiver and arising out of the ownership, maintenance, or use of the

premises." (*See* XVI App. 2266-69). As such, Aspen provided a defense to both Marquee (as its named insured) and Cosmopolitan (as an additional insured) in the Underlying Action under a reservation of rights. (I App. 5, ¶ 27; *see also* XVI App. 2195-2201; XII App. 1754-55, ¶¶ 5, 13).[3] National Union did the same, exercising its right to participate in the litigation. (I App. 6, ¶ 35; XII App. 1755, ¶¶ 5, 13). 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. (*See* I App. 11-12, ¶¶ 61-65).

With respect to Cosmopolitan, Moradi alleged that, as owner of the hotel and casino premises where Marquee is located, Cosmopolitan breached a non-delegable duty to keep patrons safe, including Moradi. (*Id.* at ¶ 13). On this issue, the Court held as a matter of law that Cosmopolitan, as property owner, "ha[d] a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers" and that Marquee and Cosmopolitan would be jointly and severally liable for Moradi's damages. (XII App. 1754, ¶ 7; *see also* VII App. 929-31).

[3] Specifically, Aspen's Reservation of Rights letter, dated August 5, 2014, stated that Aspen reserved the right to decline coverage for claims that fell within its exclusions and "reserves the right as to whether Nevada Property 1 LLC [Cosmopolitan] qualifies as an insured with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to Roof Deck Entertainment, LLC [Marquee] and whether Aspen has a continued duty to defend Nevada Property 1 LLC as an additional insured." (XVI App. 2197-99).

4. The Defendants' Insurers Fund the Settlement in Full.

On or about March 8, 2017, prior to jury trial, Aspen tendered its $1,000,000 policy limit to Marquee's excess carrier, National Union (AIG), upon demand. (I App. 9-10, ¶¶ 54, 58). On March 9, 2017, Moradi made a $26,000,000 demand (combining the limits of Marquee's carriers, National Union and Aspen); as Aspen had already tendered its policy limits to National Union, it was National Union, not Aspen, that made the decision to reject the demand and proceed to trial. (*Id.* at ¶¶ 53, 58). During the trial, National Union and/or Aspen offered to settle the case on behalf of Marquee and Cosmopolitan for Aspen's policy limits of $1,000,000, but Moradi rejected the settlement offer. (*Id.* at ¶ 57).

After Plaintiff Moradi received a jury award at trial of $160.5 million in compensatory damages, the four insurers collectively funded a settlement on behalf of the two respective insureds, Marquee and Cosmopolitan. (*Id.* at ¶¶ 67-70; *see also* XII App. 1755, ¶¶ 9-11). Neither Marquee nor Cosmopolitan contributed any money towards the litigation costs or the final settlement, as both the litigation and the settlement were fully funded by their insurers. (I App. 12, ¶¶ 66-71; *see also* XII App. 1755, ¶¶ 10-11; XII App. 1766, ¶¶ 21-22). Thereafter, Aspen exhausted its full $1,000,000 policy limit for the litigation and the post-judgment settlement of the Underlying Action. (I App. 4, 12, ¶¶ 4, 20; XII App. 1778 (District Order,

determining Aspen's applicable policy limit for the Underlying Action was $1 million); XII App. 1754-55, ¶¶ 5, 9-11, 13).

B. St. Paul's Subrogation Action Against Marquee, Aspen, and National Union.

1. St. Paul Sues Aspen and National Union Under Theories of Equitable and Contractual Subrogation.

Following the settlement of the Underlying Action, St. Paul filed a subrogation suit in the District Court against Marquee and Marquee's two insurers, Aspen and National Union, seeking to recoup the money it was required to pay under its policy in discharge of its obligation to Cosmopolitan, *i.e.* its entire settlement payment. (*See generally* I App. 1 *et seq.*).

As against Aspen, St. Paul asserted claims for equitable and contractual subrogation and equitable estoppel, alleging Aspen breached its contractual obligation to defend and indemnify Cosmopolitan under the Aspen Policy issued to Marquee and its obligation to settle within policy limits before trial.[4] Specifically, St. Paul alleged that Aspen and/or National Union acted in bad faith by not accepting Moradi's early Offer of Judgment for $1.5 million (above Aspen's limits) and

[4] As to equitable estoppel, St. Paul sought to prevent Aspen and National Union from asserting that St. Paul, as an insurer for a defendant in the Underlying Action, owed its insurer the same obligations as National Union and Aspen to defend and attempt to reasonably resolve the Underlying Action. (I App. 24, ¶ 135). The District Court dismissed this remaining cause of action against National Union, as all other claims against National Union had failed for other reasons. (*See* XII App. 1752-70).

Moradi's subsequent pre-trial demand for $26 million (after Aspen tendered its limits to National Union), as the subsequent judgment and settlement were greater. The phrase "Monday morning quarterbacking" is applicable, as St. Paul's legal arguments are based entirely on hindsight, claiming different actions "should" have been taken.

2. Defendants Seek Summary Judgment with Different Results.

Marquee, National Union, and Aspen each filed separate Motions/Countermotions for Summary Judgment as to St. Paul's subrogation claims brought against them. (*See* II App. 286 – III App. 411 (Marquee Motion and Exhibits); III App. 412 – VII App. 941 (National Union's Motion and Exhibits); VII App. 942 – VIII App. 1153 (Aspen's Motion and Exhibits)). In their respective motions, Aspen and National Union each argued, *inter alia*, that St. Paul's claims were not viable as a matter of law, as Nevada has not recognized a right to contractual or equitable subrogation between separate insurers, and that such claims could not exist as contractual privity did not exist between St. Paul – as an excess insurer for Cosmopolitan – and Marquee's insurers, nor did St. Paul exercise a position of equitable superiority over Marquee's insurers. (*See* III App. 412 – VII App. 941; VII App. 942 – VIII App. 1153).

The District Court denied the portion of Aspen's Countermotion for Summary Judgment related to subrogation, finding such arguments to be premature, stating it

viewed such issues as questions of fact. (XII App. 1771-79).[5] However, shortly thereafter, the District Court granted National Union's Motion for Summary Judgment on the same questions of equitable and contractual subrogation. (*See* XII App. 1752-70).[6]

As to St. Paul's claim for equitable subrogation against National Union, the District Court noted that the Nevada Supreme Court has not recognized such claims between insurers, and "no jurisdiction, let alone Nevada, recognizes an equitable subrogation claim between excess carriers in separate towers of coverage." (XII App. 1762, ¶¶ 3-4). Furthermore, neither insurer was in an equitably superior position as to the other, as "[b]oth St. Paul and National Union had independent obligations to Cosmopolitan," which were discharged via the settlement. (XII App. 1764, ¶ 11). As St. Paul was neither excess nor equitably superior to National Union, the District Court found St. Paul had no claim for subrogation. (*Id*. at ¶¶ 11-12).

The District Court also dismissed St. Paul's claim for contractual subrogation against National Union, finding, "In the insurance context, contractual subrogation generally is not applied by an excess insurer against a primary insurer, but between

---

[5] The District Court also denied St. Paul's Motion for Partial Summary Judgment, finding that the plain language of the Aspen Policy operates to limit coverage for the Underlying Action to $1 million. (XII App. 1771-79).

[6] St. Paul appealed the District Court's Order as to National Union, which is currently being briefed in related Nevada Supreme Court Case No. 81344.

an insurer and a third-party tortfeasor." (*Id.* at ¶ 16). As St. Paul was not a party to the National Union policy, it had no direct cause of action against National Union for breach of contract or breach of the covenant of good faith and fair dealing. (XII App. 1767, ¶ 24).

The District Court held that St. Paul had no viable breach of contract claims it could assert against National Union on behalf of Cosmopolitan, as Cosmopolitan had suffered no "actual loss" governed by contract that St. Paul could subrogate because National Union had not denied Cosmopolitan any benefits under the policy. (XII App. 1765-67, ¶¶ 17-23). Given that the various insurers had fully provided for Cosmopolitan's defense and indemnity in the Underlying Action, including up to the exhaustion of National Union's policy limits, the benefits owed under the National Union policy were provided and no breach-of-contract damages existed to which St. Paul could subrogate. (*Id.* at ¶ 22).

Following the District Court's ruling which granted National Union's Motion for Summary Judgment, Aspen filed a Renewed Motion for Summary Judgment (the "Renewed Motion"), focusing the District Court on the equitable and contractual subrogation claims that St. Paul still maintained against Aspen. (*See generally* XIII App. 1780-1808). As National Union had done, Aspen again argued St. Paul's subrogation claims should be dismissed as a matter of law, as Nevada has never recognized the existence of such claims as between insurers in separate towers of

coverage. Aspen further argued that St. Paul's subrogation claims fails, as St. Paul was not a party to the Aspen Policy, St. Paul was not equitably superior to Aspen, Aspen fully funded the defense of the Underlying Action and paid its full policy limits, and neither Cosmopolitan nor Marquee contributed towards the settlement.

However, seemingly in direct conflict with the National Union Order, the District Court denied Aspen's Renewed Motion, thereby allowing St. Paul's subrogation claims to proceed against Aspen. (*See* XV App. 2234-45). The District Court denied that the National Union Order applied, asserting that National Union and Aspen stood in a different relationship with respect to St. Paul, as Aspen was a primary carrier for Marquee, while National Union's position was as an excess carrier for Marquee. (XV App. 2186, ¶¶ 3-4). The District Court's Order did not address the fact that Aspen and St. Paul existed in separate towers of insurance coverage, nor the lack of precedence for subrogation claims between insurance carriers with regards to such separate towers of coverage. (*See generally* XV App. 2234-45).

REASONS THE WRIT SHOULD ISSUE

This Court should grant the requested writ of mandamus, or, in the alternative, writ of prohibition, to resolve important issues of first impression, including whether an excess insurer can bring claims for equitable or contractual subrogation against a primary insurer residing in a separate tower of insurance coverage.

In granting summary judgment to National Union while denying Aspen's Renewed Motion for Summary Judgment, the District Court's orders are inconsistent. The law the District Court relied on to grant summary judgment as to National Union also mandated summary judgment for Aspen.

The District Court engaged in manifest abuse of discretion by allowing St. Paul to pursue equitable and contractual subrogation claims against Aspen. The Nevada Supreme Court has never recognized an insurer's right to pursue subrogation against another insurer, and allowing St. Paul's case to continue against Aspen would create new Nevada law, in violation of public policy considerations.

Even if equitable subrogation claims could be newly recognized in Nevada as between insurers residing in the same tower of insurance coverage, St. Paul still has no basis in law to pursue a subrogation claim against Aspen because the two insurance entities are positioned in separate towers of insurance coverage. Equitable subrogation claims between insurers in separate towers of coverage are not known to have been allowed in any jurisdiction, and Nevada should not be the first to create these new laws.

Additionally, St. Paul can have no basis for a contractual subrogation claim against Aspen. Nevada law has not recognized the existence of contractual subrogation claims between insurers for bad faith failure to settle, nor should it do so now, as such claims violate public policy. Further, contractual subrogation is

inapplicable in the present two-tower context: neither St. Paul nor its insured had a contractual relationship with Aspen, as Cosmopolitan was only an additional insured under the Aspen policy, and no contractual damages exist to be subrogated, as Aspen defended and indemnified Cosmopolitan to policy limits.

A writ should issue in this case, as a direct appeal of an eventual award will not provide an adequate remedy to Aspen under the circumstances here. Aspen will not only be put to the expense and delay of the proceeding, but it will be materially prejudiced by the inconsistent and contradictory rulings as to the other named defendant insurers in this action.

Allowing St Paul's claims against Aspen to continue in District Court while St. Paul's appeal is ongoing would force Aspen to litigate subrogation claims that have never been recognized in the State of Nevada and which are the subject of a *concurrent* appeal. A potential verdict on such claims in the District Court will run the risk of contravening the ultimate Supreme Court ruling on the issue of whether equitable or contractual subrogation claims are cognizable in Nevada, and whether such claims could apply to insurers residing in separate towers of insurance coverage.

This Court should exercise its discretion to grant writ relief, as fundamental questions of first impression involving whether or not St. Paul has asserted cognizable claims against Aspen should be resolved. Petitioner requests that this

Court direct the District Court to vacate its inconsistent ruling, whereby it denied Aspen's Renewed Motion for Summary Judgment and/or enter an order granting Aspen's Renewed Motion for Summary Judgment.

I. ASPEN'S WRIT SHOULD BE CONSIDERED BECAUSE AN IMPORTANT ISSUE OF LAW NEEDS CLARIFICATION AND SOUND JUDICIAL ECONOMY AND ADMINISTRATION FAVOR GRANTING OF THE SAME.

This Court has original jurisdiction to issue extraordinary writ relief. Nev. Const. art. 6, § 4. A writ may be granted where the party seeking extraordinary writ relief demonstrates that an eventual appeal does not afford "a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170, NRS 34.330. A writ of mandamus compels the performance of an act that the law requires or controls the district court's manifest abuse of discretion. *We the People Nevada ex. rel. Angle v. Miller*, 124 Nev. 874, 879, 192 P.3d 1166, 1170 (2008); NRS 34.160. A writ of prohibition acts to arrest proceedings that are without or excess of jurisdiction of a tribunal. *Int'l Game Tech. v. Dist. Ct.*, 122 Nev. 132, 142, 127 P.3d 1088, 1096 (2006); NRS 34.320.

Even when an arguable adequate remedy exists, this Court may exercise its discretion to consider extraordinary writ relief "when an important issue of law needs clarification and sound judicial economy and administration favor the granting

of the petition."[7] *State of Nevada v. Dist. Ct. (Ducharm)*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002); *Mineral County v. State, Dep't of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (discretionary consideration of a writ may be exercised "where an important issue of law needs clarification and public policy is served" by the Court's intervention) (internal quotation omitted). Extraordinary writ relief is also warranted where a legal error affects the course of the litigation and the aggrieved party should not have to wait until the final judgment was entered to correct the error. *See In re Simons*, 247 U.S. 231, 239–40 (1918); *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008) (writ review is proper when it "will spare litigants and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings").

Writ petitions challenging a district court's denial of motions to dismiss or motions for summary judgment are appropriate where an "issue is not fact-bound

[7] The appellate courts review questions of law under a de novo standard. *SIIS v. United Exposition Servs. Co.*, 109 Nev. 28, 30, 846 P.2d 294, 295 (1993); *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008) (recognizing that questions of law are reviewed de novo "even in the context of a writ petition"). Where a party seeks relief under both a writ of mandamus and a writ of prohibition arising out of the same alleged procedural error, appellate courts review jurisdictional facts de novo, making separate review for manifest abuse of discretion unnecessary. *See NuVeda, LLC v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 137 Nev. Adv. Op. 54 (2021). Under de novo review, the appellate court uses the district court's record but reviews the evidence and law without deference to the district court's legal conclusions. *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008).

and involves an unsettled and potentially significant, recurring question of law." *Buckwalter v. Dist. Ct.*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010), citing *Smith v. Eighth Judicial District Court*, 113 Nev. 1343, 1344–45, 950 P.2d 280, 281 (1997); *MountainView Hosp. v. Dist. Ct.,* 128 Nev. 180, 185, 273 P.3d 861, 865 (2012). Consideration of writ relief regarding a motion to dismiss or motion for summary judgment is appropriate where a district court was clearly obligated to dismiss an action or "when an important issue of law needs clarification and this court's review would serve considerations of public policy or sound judicial economy and administration." *See Int'l Game Tech.*, 122 Nev. at 142–43, 127 P.3d at 1096. Writ relief is particularly justified where an issue of law is a matter of first impression and may be dispositive of the case. *See, e.g. Otak Nevada, L.L.C. v. Eight Jud. Dist. Ct.*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013).

The present petition for extraordinary writ relief presents an issue of first impression in Nevada and involves an unsettled and significant recurring question of law concerning whether Nevada will recognize equitable or contractual subrogation claims between insurers, particularly between insurers in separate towers of coverage. Confusion as to whether such claims are permissible is of statewide significance, and public policy, sound judicial economy and administration favor granting this petition to militate against potentially needless

litigation brought by other excess carriers against primary carriers whenever excess carrier policy coverage is triggered.

Aspen does not have a plain, speedy, and adequate remedy at law absent writ relief, and even if it did, consideration of writ relief would still be warranted in the present circumstances, as this writ implicates an important issue of law that needs clarification. The District Court conducted legal error in permitting St. Paul's claims against Aspen to proceed, even though Nevada has never recognized such claims.

The Court's determination on these issues of law may be dispositive of this case. Aspen should not have to wait until final judgment is entered to correct such an error. In the event this Court declines to recognize subrogation between insurers, writ relief will have spared the litigants the time and money utterly wasted enduring eventual reversal of an improperly conducted proceeding. The litigants should not be required to expend significant resources associated with litigation, discovery, and trial, before a resolution is made on this threshold issue. Furthermore, writ review will resolve the existing conflicting conclusions reached by the District Court and ensure that the same standards are applied to the resolution of this question as between ***all*** insurers from the Underlying Action to avoid inconsistent results. These legal issues of first impression are also the subject of a contemporaneous appeal pending before this Court: Nevada Supreme Court Case No. 81344. As such, it is appropriate for this Court to exercise its discretion to consider this petition for writ.

II. ST. PAUL'S CLAIMS AGAINST ASPEN FAIL AS A MATTER OF LAW BECAUSE NEITHER EQUITABLE, NOR CONTRACTUAL SUBROGATION EXIST BETWEEN INSURERS IN SEPARATE TOWERS OF COVERAGE.

St. Paul has asserted claims for equitable and contractual subrogation that have never been previously adopted in Nevada between insurers.[8] Even if the Nevada Supreme Court should choose to adopt such claims with respect to primary and excess insurers in the same tower of insurance coverage, St. Paul – as an excess insurer in a separate tower of insurance coverage – still could not assert such claims on behalf of Cosmopolitan, who was only an additional insured under the Aspen Policy.

The District Court's order denying Aspen's Renewed Motion for Summary Judgment after granting National Union's Summary Judgment Motion creates a situation of inconsistent rulings on this important matter of first impression under Nevada law. Aspen and National Union both reside in a separate tower of insurance

[8] St. Paul's FAC also asserted a Seventh Cause of Action against the carrier defendants, including Aspen, seeking to preclude Aspen and National Union from contending: (1) Aspen's policies were not primarily responsible for the defense and resolution of the Underlying Action; and (2) St. Paul had the same obligation to resolve the Underlying Action as Aspen and National Union. (I App. 24, ¶ 135). St. Paul is bringing an equitable estoppel claim as a prophylactic measure to an anticipated defense of the insurance carriers. St. Paul's equitable estoppel claim is dependent on the legal viability of its subrogation claims, seeks no monetary damages, and is not an independent claim for relief. *See, e.g. Mahban v. MGM Grand Hotels, Inc.*, 100 Nev. 593, 597 (1984). As St. Paul's subrogation claims fail as a matter of law, its claim for equitable estoppel should likewise fail.

coverage from St. Paul. As such, the legal underpinnings of St. Paul's claims against Aspen are fundamentally the same as those against National Union. The District Court thus abused its discretion in denying Aspen's motion to allow St. Paul's novel subrogation claims to continue against Aspen. Therefore, the Supreme Court should grant the requested writ relief.

A. Nevada Has Not – and Should Not – Recognize Equitable Subrogation Claims Between Insurers for Putative Claims of Bad Faith Failure to Settle.

St. Paul's claim for equitable subrogation against Aspen fails as a matter of law, as the Nevada Supreme Court has never established an insurer's right to pursue a claim for equitable subrogation against another insurer for hindsight allegations bad faith failure to settle, nor should it do so now. Subrogation is an equitable doctrine created to "accomplish what is just and fair as between the parties." *AT&T Technologies, Inc. v. Reid*, 109 Nev. 592, 595-596 (1993), *citing Laffranchini v. Clark*, 39 Nev. 48, 55 (1915) (citation omitted). "It arises when one party has been compelled to satisfy an obligation that is ultimately determined to be the obligation of another." *Id.*, *citing Am. Sur. Co. v. Bethlehem Nat'l Bank*, 314 U.S. 314, 317 (1941).

This Court should not adopt equitable subrogation between insurers for failure to settle, as such claims are in violation of public policy. It is inequitable for excess insurers who have refused or otherwise failed to be involved in the underlying

litigation to be permitted to pursue reimbursement for settlement payments made,[9] while primary insurers bear the burden of covering the total cost and management of underlying suit. Recognition of a cause of action for subrogation by an excess insurer against a primary insurer for failure to settle would allow excess insurers to take the position of a "Monday morning quarterback," thereby permitting excess carriers to pursue litigation against primary carriers as a matter of course whenever an excess carrier's policy is triggered. Primary carriers would feel compelled to settle potentially frivolous suits before sufficient discovery has been conducted into the merits of such claims or before an insurer can determine the realistic value of a claim, thereby routinely paying more than would have been necessary due to concerns about potentially being sued by an excess insurer.

In essence, St. Paul advocates for a rule that would create a strict liability situation for any and all primary insurance carriers, in *every* claim. Specifically, if there was ever a demand made to a primary carrier for limits, regardless of the merits of the case or demand, if that limit demand is not accepted and a larger verdict or settlement is obtained (for whatever reason), the primary carrier would face liability

[9] St. Paul alleges that it was not informed of the Underlying Action until February 13, 2017, at which point it requested basic information regarding the same from Marquee's excess carrier, National Union (AIG). (*See* I App. 11, ¶ 62). On March 29, 2017, St. Paul purportedly demanded that National Union settle the case for $26,000,000, but a jury verdict of $160,500.00 was reached on April 26, 2017. (*Id.* at ¶¶ 65-66). St. Paul does not indicate any further involvement in the Underlying Action prior to the final settlement of the case.

above its limits from any other carrier that was exposed to said verdict or settlement. Such is not, and must not, be the law.

In addition to encouraging outsized and premature settlements, recognition of subrogation claims brought by excess carriers undermines the public policy of judicial economy. It would encourage non-meritorious litigation by parties seeking easy pre-discovery settlements and would generate costly and complex litigation by excess insurers whenever excess policies are triggered, particularly where companies share potential liability for large risks. Such litigation is fraught with ambiguities and uncertainties of the duty-to-settle doctrine. Thus, while excess insurers will inevitably argue that equitable subrogation claims are beneficial, as they encouragement settlement, they do so by creating a new form of strict liability litigation that will inevitably follow such settlements, including trial of the original tort claim. The additional financial and legal burden of such claims will inevitably result in higher insurance rates for primary insureds who merely sought protection from potentially large claims by obtaining excess insurance coverage.

Excess insurers have contracted to cover their insureds where a primary insurer's policy limits are insufficient to meet the cost of the injury. *Travelers Case. & Sur. Co. v. Am. Equity Ins. Co.,* 93 Cal.App.4th 1142, 1149 (2001), *citing Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*, 126 Cal.App.3d 593, 597-598 (1981) ("Primary coverage is insurance coverage whereby, under the terms of the policy,

liability attaches immediately upon the happening of the occurrence that gives rise to liability" and "[e]xcess or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted.").

While excess insurers may be disgruntled by having to pay on policies for which they contracted and for which they received premiums, it would be neither fair nor just to allow them to effectively circumvent their contractual obligations by offloading their own assumed risks, burdens, and obligations onto primary insurers. Since equitable subrogation against other insurers is not an established right for insurers in Nevada – and the adoption of the same would violate public policy - St Paul has no legal basis to assert equitable subrogation claims against Aspen based on Aspen's alleged failure to settle.

B. Establishing an Equitable Subrogation Claim Between Insurance Carriers in Separate Towers of Coverage Would Violate Equitable Principles and Create New Law No Known Jurisdiction Has Previously Recognized.

Even if equitable subrogation between an insured's excess and primary carriers for failure to settle were established in Nevada, St. Paul's claims against Aspen should be denied because such claims are not cognizable between insurers operating in separate towers of insurance coverage. Indeed, no known jurisdiction

has recognized subrogation claims between insurers in separate towers of insurance.[10]

Jurisdictions that have recognized equitable subrogation claims in the insurance context have done so where claims have been asserted by an excess insurer against a carrier at a lower level *in the same tower of coverage* on behalf of their common insured.[11] *See, e.g. Perera v. U.S. Fid. & Guar. Co.*, 35 So. 3d 893, 900 (Fla. 2010) (citation omitted; emphasis added) ("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). While such jurisdictions have permitted an excess insurer to recover against a primary insurer under the doctrine

---

[10] St. Paul attempts to avoid the two tower distinction by alleging its excess coverage was a second layer excess policy above National Union and Aspen's insurance coverage. (*See* I App. 7, ¶ 44). However, the polices were negotiated and pursed by separate entities in otherwise separate towers of insurance. As such, the District Court appropriately included findings of fact on the two tower distinction and relied on such findings in the legal conclusions to its Order on National Union's Motion for Summary Judgment. (*See, e.g.* XII App. 1758-61, ¶¶ 41, 47; 1762-63, ¶¶ 4-5, 7).

[11] While some courts and states have allowed excess insurers to pursue claims against a lower level insurer for failure to settle, such cases are distinguishable, as the insurers therein resided *in the same tower of insurance coverage*. *See, e.g. Colony Ins. Co. v. Colorado Cas. Ins. Co.,* No. 212CV01727RFBNJK, 2016 WL 3360943 (D. Nev. June 9, 2016); *Am. Alternative Ins. Corp. v. Hudson Specialty Ins. Co.,* 938 F. Supp.2d 908, 916-917 (C.D. Cal. 2013); *Ace Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 2 Cal.App.5th 159 (2016); *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal.App.4th 1279, 77 Cal.Rptr. 2d 296 (1998).

of equitable subrogation, no cases exist where this principle is applied against a lower level insurer in a separate tower of insurance coverage on behalf of its additional insured.

Subrogation is an equitable remedy, not an absolute right, and it will not be granted where it would work an injustice or where the result would be against sound public policy. *See, e.g. Compania Anonima Venezolana De Navegacion v. A.J. Perez Export Co*., 303 F.2d 692, 697 (5th Cir.), *cert. denied*, 371 U.S. 942, 83 S.Ct. 321, 9 L.Ed.2d 276 (1962) (stating that subrogation is not an absolute right, "but rather, a matter of grace to be granted or withheld as the equities of the case may demand"); *see also Maxwell v. Allstate Ins. Companies*, 102 Nev. 502, 503, 728 P.2d 812, 813 (1986) (finding an insurer has no right to subrogation for medical payments, as such insurance subrogation clauses contravene public policy).

Whether a party is entitled to equitable subrogation depends on the equities and attending facts and circumstances of each case. *In re Rebel Rents, Inc.*, 307 B.R. 171, 190 (Bankr. C.D. Cal. 2004) (internal citations omitted); *Citizens State Bank v. Raven Trading Partners, Inc.*, 786 N.W.2d 274, 279 (Minn. 2010). Even in jurisdictions where excess insurers have an established right to be subrogated to their insured's rights, such subrogation rights are necessarily limited or qualified by a variety of equitable principles, such as the nature of the claims sought, public policy considerations, the particular insurance policies in question, the relation of the

insured to the insurers, and whether superior equities exist. *See, e.g. Nat'l Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 F. Supp. 2d 1013, 1022 (N.D. Ill. 1998) (internal citation omitted); *Signal Cos., Inc. v. Harbor Ins. Co.*, 27 Cal. 3d 359, 369, 612 P.2d 889, 895 (1980); *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A.*, 143 Cal. App. 4th 1098, 1106-07, 49 Cal. Rptr. 3d 785, 790-91 (2006).

The two-tower distinction is significant in the context of insurance subrogation. In such situations, equitable principles necessarily operate to qualify any rights an insurer residing in a separate tower of insurance, such as St. Paul, could theoretically have to subrogate to its insured's claims against an additional insurer, as outlined herein. As such, St. Paul's claims against Aspen are insupportable and should be dismissed.

1. Public policy and the relation of the parties militate against the application of equitable subrogation to claims involving insurers in separate towers of insurance coverage.

The circumstances of the present case and the nature of St. Paul's claims – including the existence of the two-tower relationship of the various insureds and insurers – militate against the application of equitable subrogation herein. The doctrine of equitable subrogation is predicated on the premise that "the duty owed an excess insurer is identical to that owed the insured." *Valentine v. Aetna Ins. Co.*, 564 F.2d 292, 298 (9th Cir. 1977) (internal citation omitted). "Subrogation is the insurer's right to be put in the position of the insured, in order to recover from third

parties who are legally responsible to the insured for a loss paid by the insurer." *Barnes v. Indep. Auto. Dealers Ass'n of California Health & Welfare Benefit Plan*, 64 F.3d 1389, 1392 (9th Cir. 1995).

General principles of insurance subrogation can be applied in the context of a single tower of insurance coverage. Where insurance coverage exists in the same tower, the nature of the relationship between the named insured and its primary and excess insurers is unambiguous and direct: the named insured has directly contracted with the insurer and pays premiums for both primary and excess coverage, with the excess coverage attaching for claims where the primary coverage has been exhausted. The rights, duties, and obligations of the insurers to their mutual insured (and by extension, to each other) are aligned, and are mutually negotiated and outlined within the policy provisions. Thus, the nature of the relationship among the contracting parties and the single-minded defense of claims on behalf of a single common insured allow for the application of equitable principles to excess insurer, where applicable to the facts of the case, as the excess insurer's losses can be directly attributed to a primary insurer's failure to fulfill its duties and responsibilities to the common insured.

By contrast, in the situation of an excess carrier seeking claims against an additional insurer residing in a separate tower of insurance coverage, the basic doctrine of equitable subrogation works an absurdity, particularly where the insurer

also covers its own primary insured. An insurer does not have the same duties and responsibilities to an additional insured as it would have to its own primary or excess insured. In such circumstances, it would be inequitable to allow primary and excess insurers for named insureds to idly sit on their hands, relying on additional insurers to cover the claims asserted against their own named policy holders, to then seek reimbursement where their own interests and policies have been ultimately impacted.

Unlike primary or excess carriers, carriers for additional insureds do not have obligations to cover all aspects of an underlying claim on behalf of the additional insured, and such obligations are necessarily limited by their policy written and agreed to contractual terms and their reservation of rights, which policies have not been negotiated by the additional insured. While a named insured is entitled the receive the insurance benefits for which it has negotiated and paid a premium, the additional insured pays no premiums for the additional insured policy, and the policy itself is subject to limitations that have been determined by the named insured, not by the additional insured.

By extension, excess insurers cannot have the same equitable subrogation rights against an *additional* insurer as they would have had against the insured's *primary* insurer, precisely because their relationship *vis a vis* the insured is fundamentally distinguishable from that of an additional insurer. Claims involving

separate towers of insurance coverage and additional insured provisions necessarily involve a certain amount of uncertainty as to whether the claims asserted fall – and will continue to fall – strictly within the additional contract policy provisions. Unlike claims involving primary insurers, excess insurers cannot assume or expect that their named insured will similarly be fully covered as an additional insured for all losses attendant to a claim that would otherwise be covered by their own excess policies. An insured's primary and excess insurers may be independently liable to their insured for the entire defense and indemnity obligations, notwithstanding the existence of additional insured polices, depending on the nature of the claims asserted, the limitations of the additional insured policy, and any reservation of rights retained by the additional insurer.

Further, while primary and excess insurers have shared indivisible and aligned duties and interests in the defense of their common insured, an insurer covering both a named and an additional insured must consider the interests of *both* in its strategic decisions within the underlying claim. Conflicts of interest may arise in the defense of such claims where an insurer is defending multiple insureds, including its own contracted policy holder and an additional insured. As such, an insured's own primary and excess insurers have an independent duty to ensure that their named policy holder is fully covered in the underlying litigation and that the insureds' interests are protected.

Here, Marquee and Cosmopolitan had separate insurance towers, and Aspen and St. Paul provided coverage to Cosmopolitan under two separate and distinct coverage towers, *to wit*, as a *named insured* under the St. Paul excess policy and as an *additional insured* under the Aspen primary policy. Aspen issued a primary policy providing coverage for Marquee and St. Paul issued an excess policy for Cosmopolitan. (I App. 3-4, 6, ¶¶ 15, 40; *see also* XVI App. 2208-2325; XVII App. 2326-87). Thus, although Aspen was *a* primary insurer, it was not *Cosmopolitan's* primary insurer; rather, Cosmopolitan was an additional insured under the Aspen Policy for Marquee, subject to Aspen's reservation of rights. (I App. 4, ¶¶ 24, 27; *see also* XVI App. 2208-2325; XVI App. 2195-2201).

As insurers in separate towers of coverage, St. Paul and Aspen do not hold the same type of relationship with Cosmopolitan, and they bear separate duties and responsibilities as to Cosmopolitan. Cosmopolitan's own insurers, including St. Paul, owed independent concurrent obligations to Cosmopolitan under their policies, separate and apart from any obligation owed to Cosmopolitan by Aspen and National Union. This is particularly true where Cosmopolitan could be independently liable outside of the terms of the additional insured endorsement provided by Marquee's insurers.

It is fundamentally inequitable to allow Cosmopolitan's contracted excess carrier, St. Paul, to pursue claims against Aspen for bad faith failure to settle on

behalf of Cosmopolitan. While St. Paul and Zurich had similar duties to their mutual insured in defending the Underlying Action, Aspen had a duty to consider its interests of its own primary insured (Marquee) and those of its additional insured (Cosmopolitan). Unlike insurers residing in the same tower on behalf of a common insured, Aspen was excluded from considering solely the interests of Cosmopolitan in its defense and settlement determinations.

Further, Aspen was not legally responsible for the loss paid by St. Paul. Aspen's coverage of the Underlying Action as to Cosmopolitan was separate and apart from that of Cosmopolitan's primary and excess carriers, and it was subject to separate policy limitations and Aspen's reservation of rights, by which Aspen reserved the right to decline coverage to claims that fell within its exclusions, subject to its determination as to whether Cosmopolitan qualified as an insured with respect to the Underlying Action and whether Aspen had a continued duty to defend the same. (*See* XVI App. 2197-99). Indeed, the District Court in the Underlying Action made rulings that could implicate such a reservation of rights, finding that, as the property owner, Cosmopolitan "ha[d] a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers" and that Marquee and Cosmopolitan would be jointly and severally liable for Moradi's damages. (XII App. 1754, ¶ 7; *see also* VII App. 929-31).

While Cosmopolitan qualified as an additional insured under the policies issued by Aspen and National Union, that status did not alleviate St. Paul's obligations to Cosmopolitan under its separate tower of coverage and did not place St. Paul as a second layer excess carrier above Aspen and National Union, as St. Paul alleges. (*See* FN 10 *supra*). Both St. Paul and Aspen had independent obligations as to Cosmopolitan, which were discharged when those insurers paid the amount of insurance coverage limits available under their applicable policies. To impose liability on Marquee's insurer when Cosmopolitan had bargained for its own insurance would effectively negate the rights and responsibilities of Cosmopolitan's own insurance carriers.

Equitable principles prohibit the application of subrogation claims asserted by St. Paul against Aspen. St. Paul had an independent duty to its own insured, and it cannot have a right to be free of its own agreement with Cosmopolitan. It was contractually bound to pay excess claims against its insured. St. Paul accepted premiums to cover certain risks to Cosmopolitan, and it should not be allowed to ignore years of litigation against its insured and then pass its contractually assumed risks back to Aspen in a subrogation action, thereby avoiding the coverage that Cosmopolitan purchased, taking a net loss of zero, and recovering a windfall against an additional insurer.

2. *St. Paul, as Cosmopolitan's contracted excess insurer, does not have superior equity over Aspen, Cosmopolitan's additional insurer.*

An essential element to any insurance subrogation claim, as recognized in other jurisdictions, is that "justice requires that the loss be entirety shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer." *Fireman's Fund Ins. Co.*, 65 Cal.App. 4th at 1292, 77 Cal. Rptr. 2d 296. The requirement of showing superior equities in an insurance subrogation action derives partly from the fact that the insurer has been paid a premium to assume the risk of loss, and thus should not be permitted to evade its assumed risk of loss absent a showing that the co-insurer engaged in wrongful conduct that caused the loss. *See, e.g. Sompo Japan Ins. Co. of Am. v. Action Exp., LLC*, 19 F. Supp. 3d 954, 958 (C.D. Cal. 2014), *as amended* (June 4, 2014); *see also Fed. Ins. Co. v. Toiyabe Supply Co.*, 82 Nev. 14, 20, 409 P.2d 623, 626 (1966) ("Some significance is given to the fact that the surety has been paid to assume a risk and therefore has fewer equities than the assured.").

Under the doctrine of superior equities, even if an insurer might have a subrogation interest in the insured's claim against the party that caused the loss, it cannot recover or enforce such subrogation rights unless its equities are superior to those of the defendant insurer. *See, e.g. State Farm Gen. Ins. Co.*, 143 Cal.App.4th at 1107, 49 Cal. Rptr. 3d at 790, *citing inter alia Meyers v. Bank of America Nat.*

Trust & Savings Ass'n, 11 Cal.2d 92, 102–103, 77 P.2d 1084 (1938); *see also Sompo Japan Ins. Co. of Am.*, 19 F.Supp.3d at 958.

St. Paul cannot establish that it had superior equity to Aspen. Unlike typical insurance subrogation actions, Aspen is not a tortfeasor who caused injury to Moradi in the Underlying Action, and from whom St. Paul is attempting to recoup what it paid to compensate for such injuries. Aspen did not refuse to defend the Underlying Action on behalf of Cosmopolitan, nor did St. Paul pay the entire loss stemming from the alleged injuries in the Underlying Action; to the contrary, Aspen paid its policy limit of $1,000,000. (I App. 4, 12, ¶¶ 20, 67-70; *see also* XII App. 1754-55, 1778, ¶¶5, 9-11, 13). Thus, St. Paul is not seeking reimbursement for a claim that should have been paid by Aspen.

Although St. Paul alleges its losses occurred as a result of Aspen's purported failure to settle the case prior to the verdict (*see* I App. 13-14, ¶¶ 76-77, 80), as Cosmopolitan's excess insurer, St. Paul had inferior or equal equity to Aspen, who only insured Cosmopolitan as an additional insured under a reservation of rights. St. Paul had an agreement with Cosmopolitan to protect Cosmopolitan's interests and to pay excess claims against its insured. (*See* XVII App. 2326-87).

Although Cosmopolitan's policy was implicated in the Underlying Action, Cosmopolitan took no part in the Underlying Action, and implausibly asserts that it was uninformed of the same until February 13, 2017. (*See* I App. 11, ¶ 62). Other

than belatedly requesting base case information from National Union (AIG) and demanding that National Union settle the case for $26,000,000 (Aspen's tendered $1,000,000 limit and National Union's $25,000,000 excess limit) (*see id.* at ¶¶ 65-66), St. Paul took no active role in ensuring its own insured's interests were protected, did not verify whether the claims were or could be fully covered by Aspen's policy or under Aspen's reservation of rights, and did not even monitor the ongoing litigation against its insured. It was not until after the jury verdict was reached on April 26, 2017 that St. Paul became involved in the Underlying Action, funding its portion of the settlement against its insured.

Aspen was not in a better position to avoid the loss that forms the basis for St. Paul's claims, and thus, St. Paul cannot have been equitably superior. As Cosmopolitan's excess insurer, St. Paul had an obligation to protect the interests of its insured, and it owed an independent duty to Cosmopolitan to settle the Underlying Action under its very own policy. The acceptance of the additional insurance tender by Marquee's insurance carriers cannot negate the independent duties owed to Cosmopolitan by its own primary and excess insurance carriers. Cosmopolitan's insurers, Zurich and St. Paul, had the opportunity to participate in the Underlying Action and could have settled the Underlying Action brought against their insurer prior the verdict, but they elected not to do so, leaving the burden of the defense of their insured entirely to Aspen. Accordingly, St. Paul has equitably waived any

equitably superiority it may have had, as well as any attendant equitable standing to challenge the underlying losses in the jury verdict.

Subrogation only "arises when one party has been compelled to satisfy an obligation that is ultimately determined to be the obligation of another." *AT&T Technologies, Inc.*, 109 Nev. at 595-96. St. Paul's losses are, however, attributable to Cosmopolitan's independent liability for its own breach of the "non-delegable duty" to keep patrons safe on its premises, by which Cosmopolitan's separate towers of insurance coverage were implicated, or to National Union's action in not accepting the $26,000,000 demand after Aspen had tendered its $1,000,000 limits to National Union. (XII App. 1754, ¶ 7; *see also* VII App. 929-931; I App. 9-10, ¶¶ 53-58).

In equity, it cannot be said that St. Paul's satisfaction of its own obligations to its insured via payment of its portion of the settlement of the Underlying Action should entitle it to recover against Aspen, who had different liability as to Cosmopolitan, its additional insured. By its claims, St. Paul is impermissibly attempting to shift its burdens and responsibilities as Cosmopolitan's contracted excess insurer to Aspen, who did not contract with Cosmopolitan, Zurich, or St. Paul. St. Paul accepted premiums in exchange for the assumption of certain risks, and it should bear such losses when that risk becomes a reality. As such, St. Paul cannot

have superior equity and cannot seek recovery against Aspen related to its own failure to act under a theory of equitable subrogation.

C. Contractual Subrogation Does Not Exist Between Insurers in Separate Towers of Coverage, Particularly in the Absence of Contractual Damages.

St. Paul's contractual subrogation claim based on Aspen's alleged breach of the insurance contract should likewise fail. Nevada law has not recognized the existence of contractual subrogation claims between insurers for alleged bad faith failure to settle. Public policy and the two towers of coverage precludes against the adoption of such claims in the present context, particularly where, as here, the insurer exhausted its contractual liability in paying policy limits towards the defense and settlement of the claim against the additional insured, and the insured was fully indemnified in the Underlying Action.

Courts are reticent to recognize the existence of contractual subrogation claims between insurers. In the insurance context, contractual subrogation is generally applied, not by an excess insurer against a primary insurer, but between an insurer and a *third party tortfeasor*. *See, e.g. Colony Ins. Co.*, 2016 WL 3360943, at *6, citing *21st Century Ins. Co. v. Superior Court*, 213 P.3d 972, 976 (Cal. 2009). This is because general subrogation provisions in insurance contracts "add nothing to the rights of subrogation that arise as a matter of law." *Id.* (citations omitted).

With respect to the rights and duties of several insurers to one another who have covered the same event, courts in other jurisdictions have recognized that such rights and duties "do not arise out of contract, for their agreements are not with each other." *Hartford Acc. & Indem. Co. v. Cont'l Nat. Am. Ins. Companies*, 861 F.2d 1184, 1185 (9th Cir. 1988), *quoting Signal Cos., Inc.*, 27 Cal.3d at 369, 612 P.2d at 895, 165 Cal.Rptr. at 805. In the absence of the existence of a contract between the insurers, claims can only arise based on equitable principles, which "do not stem from agreement between the insurers" and are "not controlled by the language of their contracts with the respective policy holders." *Signal Cos., Inc.*, 27 Cal.3d at 369, 612 P.2d at 895.

This Court has not previously acknowledged the existence of contractual subrogation claims in the insurance context, nor should it do so now, as such claims violate public policy. This Court has expressly rejected contractual subrogation claims in the context of insurers and insureds, stating they contravene public policy, as "[a]llowing subrogation deprives the insured of the coverage for which he has paid and results in a windfall recovery for the insurer." *Maxwell*, 102 Nev. 502, 728 P.2d at 815. Relying on this Court's ruling in *Maxwell*, the U.S. District Court for the District of Nevada similarly found a contractual subrogation claim could not be maintained between insurers, as allowing an excess insurer to sue a primary insurer

under theories of contractual subrogation also violated public policy. *Colony Ins. Co.*, 2016 WL 3360943, at *6.

St. Paul should not be permitted to pursue a claim for contractual subrogation, as such a claim would violate public policy and result in a windfall to St. Paul. St. Paul contracted with Cosmopolitan to provide excess insurance coverage, and it was bound thereby the pay excess claims against its own insured. St. Paul does not have a right to be free of its own agreement with Cosmopolitan. It accepted premiums to cover certain risks to Cosmopolitan, and St. Paul should not be allowed to pass those same risks back to Aspen in a subrogation action, thereby avoiding the coverage that Cosmopolitan purchased, taking a net loss of zero, and recovering a windfall against another insurer.

Although St. Paul's contractual subrogation claim purports to be for "breach of the Aspen Insurance Contract" (I App. 17-18, ¶¶ 96-103), St. Paul cannot support such contract-based claims against Aspen, as St. Paul had no contractual relationship – either directly or indirectly – with Aspen. No contract exists between St. Paul and Aspen, nor does Cosmopolitan itself have a direct contractual relationship with Aspen, as it was not the contracting policyholder under the Aspen Policy. St. Paul is not a third party beneficiary to the Aspen Policy, as no evidence exists that Aspen and Marquee intended to secure for St. Paul personally the benefit of the Aspen Policy's provisions. It is insufficient that St. Paul, as an excess insurer for

Cosmopolitan, incidentally benefitted from Aspen's contract with Marquee, under which Cosmopolitan was an additional insured. *See, e.g. Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 21 Cal. App. 4th 1586, 1600, 26 Cal. Rptr. 2d 762, 770 (1994) (citation omitted) (an excess insurer could not proceed with contract-based claims for bad faith against a primary insurer, as "a person who is incidentally benefitted by the payment of policy proceeds is not a third party beneficiary entitled to sue for breach of the implied covenant").

Even if this Court were to choose to allow St. Paul to "step into the shoes" of Cosmopolitan under the theory that Cosmopolitan was a third party beneficiary to the Aspen Policy, St. Paul still can take nothing by subrogation but the rights of its insured. (*See* XVIII App. 2566 (St. Paul Policy, transferring Cosmopolitan's rights to recover from third parties "all or part of any payment [St. Paul] made" under the policy)).

St. Paul can have no greater rights to a remedy than Cosmopolitan itself would have. The only rights to recovery that Cosmopolitan could ever subrogate to St. Paul are those rights Cosmopolitan itself held based on the damages it sustained. *Colony Ins. Co.*, 2018 WL 3312965, at *6; *United States v. California*, 507 U.S. 746, 756 (1993); *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 957 (9th Cir. 2013); *Travelers Cas. & Sur. Co. v. Am. Int'l Surplus Lines Ins. Co.*, 465 F. Supp. 2d 1005, 1027 (S.D. Cal. 2006).

Insurers are neither contractually nor legally required to pay more than their policy limits. *See, e.g. Everest Indem. Ins. Co. v. Aventine-Tramonti Homeowners Ass'n*, No. 2:09-CV-01672-RCJ, 2012 WL 870289, at *3 (D. Nev. Mar. 14, 2012). Once the policy limits are reached, "the insurer's duties under the policy are extinguished." *Id.*; *see also Deere & Co. v. Allstate Ins. Co.,* 32 Cal. App. 5th 499, 515, 244 Cal. Rptr. 3d 100, 112 Cal. Ct. App. (2019), *as modified on denial of reh'g* (Mar. 26, 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 citation omitted).

Other jurisdictions have held that insureds who are fully indemnified have no right to recover an additional pro rata portion of a settlement from an insurer, as their loss has been fully covered; thus, an insured has no contractual rights that co-insurer may assert against another co-insurer in subrogation. *See, e.g. Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 775 (Tex. 2007)[12]; *see also California*

[12] In *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299 (5th Cir. 2010), the Fifth Circuit distinguished itself from *Mid-Continent*, finding a primary carrier could seek contractual subrogation from an excess carrier, even though the insured had been fully indemnified. However, it did so in a context where the primary insurer insisted its policy was inapplicable, and the excess carrier refused to indemnify until the primary carrier paid its policy limit. The primary carrier did so, but sought contractual subrogation after the underlying case was settled. The Court held that, in such circumstances, the primary carrier permissibly sought contractual subrogation from the excess carrier, even though the insured ultimately had been fully indemnified, as applying *Mid-Continent* to bar subrogation in those circumstances "would have further deviated from settled principles of Texas insurance law by

Capital Ins. Co. v. Scottsdale Indem. Ins. Co., 2018 WL 2276815, at *4 (Cal.Ct.App. May 18, 2018) (unpublished) (finding contract-based claims by co-insurer were properly dismissed because the insureds had sustained no damages as a result of the defendant insurer's alleged failure to defend and indemnity or settle within policy limits, as the insureds' defense and post-judgment settlement had been fully paid); *Auto-Owners Ins. Co. v. Am. Yachts, Ltd.*, 492 F. Supp. 2d 1379, 1384 (S.D. Fla. 2007), *aff'd sub nom. Auto-Owners Ins. v. Am. Yachts Ltd.*, 271 F. App'x 888 (11th Cir. 2008) (finding an excess insurer's bad faith claim against a primary insurer could not proceed, as the settlement released the insured from all liability, and he could no longer be exposed to the potential liability for an excess judgment).

St. Paul's claims cannot exist as Cosmopolitan has suffered no contractual damages to which Cosmopolitan can subrogate. Aspen did not deny coverage to Cosmopolitan, but rather, it covered Cosmopolitan's liability and loss under a reservation of rights. (I App. 5, ¶ 27; *see also* XVI App. 2195-2201; XII App. 1754-55, ¶¶ 5, 13). Aspen defended the Underlying Action on behalf of both Marquee and Cosmopolitan, indemnifying its primary insured and its additional insured to its policy limits. (*See* I App. 4, 12, ¶¶ 20, 67; XII App. 1754-55, 1778, ¶¶ 5, 9-11, 13).

---

discouraging insurers from first defending and indemnifying and then seeking reimbursement for the costs that a coinsurer should have paid." *Id.* at 308. As Aspen defended Cosmopolitan in the Underlying Action to its policy limits, *Amerisure* is not analogous to the present situation.

As Aspen paid its share of the costs incurred in the defense and settlement of the Underlying Action, and the Aspen's Policy coverage was fully exhausted, Cosmopolitan received the maximum benefits to which it could have been entitled as an additional insured under the Aspen Policy. Moreover, Cosmopolitan suffered no loss, as Cosmopolitan was fully defended and indemnified in the Underlying Action, the claims against Cosmopolitan were resolved within policy limits by the several insurers, and no excess judgment was entered against it. (I App. 12, ¶¶ 66-71; *see also* XII App. 1755, 1766, ¶¶ 9-11, 21-22). As such, St. Paul's claim for contractual subrogation must fail, as there are no contractual damages for which St. Paul could subrogate on behalf of Cosmopolitan.

CONCLUSION

This Court should grant the requested writ relief. The District Court abused its discretion in denying Petitioner's Renewed Motion for Summary Judgment. Equitable and contractual subrogation claims do not exist between insurance carriers in Nevada for bad faith failure to settle, and Nevada should not recognize such claims, particularly, where, as here, the insurers reside in separate towers of insurance coverage. Writ relief - either directing the District Court to vacate its October 9, 2020 Order denying Petitioner's Renewed Motion for Summary Judgment, or mandating that the District Court issue an order granting Petitioner's Renewed Motion for Summary Judgment – will maintain consistency with Nevada

law and public policy in insurance matters, and will ensure consistency with the District Court's rulings as to the viability of such claims.

Respectfully submitted this 17 day of November, 2021.

MESSNER REEVES LLP

Michael M. Edwards, Esq., NBN 6281
Derek Noack, Esq., NBN 15074
Stephanie Bedker, Esq., NBN 14169
8945 W. Russell Road, Suite 300
Las Vegas, NV 89148
Telephone: (702) 363-5100
Facsimile: (702) 363-5101
Attorneys for Petitioner
Aspen Specialty Insurance Company

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared on 8 ½ by 11-inch paper, double spaced, with 1-inch margins on all side, in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman type style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) and 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains approximately **10,856** words.

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is

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

DATED this 17 day of November 2021.

MESSNER REEVES LLP

Michael M. Edwards, Esq., NBN 6281
Derek Noack, Esq., NBN 15074
Stephanie Bedker, Esq., NBN 14169
8945 W. Russell Road, Suite 300
Las Vegas, NV 89148
Telephone: (702) 363-5100
Facsimile: (702) 363-5101
Attorneys for Petitioner
Aspen Specialty Insurance Company

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Messner Reeves LLP, that in accordance therewith, I caused a copy of **PETITION UNDER NRAP 21 FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF PROHIBITION** to be served on the Real Parties in Interest via the Supreme Court's e-filing system, U.S. Mail and Hand Delivery on this 17 day of November, 2021, and upon:

The Honorable GLORIA STURMAN
Eighth Judicial District Court, Dept. 26
Clark County, Nevada
Regional Justice Center
200 Lewis Ave.
Las Vegas, Nevada 89155

Mark A. Hutchison, Esq.
Cynthia G. Milanowski, Esq.
HUTCHINSON & STEFFIN
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
T: (702) 385-2500
cmilanowski@hutchlegal.com
Attorneys for Real Party in Interest St. Paul Fire & Marine Insurance Company

Andrew D. Herold, Esq.
Nicholas B. Salerno, Esq.
HEROLD & SAGER
3960 Howard Hughes Parkway,
Suite 500
Las Vegas, NV 89169
Tel: (702) 990-3624
Fax: (702) 990-3835
aherold@heroldsagerlaw.com
nsalerno@heroldsagerlaw.com

Jeremy W. Stamelman, Esq.
KELLER/ANDERLE LLP
18300 Von Karmen Avenue, Suite 930
Irvine, CA 92612-1057
Tel: (949) 476-8700
Fax: (949) 476-0900
Attorneys for Real Parties in Interest National Union Fire Insurance Company of Pittsburgh PA & Roof Deck Entertainment, LLC d/b/a Marquee Nightclub

Laura Rose
Employee of MESSNER REEVES LLP