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

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

Volume XIII of XIX

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DOC NO.	DOCUMENT	VOL.	BATES NO.
1	[04/25/2018] St. Paul Fire & Marine Insurance Company's First Amended Complaint [filed under seal]	I	AA00001-AA00027
2	[08/29/2019] St. Paul Fire & Marine Insurance Company's Motion for Partial Summary Judgment Against Aspen Specialty Insurance Company	I	AA00028-AA00051
3	[08/29/2019] Exhibits and Declaration of Marc J. Derewetzky in Support of St. Paul Fire & Marine Insurance Company's Motion for Partial Summary Judgment Against Aspen Specialty Insurance Company	I, II	AA00052-AA00208
4	[08/29/2019] Request for Judicial Notice in Support of St. Paul Fire & Marine Insurance Company's Motion for Partial Summary Judgment Against Aspen Specialty Insurance Company	II	AA00209-AA00285
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9	[09/13/2019] Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Appendix of Exhibits in Support of Motion for Summary Judgment	III	AA00323-AA00411
10	[09/13/2019] National Union Fire Insurance Company of Pittsburgh PA's Motion for Summary Judgment	III	AA00412-AA00439

11	[09/13/2019] Declaration of Nicholas B. Salerno in Support of National Union Fire Insurance Company of Pittsburgh, PA's Motion for Summary Judgment	III	AA00440-AA00442
12	[09/13/2019] Declaration of Richard C. Perkins in Support of National Union Fire Insurance Company of Pittsburgh, PA's Motion for Summary Judgment	III, IV	AA00443-AA00507
13	[09/13/2019] National Union Fire Insurance Company of Pittsburgh PA's Appendix of Exhibits in Support of Motion for Summary Judgment	IV, V, VI, VII	AA00508-AA00937
14	[09/13/2019] Request for Judicial Notice in Support of National Union Fire Insurance Company of Pittsburgh PA's Motion for Summary Judgment	VII	AA00938-AA00941
15	[09/19/2019] Aspen Specialty Insurance Company's Opposition to St. Paul Fire & Marine Insurance Company's Motion for Partial Summary Judgment and Countermotion for Summary Judgment	VII, VIII	AA00942-AA01153
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44	National Union Fire Insurance Company of Pittsburgh, PA Policy of Insurance issued to The Restaurant Group et al, Policy Number BE 25414413	XVIII	AA02388-AA02448
45	Zurich American Insurance Company Policy of Insurance issued to Nevada Property I LLC, Policy Number PRA 9829242-01	XVIII, XIX	AA02449-AA02608

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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiffs, vs. ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA; ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB; and DOES 1-25; inclusive, Defendants.	CASE NO.: A-17-758902-C DEPT. NO.: XXVI **DEFENDANT ASPEN SPECIALITY INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT**

Defendant, ASPEN SPECIALTY INSURANCE COMPANY, by and through its counsel of record, the law firm MESSNER REEVES, LLP, files this Renewed Motion for Summary Judgment.

This Renewed Motion for Summary Judgment is based on the pleadings, exhibits, motions, orders, and other papers on file in this action, the attached declaration of counsel, the attached Memorandum of Points and Authorities, and any oral argument that may be permitted at the time of hearing on this matter.

DATED this 11th day of June, 2020.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff ST. PAUL FIRE & MARINE INSURANCE COMPANY ("Plaintiff" or "St. Paul") previously filed a Motion for Partial Summary Judgment against Defendant ASPEN SPECIALTY INSURANCE COMPANY ("Defendant" or "Aspen") concerning whether Aspen's insurance policy limit for the underlying action was $1 million or $2 million; St. Paul argued the limit was $2 million. Aspen filed an Opposition and Countermotion for Summary Judgment. Aspen successfully argued its policy limit for the underlying action was $1 million.

Aspen additionally countermoved for summary judgment as to the viability of St. Paul's claims against Aspen. The Court ultimately declined to rule at the time on the viability of St. Paul's claims against Aspen, limiting its ruling to the $1 million policy limits issue. The Court deferred ruling on the issues concerning the viability of St. Paul's subrogation claims against Aspen until after the Court could hear the other defendants' Motions for Summary Judgment concerning similar issues that were being heard one week *after* the hearing on the St. Paul-Aspen Motions.

Among other things, Defendant NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA ("National Union") moved for summary judgment arguing St. Paul's subrogation claims were not viable as a matter of law. The Court granted National Union's Motion for Summary Judgment and recently entered its order on St. Paul's Motion for Partial Summary Judgment, Aspen's Countermotion, and National Union and Marquis' Motions for Summary Judgment.

Therefore, now that the Court has entered its order on the other parties' summary judgment motions, including the non-viability of St. Paul's subrogation claims against National Union which the Court held fail as a matter of law, Aspen hereby renews its Motion for Summary Judgment as to the non-viability of St. Paul's claims against it.

St. Paul asserts three (3) claim against Aspen: (1) Subrogation – breach of the duty to settle by failing to accept $1.5 million offer (because St. Paul contended it was within Aspen's alleged $2 million policy limit); (2) Subrogation – breach of the Aspen insurance contract for failing to provide a conflict free defense to Marquee and Cosmopolitan and failing to pay all available limits under

the Aspen policy; and, (3) Equitable Estoppel – that the defendants should be prevented from arguing National Union's policy was co-excess with St. Paul's policy. Aspen is entitled to summary judgment on all three claims as a matter of law.

Aspen is entitled to summary judgment on St. Paul's subrogation claims because the claims do not fit the circumstances here and Nevada has not recognized contractual or equitable subrogation in the insurance context here. This Court likewise and correctly declined to do so when granting National Union's Motion for Summary Judgment, and the Court should follow the law of the case and do so again here with respect to Aspen as well.

St. Paul's subrogation claim for failure to accept a $1.5 million settlement offer within policy limits also now inherently fails as a matter of law because this Court has now determined Aspen's policy limit is $1 million; thus, Aspen, as a matter of law, did not fail to accept a settlement within policy limits even if subrogation could be applied here.

St. Paul's subrogation claim for breach of contract fails because St. Paul is not a party to the Aspen contract, and because St. Paul's insured, in whose shoes it contends it stands, has not suffered any damages as this Court correctly held when granting National Union's Motion for Summary Judgment. Among other things, the insurers, including Aspen, paid their full policy limits, Aspen and National Union fully funded their defense, and the insureds did not contribute toward settlement. Consequently, there can be no contract damages as the law of the case holds here.

Finally, St. Paul's Estoppel 'claim' also fails as a matter of law. It is derivative of the other claims which all fail as well. In addition, it is based on estopping parties from arguing National Union is a co-excess carrier to St. Paul, and National Union has obtained summary judgment in this case, including on the Estoppel claim alleged against the carrier defendants.

Aspen is therefore entitled to summary judgment on the St. Paul's subrogation and estoppel claims.

II. STATEMENT OF FACTS

A. Procedural History.

The defendants initially filed motions to dismiss Plaintiff's Complaint. The motions were granted, and Plaintiff filed an Amended Complaint. The defendants again filed motions to dismiss

the first amended complaint, and the Court denied them without prejudice ruling among other things that it wanted to make sure the full verified policies were submitted on record, including St. Paul's policy which it refused to provide during the motion to dismiss stage:

> Similarly, both the National Union and Aspen Specialty Ins. Co. Motions [to dismiss] require the Court to go beyond the pleadings and ask this Court to analyze insurance policies without testing through discovery whether those policies are complete and that there are no missing amendments, exhibits, riders, or endorsements. … Further, both National Union and Aspen argue that the indemnity action must fail as a matter of law, but it seems that at least one piece of evidence necessary to evaluate these legal issues is missing from the record before the Court, I.e. the St Paul policy.

Court's 02/28/19 Minute Order.

The defendants filed answers, the parties' policies were served, and motions for summary judgment were then filed by all parties where all verified insurance policies were provided on record.[1]

Plaintiff moved for partial summary judgment against Aspen to determine the policy limits of the Aspen insurance policy concerning the underlying Moradi lawsuit. Aspen countermoved for summary judgment on the same issue, as well as countermoving for summary judgment as to the viability of Plaintiff's claims as a matter of law. Defendants National Union and Marquee then also moved for summary judgment as to the viability of Plaintiff's claims against them.

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[1] In addition to the Exhibits provided herewith, Aspen hereby incorporates by this reference in full, the following Appendix and Exhibits in support of this Motion:

- National Union's 09/13/2018 Appendix of Exhibits in support of Motion for Summary Judgment which includes:
  - Exhibit 1: National Union Policy No. 25414413
  - Exhibit 2: Zurich Policy No. PRA 9829242-01
  - Exhibit 3: St. Paul Policy No. QK 06503290
  - Exhibit 4: Aspen Policy No. CRAXYD11
  - Exhibit 5: Except of 3/24/2017 trial transcript in underlying proceeding.

Plaintiff's Partial Motion against Aspen, and Aspen's Countermotion, were scheduled for hearing and heard one week prior to the hearing on the other defendants' Motions for Summary Judgment. At the hearing on Plaintiff's Partial Motion against Aspen, and Aspen's Countermotion against Plaintiff, the Court determined and ruled on the policy limit issue amongst them only—ruling that the Aspen policy limit for the underlying action was $1 million. Attached as **Exhibit A** hereto is the Court's Order denying St. Paul's Motion for Partial Summary Judgment and granting in part Aspen's Countermotion holding the Aspen has a $1 million policy limit.

The Court limited its rulings on the St, Paul-Aspen Motions at the time to the policy limits issue, and deferred ruling on the viability of Plaintiff's claims against Aspen until it heard and ruled on the other defendants' Motions for Summary Judgment being heard one week later on similar issues. Attached as **Exhibit B** is a copy of the October 15, 2019 hearing transcript on National Union's and Marquee's Motions for Summary Judgment; attached as **Exhibit C** is a copy of the October 8, 2019 hearing transcript on the St. Paul-Aspen Motions.

One week after the hearing on the St. Paul-Aspen Motions, the Court then orally granted National Union's and Marquee's Motions for Summary Judgment as to the non-viability of Plaintiff's subrogation claims as a matter of law, and invited Aspen after the hearing concluded to submit a Renewed or "me too" Motion as to the viability of Plaintiff's claims, now that the Court had ruled against the viability of St. Paul's subrogation claims on the other defendants' Motions. Attached as **Exhibit D** is a copy of the Court's Order Granting National Union's Motion for Summary Judgment.

The parties all submitted competing orders to the Court. While the parties' summary judgment motions were still pending and before orally ruling thereon, the Court stayed discovery between St. Paul and Aspen until two weeks after the summary judgment order was entered. The other defendants filed motions to stay with the discovery commissioner because at the time of the court's status hearing where the court stayed discovery as to St. Paul-Aspen, the other defendants' motions for summary judgment were not on file yet.

However, expert deadlines began approaching while the parties' competing summary judgment orders were pending. Consequently, St. Paul and Aspen agreed to stay discovery, all

deadlines, and trial pending a determination on Aspen's to-be-filed Renewed Motion for Summary Judgment on the viability of Plaintiff's claims against Aspen—to be filed after notice of entry of the Court's pending orders on all the parties' summary judgment motions. Attached as **Exhibit E** is a copy of the Court's Order staying deadlines and trial pending Aspen's Renewed Motion for Summary Judgment.

St. Paul and Aspen agreed to stay discovery and deadlines because the Court still needed to rule on the viability of St. Paul's claims against Aspen as a matter of law based on the insurance policies, and the now controlling findings of fact and law in the parties' summary judgment orders.

B. Underlying Action and Post-Judgment Settlement.

This action relates to a post-judgment settlement agreed to by St. Paul, National Union, Zurich Insurance, and Aspen following a jury trial in the personal injury case of *Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al., District Court*, Clark County, Nevada, Case No. A-14-698824-C ("Underlying Action"). Redacted Amended Complaint ("Amended Comp."), ¶ 6. Following the Moradi action, Aspen ($1 million policy limit) and National Union ($25 million policy limit) paid their policy limits as part of a global settlement, as did Zurich ($1 million limit as primary for Cosmopolitan) and St. Paul ($25 million limit as excess for Cosmopolitan). Due to the post-judgment settlement paid in full by the insurers, Cosmopolitan did not pay money in settlement of the action, nor is it alleged to have done so in the Amended Complaint either. Now, in this action, St. Paul seeks to recover the money that it contributed toward that settlement from the defendants.

In the Underlying Action, Plaintiff David Moradi ("Moradi") alleged that, on or about April 8, 2012, he was a patron at the Marquee Nightclub located within The Cosmopolitan Hotel and Casino when he was attacked and beaten by Marquee employees resulting in bodily injuries. Amended Comp., ¶¶ 6-7. Moradi filed a complaint against Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan") and Roof Deck Entertainment, LLC d/b/a/ Marquee Nightclub ("Marquee") on April 4, 2014. Amended Comp., ¶¶ 8-10; *see also* Exhibit A to Amended Complaint. Moradi alleged that, as a result of his injuries, he suffered past and future lost wages/income and sought general damages, special damages and punitive damages. *Id.* at ¶ 9.

During the course of the Underlying Action, Moradi made legal arguments that Cosmopolitan, as the owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced exposure for breaching its non-delegable duty to keep patrons safe, including Moradi. *Id*. at ¶ 13. The Court in the Underlying Action agreed with Moradi's position and imposed vicarious liability on Cosmopolitan for Marquee's actions. *Id*. The Court also ruled that Marquee and Cosmopolitan were jointly and severally liable for Moradi's damages claim. *Id*. at ¶ 14.

The Underlying Action went to trial and on April 28, 2017 and the jury returned a verdict in Moradi's favor and awarded compensatory damages in the amount of $160,500,000. Amended Comp, ¶ 60. During the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. *Id*. at ¶ 66. National Union, St. Paul, Aspen, and Zurich contributed towards the settlement demand. *Id*. at ¶¶ 67-69.

C. Insurance Policies.

Marquee is an insured under National Union commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et al. ("National Union policy"). Amended Comp., ¶ 30; Declaration of Michael F. Muscarella ("Muscarella Decl."), ¶ 2 (attached to National Union's Initial Motion to Dismiss as Exhibit "A.") The National Union umbrella policy contains limits of $25,000,000 each occurrence and $25,000,000 general aggregate. Amended Comp. ¶ 31; Muscarella Decl., ¶ 2. Cosmopolitan is alleged to be an additional insured to the National Union umbrella policy with respect to the Underlying Action. Amended Comp., ¶ 33. Marquee and Cosmopolitan tendered the Underlying Action to National Union under the National Union policy. *Id*. at ¶ 34. National Union acknowledged a potential for coverage for Cosmopolitan and Marquee under the National Union umbrella policy and provided a joint defense to Cosmopolitan and Marquee in the Underlying Action. *Id*. at ¶ 35.

Marquee is an insured under Aspen primary commercial general liability policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et al. ("Aspen Policy"). Amended Comp., ¶ 15; *see also* Declaration of Marvin Robalino ("Robalino Decl."), attached as Exhibit A to Aspen's Opposition and Countermotion for Summary Judgment;

the Aspen policy and Declaration are again attached to this Motion for reference as **Exhibit F-F1**. The Aspen primary commercial general liability policy contains limits of $1,000,000 each occurrence and $2,000,000 general aggregate. *Id*. at ¶ 16; *see also* Exhibit F1 hereto (Aspen Policy) and Exhibit A, Court's Order granting in part Aspen's Countermotion for Summary Judgment.

Cosmopolitan is alleged to also be an additional insured to the Aspen primary commercial generally liability policy with respect to the Underlying Action. Amended Comp., ¶ 20. Cosmopolitan tendered the Underlying Action to Marquee for defense pursuant to a written agreement entered into between the Marquee and Cosmopolitan. *Id*. at ¶ 25. The Marquee accepted Cosmopolitan's tender. *Id*. Aspen is alleged to have acknowledged coverage for Cosmopolitan and Marquee under the Aspen primary commercial general liability policy and provided a joint defense to Cosmopolitan and Marquee in the Underlying Action. *Id*. at ¶ 27.

Cosmopolitan is an insured under St. Paul commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013 ("St. Paul policy"). Amended Comp., ¶ 40. Attached as Exhibit B to Aspen's Opposition and Countermotion for Summary Judgment is a Certified copy of the St. Paul policy as produced by St. Paul in this action; it is attached as **Exhibit G** for ease of reference to this Motion. The St. Paul umbrella policy provided for a limit of liability of $25,000,000 with respect to .the Underlying Action. See Exhibit H. Zurich was a primary insurer for Cosmopolitan.

D. <u>Law of The Case – The Summary Judgment Orders.</u>

1. Order Granting In Part Aspen's Countermotion for Summary Judgment Regarding A $1 Million Policy Limit for the *Moradi* Action.

The Court denied St. Paul's Motion for Partial Summary Judgment and granted in part Aspen's Motion for summary judgment. Exhibit A. The Court found that Aspen issued insurance policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012, to the Restaurant Group, et. al. ("Aspen Policy") and that Defendant Roof Deck Entertainment, LLC (i.e, "Marquee) is a named insured in the Aspen Policy by endorsement. *Id*. at 2:25-27. The Court concluded and held that the plain language of the Aspen Policy operates to limit coverage for the Moradi action to $1 million. *Id*. at 8:15-20.

2. Order Granting National Union's Motion for Summary Judgment.

The Court also granted National Union's Motion for Summary Judgment making various findings and rulings. Exhibit D. In that Order, the Court made the following relevant and controlling findings of fact and conclusions of law:

I.

FINDINGS OF FACT

A. <u>The Underlying Action</u>

1. This action arises out of an underlying bodily 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"). (FAC ¶ 6.)

2. Plaintiff David Moradi ("Moradi") alleged that, on or about April 8, 2012, he went to the Marquee Nightclub located within The Cosmopolitan Hotel and Casino to socialize with friends, when he was beaten by Marquee employees. (FAC ¶¶ 6-7.)

3. Moradi filed a complaint against Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan") and Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") on April 4, 2014, asserting causes of action for Assault and Battery, Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment. (FAC ¶¶ 8-10, Exhibit A.)

4. Moradi alleged that, as a result of his injuries, he suffered past and future lost wages/income and sought general damages, special damages and punitive damages. (Id. ¶ 9, Exhibit A.)

5. Aspen, who issued a primary insurance policy to Marquee, agreed to provide a joint defense to both Cosmopolitan and Marquee. National Union, who issued an excess policy to Marquee, subsequently appointed separate counsel to jointly represent both Cosmopolitan and Marquee. (St. Paul Appendix, Exs. C, D, L, M.)

6. During the course of the Underlying Action, Moradi alleged that Cosmopolitan, as the owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced exposure for the conduct of Marquee by breaching its non-delegable duty to keep patrons safe, including Moradi. (FAC ¶ 13.)

7. The Court held in the Underlying Action that that Cosmopolitan, as owner of the property, "had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers." and that Marquee and Cosmopolitan can be jointly and severally liable as a matter of law. (See Request for Judicial Notice in Support of Motion for Summary Judgment, Ex. 5.)

8. After a five-week trial, the jury in the Underlying Action issued a special verdict on April 26, 2017 finding that Moradi established his claims for

assault, battery, false imprisonment and negligence against Marquee and Cosmopolitan and awarded compensatory damages in the amount of $160,500,000. Because the jury found for Moradi on his intentional-tort claims, the judgment would have been joint and several against Marquee and Cosmopolitan. See NRS 41.141(5)(b). (FAC, Ex. C.)

9. After the verdict and during the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. (FAC ¶ 66.)

10. Aspen and National Union as the primary and excess insurers of Marquee, and Zurich American Insurance Company and St. Paul as the primary and excess insurers of Cosmopolitan, accepted the settlement demand and resolved the Underlying Action with the confidential contributions set forth in the FAC filed by St. Paul under seal. (FAC ¶¶ 67-70.)

11. The settlement was funded entirely by the insurance carriers for Cosmopolitan and Marquee. No defendant in the underlying case contributed any money out-of-pocket towards the settlement. National Union on behalf of Marquee and St. Paul on behalf of Cosmopolitan contributed the same amount towards the settlement of the Underlying Action. (FAC ¶ 67-70.)

12. National Union contends its contribution towards the settlement of the Underlying Action on behalf of Marquee resulted in the exhaustion of the National Union Excess Policy. (MSJ p. 10, Undisputed Fact No. ("UF") 17.)[2]

13. The combined defense of Cosmopolitan and Marquee was funded entirely by Aspen and National Union. (FAC ¶ ¶ 27-28, 35-36.)

B. Insurance Policies

1. The Cosmopolitan Insurance Tower

a. Cosmopolitan's Primary Policy with Zurich American Insurance Company

14. Zurich American Insurance Company ("Zurich") issued commercial general liability policy number PRA 9829242-01, effective November 1, 2011 to November 1, 2012 to Nevada Property 1 LLC (the "Zurich Primary Policy"). (FAC ¶ 69; National Union's Appendix of Exhibits in Support of MSJ ("NU Appx."), Ex. 2, W005478.)

15. Cosmopolitan is a named insured under the Zurich Primary Policy. (FAC ¶ 69.) Marquee is not an insured under the Zurich Primary Policy. (Id.)

16. The Zurich Primary Policy contains limits of $1,000,000 each occurrence and $2,000,000 general aggregate. (FAC ¶ 69; NU Appx., Ex. 2, W005508.)

17. The Zurich Primary Policy provides that Zurich will pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily

[2] The same is true for Aspen; Aspen exhausted its full policy limit as well given the Court's determination of the Aspen policy limit.

injury' or 'property damage' to which this insurance applies." (NU Appx., Ex. 2, W005497 – W005498.)

18. The Zurich Primary Policy provides that it applies to "bodily injury" and "property damage" only if caused by an "occurrence" that occurs during the policy period. (Id.)

b. Cosmopolitan's Excess Policy with St. Paul

19. St. Paul issued commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013, to Premier Hotel Insurance Group (the "St. Paul Excess Policy"). (FAC ¶ 40; MSJ p. 11, UF 20.)

20. Cosmopolitan is a named insured under the St. Paul Excess Policy. (FAC ¶ 40.) Marquee is not an insured under the St. Paul Excess Policy. (FAC ¶ 41.)

21. The St. Paul Excess Policy contains liability limits of $25,000,000 with each occurrence and $25,000,000 general aggregate. (MSJ p. 11, UF 22.)

22. The St. Paul Excess Policy provides that it will pay on behalf of: (1) the insured all sums in excess of the "Retained Limit" that the insured becomes legally obligated to pay as damages by reason of liability imposed by law; or (2) the named insured all sums in excess of the "Retained Limit" that the named insured becomes legally obligated to pay as damages assumed by the named insured under an "Insured Contract." (MSJ p. 11, UF 23.)

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2. The Marquee Insurance Tower

a. Marquee's Primary Policy with Aspen Specialty Insurance Company

24. Aspen issued a commercial general liability policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012 to The Restaurant Group et. al. (the "Aspen Primary Policy"). (FAC ¶ 15; NU Appx., Ex. 4, ASPEN000032.)

25. Marquee is a named insured under the Aspen Primary Policy. (FAC ¶ 15.)

26. Cosmopolitan qualified as an additional insured to the Aspen Primary Policy with respect to the Underlying Action. (FAC ¶ 24.)

27. The Aspen Policy contains limits of $1,000,000 each occurrence and $2,000,000 general aggregate. (FAC ¶¶ 17, 23; NU Appx., Ex. 4, ASPEN000033.)

28. The Aspen Policy provides that Aspen will pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (NU Appx., Ex. 4, ASPEN000042.)

29. The Aspen Policy provides that it applies to "bodily injury" and "property damage" only if caused by an "occurrence" that occurs during the policy period. (Id.)

b. Marquee's Excess Policy with National Union

30. National Union issued commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, to The Restaurant Group, et al. (the "National Union Excess Policy") (MSJ p. 10, UF 11.)

31. Marquee is a named insured under the National Union Excess Policy. (FAC ¶ 30.)

32. Cosmopolitan qualified as an additional insured to the National Union Excess Policy with respect to the Underlying Action. (FAC ¶ 33; MSJ p. 11, UF 18.)

33. The National Union Excess Policy contains limits of $25,000,000 each occurrence and $25,000,000 general aggregate. (MSJ p. 10, UF 13.)

34. The National Union Excess Policy provides that National Union will pay on behalf of the insured "those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay as damages by reason of liability imposed by law because of Bodily Injury, Property Damage, or Personal and Advertising Injury to which this insurance applies or because of Bodily Injury or Property Damage to which this insurance applies assumed by the Insured under an Insured Contract." (MSJ p. 10, UF 14.)

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41. Cosmopolitan and Marquee were insured under separate towers of insurance. Cosmopolitan was insured under one of the towers of insurance where it was a named insured under the Zurich Primary Policy and the St. Paul Excess Policy, and under the other tower of insurance where Cosmopolitan qualified as an additional insured under the Aspen Primary Policy and the National Union Excess Policy that were issued to Marquee as the named insured.

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III.

CONCLUSIONS OF LAW

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3. As a threshold matter, the Second Cause of Action [Subrogation – Breach of the Duty to Settle] fails as a matter of law because the Nevada Supreme Court has never recognized an equitable subrogation claim between insurers, and this Court is unwilling to do so in the first instance.

***

5. General insurance principles and the subject policies outlined above demonstrate that Cosmopolitan and Marquee are named insureds in separate towers of coverage. Cosmopolitan is a named insured under a separate tower of insurance that includes the Zurich Primary Policy and the St. Paul Excess Policy. Marquee is a named insured under a separate tower of insurance that includes the Aspen Primary Policy and the National Union Excess Policy. Cosmopolitan qualified as an additional insured under the Aspen Primary Policy and the National Union Excess Policy issued to Marquee as the named insured.

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13. Although St. Paul is not a party to the National Union Excess Policy, in the Fourth Cause of Action for Subrogation – Breach of the AIG Insurance Contract ("Fourth Cause of Action"), St. Paul is pursuing a claim against National Union for an alleged breach of National Union's insurance contract as an alleged subrogee of Cosmopolitan.[3]

14. However, for the same reasons proffered above in concluding that the Second Cause of Action fails as a matter of law, the Fourth Cause of Action must also fail as a matter of law. Specifically, the Nevada Supreme Court has never recognized the viability of an equitable subrogation claim between insurers, and this Court is unwilling to do so in the first instance.

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16. The Fourth Cause of Action [Subrogation – breach of insurance contract] also fails as a matter of law because Nevada courts have expressly rejected contractual subrogation claims between insurers. In the insurance context, contractual subrogation generally is not applied by an excess insurer against a primary insurer, but between an insurer and a third-party tortfeasor. *See Colony Ins. Co. v. Colorado Cas. Ins. Co*., No. 2:12-cv-01727-RFB-NJK, 2016 WL 3360943 at *6 (D. Nev. June 9, 2016). As noted by the *Colony* court, the Nevada Supreme Court has held that contractual subrogation in the context of insurers and insureds may contravene public policy and contractual subrogation may provide for windfalls in the insurance context. *Id*. (citing *Maxwell v. Allstate Ins. Cos*., 102 Nev. 502, 506, 728 P.2d 812, 815 (1986)). As such, St. Paul cannot pursue claims against National Union based on a contractual subrogation theory of recovery.[4]

17. The Second Cause of Action also fails as a matter of law for the separate and independent reason that Cosmopolitan has suffered no contractual damages.

18. General principles of subrogation allow an insurer to step into the shoes of its insured, but the insurer has no greater rights than the insured and is subject to all of the same defenses that can be asserted against the insured. *State Farm General Ins. Co. v. Wells Fargo Bank, N.A*., 49 Cal. Rptr. 3d 785, 790-91 (Cal. Ct. App. 2006).

19. A breach of contract claim requires (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach. *See Contreras v. American Family Mut. Ins. Co*., 135 F. Supp. 3d 1208, 1224 (D. Nev. 2015) (citing *Richardson v. Jones*, 1 Nev. 405, 409 (1865)).

20. A claim for breach of contract is not actionable without damage. *Nalder ex rel. Nalder v. United Auto. Ins. Co*., No. 70504, 2019 WL 5260073, 449 P.3d 1268 (Nev. 2019) (unpublished) ("It is beyond cavil that a party must suffer actual loss before it is entitled to damages." (quoting *Riofrio Anda v. Ralston Purina*

[3] Similarly, St. Paul asserts the same claim against Aspen but is likewise not a party to the Aspen insurance contract.

[4] For the same reasons, it cannot pursue such claims against Aspen either.

Co., 959 F.2d 1149, 1153 (1st Cir. 1992)); *California Capital Ins. Co. v. Scottsdale Indem. Ins. Co*., 2018 WL 2276815, at *4 (Cal.Ct.App. May 18, 2018) (unpublished); *Bramalea California, Inc. v. Reliable Interiors, Inc*., 14 Cal. Rptr. 3d 302, 306 (Cal. Ct. App. 2004). In the insurance context, damages for breach of an insurance policy are based on the failure to provide benefits owed under the policy. *Morris v. Paul Revere Life Ins. Co*., 135 Cal. Rptr. 2d 718, 726 (Cal. Ct. App. 2003); *Avila v. Century Nat'l Ins. Co*., No. 2:09-cv-00682-RCJ-GWF, 2010 WL 11579031 (D. Nev. Feb. 10, 2010). If the insured does not suffer "actual loss" from the insurer's breach of a duty under the policy, there can be no claim for damages. *Nalder ex rel. Nalder v. United Auto. Ins. Co*., No. 70504, 2019 WL 5260073, 449 P.3d 1268 (Nev. 2019) (unpublished).

21. Here, St. Paul alleges that National Union breached its obligations to Cosmopolitan under the National Union Excess Policy and seeks extra-contractual damages for such breach. However, it is undisputed that Cosmopolitan's defense and indemnity in the Underlying Action were fully paid for by insurers. The damages sought by St. Paul are not contract damages suffered by Cosmopolitan due to any failure to provide policy benefits, but are instead an attempt to recoup extra-contractual damages to reimburse St. Paul for the money it was required to pay under its policy in discharge of its separate obligation to Cosmopolitan.

22. It is undisputed that Cosmopolitan was indemnified by National Union when it exhausted its policy limit by participating in the settlement of the Underlying Action. Cosmopolitan's defense in the Underlying Action was funded entirely by insurers. Accordingly, Cosmopolitan suffered no contract damages as a matter of law and, as such, has no viable claim for breach of contract against National Union. As Cosmopolitan has no viable claim for breach of contract against National Union, neither does St. Paul under subrogation principles as it holds no greater rights than Cosmopolitan.[5]

23. The facts of this case are similar to *California Capital*, in which an insurer sued another insurer to recover amounts it paid in settlement (and defense) of its named insureds in an underlying bodily injury action. Like St. Paul, California Capital asserted causes of action against a co-carrier for breach of contract and breach of the covenant of good faith and fair dealing, among others, alleging its named insureds were additional insureds under the defendant insurer's policy and that its named insureds had expressly assigned all of their rights under the defendant insurer's policy to California Capital. 2018 WL 2276815, at *2-4. California Capital alleged the defendant insurer breached its policy by refusing to provide the additional insureds the benefits due under the policy and also alleged defendant insurer breached its obligations of good faith by failing to defend and indemnify the insureds when it knew they were entitled to overage under the policy, withholding payments under the policy when defendant insurer knew plaintiff's claim was valid, failing to properly investigate the insureds' request for policy benefits, and failing to provide a reasonable explanation of the factual basis for denial of the insureds' claim for benefits under the policy. *Id*. at *4. The trial court held that California Capital had no cause of action for breach of contract or breach of the covenant of good faith and

[5] Again, the same is true with respect to Aspen.

fair dealing because the insureds had sustained no damage as a result of defendant insurer's alleged failure to defend and indemnify them or its failure to settle the claim within its policy limit. Id. Given the insureds' defense and post-judgment settlement had been fully paid by California Capital, the trial court found the essential element of contract damages was absent from the breach of contract cause of action such that the insureds had no viable claims to assign to California Capital. *Id*. The trial court further found that California Capital had no direct cause of action against the defendant insurer because it was not a party to defendant insurer's policy. *Id*. at *6. The trial court in California Capital found that both insurers provided primary coverage for the loss. *Id*. at *8. The Court of Appeal affirmed the foregoing findings by the trial court and held that California Capital could not pursue assigned claims for breach of contract or breach of the covenant of good faith and fair dealing against the defendant insurer. *Id*. at *1, *30.

24. Like the plaintiff insurer in California Capital, St. Paul is not a party to the National Union Excess Policy and has no direct cause of action against National Union for breach of contract or breach of the covenant of good faith and fair dealing. Both St. Paul and National Union had independent obligations to Cosmopolitan, and both insurers discharged those obligations by settlement of the Underlying Action. As such, neither insurer is in an equitably superior position as to the other. Further, given the cost of Cosmopolitan's defense and the post-verdict settlement was fully funded by insurers in the Underlying Action, Cosmopolitan has no contract damages for policy benefits against National Union. Therefore, Cosmopolitan has no viable breach-of-contract claim for St. Paul to step into its shoes to pursue against National Union. Accordingly, St. Paul's Fourth Cause of Action For Subrogation – Breach of The AIG Insurance Contract fails as a matter of law.

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30. In the FAC, St. Paul asserts the Seventh Cause of Action for Equitable Estoppel ("Seventh Cause of Action"), seeking to preclude National Union [and Aspen] from asserting that: (1) National Union's policies were not primarily responsible for the defense and resolution of the Underlying Action; and (2) St. Paul, a non-defending carrier, had the same obligation to resolve the Underlying Action as Aspen and National Union. (FAC ¶ 135.)

31. Typically, equitable estoppel is raised as an affirmative defense. However, under Nevada Law, equitable estoppel can be treated as an affirmative claim under the appropriate circumstances.

32. To establish equitable estoppel, the plaintiff must prove the following: (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) he must have relied to his detriment on the conduct of the party to be estopped. *See Cheqer, Inc. v. Painters & Decorators Joint Comm., Inc*., 98 Nev. 609, 614, 655 P.2d 996, 999 (1982); *In re Harrison Living Trust*, 121 Nev. 217, 223, 112 P.3d 1058, 1061-1062 (2005).

33. Because the Second, Fourth, and Eighth Causes of Action fail as a matter of law, including for reasons that are unaffected by National Union's assertions that St. Paul seeks to estop, this Seventh Cause of Action must also fail.

Exhibit D.

III. ARGUMENT

A. Summary Judgment Standard.

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). While the pleadings and other proof must be construed in a light most favorable to the non-moving party, that party bears the burden "to do more than simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986); *Wood v. Safeway, Inc*., 121 Nev. 724, 729, 121 P.3d 1026, 1030 (2005).

The non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Bulbman Inc. v. Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992); *Wood*, 121 Nev. at 732, 121 P.3d at 1031-32. The non-moving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Bulbman*, 108 Nev. at 110, 825 P.2d 591 (quoting *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)).

B. Aspen Is Entitled to Summary Judgment on St. Paul's Subrogation Claims.

St. Paul's Amended Complaint was drafted vaguely so as to be undiscernible which form of subrogation it was actually asserting, equitable or conventional. The omission of the word "equitable" from its Amended Complaint, which formerly appeared in the initial Complaint, naturally suggests the Amended Complaint at best seeks to state a claim for contractual subrogation only. Plaintiff's prior Motion for Partial Summary Judgment, however, argued that it is entitled to both contractual and equitable subrogation. The Court may make a determination of the viability of St. Paul's claims as a matter of law, and in fact did so on National Union's Motion.

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1. St. Paul Is Not Entitled To Contractual Subrogation.

St. Paul has not alleged that it had any right to subrogation against Aspen based on any contract *with Aspen*. St. Paul is a stranger to the Aspen contract. In determining whether a party can maintain an action for breach of the implied covenant of good faith and fair dealing, the prerequisite for maintaining any such action is the existence of a contractual relationship between the parties.

This is because the covenant of good faith and fair dealing is an implied term in the contract. *Fireman's Fund Ins. Co. v. Maryland Casualty Co*., 21 Cal. App. 4th 1586, 1599 (1994). Nevada also recognizes the implied covenant of good faith and fair dealing where a contract exists. *A.C. Shaw Construction, Inc. v. Washoe County*, 105 Nev. 913, 914 (1989). Without a contractual underpinning, there is no independent claim for breach of the implied covenant. *Fireman's Fund Ins. Co*, 21 Cal. App. 4th at 1599 (citing *Love v. Fire Ins. Exchange* , (1990) 221 Cal.App.3d 1136, 1153, 271 Cal.Rptr. 246 (1990) (implied covenant is auxiliary and supplementary to express contractual obligations; it has no existence separate from the contractual obligations). Further, the California Supreme Court has held that nonparties to the insurance contract are not subject to a suit for breach of the implied covenant. *Id*. (*citing Gruenberg v. Aetna Ins. Co*., Cal.3d 566, 576, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973)).

In *Fireman's Fund Ins. Co. v. Maryland Casualty Co*., the court held that where two contracts existed, one between the insured and the insurance company for primary coverage, and the other between the insured and another insurance company for excess coverage, that no direct contractual relationship existed. 21 Cal. App. 4th at 1599. The Court then analyzed whether the excess insurer could be considered a third party beneficiary to the primary insurance company's policy such that that the excess carrier could maintain its action for breach of an implied covenant. *Id*. The Court ruled that under California law, that the contract must be expressly made for the benefit of the third person and that it is not enough that an excess insurer incidentally benefits from the primary insurance company's contract with the insured. *Id*. at 1600.

Nevada follows the same approach, and looks to the terms of the contract as a whole in determining whether an entity or individual is an intended beneficiary and in doing so has applied

California law. *Canfora v. Coast Hotels and Casinos, Inc*., 121 Nev. 771, 779, 121 P.3d 599, 604-605 (2005) (*citing Jones v. Aetna Casualty & Surety Co*., 26 Cal. App. 4th 1717, 33 Cal Rptr 2d 291 (requiring that the an individual be more than merely an incidental beneficiary to a contract to have standing to enforce a covenant in an insurance policy intended to benefit the lessor). *California courts* recognizing that an excess insurer has a right to sue a primary insurer have concluded that such right arises by *equitable* subrogation (discussed below) and not by reason of an independent duty arising under breach of contract such as breach of the duty of good faith and fair dealing. *Fireman's Fund Ins. Co. v. Maryland Casualty Co*., 21 Cal. App. 4th at 1600.

Here, in Plaintiff's First Cause of Action for Subrogation- Breach of the Duty to Settle, St. Paul alleges that Aspen breached its duty by refusing to settle the Underlying Action after receiving a pre-trial settlement demand that was within applicable policy limits. Specifically, St. Paul alleges that Aspen breached the duty to settle by refusing to settle the Underlying Action despite receiving a reasonable $1,500,000.00 pre-trial Offer of Judgement by Moradi, which St. Paul alleges was within Aspen's policy limits. Amended Comp., ¶ 76.

In the second cause of action against Aspen, Subrogation- Breach of The Aspen Insurance Contract, St. Paul alleges that Aspen breached its obligations under the Aspen Policy by failing to provide a conflict-free defense and failing to pay any amount on Cosmopolitan's behalf toward the settlement, and by failing to pay all limits under the Aspen policy to resolve Cosmopolitan's liability when it had the opportunity. Amended Comp., pp. 17-18.

However, both causes of action require the existence of a contract between Aspen and St. Paul, which lacks as a matter of law. Here, like in *Fireman's Fund Ins. Co. v. Maryland Casualty Co*., separate contracts exist -- the Aspen policy, the National Union policy, and the St. Paul policy which is an umbrella policy that insures the Cosmopolitan. No direct contractual relationship exists between Aspen and St. Paul such that St. Paul can maintain its subrogation claims.

Further, St. Paul is not an express beneficiary under the Aspen contract either such that it can maintain an action stemming from breach of contract and breach of an implied duty of good faith and fair dealing. Under Nevada law, the insurance policy must have been expressly made for

the benefit of St. Paul, and it is not enough that St. Paul *incidentally* benefits from the Cosmopolitan's insurance policy with Aspen.

Contractual subrogation in the insurance context has also been rejected and held to be against public policy in Nevada. *Maxwell v. Allstate Ins. Companies*, 102 Nev. 502, 505, 728 P.2d 812, 814-815 (Nev. 1986). Even the unpublished Nevada federal *Colony* recognizes that contractual subrogation, between primary and excess insurers, would provide improper windfalls in the insurance context—just as it would here for St. Paul—and that it is not generally applied by an excess insurer against a primary insurer. *Colony Ins. Co. v. Colo. Casualty Ins. Co.*, 2016 WL 3360943, *6 (D. Nev. June 9, 2016). Contractual subrogation amongst insurers has also been rejected by other courts too. *See, e.g., Fireman's Fund Ins. Co. v. Maryland Casualty Co*., 21 Cal.App.4th 1586, 1599 (1994) (no direct contractual relationship between primary and excess insurers and insurer is not intended third party beneficiary).

Contractual subrogation in this context is thus not a viable cause of action. St. Paul cannot dispute there is no contractual privity here. And, in the *California Capital* case, the facts were similar as here, where the Court found, and correctly so, that the insured had no assignable cause of action because, among other things, the insured had not suffered any damages since, regardless of a judgment in excess of insurance limits, the **post judgment settlement** and defense expenses were fully paid by insurers—just as here. *California Capital Ins. Co. v. Scottsdale Indem. Ins. C*o., 2018 WL 2276815, *4 (Cal. Ct. App. May 18, 2018 (unpublished).

This Court has also already determined in this case that contractual subrogation is not viable here. Accordingly, Aspen is entitled summary judgment on the subrogation claims to the extent they are contractually based.

2. St. Paul Is Not Entitled To Equitable Subrogation Either.

To the extent the court entertains St. Paul's claims as equitable claims for subrogation, they still fail however, because once again, Nevada state court has not recognized such a cause of action, as even the unpublished federal *Colony* decision recognized: "[T]he question of equitable subrogation's application in the current context—between insurance carriers and excess carriers—has not yet been addressed by the Nevada Supreme Court." *Colony*, 2016 WL 33609413 at *4. .

Nevada state court has not recognized that an excess insurer can pursue a claim against another insurer for equitable subrogation. This Court should not create new law here.

Equitable subrogation is an equitable remedy that has not been extended to the context here by the Nevada Supreme Court. The circumstances present do not implicate equity "to accomplish what is just and fair to the parties," because, among other things, St. Paul's $25 million excess coverage was not the obligation here of Aspen, the primary insurer with $1 million of coverage; shifting that obligation to Aspen here is not equitable, but rather a windfall for St. Paul, who is in a different tower of coverage among other things.

Essentially, St. Paul is arguing that it is just for this Court to recognize equitable subrogation in Nevada for the first time, across towers of coverage, but has not alleged any corresponding injustice for this court to do so. This is even more particularly true because the Court has construed the Aspen policy as a $1 million limit. The subrogation claims are based on the alleged failure to settle within policy limits and alleged failure to pay all amounts owed under the Aspen policy, neither of which is present here. Equity does not require the Court to recognize a new cause of action in Nevada for the first, and Plaintiff is not in a superior equitable, position. The circumstances and equities in this case simply do not call for this Court to recognize a new claim for relief in Nevada which has not previously been recognized in this context.

St. Paul in its Motion for Partial Summary Judgment cited the *Colony* case, an outlier, unpublished federal case which has never been cited by any other courts, in an effort to have this Court recognize equitable subrogation in Nevada state court for the first time. *Colony* cited California law and discussed the *essential* elements of such a claim, where it is recognized in that state (but not here). Specifically, in *Colony*, the United States District Court relied upon the California case of *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1292, 77 Cal. Rptr. 2d 296, 303 (1998) to identify eight essential elements of an excess insurer's cause of action for equitable subrogation against a primary insurer. The eight elements identified were:

(1) the insured (Cosmopolitan) suffered a loss for which the defendant insurer (Aspen) is liable, either as the wrongdoer whose act or omission caused the loss or because the defendant is legally responsible to the insured for the loss caused by the wrongdoer;

(2) the claimed loss was one for which the insurer (Excess) was not primarily liable;

(3) the insurer (Excess) has compensated the insured in whole or in part for the same loss for which the defendant is primarily liable;

(4) the insurer (Excess) has paid the claim of its insured (Cosmopolitan) to protect its own interest and not as a volunteer;

(5) the insured (Cosmopolitan) has an existing, assignable cause of action against the defendant (Aspen) that the insured (Cosmopolitan) could have asserted for its own benefit had it not been compensated for its loss by the insurer (Excess);

(6) the insurer (Excess) has suffered damages caused by the act or omission upon which the liability of the defendant (Aspen) depends;

(7) justice requires that the loss be entirely shifted from the insurer (Excess) to the defendant (Aspen), whose equitable position is inferior to that of the insurer (Excess); and

(8) the insurer's (Excess) damages are in a liquidated sum, generally the amount paid to the insured (Cosmopolitan).

See Colony at *5.

Even were this court to decide to newly recognize a cause of action in Nevada for equitable subrogation amongst insurers and across different towers of coverage, it would have to find that all the elements of the claim are present *and* that equity favors the claim. However, several elements are lacking as a matter of law. *See Fireman's Fund Ins. Co. v. Maryland Cas. Co*., 65 Cal. App. 4th 1279, 1292 (Cal. Ct. App. 1998) (listing the essential elements for an insurer's equitable subrogation cause of action).

Two of the essential elements include (1) that the insured (Cosmopolitan) have suffered a "loss," as that is construed by states who recognize equitable subrogation amongst insurers, and (5) the insured (Cosmopolitan) had an existing, assignable cause of action, again, as construed by states who recognize equitable subrogation amongst insurers. Both such essential elements are lacking as matter of law, under the law of California, should this Court seek to adopt that law to create a new cause of action in Nevada. *See Fireman's Fund Ins. Co*., 65 Cal. App. 4th at 1292. However, there

is no "loss" to Cosmopolitan here as the courts that allow equitable subrogation construe "loss," and this Court ruled on summary judgment for National Union that there are no such damages because the insurers fully defended and paid the settlement.

In *California Capital Ins. Co. v. Scottsdale Indemnity Ins*., 2018 WL 2276815 (Cal.Ct.App. 2018), California Capital Insurance Company ("California Capital") defended its insureds in a personal injury action filed against them. *Id*. at *1. It rejected the personal injury plaintiff's settlement demands. *Id*. The judgment entered against the insureds far exceeded policy limits. *Id*. California Capital then entered into a post-judgment settlement with the claimant and made the agreed payment to satisfy the judgment against the insureds. *Id*. This is precisely what is alleged to have happened in Moradi as well.

California Capital then sued Scottsdale Indemnity Company ("Scottsdale"), alleging Scottsdale's insurance policy, issued to another defendant in the underlying personal injury action, also covered California Capital's insureds as additional insureds (just like St. Paul contends here). *Id*. California Capital's complaint included causes of action for breach of contract and breach of the covenant of good faith and fair dealing. *Id*. at *4. California Capital sought to recover all or a portion of the amounts it paid to defend and indemnify its insureds in the underlying action. *Id*. at *1.

"The trial court found California Capital could not pursue the causes of action for breach of contract and breach of the covenant of good faith and fair dealing that had been assigned to it by the insureds, because the insureds sustained no damage as a result of those alleged breaches." *Id*. California Capital appealed challenging the rejection of the assigned contractual claims. *Id*. The appellate court "conclude[d] the trial court correctly determined California Capital could not pursue the assigned causes of action because the insureds suffered no actionable damages." *Id*. This Court has similarly found the same with respect to St. Paul's insured here too.

The California appellate court held "[t]he insured's damage claim against the insurer is assignable, although some damages potentially recoverable in a bad faith action, including damages for emotional distress and punitive damages, are not assignable." *Id*. at *4. "The assignment merely transfers the interest of the assignor." *Id*. "The assignee 'stands in the shoes' of the assignor, taking

his rights and remedies, subject to any defenses which the obligor has against the assignor prior to notice of the assignment.'" *Id.* The Court then held:

> The trial court concluded California Capital had no cause of action for breach of contract or breach of the covenant of good faith and fair dealing, because the insureds from whom it obtained its assignment of rights sustained no damage as a result of Scottsdale's failure to defend and indemnify them, or to settle the claim within Scottsdale's policy limits. The [] **defendants' defense costs and the post-judgment settlement were fully paid by California Capital. Therefore, an essential element of California Capital's causes of action was missing**. Case law supports the trial court's conclusion.

Id. The Court then went through California caselaw supporting upholding of the ruling on appeal. *Id*. at *5-6. The Court then held:

> Here, California Capital had no direct cause of action for breach of contract or breach of the covenant of good faith and fair dealing against Scottsdale. California Capital was not a party to the Scottsdale insurance policy issued to Joe's Trucking. California Capital pursued its causes of action for breach of contract and breach of the covenant of good faith and fair dealing as assignee of the Wend defendants' claims against Scottsdale under the Scottsdale policy issued to Joe's Trucking. It was undisputed that California Capital paid all of the costs of the Wend defendants' defense and satisfied the judgment against them through a postjudgment settlement. Consequently, because their causes of action for breach of contract and breach of the covenant of good faith and fair dealing lacked the essential element of damages, the Wend defendants had no viable claim under those theories to assign to California Capital.

Id. at *6. Similar here, the insured, Cosmopolitan, suffered no loss and had no assignable cause of action to assign to St. Paul. Because Cosmopolitan did not have a loss or assignable cause of action, as those are *essential* elements required in a *California* equitable subrogation claim, essential elements of a claim for equitable subrogation, if the Court were to recognize it here, are lacking as a matter of law anyways. Aspen is therefore entitled to summary judgment on the claim as a matter of law even were the Court to newly recognize the claim in Nevada.

Similarly, in *National Union v. Tokio Marine*, the California court of appeals upheld dismissal of an equitable subrogation claim because the insured suffered no loss. 233 Cal. App.4th 1348, 1362 (Cal.Ct.App. 2015). National Union pled a cause of action against Tokio Marine for

equitable subrogation of Costco's bad faith claim, based on its status as an additional insured under the Insurance Policy. *National Union*, 233 Cal.App. 4th at 1360.

National Union alleged that Tokio Marine breached the duty of good faith and fair dealing it owed to Costco by, among other things, refusing Costco's tenders of defense and indemnity, failing to conduct its own investigation of the claimant's claims against Costco, and failing and refusing to give Costco's interests as much consideration as the other insureds and/or their own. *Id*. at 1360-1361. National Union sought to recover $187,000 in settlement monies Costco paid towards the settlement, approximately $4.3 million that National Union paid to settle the case, and National Union's fees. *Id*. at 1361

The trial court dismissed the equitable subrogation claim agreeing that "National Union did not present any 'allegation that Costco suffered identifiable damages due to the bad faith conduct upon which [National Union] has paid money and for which equitable subrogation is now sought.'" *Id*. National Union challenged the ruling on appeal. *Id*. The Court, on appeal when reviewing a dismissal, treated it as admitting all facts true, considered all matters judicially noticed, determined whether the facts constitute a claim for relief, and whether a defect could be cured by amendment. *Id*. The Court still upheld dismissal of the equitable subrogation claim because there was no loss to Costco, the insured, under the law construing equitable subrogation:

> the settlement payment made by National Union was not a loss suffered by Costco, and Costco's payments toward the settlement were not reimbursed by National Union. Thus, neither of the payments claimed in this cause of action meet the specific requirements for pleading a bad faith subrogation claim.

Id. at 1362.

In addition to the other elements, for an equitable subrogation claim to be recognized, "justice [must] require[] that the loss be entirely shifted from the insurer to the defendant, whose equitable position is deemed inferior to that of the insurer." *Fireman's Fund*, 65 Cal. App. 4th at 1292. Here, Plaintiff was not in a superior position of equity and justice does not require the shifting of St. Paul's $25 million excess obligation to a $1 million primary insurer like Aspen.

Nevada does not recognize contractual or equitable subrogation. This Court declined to recognize it for the first time in Nevada when ruling on National Union's Motion for Summary Judgment, and should do so here as well.

Even were the Court to consider recognizing subrogation here, St. Paul's claims would still fail. St. Paul's subrogation claim for failure to settle within policy limits (i.e., failure to accept a $1.5 million offer of judgment) fails as a matter of law now in light of the Court's determination that Aspen only had a $1 million policy limit. And St. Paul's subrogation for breach of contract likewise fails because St. Paul is not a party the Aspen insurance contract, Cosmopolitan has not suffered cognizable damages because the insurers fully paid for the defense and settlement, Cosmopolitan thus had no assignable cause of action to St Paul, and exhausted its policy limits.

C. Aspen Is Entitled to Summary Judgment on St. Paul's Equitable Estoppel Claim Because It Is Not Directed at Aspen, and National Union, To Whom It Is Directed, Obtained Summary Judgment On The Claim As Well.

Equitable estoppel, as has been stated, is "essentially a defense to a defense." *Mahlan v. MGM Grand Hotels, Inc.*, 100 Nev. 593, 597, 691 P.2d 421 (1984). It is derivative of another claim, raised to bar a litigant from asserting an issue relevant to the other cause of action, not a standalone claim in and of itself. In *Mahlan*, the court discussed its application in the context of a separate claim for "damages for breach of a lease agreement" where the doctrine was "raised as a bar to respondent's assertion of its right to terminate under the destruction-of premises clause in the lease agreement." *Id*. Consequently, if the other claims on which equitable estoppel is based are dismissed or judgment obtained, there is no basis for the estoppel claim to remain.

St. Paul's estoppel claim does not involve Aspen, but rather involves National Union's position in its initial motions to dismiss arguing that St. Paul is not a higher level excess carrier, and whether this is determinative of damages in other claims asserted against *National Union* by St. Paul. In fact, the Amended Complaint states this is the precise basis for the claim: "In its motion to dismiss St. Paul's original complaint AIG asserted for the first time it is a 'co-excess' carrier with St. Paul …" *See* Amended Complaint, ¶137.

Here, St. Paul asserts the claim with respect to a defense raised by National Union to prevent National Union from asserting it is co-excess concerning the claim for damages by St. Paul against National Union for subrogation. In other words, there is no basis for the claim as against Aspen, particularly since Aspen is entitled to summary judgment on the subrogation claims. The issue, claims, and estoppel were between St. Paul and National Union, who disputed whether they were co-excess insurers. Estoppel was Plaintiff's defense to National Union's defense that St. Paul is not excess to National Union. Aspen should therefore receive judgment in its favor.

In addition, the Court has granted summary judgment on the Estoppel claim to National Union, who is no longer a party to this case. The Estoppel claim therefore no longer has any place here, and the Court has ruled National Union is an excess insurer just in a different tower of coverage. Therefore, Aspen is entitled to summary judgment on the Estoppel claim on these bases as well.

IV. CONCLUSION

For the foregoing reasons and arguments, Aspen is entitled to summary judgment on St. Paul's claims including on, but not limited to, the following grounds:

1. Nevada has not recognized the subrogation claims in the context here and this Court should decline to do so as well;
2. St. Paul's subrogation claims fail because St. Paul is not a party to the Aspen contract;
3. St. Paul's subrogation claims fail because its insured has not suffered damages since the insurers fully paid for the defense and settlement;
4. St. Paul's subrogation claims fail because Aspen did not fail to accept a settlement offer within its $1 million policy limit;
5. St. Paul's subrogation claims fail because Aspen exhausted policy limits;
6. Equity does not require recognizing St. Paul's claims here for the first time in Nevada;

///

///

///

7. St. Paul's Estoppel claim fails because it is not directed against Aspen, National Union obtained summary judgment on the Estoppel claim and is no longer a party, and the Court has determined National Union is an excess insurer just in a different tower of coverage than St. Paul.

DATED this 11th day of June, 2020

MESSNER REEVES LLP

/s/ Ryan A. Loosvelt

MICHAEL M. EDWARDS
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PROOF OF SERVICE

St. Paul Fire & Marine Insurance Company v. Aspen Specialty Insurance Company
Case No.: A-17-758902-C

The undersigned does hereby declare that I am over the age of eighteen (18) years and not a party to the within entitled action. I am employed by Messner Reeves LLP, 8945 W. Russell Road, Suite 300, Las Vegas, Nevada 89148. I am readily familiar with Messner Reeves LLP's practice for collection and processing of documents for delivery by way of the service indicated below.

On this 11th day of June, 2020, I served the following document(s):

DEFENDANT ASPEN SPECIALITY INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT

on the interested party(ies) in this action as follows:

Michael K. Wall
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10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
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mwall@hutchlegal.com
Attorneys for Plaintiff, St. Paul Fire & Marine Insurance Company

By Electronic Service. Pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR, I caused said documents(s) to be transmitted to the person(s) identified in the E-Service List for this captioned case in Odyssey E-File & Serve of the Eighth Judicial District Court, County of Clark, States of Nevada. A service transmission report reported service as complete and a copy of the service transmission report will be maintained with the document(s) in this office.

I declare under penalty of perjury under the laws of the States of Nevada that the foregoing is true and correct.

/s/ Desja Wilder
An employee of Messner Reeves LLP

APEN
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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiff, vs. ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA; ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB; and DOES 1-25; inclusive, Defendants.	CASE NO.: A-17-758902-C DEPT. NO.: XXVI **APPENDIX TO EXHIBITS TO DEFENDANT ASPEN SPECIALITY INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendant Aspen Specialty Insurance Company ("Defendant"), by and through its counsel, Michael M. Edwards, Esq., and Ryan L. Loosvelt, Esq., of MESSNER REEVES LLP, hereby submits Appendix to Exhibits to Defendant Aspen Specialty Insurance Company's Renewed Motion for Summary Judgment as follows:

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APPENDIX TO EXHIBITS TO DEFENDANT ASPEN SPECIALITY INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT

Exhibit	Description	Amount of Pages
A	05/27/2020 Notice of Entry and Order Denying Plaintiff's Motion for Partial Summary Judgment And Order Granting In Part Aspen's Countermotion for Summary Judgment	1-11
B	10/15/2019 Hearing Transcript on National Union's Motion for Summary Judgment	1-55
C	10/08/2019 Hearing Transcript on Plaintiff's Motion for Partial Summary Judgment and Aspen's Countermotion for Summary Judgment.	1-24
D	05/27/2020 Notice of Entry and Order Granting National Union's Motion for Summary Judgment.	1-21
E	04/27/2020 Notice of Entry of Order on Plaintiff and Aspen's Stipulation and Order to Stay Discovery and Stay or Vacate Trial	1-9
F	Declaration of Marvin Robalino (this was attached as Exhibit A to Aspen's Opposition to Plaintiff's Motion for Partial Summary Judgment and Countermotion for Summary Judgment)	1
F1	Aspen insurance policy (this was also attached as Exhibit A1 to Aspen's Opposition to Plaintiff's Motion for Partial Summary Judgment and Countermotion for Summary Judgment)	1-118
G	Certified copy of the St. Paul insurance policy (this was attached as Exhibit B to Aspen's Opposition to Plaintiff's Motion for Partial Summary Judgment and Countermotion for Summary Judgment)	1-62
H	Declaration of Ryan A. Loosvelt in Support of Defendant Aspen Specialty Insurance Company's Renewed Motion for Summary Judgment	1-3

DATED this 11th day of June, 2020.

MESSNER REEVES LLP

/s/ Ryan A. Loosvelt

Ryan A. Loosvelt, Esq.
Nevada Bar No. 8550
8945 West Russell Road, Suite 300
Las Vegas, Nevada 89148
Attorneys for Defendant Aspen Specialty Ins. Co.

PROOF OF SERVICE

St. Paul Fire & Marine Insurance Company v. Aspen Specialty Insurance Company
Case No.: A-17-758902-C

The undersigned does hereby declare that I am over the age of eighteen (18) years and not a party to the within entitled action. I am employed by Messner Reeves LLP, 8945 W. Russell Road, Suite 300, Las Vegas, Nevada 89148. I am readily familiar with Messner Reeves LLP's practice for collection and processing of documents for delivery by way of the service indicated below.

On June 11, 2020, I served the following document(s):

APPENDIX TO EXHIBITS TO DEFENDANT ASPEN SPECIALITY INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT

on the interested party(ies) in this action as follows:

Michael K. Wall
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10080 West Alta Drive, Suite 200
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T: (702) 385-2500
mwall@hutchlegal.com
Attorneys for Plaintiff St. Paul Fire & Marine Insurance Company

By Mail. By placing said document(s) in an envelope or package for collection and mailing, addressed to the person(s) at the address(es) listed above, following our ordinary business practices. I am readily familiar with the firm's practice for collection and processing of mail. Under that practice, on the same day that mail is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope or package with the postage fully prepaid.

X By Electronic Service. Pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR, I caused said documents(s) to be transmitted to the person(s) identified in the E-Service List for this captioned case in Odyssey E-File & Serve of the Eighth Judicial District Court, County of Clark, State of Nevada. A service transmission report reported service as complete and a copy of the service transmission report will be maintained with the document(s) in this office.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

/s/ Desja Wilder
An employee of Messner Reeves LLP

EXHIBIT A

{03614133 / 1}

NEOJ
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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiff, v. ASPEN SPECIALITY INSRUANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA.; ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB; and DOES 1 through 25, inclusive, Defendants.	Case No: A-17-758902-C Dept. No: XXVI **NOTICE OF ENTRY OF ORDER DENYING ST. PAUL FIRE & MARINE INSURANCE COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND ORDER GRANTING IN PART DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY'S COUNTER-MOTION FOR SUMMARY JUDGMENT**

Please take notice the on the 14th day of May, 2020, the Court entered an Order Denying St. Paul Fire & Marine Insurance Company's Motion for Partial Summary Judgment, and Order Granting in Part Defendant Aspen Specialty Insurance Company's Counter-Motion for Summary Judgment in the above-entitled action. A copy of said Order is attached hereto.

DATED this 27 day of May, 2020.

HUTCHISON & STEFFEN, PLLC

By _____
Michael K. Wall (2098)
10080 W. Alta Drive, Suite 200
Las Vegas, NV 89145
mwall@hutchlegal.com

Attorney for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 27th day of May, 2020, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF ORDER DENYING ST. PAUL FIRE & MARINE INSURANCE COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND ORDER GRANTING IN PART DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY'S COUNTER-MOTION FOR SUMMARY JUDGMENT** to be served as follows:

[ ] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

[ ] to be sent **via facsimile;** and/or

[X] to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or

[ ] to be hand-delivered;

to the attorney(s) listed below at the address and/or facsimile number indicated below:

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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiffs, vs. ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; ROOF DECK ENTERTAINMENT, LLC, d/b/a MARQUEE NIGHTCLUB; and DOES 1 through 25, inclusive, Defendants.	CASE NO.: A-17-758902-C DEPT.: XXVI ORDER DENYING ST. PAUL FIRE & MARINE INSURANCE COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND ORDER GRANTING IN PART DEFENDANT ASPEN SPECIALITY INSURANCE COMPANY'S COUNTER-MOTION FOR SUMMARY JUDGMENT

Plaintiff St. Paul Fire & Marine Insurance Company's ("Plaintiff" or "St. Paul") Motion for Partial Summary Judgment against Defendant Aspen Specialty Insurance Company ("Defendant" or "Aspen"), and Aspen's Countermotion for Summary Judgment, having come on for hearing on October 8, 2019 before the Honorable District Court Judge Gloria Sturman in Department XXVI of the Eighth Judicial District Court, Clark County, Nevada. Ryan A. Loosvelt, Esq. of Messner Reeves, LLP appeared on behalf of the Defendant, and Ramiro Morales, Esq. of Morales Fierro Reeves appeared on behalf of the Plaintiff. The Court, having reviewed the papers and exhibits submitted by the parties, rules as follows:

I.

FINDINGS OF FACT

This action relates to a post-judgment settlement by St. Paul, Defendant National Union Fire Insurance Company of Pittsburgh PA ("National Union"), Zurich Insurance, and Aspen following a jury trial in the personal injury case of *Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case No. A-14-698824-C ("*Moradi* Action"). St. Paul seeks to recover money it paid toward that settlement from the defendants in this action including Aspen.

In the *Moradi* Action, Plaintiff David Moradi ("Moradi") alleged that, on or about April 8, 2012, he was a patron at the Marquee Nightclub located within The Cosmopolitan Hotel and Casino when he was attacked and beaten by Marquee employees resulting in bodily injuries. Moradi filed a complaint against Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan") and Roof Deck Entertainment, LLC d/b/a/ Marquee Nightclub ("Marquee") on April 4, 2014 asserting causes of action for Assault and Battery, Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment.

Among other pre-trial settlement offers, Moradi issued a $1.5 million Offer of Judgment that lapsed.

The *Moradi* Action went to trial and resulted in a judgment against Marquee and Cosmopolitan, and there was a post-judgment settlement funded by St. Paul, National Union, Zurich, and Aspen. St. Paul contends Aspen has a $2 million policy limit for the *Moradi* Action because the Aspen Policy provides $1 million in applicable limits for damages because of bodily injury and $1 million in applicable limits for personal and advertising Injury, which St. Paul contends were both implicated by the *Moradi* Action, whereas Aspen contends its policy operates to limit coverage for the *Moradi* Action to a $1 million.

Aspen issued insurance policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012, to the Restaurant Group, et. al. ("Aspen Policy"). Defendant Roof Deck Entertainment, LLC (i.e, "Marquee) is a named insured in the Aspen Policy by endorsement.

The Aspen Policy contains a $1 million each occurrence limit for damages because of

bodily injury and property damage, a $1 million per person limit for damages because of personal and advertising injury, and a $2 million general aggregate limit. The Aspen Policy contains a "Commercial General Liability Coverage Form" and a "Liquor Liability Coverage Form." The "Commercial General Liability Coverage Form" contains Section I, Coverages, which contains "Coverage A Bodily Injury and Property Damage", "Coverage B Personal and Advertising Injury Liability", and "Coverage C Medical Payments."

The "Commercial General Liability Coverage Form" of the Aspen Policy, Section I, "Coverage A Bodily Injury and Property Damage Liability" provides:

> SECTION I – COVERAGES
>
> COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.

Section I, "Coverage A Bodily Injury and Property Damage Liability" in the "Commercial General Liability Coverage Form" of the Aspen Policy also contains the following exclusions:

> **2.Exclusions**
>
> This insurance does not apply to:
>
> **a. Expected Or Intended Injury**
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.
>
> ***
>
> **o. Personal And Advertising Injury**
>
> "Bodily injury" arising out of "personal and advertising injury".

Section I, "Coverage B Personal and Advertising Injury Liability" in the "Commercial

General Liability Coverage Form" of the Aspen Policy provides:

> **COVERAGE B PERSONAL AND ADVERTISING**
>
> **INJURY LIABILITY**
>
> **1. Insuring Agreement**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result.

Section I, "Coverage B Personal and Advertising Injury Liability" in the "Commercial General Liability Coverage Form" of the Aspen Policy also contains the following exclusions:

> **2. Exclusions**
>
> This insurance does not apply to:
>
> **a. Knowing Violation Of Rights Of Another**
>
> "Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".
>
> ***
>
> **d. Criminal Acts**
>
> "Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

Section V in the "Commercial General Liability Coverage Form" of the Aspen Policy includes the following definitions:

> **SECTION V – DEFINITIONS**
>
> ***
>
> 3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
>
> ***
>
> 13."Occurrence" means an accident, including continuous or

repeated exposure to substantially the same general harmful conditions.

14."Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

The Aspen Policy also contains the following Amendment by Endorsement (the "Other Insurance Endorsement"):

The Common Policy Conditions (IL 00 17 11 /98) are amended by the addition of the following:

G. Other Insurance with This Company

If this policy contains two or more Coverage Parts providing coverage for the same "occurrence," "accident," "cause of loss," "loss" or offense, the maximum limit of insurance under all Coverage Parts shall not exceed the highest limit of insurance under any one Coverage Part.

If this policy and any other policy issued to you by us apply to the same "occurrence," "accident," "cause of loss," "injury," "loss" or offence, the maximum limit of insurance under all of the policies shall not exceed the highest limit of insurance under any one policy. This condition does not apply to any policy issued by us which specifically provides that the policy is to apply as excess insurance over this policy.

///

///

II.

CONCLUSIONS OF LAW

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Nev. R. Civ. P. ("NRCP") 56(c). On a summary judgment motion it is the moving party's obligation to show that there is "no genuine issues of material fact." NRCP 56(c). The party moving for summary judgment bears the initial burden of production to show the absence of material fact. Cuzze v. Univ. & Cmty. College Sys., 123 Nev. 598, 602, 172 P.3d 131 (2007). If such a showing is made, the party opposing summary judgment assumes the burden of production to show the existence of material fact. Id. A party opposing summary judgment "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." Wood v. Safeway, Inc., 121 Nev. 732, 121 P.3d 1026 (2005).

An opposition to a motion which contains a motion related to the same subject matter will be considered as a counter-motion. EDCR 2.20(f). A counter-motion will be heard and decided at the same time set for the hearing of the original motion and no separate notice of motion is required. *Id.*

Plaintiff's motion for summary judgment and Aspen's Countermotion both seek a legal determination concerning the interpretation of the Aspen Policy's policy limits for the *Moradi* Action. Plaintiff contends that Aspen's policy limit for the *Moradi* Action was $2 million and Aspen's opposition and countermotion opposes such relief and countermoves for a determination that it's policy limit was $1 million for the *Moradi* Action. Aspen's Countermotion also seeks summary judgment on Plaintiff's claims arguing they are not viable and/or fail as a matter of law.

Regarding Aspen's Countermotion to the extent it seeks a ruling on the viability of Plaintiff's claims and/or whether they fail as a matter of law, the Court views these other issues as questions of fact.

This Court therefore focuses its ruling here on the interpretation of the Aspen Policy's policy limits as it applies to the *Moradi* Action. Interpretation of a contract is a question of law.

Farmers Ins. Exch. v. Neal, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003). An insurance policy is a contract that must be enforced according to its terms to accomplish the intent of the parties. *Farmers Ins. Exch.*, 119 Nev. at 64. The interpretation of an insurance policy presents a legal question. *Las Vegas Metropolitan Police Dept. v. Cregis Ins. Co.*, 127 Nev. 548, 553, 256 P.3d 958, 961 (2011).

In determining the meaning of an insurance policy, the language should be examined from the viewpoint of one not trained in law or in the insurance business; the terms should be understood in their plain, ordinary and popular sense. *National Union Fire Ins. Co. of State of Pa., Inc. v. Reno's Executive Air, Inc.*, 100 Nev. 360, 364, 682 P.2d 1380, 1382 (1984). Where the language of the policy is not ambiguous, it should be given its plain meaning and construed as written. *Farmers Ins. Exchange v. Young*, 108 Nev. 328, 332, 832 P.2d 376, 378 (1992). Courts interpret the policy language according to its plain and ordinary meaning and will not rewrite contract provisions that are otherwise unambiguous or increase an obligation to the insured that was intentionally and unambiguously limited by the parties. *Vitale v. Jefferson Ins. Co. of NY*, 116 Nev. 590, 595, 5 P.3d 1054, 1057-1058 (2000).

Where an ambiguity in the language of the policy exists, the contract will be given a construction which will fairly achieve its object of providing indemnity for the loss to which the insurance relates. *Reno's Executive Air, Inc.*, 100 Nev. at 365. If policy language is ambiguous, an interpretation in favor of coverage is reasonable only if it is consistent with the objectively reasonable expectations of the insured. *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1265, 833 P.2d 545 (1992).

A policy must be read as a whole in order to give a reasonable and harmonious meaning and effect to all its provisions. *Reno's Executive Air, Inc.*, 100 Nev. at 364. A court must look to the entire contract of insurance for a true understanding of what risks are assumed by the insurer and what risks are excluded. Id.

Nevada has adopted the "causal" approach to determining whether "a particular situation constitutes a single occurrence or multiple occurrences for the purposes of insurance liability." *Bish v. Guaranty Nat'l Ins. Co.*, 109 Nev. 133, 135, 848 P.2d 1057, 1058 (1993). The focus of the

inquiry is not on the number, magnitude or time of the injuries, but rather on the cause or causes of the injury; as long as the injuries stem from one proximate cause there is a single occurrence. *Bish,* 109 Nev. at 135; see also *Safeco Ins. Co. of America v. Fireman's Fund Ins. Co.*, 178 Cal.App.4th 620, 633-634, 55 Ca.Rptr.3d 844 (2007). Policy limits are determined by the cause of the damage. See *Century Sur. Co. v. Casino West, Inc.*, 99 F.Supp.3d 1262, 1264 (D. Nev. Mar. 27, 2015), citing *Bish,* 109 Nev. at 137; *Safeco Ins. Co. of America*, 178 Cal.App.4th at 634.

Plaintiff and Aspen do not dispute there has been one "occurrence" under CGL Coverage Part A of the Aspen Policy. This Court also finds that all of Moradi's injuries are attributable to one proximate, uninterrupted and continuing cause and concludes there has been one "occurrence" under CGL Coverage Part A of the Aspen Policy implicated by the *Moradi* Action.

To the extent Moradi also sought damages because of personal injury under Coverage Part B of the Aspen Policy, the Court finds that the Other Insurance Endorsement to the Aspen Policy operates in a manner of anti-stacking of the Coverage Part A and Coverage Part B limits. See e.g., *Farmers Ins. Group v. Stonik By and Through Stonik*, 110 Nev. 64, 867 P.2d 389 (1994). Considering the Aspen Policy as a whole, the Court therefore concludes that the plain language of the Aspen Policy operates to limit coverage for the *Moradi* action to $1 million.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Partial Summary Judgment is DENIED and Aspen's Countermotion for Summary Judgment is GRANTED IN PART in that the Court concludes the Aspen Policy's policy limit for the *Moradi* Action is a $1 million policy limit. Aspen's Countermotion on other issues presented is denied.

IT IS SO ORDERED this 14th day of May, 2020.

DISTRICT COURT JUDGE

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APPROVED AS TO FORM AND CONTENT:

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EXHIBIT B

{03614133 / 1}

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiff, vs. ASPEN SPECIALTY INSURANCE COMPANY, ET AL, Defendant.	CASE#: A-17-758902-C DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN
DISTRICT COURT JUDGE
TUESDAY, OCTOBER 15, 2019

RECORDER'S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES

For the Plaintiff:	WILLIAM C. REEVES, ESQ. MARC J. DEREWETZKY, ESQ.
For Defendant Roof Deck Entertainment LLC:	JENNIFER L. KELLER, ESQ.
For Defendant National Union Fire Insurance Company of Pittsburgh PA:	NICHOLAS B. SALERNO, ESQ.
For Aspen Specialty Insurance Company:	RYAN A. LOOSVELT, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

Las Vegas, Nevada, Tuesday, October 15, 2019

[Case called at 10:05 a.m.]

MR. REEVES: Your Honor, William Reeves for Plaintiff. I have a -- I used the Court's application for some illustrative exhibits.

THE COURT: Okay.

THE CLERK: Mr. Reeves, your Bar number, please?

MR. REEVES: 8235.

THE CLERK: Thank you.

MR. REEVES: So I have it here on my phone. I don't know whether I did it correctly or not.

THE CLERK: Did you send exhibits by email?

MR. REEVES: No. I used the court's app. My partner did it last week, so there's --

THE COURT: Oh you mean to use the audio visual?

MR. REEVES: Yes.

THE COURT: So we'll just need to turn that on, Kerry.

MR. SALERNO: Is this something that we've seen? Are these existing exhibits?

MR. REEVES: Yeah.

MR. DEREWETZKY: Good morning, Your Honor. Mark Derewetzky, also appearing on behalf of Plaintiff, St. Paul. Bar number is 6619.

MS. KELLER: Good morning, Your Honor. Jennifer Keller, appearing on behalf of National Union and Marquee, and I'm appearing

pro hac vice.

THE COURT: Thank you.

MR. SALERNO: Good morning, Your Honor. Nick Salerno for National Union and Marquee, as well.

THE COURT: Thank you.

Okay. So at this point in time then -- so in just a minute here we're going to get the system up and running.

MR. LOOSVELT: Your Honor, Ryan Loosvelt for Aspen. I'm just observing today.

THE COURT: Understood. Thank you, sir.

Is the system booted up here? I guess not.

MR. REEVES: I did press play, and I did the code, 1004.

THE CLERK: Did you already hit play?

MR. REEVES: I did. And it's not that important. I mean --

THE CLERK: Let's see.

MR. REEVES: -- a couple choice pages.

[Pause]

THE COURT: But you said you have paper you could just put on the Elmo?

MR. REEVES: Yeah. There's no need to wait.

THE COURT: All right. Okay. All right. So if that's going to work then just to use the Elmo to do anything on display instead of the electronic -- okay, great.

So then we will proceed then. We have two motions on. We have Defendant Roof Deck's motion for summary judgment, and

Defendant National Fire Union's motion for summary judgment. Both have been exhaustively briefed. We have an opposition and counter motion on the duty to indemnify. Okay.

So at this point in time, I don't know which one it makes more sense to start with. As I said, they've both been thoroughly briefed and reviewed. So I don't know who wants to start.

MR. REEVES: Well, it doesn't much matter to us. I do think there's a clean separation between the AIG National Union piece, and then the Cosmo Marquee piece. And so I would defer to the Court in terms of how --

THE COURT: Yeah.

MR. REEVES: -- it wants to do that.

THE COURT: So I want to start with the Roof Deck.

MS. KELLER: Well, we -- yeah, sure. We could -- we're going to split the argument, Your Honor, if we can.

THE COURT: Oh okay.

MS. KELLER: So I'll do St. Paul, and my colleague will do Roof Deck.

THE COURT: Okay. Go ahead.

MR. SALERNO: Good morning, Your Honor. Given that this has been argued and briefed, Your Honor, a couple times now, this is the third time, I'll be brief on my opening points and reserve for reply, if I may. But the primary thing I'd like to point out here that I am seeing in the opposition that's been submitted is the faulty notion on the part of St. Paul that our argument is premised on the belief that Cosmo had to

be a signator or bound by the night club management agreement.

Our position is not based on that. We think that's true. Our position though is just based on the fact that that's the operative agreement that they're trying to subrogate under. They've now clarified it's under the tentative third-party beneficiary status, which actually puts them in the same place no matter how you look at it.

Nevada law is clear that as an intended third-party beneficiary, you don't get to pick and choose the parts of the contract that suit you and favor your position and discard the ones that you don't saying you're not bound by them. That's simply not how it works. There's two aspects of the nightclub management agreement. And that's the -- we cite those cases for Your Honor in our reply; the *Gibbs* case and the *Canfora* case. Pretty long established Nevada law that as an intended third-party beneficiary, you're strapped with the terms of the contract.

This contract has two provisions that are fatal to the claims against Marquee, which Your Honor is probably familiar with by now. There's the subrogation waiver provision, which is part of the insurance requirements on the part of both parties. And Cosmo tries to distinguish themselves by saying they're not bound by those. Even if that were true, which it's not because they're bound by the terms of the contract and the subrogation waiver requirements, which are found in its insurance policy, you have an express indemnity cause of action that they're trying to subrogate to. And by its very express terms, that express indemnity provision only applies to losses that are not covered by insurance.

The other aspect of Cosmo's opposition seems to be that it only thinks that that aspect of the express indemnity provision, which is found in provision 13.1, applies if it's insurance required to be maintained under the nightclub management agreement. We've gone through our papers, and I'll reserve on reply if necessary to clarify this. But why the St. Paul policy is insurance that was required to be maintained under this -- the nightclub management agreement. They took on the obligation to procure it. They're part of the definition of the owner policies. And in fact, that's the insurance that applied, and has the subrogation waiver provision that was required under the nightclub management agreement.

Just as importantly though, Your Honor, if you look at provision 13.1, the express indemnity provision that they're trying to subrogate under, it only applies to capital L losses. And losses is a defined term in the nightclub management agreement. If you look at the nightclub management agreement on page 9, which is Bates stamped page T-72, it defines losses as any and all liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, expenses, and disbursements of a person not reimbursed by insurance. So the term itself, "losses", under the expressed indemnity provision is a loss not paid by insurance, not reimbursed by insurance.

There's no dispute in this case that all the money at issue that was part of the settlement in the underlying case was funded by insurance. So no matter how you look at this equation, these claims -- the claims that they're trying to seek against Marquee are barred by the

subrogation waiver provisions of the nightclub management agreement, and under the expressed terms of the expressed indemnity provision that they're trying to subrogate under. That's the main point I would like to emphasize before my reply points. As to the contribution -- on the expressed indemnity cause of action.

As to the contribution cause of action, there seems to be another faulty notion on the part of St. Paul, that the contribution cause of action is permissible as an alternative cause of action in the event they don't prevail on the expressed indemnity cause of action. And that's also not how it works under the uniform contribution act, Your Honor, and under the *Calloway* case that we cite for Your Honor.

In the *Calloway* case, the court made very clear not only that common law causes of action like contribution, but also common law causes of action like equitable indemnity, cannot be pursued by a party who is contracted under express indemnity rights. And it's not if you win under your express indemnity rights; it's if there's the mere presence of an express indemnity arrangement that the party is contracted for. That's what governs.

You don't get your cake and eat it, too. And if you fail under what you've contracted and bargained for, you get an additional bite at it under a common law cause of action. The Calloway case makes that very clear. And I'll just reserve for a reply, Your Honor.

THE COURT: Okay. Thank you.

MR. SALERNO: Thank you.

MR. REEVES: Your Honor, when we were here with you

before, you -- and this is our third time around on this stuff. We pointed out, and Your Honor agreed, that Cosmo is not a party to the agreement; it's a party to portions of the agreement that it agreed to be a signatory to.

Let's just see if this works. Do I need to do something?

THE CLERK: Hit that little pod behind there -- that little square that has the blue light on the backside of the -- okay. Thank you.

MR. REEVES: All right.

THE COURT: And then you just need to focus.

THE CLERK: Yeah. Hit the auto focus button. I think that's what it's called.

MR. REEVES: Auto focus? Auto tune?

THE CLERK: Yes, auto tune.

MR. REEVES: There we go. All right. So in order to be assistive, I came up with titles for everybody. And so we've got the operator; that's Marquee. We've got the master tenant; and that's the LLC, and that's a signatory to the agreement. And then we've got Cosmo; and that's the property owner.

And so this Court was -- had pointed out previously and was intimately aware that the agreement first of all, is between Master tenant and Marquee, not Cosmo. And then relative to Cosmo, it was a signatory, but only as to limited provisions. And what you haven't heard from counsel is that any of those provisions bear upon anything that's going on today. So they haven't said that Cosmo by virtue of acknowledging and agreeing to any of these provisions bear on any of

this.

So I see repeated efforts to conflate Master tenant and Cosmo, and they're separated entities, and they're treated separately. And they're -- by virtue, that there are different obligations, duties, and remedies that flow from each.

Let's go first of all to the common law claim. We have pled in the disjunctive that Cosmo is entitled to indemnity pursuant to the expressed indemnity provision, not as a signatory, but as an intended beneficiary. But in the alternative, we've pled that Cosmo is entitled to indemnity by virtue of statute, and that's 17.225. And by virtue of that latter, we moved to file a counter-motion. And the counter-motion is premised on the concept that we have joint tortfeasors, at least the verdict form suggests that. And the verdict form is not crystal clear relative to what liability Cosmo faces. But the Court said it was non-delegable duty, and so it's vicarious.

And 17.225 says that where you have joint tortfeasors, then you can work out a portion between them, because that was never adjudicated in the underlying case. And we've pointed out that there's no facts that Cosmo had -- did anything in this. It was simply the owner of the real estate and wasn't -- had no active role out there.

And so what I hear counsel say is that well, you don't get the benefit of that because you're bound by the contract. And I'm not understanding that because if I'm -- if Cosmo is not a signatory to the contract -- and I'll put the first page up for you, if you'd like. And again, this is Exhibit A I'm pulling from. And again, we have owner and

operator. Owner and operator; that's Marquee and Master tenant. That's who the agreement is between. You have Cosmo mentioned as the project owner, but they're not a party to the agreement. The agreement is between Marquee and Master tenant.

And so by virtue of that, not being a party to the agreement, there's no -- we're not trying to do an end around here relative to any of this. Rather, we're trying to work within the law. And the law is that if you are a signatory and you're bound by expressed indemnity provision, then that's your exclusive remedy. But if you're not bound by it, but rather you're -- you get the benefit of it, but you're not bound by it, then you can pursue recovery in terms of the contribution -- the statutory act.

And in that regard, we move for summary judgment. And if this Court were to grant summary judgment as to the statutory claim, I'd abandon the expressed indemnity claim. It's superfluous. It simply adds on. I don't -- I'm going to address counsel's argument relative to the expressed indemnity claim, but let's be clear, Cosmo, because it's not a party to the agreement, has the right to seek recovery per statute. It is doing so in this case. It has made a prima facie showing that it did nothing out there; that all the conduct was by Marquee. And it's unrebutted. And there's not even a request for discovery on that point.

THE COURT: But isn't there a -- under gaming law, an obligation on the part of -- you called them project owner -- the licensee -- the gaming licensee to exercise a certain amount of control over their tenants?

MR. REEVES: Not to my knowledge, Your Honor. Certainly

not argued. But more importantly, where we're weighing the --

THE COURT: Well, there is. So I mean, as a matter -- and that's what I think was the issue for Judge Johnson, was under Nevada gaming law, the licensee of the casino -- the all-encompassing licensee has obligations to the public. And --

MR. REEVES: Fair enough.

THE COURT: -- their -- any of their tenants, they have a non-delegable duty over their tenants to make sure that the public is protected because they're the gaming licensee. And if they have a tenant who does something that be violative of Nevada gaming law that would get the licensee in trouble, then the licensee has an obligation to exercise control over that.

MR. REEVES: And relative -- understood and agreed. Relative to that obligation, is that a primary obligation, or is that a secondary obligation as it bears upon Marquee? Because in the underlying case where we're dealing with the public, and that which you are articulating, that which Judge Johnson held, is that you may have delegated operation of the club --

THE COURT: Right.

MR. REEVES: -- but you're still on the hook. But then you get over to the statute -- the contribution statute, and it says all right, now we're going to look at the relative fault of the parties. And again, this is an issue that was not tested in the underlying case. There was no cross-claim between Marquee and Cosmo. There was one lawyer that represented both.

THE COURT: Uh-huh.

MR. REEVES: And so that's what we're here doing. We are now going now to the next step. What is the relative fault between Cosmo and Marquee? We filed a counter-motion on the basis that the relative fault is -- it's all on Marquee because Cosmo didn't do anything.

So as it pertains to the general public, understood and agreed. And that's what the underlying case was about. But this is our round two litigation. This is now dealing with the fallout from an adverse result and a very substantial settlement. And relative to that, and relative to our counter-motion, we're pointing out to this Court that if you're weighing culpability, liability between Marquee and Cosmo, it all falls on Marquee. It doesn't fall on Cosmo whatsoever.

And again, I can't stress this enough. There's no contrary evidence. There's no request for discovery. It is a pure legal issue as framed by the undisputed facts that are before this Court. And so we would ask this Court to certainly rule on the motion, and relative to what's before it, grant the motion.

THE COURT: All right. So that's with respect to your counter-motion?

MR. REEVES: It certainly is.

THE COURT: Okay. So -- all right.

MR. REEVES: So relative to the thrust of their motion, which is that the -- first of all, I went to the contribution of the statute and I pointed out that it's in the disjunctive because we're not a signatory to the management agreement. When I say that, Cosmo is not a signatory

to the management agreement. And so it's not bound by the management agreement.

But even within the management agreement, expressed indemnity applies because the only carve out is insurance required under the agreement. And if Cosmo is not bound to obtain insurance, then it is not insurance required by the agreement. I could show you that provision, as well. And again, I'm pulling from Exhibit A. And it's -- the key point is here, "and not otherwise covered by the insurance required to be maintained hereunder".

THE COURT: Okay.

MR. REEVES: No obligation of Cosmo to get any insurance in this agreement. It didn't obligate itself to do so. It's not addressed in it. So by virtue of that, the indemnity -- and again, you haven't heard counsel say the indemnity doesn't apply. What you've heard is that the carveout, or the manner in which it's taken away applies. The indemnity applies. What we're quibbling over is is it taken away because it's covered by insurance. And the answer is no, because the St. Paul policy was not insurance required to be maintained hereunder. And so contractually, Marquee, master tenant didn't obligate Cosmo to get insurance. And because of that, it falls outside of it, and we get the expressed indemnity.

But again, it's -- we state in the disjunctive they're elected remedies. And you know, maybe the cleanest way is to deal with the statutory claim because again, the evidence before this Court is that Cosmo had no active role out there.

We'll submit, Your Honor.

THE COURT: Okay. Thank you very much.

MR. SALERNO: Your Honor, we've said repeatedly that the express indemnity provision doesn't apply by its terms. I'm looking at the same provision as I mentioned. The term "Losses" is capitalized with an L.

THE COURT: Uh-huh.

MR. SALERNO: Your Honor seems familiar with that. That's a defining term. I probably don't need to show you the definitions. So by its express terms, express indemnity does not apply. And whether they are a signatory to it or not doesn't matter. They are part of the owner indemnities defined in there. So that's the provision they're attempting to subrogate under, and that provision doesn't apply. The express indemnity claim fails because it only applies to losses that are not covered by insurance.

Further, the intent is clear where it has this additional language, otherwise covered by insurance required to be maintained here under it, that's an end. So we've gone through the analysis here with the lease agreement attached. I'll spare Your Honor pulling those out and showing them to you. I have the impression you've done that, but Cosmopolitan took on the obligation to procure the insurance required by the owner in the lease agreement attached to the nightclub management agreement.

So there's no question that that's the party's intent, and no question that that's the insurance required to be maintained hereunder,

and there's no legal dispute that the St. Paul policy has the subrogation waiver provision that further corroborates that intent by all the parties. In other words, Cosmopolitan complied. They obtained insurance with the subrogation waiver provision.

It sounds like St. Paul is now backing off that position and focused more on the contribution cause of action. That contribution claim fails because this is what the parties bargained for. They're included in the definition of owner indemnities. They've even tried to proceed under this provision, although now they're trying to back away from it.

And the law is clear in Nevada under *Calloway* and the Uniform Contribution Act that where there's an existing express indemnity arrangement -- not whether you prevail under it, but if it exists, that's what governs, and that's what we have here. Further, on top of that the law in the *Calloway*, expressed in the *Calloway* case, the contribution statutes provide that contribution is not available to a party who has been found liable for an intentional tort.

I don't think there's any dispute here either that the verdict -- this is what's been argued by St. Paul, it was issued jointly and severally against Cosmopolitan and Roof Deck, Marquee, that included intentional torts, like battery, assault, and false imprisonment. There's just no question here that contribution is not a viable cause of action, both because there's an express indemnity provision which governs, and therefore precludes that ability, which by the way, precludes the ability to proceed under equitable indemnity too, and under the statute because

of the intentional torts.

As far as this cross-motion, I've had trouble following today exactly what it is, as we did with the papers. They're mixed together. When counsel says there's no facts that have been raised, I don't know what facts they're relying on. I don't know what cause of action it's based on. They've talked about this active passive distinction. They nowhere frame in their motion -- and it's procedurally defective and fatally deficient in that regard -- they don't say what claim or defense it pertains to, and that's because it doesn't pertain to any claim or defense.

The active/passive distinction has been discussed in the long line of Nevada law in the equitable indemnity context. That's your Piedmont Equipment's, your Black & Decker's, your Medallions. When you look at those cases, they all talk about the importance of the active/passive distinction of being one element in the ability to pursue an equitable indemnity. For all the reasons we've discussed, they don't have the ability to pursue equitable indemnity because there's an express indemnity provision.

There's nothing in this express indemnity provision that mentions an active/passive distinction. They don't say why it matters. They've asked Your Honor to find that there's an obligation on the part of Marquee to indemnify Cosmo that St. Paul can subrogate into, but they don't say why. They're asking the Court to find, as a matter of law, a factual question that is disputed, that there's an active/passive distinction that was never determined or addressed in the underlying case by their own admission. They don't say what evidence supports that. It's

impossible for us to oppose that. There's no separate statement.

There's not even an indication of what evidence they're relying on, but the bottom line is that the active/passive distinction, Your Honor, is only relevant under Nevada law to equitable indemnity claims. It's not relevant to a contribution claim. Contribution claims involves comparative fault where it applies and where it's available.

You can pursue equitable indemnity and shift all of the fault in Nevada, which follows the distinction. Some jurisdictions have abandonment between equitable indemnity and contribution, but in Nevada, you can pursue equitable indemnity and shift all the fault, and sometimes a portion of fees and costs, if one party is only passively at fault.

Those issues have not been properly presented to you, Your Honor. It's not a cause of action they have. They don't have a cause of action for equitable indemnity. They have one for express. And they're not able to pursue a cause of action for equitable indemnity for all the same reasons they can't pursue contribution. The *Calloway* case actually dealt with that precise argument, and *Calloway* made it clear. In *Calloway*, the argument -- the decision in the District Court was that the express indemnity provision in the permit application was a contract of adhesion, so it didn't apply.

So it wasn't a situation in *Calloway* where they lost on express indemnity, so they were able to pursue equitable indemnity or contribution. The Court said no. You have -- this exists, you bargained for it. You don't get equitable indemnity, you don't get common law

remedies.

So I don't know what this counterclaim -- what this counter-motion even pertains to. It's not properly brought. What evidence are they relying on?

THE COURT: All right. So in looking at the complaint, since your point is what causes of action are -- and this is the amended complaint. Fourth cause of action subrogation against the AIG insurance contract only.

MR. SALERNO: That's AIG.

THE COURT: Statutory subrogation contribution against Marquee.

MR. SALERNO: Right.

THE COURT: Sixth cause of action, subrogation express indemnity against Marquee.

MR. SALERNO: Right. Those are the two.

THE COURT: And then equitable estoppel against the carriers.

MR. SALERNO: Correct.

THE COURT: Then let me see. What's our next cause of action? Oh, okay. Eighth is equitable contribution against, again, AIG only, and then we have the prayers for relief, so.

MR. SALERNO: And so the two causes of action --

THE COURT: Uh-huh.

MR. SALERNO: -- against Marquee -- and I'm only addressing those. My colleague will address the others.

THE COURT: Right. Uh-huh.

MR. SALERNO: Is the contribution and the express indemnity, which I have addressed. This active passing thing that they've sort of made up from what I -- the best I can tell, haven't fit to any cause of action, haven't said what evidence is undisputed that supports it, has no bearing on any of their causes of action. If they had a claim for equitable indemnity that was permissible, it would have a bearing on that, but they don't have a claim for equitable indemnity, nor can they for all the reasons we've discussed. Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. REEVES: May I respond, Your Honor?

THE COURT: Yeah.

MR. REEVES: Thank you. *Calloway*, Your Honor, is a case where a party was bound by what it had agreed to. Cosmo is not a party to the management agreement. That is the core distinguishing factor, and the reason I separated out the causes of action is because counsel is continuously arguing that Cosmo is a party to the management agreement. I continuously hear that, and Cosmo is not. And so for purposes of everything that's going on here, let's assume -- you know, let's distance ourselves from the express indemnity and just focus on the contribution claim -- the statutory contribution claim. Cosmo is not a party to the agreement.

In terms of our counter-motion I just -- you know, we gave this Court a binder, and hopefully it received it.

THE COURT: Yeah.

MR. REEVES: I think we've got A through V in there. I'm looking at our paperwork here, and we have a fact section, background facts, it begins on page 3. We cite to portions of the appendix, declaration validating the exhibits. I'm not understanding, procedurally, what is amiss here, and I fear that's an effort to simply throw things against the wall, much like this active/passive. The thrust of our position is not active/passive.

THE COURT: Uh-huh.

MR. REEVES: It's no evidence of any conduct. Cosmo did nothing. And so by virtue of doing nothing, it made them liable because of non-delegable duty, but by doing nothing, it was entitled to contribution from Marquee. And again, you're not hearing contrary evidence. You're hearing what are the facts, what are the facts.

Well, what are the facts? The facts are that there are no facts that Cosmo did anything. I cite to the briefs filed in the underlying case, that Marquee filed, so Marquee says, Cosmo did nothing, Cosmo did nothing. And so then to come here and suddenly, there's no evidence, there's no evidence. Well, I've got your own admissions. I've got your own representations. I've got trial testimony from Marquee's representative. And so I'm at a loss to understand what it is procedurally that is missing. I'm asking for a ruling regarding duty. Motion for summary judgment, partial summary judgment, is appropriate as to duty.

So again, core points we wish to make. Cosmo is not a party to the management agreement. It is certainly an intended third-party

beneficiary, but it's not a party to it, and it's therefore not bound by it, and it is therefore not barred and solely seeking recourse through the contract. Contribution claim is based on undisputed evidence for which there's no request for discovery, and I -- counsel was just up here, and he didn't say he needed discovery on it. He raises procedural issues, which I don't understand, but there's nothing substantive. Cosmo did nothing. It is entitled to reimbursement for what it was saddled for by virtue of how this case played itself out. We'll submit, Your Honor.

THE COURT: Okay.

MR. SALERNO: Your Honor, counsel raised a new issue just now. May I address that?

THE COURT: Okay. And then certainly, if you have a response --

MR. REEVES: What new issue did I raise?

MR. SALERNO: That they're moving on duty.

MR. REEVES: Yes. It's in our paper.

MR. SALERNO: That's not in your papers.

MR. REEVES: Yes, it is.

MR. SALERNO: Show me where.

THE COURT: In the counter-motion?

MR. REEVES: St. Paul's counter-motion presents a pure legal issue, given that it's undisputed that Cosmo's liability in the underlying matter was derivative from Marquee's act of negligence.

MR. SALERNO: Where's the word "duty"?

MR. REEVES: Cosmo is entitled to be indemnified by

Marquee. Duty.

MR. SALERNO: Entitled is not duty.

MR. REEVES: Entitle is not duty?

THE COURT: Okay.

MR. SALERNO: Anyways, may I be heard --

THE COURT: Okay.

MR. SALERNO: -- on that, Your Honor?

THE COURT: So --

MR. REEVES: What? I didn't use the magic word?

THE COURT: Here we go. On 9/27, this is the Plaintiff's opposition to the motion for summary judgment by Marquee in counter-motion, duty to indemnify --

MR. REEVES: Thank you, Your Honor.

THE COURT: -- in the caption.

MR. SALERNO: May I address that?

THE COURT: Okay. Sure.

MR. SALERNO: We've had an opposition and a counter-motion that don't delineate anything from each other. We don't know what's an opposition point intended to be a materially disputed fact that goes to the opposition, and what goes to the counter -- there's no delineation. So it's impossible for us to know what they claim we need discovery on. We've submitted objections to every piece of their so-called evidence, their counsel's declarations, and some transcript testimony from the underlying case. I don't know if Your Honor wants to address those independently, but counsel still hasn't sat here before and

said what evidence they think supports this duty --

MR. REEVES: Happy to do --

MR. SALERNO: -- claim.

MR. REEVES: -- so, Your Honor.

MR. SALERNO: May I just complete?

THE COURT: Well, you'll have the final word.

MR. SALERNO: Yeah. And what does duty go to? What cause of action? It's not part of the express indemnity cause of action. It's not part of the contribution cause of action. So they're asking for relief that has no relevance and bearing to any claim or defense in this case. They don't outline for Your Honor -- setting aside all of these procedural problems, these evidentiary problems -- they don't outline how that goes to any claim or defense in any way.

THE COURT: So you would say that that's not relevant to the fifth cause of action, statutory subrogation contribution for NRS 17.225 against Marquee only?

MR. SALERNO: The element -- duty is not an element of contribution.

THE COURT: Duty can be --

MR. SALERNO: And contribution has many more elements than duty. And I don't know what facts they're even relying on to say that there was a duty and that we breached the duty. That's a negligence thing. It can come into play in other causes of action. It can be an element, but that's the problem with what they've done here with their opposition and counter-motion. I just -- we don't know what they're

moving on, and what facts it's based on, what elements, claims, and defenses.

MR. REEVES: All right.

THE COURT: Thank you.

MR. REEVES: Briefly?

MR. SALERNO: Thank you, Your Honor.

THE COURT: Yes. Uh-huh.

MR. REEVES: I'm reading from page four of our brief on the counter-motion.

MR. SALERNO: The opposition or the counter-motion?

MR. REEVES: Again, page four, line 22. "In joint filings made on behalf of Marquee of Cosmo, Marquee conceded that Cosmo had no express or implied authority to control the Marquee nightclub, such that Mauradi was not a business and invitee of Cosmo." It's appendix, Exhibit P, page 5, line 20, through page 6, line 4.

"Given this, Marquee conceded that Cosmo was, at most, an alleged passive tort fees with no active role in any aspect of the operations of the Marquee Nightclub." That's appendix, Exhibit O, page 4, line 27, through page 5, line three. See also Exhibit N. Page four, line 26. Page 5, line 1. "Trial testimony from the Marquee representative was in accord. In accord that Marquee alone, and not Cosmo, operated or managed the Marquee Nightclub." And I've got a cite there. And that's Exhibit O --

THE COURT: Uh-huh.

MR. REEVES: -- page 3, line 15 through page -- or through

line 24. So --

MR. SALERNO: May I address the objections to his evidence.

MR. REEVES: Stop. Stop. I'm still talking.

THE COURT: Please don't interrupt each other, counsel, please.

MR. SALERNO: I'm sorry, I thought you were done.

THE COURT: So, yeah.

MR. REEVES: I don't know what we're doing here, Your Honor.

THE COURT: All right. And perhaps you can clarify because with respect to -- if we're talking about Marquee, the fifth cause of action against Marquee is statutory subrogation for contribution pursuant to NRS 17.225, and then the sixth cause of action is subrogation for express indemnity against Marquee only.

MR. REEVES: Agreed.

THE COURT: So --

MR. REEVES: Within those two causes of action, there are duty --

THE COURT: Which are disjunctive.

MR. REEVES: -- yes, which are disjunctive.

THE COURT: Pled in the alternative. Okay. Right.

MR. REEVES: Yes.

THE COURT: Uh-huh.

MR. REEVES: And so we're seeking an adjudication as to duty under either.

THE COURT: And so when you say duty, because counsel pointed out, the duty is kind of like -- I'm not exactly sure it's an element of either contribution or subrogation. So duty -- but duty to indemnity.

MR. REEVES: Yes.

THE COURT: How does that relate to contribution? I understand your concept under express indemnity, but how does it relate to contribution?

MR. REEVES: My client paid a substantial amount of money on behalf of Cosmo. My client is entitled to be indemnified for that sum. It is entitled to be reimbursed. These are words that I'm using interchangeably relative to what we are seeking. We are seeking an award of money that was paid on behalf of Cosmo, and so the motion -- because the dollars are subject to protective order, and the dollars are not pled in the complaint.

THE COURT: Right.

MR. REEVES: We're moving for partial summary judgment that Marquee is under an obligation to reimburse St. Paul for the sums that it paid on behalf of Cosmo. I characterize that as a duty, duty to indemnity, but it could very well easily say entitled to reimbursement.

THE COURT: Okay.

MR. REEVES: A right to reimbursement.

THE COURT: Thank you.

MR. REEVES: A right to reimbursement.

THE COURT: Thank you. All right. Great. Thanks. All right. So yes, with respect to --

MS. KELLER: St. Paul, Your Honor.

THE COURT: -- St. Paul. Uh-huh.

MS. KELLER: So as the Court pointed out, there are four causes of action against National Union brought by St. Paul. The second cause of action for subrogation, three, bad faith, the fourth cause of action for subrogation re: breach of contract, the eighth for equitable contribution, which was pled in the alternative in the second and fourth. And the seventh cause of action for equitable estoppel, which can't and doesn't seek money damages.

So the key issue, I think, overall -- and we were talking about this when we were here way back toward the beginning of the year is can an excess insurer in one tower subrogate against an excess insurer in a different tower? And at the time, the Court didn't have the policy, the St. Paul policy in front it, but now it does. So it's very clear that as to Marquee, Aspen is primary and sitting on top of it is National Union. And as to Cosmo, Zurich is primary and sitting on top of it is St. Paul. They're on an equal level in different towers.

So, no Nevada State Court case has ever recognized this or even recognized subrogation between any two insurers. More importantly, no case in any jurisdiction has ever recognized subrogation between two excess carriers on the same level in different towers. So if the Court denies the motion for summary judgment, this Court, I guess would be the first in the nation to recognize such a possibility. And I think it's pretty clear what the policy reasons are against it and why we haven't even found a case nationwide where anyone has even asked for

that. We haven't found a case where an excess insurer in a different tower has even asked for subrogation against an excess in a different tower.

THE COURT: Well, it seems that the dispute here is you define your relationship as coequal excess carriers in separate towers and they don't view it that way. They define it differently. So is that issue a question of fact or a question of law?

MS. KELLER: It's a question for the Court. It's a question of law.

THE COURT: Okay.

MS. KELLER: And the Court has the policies. And I think the Court recognized that last time, Your Honor, in your order. You said based on the record before the Court at this time, there appear to be no material questions of fact and the only issues remaining are purely questions of law and that's why you denied without prejudi -- you denied the motion to dismiss without prejudice to raise these issues in a motion for summary judgment. That's what it said in the order.

So now, the Court has the relevant policies from both. They're properly before the Court. So there's no factual dispute about what they say. Therefore, it's a pure question of law. So there's no question by their terms as to what they are. You know, the -- our learned opponents can say whatever they want, but the law is the law. The policy is the policy. And one is primary, and one is excess in each tower. So it would be launching off in a new territory that from a policy point of view would be disastrous.

You really would never have finality of settlements anymore. You'd have carriers settling and then immediately attacking each other, much as happened here. If the Court -- if there's anything more sacrosanct than the public policy in favor of settlements, I'm not sure what it is. We do everything humanly possible to facilitate them and to promote them. And --

THE COURT: And so -- but isn't that their whole complaint is that there was an opportunity to settle this case and it was missed and therefore, a greater loss was suffered than the case could have settled for $1.5 million at one point in time. Instead, it -- the jury verdict was for $145 million. Settlement was for some dollar amount less, which we will not discuss in public.

MS. KELLER: And if they were excess coming after primary --

THE COURT: Uh-huh.

MS. KELLER: -- they'd be right. The Colony case that they cite, which is the only Nevada case. It's not really a Nevada State Court case, but a federal case, that was the case where a district court, for the first time that we could find in Nevada, did find the ability to subrogate between two insurance carriers, but one was primary, and one was excess. And it was sort of a classic subrogation in terms of the type we see in California, which is the primary, for lack of a more elegant term, screwed around.

THE COURT: Uh-huh.

MS. KELLER: There was clear liability. It was a driver of a

truck owned by a company that was insured by the primary and the excess. Clear liability. The person sustained really bad injuries and the primary carrier didn't bother to settle it. Just kind of screwed around and screwed around and screwed around. Several demands were made within policy limits and they said no. Finally, after the person had had three back surgeries and was in horrible, constant pain and the tab was escalating, finally the primary settled.

But by now, the demand was in excess the policy and the excess had to pick up that excess and they then turned around and said hey primary, you were driving this train and you refused to settle. You could have gotten rid of this a long time ago. Our loss is directly attributable to you. And had they been standing in the shoes of the insured, the insured would have faced that additional loss. So that's kind of classic, excess against primary. That's where you see these claims.

Or in one case that they cited from Illinois, you had a stack of excess carriers, but they were all in the same stack. That was four excess carriers and they were essentially seeking subrogation, because again, the primary carrier didn't settle within limits and they all ended up getting triggered. But it was a straight up stack. And I think the reason for that is because generally speaking, the lower carrier, the primary carrier, is the one so-called driving the train.

They're the one providing the defense. They're the one with the ability, if there is an ability to settle within policy limits early, they're the ones who have it. But you have never -- there isn't a single case in the whole country, where you have excess versus excess in two different

towers. And the only multiple excess in the same tower subrogation case they cited you was that one Illinois case I talked about. So this is -- these are uncharted waters.

And if something this dramatic is going to happen, where you're never going to have as among insurance carriers any sort of finality, where they can all come after each other and there's going to be a may lay, there will be endless litigation after the litigation that was supposedly settled, then that's something that should be done by the legislature or it should maybe be decided by the Nevada Supreme Court. But I don't think that a trial Court should be creating this new law, which is going to have such a potentially dramatic impact.

So back to the causes of action. The equitable contribution claim that St. Paul -- that's they're alternative theory. No Nevada State Court has recognized equitable contribution between two insurers. Equitable contribution doesn't allow for the recovery of damages beyond the limits of the insurer's policy and it's undisputed that National Union here paid the full policy limit. So that can't survive.

And what about causes of action two and four? St. Paul can't sue National Union for breach of contract. They didn't have a contract. National Union and St. Paul had no contract. So similarly, St. Paul can't sue National Union for bad faith, breach of the duty to settle. It owed no such duty. And that -- you know, when we're -- we can't really start using the term duty interchangeably with a whole bunch of other duties, when it's a term of -- a whole bunch of other terms, when it's a term of art. National Union did not owe St. Paul a duty to settle.

And so that's why St. Paul is attempting to shoehorn these unfounded subrogation theories into the so-called stepping into the shoes of Cosmo. But again, they have to invent subrogation claims that don't exist in Nevada. So -- and I think if you look at the St. Paul opposition to our motion, Your Honor, they cite Nevada State cases that have nothing to do with subrogation between insurers. Every one. Let alone between two excess insurers, let alone two excess in different towers.

The *Lafroncini* [phonetic] case they cite is subrogation between two mortgagees. *American Sterling Bank*. That was subrogation between mortgage lien holders. *AT&T Technologies* was employer verses employee. *Federal Insurance Company*, surety verses bank. *Globe*, surety versus contractor. *Fountainblow* was a mechanics lien case and *Lumberman's* was an insurer against a subcontractor.

St. Paul has got a duty to provide authority, if we're going to talk about duty.

THE COURT: Well, isn't it a well-established principal in Nevada that there's no third party bad faith, which is essentially what they're trying to create here?

MS. KELLER: Yes.

THE COURT: That if this were a car accident, you -- and you were injured in the car accident and I was the person who had the insurance company, you could not sue my insurance company for bad faith?

MS. KELLER: Correct.

THE COURT: It's not your insurance company.
MS. KELLER: Right.
THE COURT: Same thing they're trying to create here, is a right to sue somebody else's insurance company.
MS. KELLER: Under a different guise.
THE COURT: Yeah.
MS. KELLER: Yes.
THE COURT: Instead of bad faith, they're calling in indemnity or subrogation. But that's Nevada policy.
MS. KELLER: Yes.
THE COURT: Okay.
MS. KELLER: That's right.
THE COURT: Thanks. All right. Fine. Thanks.
MS. KELLER: And --
THE COURT: Anything else?
MS. KELLER: -- just very quickly, if I could have a second, Your Honor --
THE COURT: Sure.
MS. KELLER: -- to see if there's anything we have missed. Does the Court have any additional questions for me?
THE COURT: No. I think that that was the one I wanted answered. I think I had -- oh, that there's no -- that's why I asked about the question of fact. I think you answered that one, that we don't have a Choi affidavit, so we don't know what issues of fact there would be, but your position being there really aren't any issues of fact. This is purely a

question of law for the Court. So that was the one that I wanted to determine, that this whole question of equity -- this is all just questions of law. We don't have any fact questions here.

MS. KELLER: I think that's correct, Your Honor.

THE COURT: All right. Great.

MS. KELLER: If the Court has nothing further.

THE COURT: Yeah. And then there's just this distinction -- no. And I'll talk to counsel about -- because it's just this distinction between the two different parties as to how they distinguish or how they identify two equal but separate towers versus this -- but somehow they're in the same -- I'll ask counsel to explain that.

MS. KELLER: Well, they're trying to interpret the nightclub management agreement in such a way as to somehow implicate us.

THE COURT: Yeah.

MS. KELLER: And they can't do that, either. I mean, the -- it's pretty much blackletter law that the insurance policy governs. Two individuals can't make an a -- let's say that the agreement was what they said it was -- and it isn't. But let's say it were. The two individuals can't contract between themselves to create obligations for insurance carriers that don't exist in the polices.

THE COURT: Right. Thanks.

MS. KELLER: The insurance contract is paramount.

THE COURT: Got it. Thank you.

MS. KELLER: Thank you, Your Honor.

THE COURT: Counsel.

MR. DEREWETZKY: Good morning, Your Honor. Not exactly sure where to begin. On the issue of whether there's third party bad faith in Nevada --

THE COURT: Right.

MR. DEREWETZKY: -- this isn't a third party bad faith case, Your Honor.

THE COURT: Yeah, but that's what -- it's analogous. I -- it --

MR. DEREWETZKY: No, it's not actually analogous in any way.

THE COURT: Okay. All right.

MR. DEREWETZKY: Cosmopolitan is an insured under National Union's policy. It's Cosmopolitan's bad faith claim that we're seeking to subrogate to. It's a claim by the insured against its own carrier, not a third party claim at all. It seems that a key issue in his motion is going to be whether there are any factual questions or whether --

THE COURT: Uh-huh.

MR. DEREWETZKY: -- everything can be resolved as a question of law. The -- National Union cited a case in its briefs called *Travelers Casualty and Surety v. American Equity Insurance Company,* 93 Cal App 4th 1142, and this is in the context of cases that are trying to determine the priority of coverage, Your Honor, the issue of which tower things go in and who goes first. And the case they cited says all courts will assess whether the factual circumstances create a relationship between the indemnity contract and insurance allocation issues. It is a

factual question and we raise at least three different factual issues that have to be decided by the Court.

Your Honor, in the management agreement, the management agreement itself provides that all insurance coverage maintained by Marquee will be primary to any insurance coverage maintained by any owner insured parties. There is an indemnity provision in the management agreement that flows from --

THE COURT: Okay. But owner. How are we defining owner? Because as it was pointed out, there is the project owner versus the owner that's defined in the management contract.

MR. DEREWETZKY: Well, it refers to owner insured parties, Your Honor --

THE COURT: Okay.

MR. DEREWETZKY: -- so parties that are insured by the owner.

THE COURT: Okay.

MR. DEREWETZKY: There's the indemnity provision in the management agreement. There's a dispute between National Union and St. Paul about whether the indemnity agreement has any effect on the relation between the parties. This is the area where National Union cited the *Travelers* decision. One of the key distinguishing factors -- well, there's -- I don't want to say there's a split of authority. They're actually cases that go make a variety of different conclusions about the priority of coverage under California law.

THE COURT: Uh-huh.

MR. DEREWETZKY: We cited the *Rossmore* decision and *Mt. Holly v. Hartford* and some other cases for the proposition that under certain circumstances, the Court should look to the indemnity provision, because otherwise what happens is the result is contrary to the intent of the parties with respect to who bears the responsibility for an incident or claim.

One of the things that is said in the *Travelers* policy that -- *Travelers* case that National Union relies on is there was language in the policy that says nothing here shall be construed to make this policy subject to the terms, conditions and limitations of other insurance, reinsurance or indemnity. That provision, which the Court in Travelers relied on heavily, is not in the National Union policy. So we can distinguish the *Travelers* case in many ways from the arguments that are being made.

One of the other key distinctions in the cases cited by National Union and the cases we cite, Your Honor, is that our case involves not only the insurance companies, but the insureds as well. We have a claim, subrogated claim by the insured, Cosmo, against the insured, Marquee, based on indemnity principals. And that is a key distinction in how you look at whether indemnity provisions will be considered in determining the priority of coverage. The -- our argument, Your Honor, is there's one tower of coverage for Cosmopolitan.

THE COURT: Uh-huh.

MR. DEREWETZKY: There can only be one tower of coverage. And the coverage goes Aspen, National Union and then the

St. Paul policy on top. The St. Paul policy is excess. And Your Honor, I was not here. I didn't have the benefit of being at the hearing last week, but it's my understanding that the Court denied Aspen's motion for summary judgment on the subrogation claims that were brought against it by St. Paul.

THE COURT: I just said I wasn't going to hear them.

MR. DEREWETZKY: I'm sorry?

THE COURT: I didn't deny them. I just said I wasn't going to hear them. We -- because we -- my concern here was were, they going to be seeking a 54(b) ruling on the decision, such that we would need to certify that and that would go up. So then I felt like we shouldn't get into the whole issue of their subrogation claim. That seemed premature to me, so I said I wasn't going to consider those -- that part of the motion.

MR. DEREWETZKY: The countermotion granted only as to coverage. I'm just reading from the --

THE COURT: Right. Uh-huh.

MR. DEREWETZKY: -- minute order. And what was the Court's decision with respect to the --

THE COURT: Because -- my question to them was are you going to be appealing this? Do you need a 54(b) certification?

MR. DEREWETZKY: Is Aspen going to apply? I thought you were asking --

THE COURT: No. Your client. Was your client going to be appealing it? So based on that, then it just seemed to me that going forward with this issue, this question on of the Aspen subrogation issue,

which is very different, seemed premature, if we -- if they were -- because they hadn't made a determination whether you were going to seek a 54(b) certification on that with respect to Aspen.

MR. REEVES: He had understood -- with the feedback we got, he had understood you were -- that question was posed as to number of limits and so your 54(b) question was directed to--

THE COURT: Right. Exactly.

MR. REEVES: But --

THE COURT: And so then that's why I said I just -- I wanted to know if that was going to be -- if they were going to seek 54(b) certification on the limits.

MR. REEVES: Yes.

THE COURT: If so, then it seemed like we needed to figure that out before we got into this whole issue of subrogation.

MR. REEVES: he had understood you found questions of fact otherwise, so this is new information to us.

THE COURT: No. I said -- I wanted to know what was going on with the 54(b) certification on this question of limits, because it seemed like we wouldn't want to get into the all the subrogation, if we first had to take the subroga --

MR. REEVES: I guess he wanted to get into --

THE COURT: -- take the 50 --

MR. REEVES: -- all the subrogation, so --

THE COURT: Yeah, well, I didn't, so.

MR. DEREWETZKY: Well, Your Honor, one of our additional

arguments in opposition to the National Union summary judgement motion on subrogation is that it was the intent of the parties, as evidenced by the conduct in the case --

THE COURT: Uh-huh.

MR. DEREWETZKY: -- that the National Union policy would pay first, and the Cosmopolitan policy would pay second. And that's evidenced by all kinds of conduct, including the fact that AIG did not even provide notice to St. -- to St. Paul until February, when the case was set for trial in March that National Union didn't provide notice of opportunities to settle within the limits, not of our policy, but of the National Union policy. They wanted to control the defense. They wanted to control the case. And that is contrary to the idea that they thought that our policy was co-insurer with theirs. If it had been, they would have behaved differently any number of ways.

THE COURT: And so -- and so that's -- in talking to counsel, I think it was kind of like the key distinction between your analysis of the case, and their analysis of the case. Their analysis of the case is two very separate and distinct, separate towers. There's no right to sue across those towers, for any kind of contribution indemnity, anything, because they're separate towers. So your view, as to why this should be considered one tower is course of dealing?

MR. DEREWETZKY: Our view is that the -- it says so in the management agreement. It says so in the indemnity agreement. There's caselaw to the effect that the indemnity agreement should be enforced under the circumstances of this case, and that there's a course of

conduct, and course of dealing. And, Your Honor, Your Honor asked me a number of times when we were here previously for Rule 16 conferences, whether I thought there would be a necessity for discovery.

THE COURT: Uh-huh.

MR. DEREWETZKY: And I said I needed to see the papers. Now that we've seen the papers, there are three places in our opposition where I specifically asked for discovery on a number of issues. Counsel complains about my declaration, because it misstates facts, I don't have sufficient knowledge, et cetera and so forth, well, I've been prevented from doing any discovery whatsoever, Your Honor. It's as if we're still at the pleading stage. We haven't done any discovery at all. We haven't had the right to do anything.

So it's a little disingenuous for counsel to argue that I don't have sufficient knowledge to state facts, when I haven't had the opportunity to go get the people with sufficient knowledge to state those facts.

THE COURT: Okay. So then looking at your declaration, starting at the bottom of page 5, which is the, in support of the request for relief under 56(d), the issues are the number of issues with respect to which discovery is requested, AIG's retention of a single set of lawyers to defend Marquee and Cosmo jointly without seeking a conflict waiver. Express and implied representation by AIG that its policy would respond prior to St. Paul's. So this makes it de facto excess. Whether St. Paul had a reasonable opportunity to settle the underlying action. I mean I don't know what discovery would be necessary on that one. AIG's

history of pursuing subrogation claims, where it has paid the loss on behalf of its insured.

So are you talking about other cases where AIG has pursued the same --

MR. DEREWETZKY: Oh, yes, Your Honor. They make -- they take the position that subrogation is this bizarre unicorn thing that nobody knows anything about it. I want to discover what they do with subrogation claims, and how many they've brought in Nevada.

THE COURT: And then concealment of the settlement offer, and then generally concealment of -- like just not disclosing this earlier to avoid interference in their defense? So those are --

MR. DEREWETZKY: Those are what I know based on no discovery to date. That's -- that's where we stand --

THE COURT: Uh-huh.

MR. DEREWETZKY: -- at the moment. And, you know, there's a lot of case law also in this jurisdiction that where a summary judgment motion is brought early in the litigation, a Rule 56(d) motion for additional time should be granted, as a matter of course.

THE COURT: Okay. Anything else?

MR. DEREWETZKY: Just let me check my notes, Your Honor, if you don't mind. On the issue of contribution, Your Honor, we're sort of in the same boat as the other motion. They're pled really in the alternative. If there is a finding that we're co-insurers, co-insurers are entitled to equitable contribution between themselves. The fact that there's no case in Nevada that says that, so far, is probably attributable

to the fact that insurers don't really want to find out what the Nevada Supreme Court would say about it. But in my practice, everybody behaves as though contribution is the rule.

That's all I have, Your Honor.

THE COURT: Okay. Thanks.

MS. KELLER: Well, starting with last first, we did complain about counsel's declaration. We did think that it was full of things that had nothing to do with legal issues in this case. It is -- it's interesting that St. Paul seems to take the position that gosh, we're just this poor little company that was just relying on National Union to handle everything for us.

And yet they were co-equal excess carriers with the same amount of -- ultimately paid the same amount in settlement. We're not going to go into what that is, but it was identical. If they decided to at some point save money by sitting back and not paying sufficient attention, that's their problem. They were not primary.

And you notice that in discussing the tower, Your Honor, Zurich has disappeared. They said Aspen was primary and then -- you know, and then St. Paul, and then -- anyway, Aspen -- Zurich is gone. Zurich doesn't appear anywhere. The reason is because Zurich was primary for Cosmopolitan. And so they don't want to mention that, because they were excess to Zurich.

At any rate, we continue to object to the declaration. We think it's -- it is -- has zero to do with the legal issues that are before the Court, which have to do with those policies. Counsel mentioned contract

damages, and stepping into the shoes, and all that. There can't be any claim for a contract breach, without contract damages. Because this is an insurance case, damages for breach of a policy are limited to the policy benefits owed, Defense and indemnification costs.

St. Paul doesn't dispute Cosmo's lack of contract damages. Cosmo's defense was fully paid for. Cosmo's indemnification settlement was fully paid for. Cosmo contributed no money to the defense or the settlement. So St. Paul is seeking extracontractual damages for alleged bad faith duty to settle. Those tort damages are not recoverable under a breach of contract theory. And even if St. Paul could step into Cosmo's shoes, it would only get the remedies as Cosmo. Cosmo has no contract damages. If Cosmo were to sue National Union, it would get nothing. It couldn't get anything. How could it sue for bad faith, when everything was paid?

So no contract damages are available to St. Paul through subrogation. You can't -- it again is exactly what Your Honor pointed out earlier, it's a backdoor attempt to get bad faith damages on a third-party basis. That's all it is. Because Cosmo has no contract damages.

MS. KELLER: Thank you, Your Honor.

THE COURT: Okay. Thanks.

MR. DEREWETZKY: Yeah, very briefly, Your Honor.

THE COURT: Okay. I'm going to let counsel have the last word. It's your motion.

MR. DEREWETZKY: The whole idea of contact damages as framed by National Union is a complete red herring. We've now briefed

this issue for the Court any number of times. Subrogation is based on the fact that the insurance company pays on behalf of the insured, and then has the insured's rights to pursue somebody else. No insured ever has any damages in a subrogation cases. It's the way that subrogation operates that, you know, the insurance company pays, and then has -- assumes the rights to go over the liable third-party.

In this case, Your Honor, the liable third-party is the insurance company, National Union AIG, which failed to take its insured Cosmopolitan out of harm's way. One issue that sort of hasn't been explored completely, Your Honor, is the argument that we can't get contribution because the National Union policy is exhausted. Our position, and we can develop that in discovery, is that National Union improperly exhausted its limits because it failed to pay on behalf of Cosmopolitan.

It paid everything on behalf of Marquee. It had to have paid everything on behalf of Marquee, because St. Paul has no obligation to Marquee. And if anything was not paid as to Marquee, then it wouldn't have -- the case wouldn't have settled.

So the exhausting argument has no legs, and we can develop that further in discovery.

THE COURT: Thanks again. And the final word.

MS. KELLER: Exhaustion, Your Honor, being developed in discovery is that -- speaking of red herrings, that's another legal issue for the Court. The Court's got all the information before it. There isn't going to be a magical new witness popping up with any additional information.

MR. REEVES: We submit it.

THE COURT: Thank you. Okay.

On the surface this appears to be very complex. I don't think it is. I think it's actually a really simple question. Because Judge Johnson found a non-delegable duty on the part of Cosmo, which, you know, I believe, and although not articulated, that he's going back to gaming law. The obligation of a gaming licensee over their tenants. These nightclubs have been a particular problem in the state for gaming licensees for many years. That's a non-delegable duty. We know that.

So I believe that that really is the basis of how the rest of this falls out. Because Judge Johnson found that duty, I'm -- because I know I read these letters, and I saw where early on in the case, they're like oh, well, Cosmo didn't do anything, they're going to get out on summary judgment. No, they're not. No, they're not. You're wrong about that.

So maybe that set everything off on -- you know, maybe they were looking at it wrong from the beginning. But very clearly, Cosmo had its own obligations. I understand the argument that it boils down to this question of well, do we have two towers or one tower here. With all due respect, I believe we have two separate towers of insurance. These are totally separate towers, and I appreciate you don't like my analogy to third-party bad faith, but that's essentially what it is. You can't sue somebody else's insurance company. They don't owe you any duty. I get the point that what we have here is a problem in that National Union initially, or Aspen, whoever it was, took on the joint defense of Cosmo and -- when it was tendered and Marquee. And they only used one

attorney. I don't believe that creates a question of fact, with all due respect. I think they were obligated to -- you know, to take on that joint defense. But Aspen does have its own independent issues.

Should they have had a separate attorney? Well, maybe they should have. But I don't know that that necessarily gives rise to any kind of a cause of action to recover here. They could have demanded that, and they didn't. So that's how it proceeded, fine. It came out in a way that I don't think anybody anticipated. I think pretty much everybody -- everybody in this building was kind of shocked. It's a very large verdict. But I think that it just all starts with that simple question of who's being sued here.

And I understand that Cosmo was not being sued directly as, you know, Cosmo, but there is still an obligation. And it's a duty owed to the public, because they're a gaming licensee. So that's I think where Judge Johnson was coming from, and where he said he felt they just had a non-delegable duty and that even though early on they were -- it carries the registry, don't worry, they didn't do anything, that duty creates this problem for us, that then carries through that litigation and into this litigation. I think it's two completely separate towers of insurance. You cannot sue somebody else's insurance company.

And so for that reason I'm going to grant the motion with respect to National Union. I'm going to also grant the motion with respect to Marquee, because again -- and part of the problem we had early on is we didn't have complete agreements. And I do believe now that we have -- everything is complete. I didn't see anybody alleging that

you didn't really give us the full operating agreement. You didn't really give us your full insurance policy. That was our problem early on, is that we didn't have policy. We didn't have agreements. We've got it all now. It's really well documented, as I said. Exhaustively briefed, and fully -- every single potential exhibit is here.

I do not see that we have any questions of fact here. I think these are all issues of law in the end. And the duty, as I indicated, I believe that it could go all the way back to this operating agreement. There is -- they all had separate insurance. And that's what was intended. So I didn't see that they were acting as if they somehow had created an obligation through their actions, that one of the excess carriers was more excess than the other excess carrier.

You're going to say that. If I'm the first lawyer of excess, you're going to say that in your agreements. And there's nothing here that says -- as was pointed out, there was a primary and an excess for Cosmo, and a primary and excess for Marquee. It wasn't primary, excess one, excess two, excess three. It wasn't like that. It wasn't set up that way. It was set up as two completely separate towers.

So for that reason, I'm granting both the motions and denying the counter-motion. You finding -- and again, here's my -- my question. Now I think we're down to my question from last week, because we only had Aspen last week. Now my question is, do we have 54(b), because technically -- and that's the reason why I didn't want to get into this whole issue of their subrogation problems last week, because it was just them.

I'm assuming we're going to have an appeal. That's why I said everything is here. Everything is in this file. So that's my question. Is where are we on all that? Because --

MR. SALERNO: Your Honor, if I may clarify that question. And attempt to answer it.

THE COURT: Yeah.

MR. SALERNO: Did you view the ruling as to Aspen to be dispositive of the claims against Aspen?

THE COURT: That's why -- that was my question. Was like is it -- is this just a question of it's just -- they just want to know if they have a million dollar policy, or do they have this other issue. Since we hadn't looked at this yet, that -- it made me uncomfortable making a ruling in that -- in that case, totally in a vacuum --

MR. SALERNO: Yeah.

THE COURT: -- not having looked at this other part of the case.

MR. SALERNO: Because we would be a 54(b) is Aspen is not getting out completely. If they are, then it's just -- it's not.

THE COURT: And so that's, I guess the question. And that's why I asked. I just --

MR. SALERNO: We asked -- we asked them to address that.

THE COURT: I didn't know where we left them and we -- because they were done separately, it was a -- I just felt it was awkward at that point in time to get into all of these issues with Aspen when we hadn't looked at any of these issues for these other carriers. And

because they are primary.

MR. SALERNO: Are you going to -- maybe a related question. Are you going to ask us to prepare findings?

THE COURT: Yeah. Yes.

MR. SALERNO: So --

THE COURT: And that's why -- that was my question --

MR. SALERNO: -- and we're going to have to --

THE COURT: -- about 54(b).

MR. SALERNO: -- include a 54()b) in that event.

THE COURT: That was my question. Was, you know, where are we now with this, because I think you're going to -- you're going to need --

MR. SALERNO: I think it's our preference to do --

THE COURT: -- assuming you're going --

MR. SALERNO: -- a 54(b). We don't want to get locked up in whatever dispute remains with Aspen. And if it ends up being that that ruling carries over to be completely dispositive as to Aspen, then the whole case is over at that point.

I think that's the proper way to do it. Ours should be a 54(b). It can go immediately up for appeal if they still lock horns with Aspen, and they --

MR. DEREWETZKY: I think that's probably right, so that we should have the findings relative to what this Court is ruling today.

THE COURT: Uh-huh.

MR. DEREWETZKY: And then with those -- then extrapolate

from that. So as I understand you're granting their motion relative to Marquee, Cosmo vs. Marquee.

THE COURT: Correct.

MR. DEREWETZKY: So Cosmo vs. Marquee does not survive the motion?

THE COURT: Correct.

MR. DEREWETZKY: Okay.

THE COURT: I'm granting their motion for summary judgment. I'm -- with respect to the operating agreement. I'm also granting the motion for summary judgment on the insurance agreements.

MR. DEREWETZKY: Well, and I guess, just so we're clear, it's Cosmo vs. -- you're -- you're -- Cosmo vs. Marquee. Marquee filed a motion for summary judgment.

THE COURT: Correct.

MR. DEREWETZKY: So Cosmo may not bring a claim against us. And you're ruling in favor of --

THE COURT: Cosmo, correct.

MR. DEREWETZKY: -- Marquee relative to that.

THE COURT: Correct.

MR. REEVES: Both motions.

MR. DEREWETZY: Yes, and St. Paul.

THE COURT: Under that -- under the management agreement. And as I said, early on we did not have complete agreements. We didn't have complete insurance policies, we didn't have

complete operating agreement. It's -- I did not see anybody raise an issue. I know there's -- you objected to each other's questions of fact, and each other's representations in your motions. But I didn't see anybody say that's not the complete operating agreement, or that's not a complete insurance policy. My belief is the problem we had here is we didn't have complete record. I think we have it now.

MR. DEREWETZY: Your Honor.

MR. SALERNO: Oh, go ahead.

MR. DEREWETZY: We have a pending motion before the Discovery Commissioner. I think that your ruling would render that moot, but we're not going to get an order before the hearing, so --

THE COURT: You can --

MR. DEREWETZY: Can we take that off calendar?

MR. SALERNO: We'll go ahead and withdraw it. We have a record of today, so if that comes up for any reason, we'll have a record.

THE COURT: Okay. All right.

MR. SALERNO: We'll withdraw it without prejudice.

THE COURT: Okay. Thanks.

MR. SALERNO: Based on the ruling.

THE COURT: Thanks, yes. And so now we've done this one and that leaves us with Aspen. And as I said, I just was not comfortable last week, because I hadn't even looked at this, so --

MR. SALERNO: Sure. One other housekeeping matter, we had a motion to seal Exhibit 1, it as the micromanagement agreement, and I have an order on that.

THE COURT: Okay. Thank you, yes.

MR. SALERNO: So may I approach?

THE COURT: Yes.

MR. SALERNO: Do you need to see that?

THE COURT: And was that the only thing that we needed to seal, because one of the insurance policies was not redacted. I think it was --

MR. REEVES: I don't think -- I think this is it, Your Honor.

THE COURT: Okay.

MR. SALERNO: At least that's the only we filed.

THE COURT: Okay, because, yeah, I did see that we -- I just want to make sure that we're not -- see, it's sealed for purposes of anybody viewing it publicly, but, of course, it would be --

MR. SALERNO: Yeah.

THE COURT: -- it's available in the record.

MR. SALERNO: In the record. Yes.

THE COURT: And so I want to be really clear. We've got a complete record because this one -- this is --

MR. SALERNO: Yes.

THE COURT: -- really sure that we've got everything clear in the record.

MR. SALERNO: Yeah, so I would think the transcript today, to the extent it refers to any aspects should be sealed. I don't know if it's easier just to seal the whole transcript.

THE COURT: Nobody --

MR. REEVES: No, the transcript shouldn't be sealed.

THE COURT: We were pretty careful.

MR. REEVES: Yeah. Agreed.

THE COURT: I don't think anybody mentioned anything about policy limits.

MR. REEVES: I don't think there's anything to be sealed.

THE COURT: I think the only time it was mentioned was that they were equal policy limits, and they paid equally. But nobody mentioned --

MR. REEVES: No, counsel --

THE COURT: I think we're -- I'm pretty sure we were careful. If you get the transcript and you have a concern about it, and you want to seal it, you can certainly ask after the fact. I don't think we need to seal it. I think that everybody was really careful.

MR. SALERNO: And, Your Honor, I want to clarify, too, that our motion included request for attorney's fees, on behalf of Marquee, the prevailing party under the Nightclub Management Agreement.

THE COURT: That would be a separate -- I would have to look at that as a separate motion.

MR. SALERNO: It's part of our motion. Do you --

THE COURT: Right, but because we need all the documentation on that --

MR. SALERNO: So right now I have a motion for fees and costs.

THE COURT: They have the right then to oppose it.

MR. SALERNO: Very good.

MR. REEVES: Thank you, Your Honor.

MR. SALERNO: Thank you, Your Honor.

THE COURT: Okay.

[Proceedings concluded at 11:27 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

Jessica B. Cahill

Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

EXHIBIT C

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Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiff, vs. ASPEN SPECIALTY INSURANCE COMPANY, ET AL, Defendant.	CASE#: A-17-758902-C DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN
DISTRICT COURT JUDGE
TUESDAY, OCTOBER 8, 2019

RECORDER'S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES

For the Plaintiff: RAMIRO MORALES, ESQ.

For Aspen Specialty Insurance Company: RYAN A. LOOSVELT, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

Case Number: A-17-758902-C

Las Vegas, Nevada, Tuesday, October 8, 2019

[Case called at 10:06 a.m.]

THE COURT: We're going to be calling the -- we've got somebody on the phone there, I think. So, yeah, this would be the St. Paul v. Aspen. And we'll call --

MR. MORALES: Good morning, Your Honor.

THE COURT: -- I believe there is somebody who was going to be participating telephonically.

MR. MORALES: Okay.

THE CLERK: Mr. Herold. Hello.

MR. MORALES: Good morning, Your Honor. [Indiscernible} on their way.

UNIDENTIFIED SPEAKER: Hello.

THE CLERK: Do I have Mr. Herold on the line?

THE COURT: Okay. The Court has called St. Paul Fire & Marine v. Aspen Specialty Insurance, 758902. Is there anybody on the telephone who wishes to participate in St. Paul Fire & Marine v. Aspen Specialty? If not, then you'll just need to hold pending your matter.

UNIDENTIFIED SPEAKER: Okay.

THE COURT: Okay. All right. Thanks. So it appears that he did not call in. Okay. So I guess we can --

MR. MORALES: Okay. Good morning. Ramiro Morales, counsel for St. Paul, bar number 7101.

MR. LOOSVELT: Good morning, Your Honor. Ryan Loosvelt

for Aspen.

THE COURT: Okay. All right. Great. So this is the motion for partial summary judgment, and this is the question of the policy limits.

MR. MORALES: Yes. Yes, Your Honor.

THE COURT: Okay.

MR. MORALES: Again, this is a single issue motion. The issue was whether there was two million available --

THE COURT: Uh-huh.

MR. MORALES: -- if there was two million or one million available.

THE COURT: Uh-huh.

MR. MORALES: In reviewing the papers from Aspen, they seem to raise three issues. One, that they have a coverage part endorsement that limits coverage is to a single limit. Two, that the policy is limited by the number of occurrences. And, three, that there is ambiguity in the policy.

My view of that is the easiest way to deal with it is really just to read the policy because -- so what I've done is I just have a short PowerPoint just to run through the policy terms, because the arguments that Aspen has made in response, is they don't dispute that there's a $2 million aggregate limit. They don't dispute that there is a $1 million personal injury limit, and a $1 million coverage paid bodily injury limit. They just say they're combined. There's really no authority for that in their papers because when you read the policy it is very clear that in fact

it is -- they are separate limits.

So I just ran through here and to just go through the policy terms, I think is the easiest thing to do. When you look at the declaration page of the policy, you'll see that they have the coverage part argument that the coverage part limits all coverage to one limit, but you'll see that the coverage parts are actually separate. There's the commercial general liability coverage part and the liquor liability coverage part, those are separate coverage parts. That's what the endorsement that they refer to, to limit coverage to.

THE COURT: I thought this was a stacking case when I read it, and I didn't understand why it wasn't being approached that way. If this policy contains two or more coverage parts --

MR. MORALES: Yes.

THE COURT: -- providing coverage for the same occurrence. And I thought this was your argument, maybe I'm wrong about it. I thought your argument was these were two different occurrences. That he had an advertising injury and the actual slamming his head into the concrete floor injury?

MR. MORALES: That is true, but in a precise reading of the policy that's actually not an occurrence argument --

THE COURT: Okay.

MR. MORALES: -- because the advertising injury coverage is driven by personal injury offenses. And the law is that advertising injury is not driven by occurrence. And I actually have a slide that will address that, if you give me a moment.

THE COURT: Uh-huh.

MR. MORALES: You'll see this is the limit of liability section of the policy. And you'll see that paragraph four refers to the personal and advertising injury limit, referring to coverage B. And paragraph five says -- refers to the coverage A, and it refers to each occurrence.

So it is somewhat conflating the concepts when you say that the advertising injury coverage is an occurrence limit. The advertising injury coverage is an offense limit --

THE COURT: Uh-huh.

MR. MORALES: -- and the bodily injury coverage is an occurrence limit. And you have separate limits for those. Let me just get to that.

You'll see there that in the policy there is an occurrence limit of $1 million and a separate personal injury limit of $1 million bound by the aggregate limit. And here, because you have a unique set of factual circumstance where they actually have both claims of false imprisonment and claims of bodily injury, and it's ultimately a judgment on both, you get two limits.

THE COURT: Okay. I'm going to go back to their other -- they call it another insurance. They don't call it standby stacking. In your policy, I believe it's specifically identified as anti-stacking. In their policy, they term it other insurance.

If this policy contains two or more coverage parts providing coverage for the same occurrence, accident, cause of loss, loss, or offense -- so they have both occurrence and offense -- the maximum

limit of insurance under all coverage parts shall not exceed the highest limited insurance under any one coverage part.

MR. MORALES: Okay. So you're referring to the coverage part, Your Honor.

THE COURT: Right.

MR. MORALES: The coverage part is the commercial general liability coverage. There are separate coverage parts in the policy. Let me get --

THE COURT: Yes, there are two. There are three, actually.

MR. MORALES: No, there is a liquor liability coverage part and a commercial general liability coverage part. Within the commercial general liability coverage part, there are two separate coverages. Those are not coverage parts. The commercial general -- the personal injury coverage and the bodily injury coverage are not coverage parts. Those are coverages within a single coverage part.

THE COURT: Uh-huh.

MR. MORALES: What the endorsement does is it prevents combining of the liquor liability coverage and the -- the liquor liability and the commercial general liability coverage.

THE COURT: Okay. And so -- I mean, is there anything further? I didn't want to cut you off.

MR. MORALES: No, I mean, it's --

THE COURT: For purposes of having a clear record, we would -- if you could email the slides so that it's clear in the Court's records. And so, we have them --

MR. MORALES: Okay. I have copies here. Would you preferred them emailed?

THE COURT: Well, if you got a hard copy, we'll absolutely take a hard copy. I don't know, counsel, if you wanted to see that. So, again, I look at it as a stacking case, and I believe you provided -- and we should make it clear, I don't think any of these policies were -- I mean there's nothing in here that we need to worry about it being sealed, right? Because I mean we do have a really -- a lot of confidentiality agreements governing us.

MR. MORALES: Yes. Yes.

THE COURT: So I just want to make clear that the pleadings that we've got filed, we don't have to worry about any -- nobody's got any issues with any of this having to be sealed or be confidential.

MR. LOOSVELT: I don't. Do you?

MR. MORALES: No, Your Honor.

THE COURT: Okay. Got it. Okay. Because I looked at the two different policies. They call it anti-stacking in their policy. You provided that. And then they provided your policy, which has this other insurance clause and, which, kind of is the same thing. So that's what I look at it as. And counsel's point is that I'm reading this too restrictively. That the coverages are the CGL versus the liquor, not the three coverage parts that are under this one policy, because there were three.

MR. MORALES: Your Honor, we cite to ten different portions of the CGL policy where they refer to it as a single coverage part.

THE COURT: Right. So commercial general liability has the

insurance agreement, and then let's see what we got up here. We got the chart. Because it contains within it coverage -- it's coverage B, personal and advertising, it's two different -- they're both coverage parts. I mean, I don't --

MR. MORALES: They're not coverage parts. They use coverage part as a definition of different coverages. When you look at the declarations page of the policy --

THE COURT: Okay.

MR. MORALES: -- they refer to coverage part as the liquor liability coverage part, the commercial general liability --

THE COURT: Yeah, let me get back to that.

MR. MORALES: -- coverage part, and the property coverage part.

THE COURT: Let me get back to --

MR. MORALES: Within those --

THE COURT: -- let me back to those.

MR. MORALES: -- there are different coverages.

THE COURT: Let me get back to these. Okay. Okay. Great. I'm back there. Common policy declarations.

MR. MORALES: Yes.

THE COURT: Okay. Common policy declarations, page 32. Commercial general, commercial property coverage, liquor liability coverage part --

MR. MORALES: They all say part at the end.

THE COURT: -- terrorism premium, and the total events

premium. Okay.

MR. MORALES: So they're each separate parts. Then within the CGL there are two limits bound by the aggregate. So the protection is the aggregate limit, the 2 million. You have two different coverages, the personal injury coverage and the bodily injury coverage.

THE COURT: Okay. All right. So then when I look at the CGL policy, it has coverages and in the policy -- because I don't know that the declarations page is a binding contract. The policy it calls it coverages. Coverage A, bodily injury and property damage. Coverage B, personal and advertising injury liability. And Cover C, I think was med pay.

MR. MORALES: An then there was another form as well. There is a separate coverage.

THE COURT: Oh, separate. Uh-huh.

MR. MORALES: It's got a completed operations coverage and a general aggregate.

THE COURT: Okay. All right. So just this interpretation of what is the other insurance --

MR. LOOSVELT: Yeah. So the endorsements is just one aspect of what we need to look at here. But just to address that quickly. The way Your Honor read it -- and we submitted our reply yesterday. I don't know if you had a chance to read it.

THE COURT: I got it here.

MR. LOOSVELT: Okay.

THE COURT: Uh-huh.

MR. LOOSVELT: And the reason is for that is we had an

agreement to continue the hearing, and that was pulled last week, so we wanted to get the reply on file before the hearing today. But in any event, the endorsement, as you read it, it does include -- it states occurrence, offense. And those are the words within those coverage points in bodily injury, in the personal advertising injury. We think it's pretty plain on its face that that's what it covers, and it limits it to the maximum for any one, which he concedes is the 1 million in their papers.

But there's more -- there's other reasons here outside of this endorsement. Everyone knows it's a $1 million policy. This is how they've been treated always. This is not a new interpretation Aspen is advancing. This is a new interpretation that St. Paul is asking the Court to adopt. They filed a 30 page reply with 98 authorities in it, none of which state what they want this Court to adopt. We did discuss in our reply the *Safeco Insurance Company* case, where this very argument was made. The artful pleading of claims is not going to double the coverage just because they have -- they allege false imprisonment in addition to the negligence claim. That doesn't double coverage. What's the effect it's going to be. And any plaintiff is going to be able to double the coverage on the policy just by artful pleading of the claims.

And that's not what the law says. The law for the policy limits, it looks at the causal nexus of all the injuries. Here there is no dispute it was all just one cause, what happened at the nightclub that evening that caused all the injuries.

THE COURT: Right. And so, again, just to be clear, I had

nothing to do with the trial. So I don't know anything about the underlying trial. So I don't think it's really disputed how they describe the accident. I mean what happened is what happened. I mean, I think, we're all in agreement on that. That he was -- you know, ran into this altercation with management in the club. You know, hit his head on the doorframe. Then they took him into the bathroom and allegedly beat him up before letting him go.

So each of those, hitting his head on the floor of the holding cell, versus hitting his head on the doors as they're taking him out aren't separate occurrences.

MR. LOOSVELT: Correct. And I don't even think Plaintiff is arguing there's multiple occurrences.

THE COURT: Right. So I mean --

MR. LOOSVELT: They're just saying --

THE COURT: -- but it's the same thing.

MR. LOOSVELT: Right.

THE COURT: I mean, occurrence is defined.

MR. LOOSVELT: Right. Right. So it's all one continuous act. It's all one cause. So there's one occurrence here. And the way the law looks at it, that's how the policy limits are applied. So if there are multiple occurrences, then it would -- then the aggregate might come into play, but it doesn't here. And this is a new interpretation that they're asking the Court to adopt and frankly there's no support for it.

It's how the policy reads, it's how it's treated, it's how the law construes the limits. And, frankly, it's how it was treated throughout the

entire case. So there was a $26 million settlement offer. Well, what did that represent? That's the 1 million primary Aspen and the 25 million National Union.

THE COURT: Okay. I don't think we're supposed to talk about settlement or policy limits.

MR. LOOSVELT: Oh, okay.

THE COURT: I think that was part of the agreement.

MR. LOOSVELT: But the same thing with the -- if we look at the post-judgment settlement. That represents --

MR. MORALES: It's all confidential, Your Honor.

THE COURT: Right.

MR. LOOSVELT: I understand, but that represents the --

THE COURT: You're not going to talk about numbers.

MR. MORALES: Okay.

THE COURT: I think we all agreed we wouldn't talk about the numbers.

MR. LOOSVELT: Right. So we all know what those numbers are, and we know what those represented. And so that's how it was treated the whole time here. So we think the plain language applies to a $1 million policy. We haven't seen anything else to show us otherwise here in the 30 page reply. There was nothing on point there that would -- that would allow us to adopt this new doubling the coverage, because he pled alternative claims here. And a duty to defend is different than a duty to indemnify. And the law is pretty clear on this.

So what we have, we have Plaintiff's claims, contractual

subrogation, which isn't recognized in Nevada with equitable subrogation, which hasn't been recognized yet, and they're asking the Court to recognize it here. But because -- most importantly because there's a 1 million policy limit, there's been no bad faith refusal to settle within the policy limit. They contend the settlement was the 1.5 million offer. That's in excess of that.

So there's no security equity here for St. Paul to even have these equitable subrogation claims, were the Court even to recognize it here for the first time.

THE COURT: Now -- so their request for relief on their motion for partial summary judgment was for the Court to interpret this as a $2 million limit. Your countermotion?

MR. LOOSVELT: Was for the $1 million limit and summary judgment on the claims against Aspen.

MR. MORALES: No. I think all we pled was the $1 million limit and dismissal of the equitable estoppel claim.

THE COURT: Yeah, the estoppel. Uh-huh.

MR. MORALES: I didn't see anything else.

MR. LOOSVELT: We would --

THE COURT: So I'm just trying to figure out what you're asking for because --

MR. LOOSVELT: Well, we're asking for summary judgment on the claims because there -- it was a countermotion based on the relief. They're seeking the viability of these subrogation claims. And our countermotion in opposition, they're not viable, and they can't be

recognized, and because we have this $1 million limit, they couldn't be viable even if it were going to be recognized as equitable subrogation claims.

MR. MORALES: Your Honor --

MR. LOOSVELT: So those are at issue here, just like they're at issue in the summary judgment motions you're hearing next week with the other Defendants, whether or not contractual subrogation and equitable subrogation, summary judgment should be granted --

THE COURT: Okay.

MR. LOOSVELT: -- in favor of Defendants.

MR. MORALES: Your Honor, if could just -- because we're going a little far afield here --

THE COURT: Okay.

MR. MORALES: -- but I just want to make a couple of things clear. We asked for a very specific issue. He's referring to Aspen's conduct during the underlying case. There will be evidence that even when they could have settled for the one-five, they never even offered $1 million. They offered nothing. So there will be evidence about improper conduct throughout. It's just --

THE COURT: Right. I mean that seems kind of premature to me.

MR. MORALES: Yes.

THE COURT: I mean because you had a very narrow issue, just what are the limits.

MR. MORALES: Yes. And then -- but just to respond.

Counsel repeatedly says the law doesn't support it. This is a novel concept. Not a single citation. Okay. It's -- if you read the record he could say, look, it's not supported by the law. It's not supported by the law. We gave you law that says the advertising injury limit and the coverage A, bodily injury limit, are separate limits. They are driven separately. If you look at page 6 of our reply brief, we cite to the IRMI article, which is well regarded authority cited by the Nevada Supreme Court in the *McKinney* case as authoritative. It explains the difference between coverage A and coverage B, that one is different by offenses, the other is different by occurrences. To say these are all the same occurrence is the wrong starting point.

THE COURT: Okay. Well --

MR. MORALES: There is an offense and an occurrence.

THE COURT: Okay. But we have this other insurance clause, which includes all of those definitions.

MR. MORALES: It includes all of those for a coverage form for separate coverage forms.

THE COURT: Uh-huh.

MR. MORALES: This is not a separate -- the maximum limit on this coverage form is $2 million.

THE COURT: Uh-huh.

MR. MORALES: It's the aggregate. The maximum limit on this coverage form, coverage A, before you, is $2 million.

THE COURT: Okay. And so then again reading your client's anti-stacking endorsement, regardless of the limits testified in the

declarations of this policy, if any bodily injury, property damage, personal injury, or advertising injury covered by this policy is also covered by any other named insured certificate issued by whatever this entity is, the maximum that we will pay for all such bodily injury, property damage, personal injury, or advertising injury will be the highest applicable, each occurrence limit under any one of those certificates.

So your position being that an anti-stacking clause as written by -- in your client's policy, where it's dependent on the certificates and encompasses all those different kinds of coverage, is operative to limit the exposure under the anti-stacking.

MR. MORALES: That anti-stacking endorsement --

THE COURT: Uh-huh.

MR. MORALES: -- goes to different policies --

THE COURT: Uh-huh.

MR. MORALES: -- not coverages within a policy.

THE COURT: Right. And that's what I'm saying.

MR. MORALES: So anti-stacking is a different concept there.

THE COURT: Right.

MR. MORALES: Okay. So it is different.

THE COURT: Okay. And so, again, I just want to make it clear that -- because when I look at this, I just thought, well, it's with the stacking. I thought we settled stacking 30 years ago when I first moved here. So --

MR. MORALES: You have a personal injury event and a

bodily injury event.

THE COURT: Uh-huh.

MR. MORALES: Two limits.

THE COURT: Okay. Perfect. So did you want to say anything further with respect to his motion, because to the extent that I view this as -- you had narrowed the issue pretty clearly. I do think that these other issues are questions of fact about whether or not you can recover on any of these --

MR. MORALES: Okay.

THE COURT: -- causes of action or --

MR. MORALES: That's fine. Yeah.

THE COURT: The policy limit part I understood is very limited. I don't know if you want to address it any further with respect to why I should go beyond the one narrow issue that they started with, which was the policy limit. Your counter-motion seemed to expand just to more -- a couple more issues.

MR. LOOSVELT: Yeah, we discussed it, and I kind of hit it already, but we discussed the law and how it construes the policy limits and the one cause. We went over that as well. We did cite a case in our reply brief, when you get a chance to look at it. I know it was submitted yesterday. It kind of rejects this argument that you're going to double cover just because you have a personal injury claim, and then also a claim in the other coverage part. So it's a $1 million policy. It's how everyone treated it.

THE COURT: And so, as I said, pointing to they had -- they

specifically called theirs anti-stacking. Your client's policy was other insurance. Same concept. They differentiated it in theirs by the basis of certificates and types of policies, that anti-stacking of the policies. Whereas, in this one it's anti -- it looks to me -- I mean this is an anti-stacking clause. We've had them for 35 years.

So I'm going to grant the countermotion, deny the motion. I believe that the other insurance clause in this policy operates to limit coverage to $1 million. Whether they should have made any offers, whether they could have made an offer or could have gone over any of those other issues that kind of were talked about a little bit it in this wonderful, you know, 550 page reading, thank you very much guys, which I did. I read it.

MR. MORALES: Your Honor, if I could clarify for the record the Court is relying on the conditions endorsement for -- that they're limited to one --

THE COURT: The other insurance clause, yeah.

MR. MORALES: Yes.

THE COURT: Let me -- I appreciate the fact you had your pages numbered. So this was -- it appears to be -- it's page 68. And I read that, but I didn't limit it to that. I read that. And then, as I said, I went back, and I looked at all these -- the way all these other things were defined, because I went back and read the definitions. I read the definition of occurrence. It's not in here. Occurrence. I read the definition of injury, and it wasn't -- some of these weren't defined.

MR. MORALES: Personal injury is defined as an offense.

THE COURT: Yeah. And so where's my definitions. Okay. So we have bodily injury -- definitions. Where's my definitions? I have all these different tabs. There was supposed to be different colors, so I can tell what I was looking at with the different colors, and then I forgot what my colors mean.

MR. LOOSVELT: Your Honor, just also for the --

MR. MORALES: I can -- Your Honor, personal injury is an offense defined as a number of offenses including false imprisonment, false arrest, libel, slander, defamation.

THE COURT: Uh-huh.

MR. MORALES: It runs through that. That's personal injury and advertising injury definition.

THE COURT: Uh-huh.

MR. MORALES: You have the bodily injury definition, which is --

THE COURT: And occurrence on page -- well, it's page 12 of the policy, in your pleading it's page 53.

MR. MORALES: -- an accident including continuous repeated exposure to the --

THE COURT: Right.

MR. MORALES: -- same conditions.

THE COURT: Yeah.

MR. MORALES: You will find that the word occurrence is not found in the personal injury coverage.

THE COURT: Uh-huh.