IN THE SUPREME COURT OF THE STATE OF NEVADA

ASPEN SPECIALTY INSURANCE COMPANY,

Petitioner,

v.

THE EIGHT JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE GLORIA STURMAN, DISTRICT JUDGE,

Respondents.

And

ST. PAUL FIRE & MARINE INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; ROOF DECK ENTERTAINMENT, LLC, D/B/A MARQUEE NIGHTCLUB,

Real Parties in Interest

Supreme Court No: 83794

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ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(1), and must be disclosed:

The Travelers Companies, Inc., which is publicly held, is the 100% owner of appellant St. Paul Fire and Marine Insurance Company.

The attorneys who have appeared on behalf of St. Paul Fire and Marine Insurance Company in this Court and in district court are:

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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 21st day of March, 2022.

/s/ Mark A. Hutchison

By:_____

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CASE LAW

INTRODUCTION

On December 20, 2021, this Court ordered real party in interest, St. Paul Fire and Marine Insurance Company ("St. Paul"), to answer Petitioner Aspen Specialty Insurance Company's ("Aspen") original petition for a writ of mandamus or in the alternative, prohibition seeking to compel the district court to grant a motion of summary judgment in an insurance subrogation matter (the "Petition"). This Court directed St. Paul to address both the "propriety of writ relief," and the merits of the Petition.

In short, writ relief is not proper. The Petition does not meet the demanding standard for this Court's extraordinary intervention, nor does it fit within any of the very few exceptions to the general rule disfavoring writs that challenge summary judgment denials.

Further, granting the Petition would not save any judicial resources. The district court has repeatedly held that St. Paul's case against Aspen differs legally and factually from St. Paul's case against fellow real parties in interest, National Union Fire Insurance Company of Pittsburgh, PA ("National Union") and Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee"). Aspen confirms as much by making new arguments that contradict or discord with National Union's and Marquee's positions in pending Appeal No. 81344 (the "Appeal"). And the briefing in the Appeal is complete. Indeed, this Court recently

set oral argument for April 5, 2022. To the extent the Petition mimics questions already raised in the Appeal, this Court will soon provide answers.

Aspen had no justifiable reason to stand pat for a year before seeking "extraordinary" relief, yet it waited more than a year—while two separate matters made significant progress. And Aspen does not pretend otherwise. Instead, Aspen argues *as if* its Petition followed a natural and orderly course from court decision to writ request. The *13-month* intermission goes unmentioned and unexplained.

Aspen has fully participated in the district court litigation of this case since its motion for summary judgment and its renewed motion for summary judgment were denied. Indeed, as detailed *infra*, Aspen has fully engaged in discovery, motion practice, discovery extensions, and court hearings during that time.

In sum, Aspen's delayed Petition prejudices St. Paul, which spent the last year working on both the lower court matter and the Appeal simultaneously, believing that if Aspen was going to seek writ relief it would have done so with reasonable timeliness.

Therefore, the doctrine of laches bars the Petition. Aspen waited more than *13 months* before filing its Petition. During those 13 months, the underlying case moved forward. The Appeal also advanced. St. Paul filed its Opening Brief on March 1, 2021; National Union and Marquee filed its Answering Brief on August

2, 2021; and St. Paul filed its Reply on November 30, 2021 – just 13 days after Aspen filed its Petition. Oral arguments are scheduled in less than three weeks.

Ultimately, Aspen adds little more than legal and practical confusion to the Appeal. Should this Court grant the Petition, both the lower court action and the Appeal would be delayed while St. Paul and Aspen go through another round of briefing and the relevant factual questions (on a case initiated in 2017) continue to go unanswered. If the Petition is denied, the lower court action can continue as scheduled (the trial is set for next March), and this Court can resolve the Appeal through the ordinary course. In the unlikely event that National Union and Marquee win the Appeal in a way that somehow implicates Aspen, then Aspen will be free to move accordingly in the lower court. The most efficient use of judicial resources demands keeping both matters separate and on track.

Lastly, Aspen's Petition fails on the merits. Its arguments share many of the same fatal flaws that National Union's and Marquee's arguments do in the Appeal. For example, Aspen continues the flawed argument that St. Paul cannot pursue subrogation claims against Aspen because St. Paul is an insurer in a different "tower" of insurance than Aspen. Like National Union and Marquee, Aspen wants this Court to ignore that St. Paul, as subrogee to Cosmopolitan's claims against Aspen, possesses the same rights and assumes the same position as Cosmopolitan, which was an additional insured of Aspen and thus within Aspen's own tower of

insurance. Cosmopolitan could pursue a bad-faith action against its insurer, Aspen, and so can St. Paul as Cosmopolitan's subrogee.

Aspen, National Union, and Marquee all try to escape the consequences of their own bad acts. But Aspen's position is even less persuasive, its theories even more extreme. For instance, Aspen claims subrogation actions can never exist between insurers in any contexts, coming close to arguing entirely out of existence all bad-faith-refusal-to settle claims. Indeed, Aspen's policy-based arguments seeks to strip settled Nevada law of an insurer's obligation to negotiate settlements in good faith while defending their insureds.

Contrary to Aspen's contention, the law did not permit Aspen (and National Union) to favor Marquee over Cosmopolitan during the *Moradi* litigation, or in acting recklessly in not pursuing a reasonable settlement. Indeed, Aspen breached its duty to its additional insured, Cosmopolitan, on both of these points. That is the crux of St. Paul's entire bad-faith case. But only Aspen has been so brazen as to admit what it did, and argue justification. The district court had no patience for Aspen's position, which is one of the reasons it denied summary judgment. "The Court finds that there are issues of fact as to whether Aspen is guilty of negligence in its handling of the [Moradi litigation]." 15 AA 2187 (5:2-3).

ROUTING STATEMENT

No section of NRAP 17 applies directly to Aspen's Petition challenging an order of the district court denying a motion for summary judgment. St. Paul largely agrees that Aspen raises some issues of first impression under Nevada common law, but does not agree that the Petition contains any questions of statewide public importance. Nevertheless, St. Paul does not contest Aspen's request that this Court retain the Petition.

POCEDURAL HISTORY AND FACTUAL BACKGROUND

1. The Moradi Verdict and Settlement.

Aspen's replay of the history and facts of this dispute, while mostly accurate, is also quite sterile – a narrative void of any of the relevant (and, frankly, outrageous) misconduct by Aspen, Nation Union, and Marquee. They shirked their duties to Cosmopolitan, putting their own and Marquee's interests first, and leaving Cosmopolitan exposed to a $160.5 million verdict when Cosmopolitan should not have had to pay a dime. It is hard to imagine a more straightforward case of bad faith by two different insurers against their insured. Aspen and National Union voluntarily assumed and therefore owed Cosmopolitan an *unconflicted* duty to defend it in the Moradi litigation. That duty included the obligation to negotiate settlement in good faith. They treated Cosmopolitan with impunity, believing the law would grant them immunity.

As Aspen details, the dispute between it and St. Paul stems from an underlying bodily injury action captioned *David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan*. Moradi claimed that on April 8, 2012, employees of Marquee Nightclub beat him while he was socializing with friends, causing severe injuries. Moradi sued Marquee on April 4, 2014, asserting various tort claims. Moradi also sued the Cosmopolitan Hotel ("Cosmopolitan"), as the owner of the property where Marquee was located, for breaching its nondelegable duty to keep patrons safe. 1 AA 1-27.

Moradi's lawsuit implicated four different insurance policies from insurers Aspen, National Union, Zurich, and St. Paul. Aspen issued a primary policy of insurance in favor of Marquee, with limits of $1,000,000 each occurrence and $2,000,000 general aggregate. National Union issued a commercial umbrella policy to Marquee. The National Union policy provided limits of $25,000,000 for each occurrence, subject to a $25,000,000 general aggregate. 1 AA 5 (5:21-22).

Critically, Aspen and National Union also insured Cosmopolitan *as an additional insured*. Thus, Aspen and National Union insured both Marquee and Cosmopolitan at the same time. Cosmopolitan had additional primary insurance through Zurich, and excess insurance through St. Paul. 8 AA 1148.

At the start of the Moradi litigation, Marquee and Cosmopolitan tendered the action to Aspen and National Union. Aspen–which had a duty to defend both

insureds–and National Union–which exercised its right to associate in the defense of both insureds–each decided to provide a joint defense to both Marquee and Cosmopolitan, despite obvious conflicts between the two. Absent a conflicted defense, Cosmopolitan would have cross-complained against Marquee for indemnity, and, neither Aspen nor National Union ever sought nor procured a conflict waiver from Cosmopolitan. 1 AA 53.

During the course of the litigation and trial, Moradi made at least three settlement demands. On or about December 10, 2015, Moradi served a formal, written statutory Offer of Judgment for $1.5 million—less than one percent of the eventual $160.5 million jury verdict. 1 AA 54. Aspen and National Union rejected the offer without informing either St. Paul or Cosmopolitan. On November 2, 2016, and, again, on March 9, 2017, National Union rejected two settlement offers for $26 million, the amount of the combined Aspen and National Union limits. 1 AA 9-10.

Aspen (and National Union) rejected these settlement offers despite being aware of the risks of trial. Aspen included documents supporting this point, including the timing of its knowledge of the risks and the analysis and advice of its counsel in plainly setting forth the risks of proceeding to trial in the Appendix filed with the Petition. 2 AA 193-205.

Nevertheless, after a five-week trial, the jury awarded Moradi compensatory damages of $160.5 million. After the verdict and during the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. The four insurance companies then paid the settlement, resolving Marquee and Cosmopolitan's liability to Moradi. 1 AA 10; 12 AA 1755.

St. Paul subrogated Cosmopolitan's claims and filed suit against Aspen, National Union, and Marquee, seeking to recover the money it was forced to contribute to the ultimate settlement to satisfy a verdict that should have never occurred. 1 AA 1-27.

2. The Case Against Aspen.

On December 13, 2017, Aspen moved to dismiss St. Paul's claims. The district court denied the motion, and then denied Aspen's second motion to dismiss filed in response to St. Paul's amended complaint.

On August 29, 2019, St. Paul filed a motion for partial summary judgment against Aspen. The motion sought a declaration of the amount of coverage available under the Aspen policy. On September 19, 2019, Aspen opposed St. Paul's motion for partial summary judgment, and included a counter-motion for summary judgment. On October 8, 2019, the district court conducted a hearing on St. Paul's motion and Aspen's counter-motion. 11 AA 1593-1616.

On May 14, 2020, the district court granted in part and denied in part Aspen's motion for summary judgment. Aspen renewed its motion for summary judgment, and the district court denied the motion for summary judgment on October 9, 2020, finding a difference between a claim via subrogation against a primary carrier, and a similar one against an excess carrier. The district court also reiterated that St. Paul's claims against Aspen still contained disputed factual issues. In particular, "there are issues of fact as to whether Aspen is guilty of negligence in its handling of the [Moradi] case." 15 AA 2187

With its Petition, Aspen is now challenging the district court's October 9, 2020 order denying Aspen's renewed motion for summary judgment. But on November 11, 2020, shortly after the October 9, 2021 order, the parties stipulated to a scheduling order, which the district court issued as the governing Scheduling and Trial Order. This Court can take judicial notice that Order set trial for a four-week civil jury trial stack beginning March 21, 2022. Since then, as noted, the parties have conducted discovery (with Aspen demanding documents as late as the end of 2021), engaged in motion practice, and appeared before the lower court multiple times. This Court can take further notice that the trial date has since been pushed back to 2023.

3. The Appeal.

In May 2020, the district court granted National Union's and Marquee's motions for summary judgment on St. Paul's claims against them, and issued Findings of Fact and Conclusions of Law granting both motions on May 14, 2020. 12 AA 1752-70.

St. Paul timely appealed the district court's orders. After the parties completed the settlement program, briefing started. St. Paul filed its opening brief on March 1, 2021. On May 13, 2021, non-party Aspen filed an answering brief, which the Court subsequently struck on June 4, 2021. National Union and Marquee filed their answering brief on August 2, 2021, and St. Paul replied on November 30, 2021. Briefing is complete and oral argument is scheduled.

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ARGUMENT

1. Writ Relief is Not Proper.

A. Aspen's Petition Does Not Merit Extraordinary Relief.

Aspen seeks extraordinary relief. And as this Court recently held, "[e]xtraordinary relief should be extraordinary." *Walker v. Second Jud. Dist. Ct.*, 476 P.3d 1194, 1195 (2020). In order to justify such relief, Aspen must show:

> (1) a legal right to have the act done which is sought by the writ; (2) it must appear that the act which is to be enforced by the mandate is that which it is the plain legal duty of the respondent to perform, without discretion on his part either to do or refuse; (3) that the writ will be availing as a remedy, and that the petitioner has no other plain, speedy, and adequate remedy.

476 P.3d at 1196

"[T]he question of whether a petitioner has a legal right to any particular action by the lower court turns, in part, on whether the action at issue is one typically entrusted to that court's discretion, and whether that court has exercised its discretion appropriately." *Id.* "Where a district court *is* entrusted with discretion on an issue, the petitioner's burden to demonstrate a clear legal right to a particular course of action by that court is substantial; we can issue traditional mandamus only where the lower court has *manifestly* abused that discretion or acted arbitrarily or capriciously." 476 P.3d at 1196-1197 (emphasis in original).

"[T]raditional mandamus relief does not lie where a discretionary lower court decision 'result[s] from a mere error in judgment'; instead, mandamus is available only where 'the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.'" *Id.* A writ of mandamus is not meant to be a "writ of error." *Id.*, 476 P.3d at 1198. Furthermore, "the right to an appeal is generally an adequate legal remedy that precludes writ relief" *Pan v. Eighth Judicial Dist. Ct.*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004)

Aspen challenges the district court's purely discretionary act of reviewing and denying a motion for summary judgment. No statute or rule required summary judgment; no law was overridden or misapplied. What Aspen seeks is a writ of error, and not one for mandamus. Furthermore, Aspen still has the right to appeal any adverse judgment, or to move in the lower court should this Court decide the Appeal in a way that controls the outcome of St. Paul's case against Aspen. In short, Aspen's Petition is not extraordinary, so it is not entitled to extraordinary relief.

B. Aspen Cannot Overcome the General Rule Against Writs Challenging Summary Judgment Denials.

Aspen is also unable to show why this Court should depart from its general rule declining to consider writ petitions that challenge summary judgment denials.

See Smith v. Eight Jud. Dist. Ct., 113 Nev. 1343, 1344-45, 950 P.2d 280, 281 (1997). This Court only recognizes "very few exceptions" to this general rule. *Id.*

Therefore, this Court will only consider "certain petitions where no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court obligated to" grant summary judgment, or "an important issue of law requires clarification." 113 Nev. at 1345, 950 P.2d at 281.

Nevertheless, the interests of judicial economy . . . will remain the primary standard by which this court exercises its discretion." *Id.* "Judicial economy is the lodestar." *USAA*, 2021 WL 2769032 *1 (*citing Smith*, 113 Nev. at 1345, 950 P.2d at 281).

Since the 2020 *Walker* decision, though, this Court has denied at least eight requests for writ relief of summary judgment denials. *See Berkshire Hathaway, Home Service Nevada Property v. Eighth Jud. Dist. Ct.*, 480 P.3d 835 (Feb. 16, 2021) (unpublished decision); *Crossman v. Eighth Jud. Dist. Ct.*, 481 P.3d 1256 (March 6, 2021) (unpublished decision); *Corner Invest. Comp., LLC v. Eighty Jud. Dist. Ct.*, 481 P.3d 1255 (March 9, 2021) (unpublished decision); *Olson, Cannon, Gormley, Angulo & Stoberski*, 488 P.3d 572 (June 5, 2021) (unpublished decision); *Vickie's Diner, Inc. v. Eighth Jud. Dist. Ct.*, 488 P.3d 578 (June 11, 2021) (unpublished decision); *Boulevard*; *Richardson v. Eighth Jud. Dist. Ct.*, 494 P.3d 901 (Sept. 13, 2021) (unpublished decision); *Las Vegas Paving*; and *USAA*

Casualty Ins. Co. In fact, St. Paul is not aware of any instances of this Court granting writ relief from a denial of summary judgment since *Walker*.

(1) Aspen's Petition does not meet the "very few" exceptions to the general rule disfavoring writs for summary judgment denials.

Aspen's request does not meet any of the "very few" exceptions from the general rule to decline writ relief for denials of summary judgment. First, factual issues remain disputed. The district court has ruled as follows:

> 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 as questions of fact.

15 AA 2234-45 (Order on Renewed MJS, 2:8-11).

> Aspen was the primary insurer in *Moradi* that made the decisions that resulted in the case going to trial, and in the verdict, and the consequent settlement. Aspen is the entity that allegedly refused to settle. Aspen is in a completely different position than National Union.

Id., 4:23-26.

> The Court finds that there are issues of fact as to whether Aspen is guilty of negligence in its handling of the case. Even with the policy limit of only $1 Million, and assuming there was no opportunity to settle within that limit, does that mean Aspen should have refused to pay, or does it mean that Aspen should have gotten St. Paul and the other carriers involved sooner because there was not enough insurance and the risks of trial were great? There are questions of fact as to whether Aspen did not properly settle when it should have.

(*Id.*, at 5:2-8.)

Second, no statute or rule compelled the district court to rule in Aspen's favor. Third, the only parties currently interested in the outcome of the legal questions here and in the Appeal are Aspen, St. Paul, National Union, and Marquee. This is a far cry from a legal matter of statewide importance. This Court will soon decide the fully briefed Appeal, likely answering any important legal questions of first impression. Should the decision implicate St. Paul's case against Aspen, Aspen may seek relief in the lower court.

Finally, one main thrust of Aspen's global argument is that St. Paul somehow stood idly by, while Cosmopolitan was at risk and Aspen and National Union did all of the defense work. (Pet. at 29). St. Paul rejects both the factual foundation and legal premise of that argument. St. Paul was not made aware of the *Moradi* litigation and risks until the eve of trial. Even so, Aspen is essentially making an equitable estoppel defense. And the existence of equitable estoppel is a question of fact. *See In re Harrison Living Trust*, 121 Nev. 217, 221 n. 12, 112 P.3d 1058, 1061 n. 12 (2005).

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(2) Judicial economy favors denial.

Aspen wrongly contends that granting its Petition would save judicial economy. On the contrary, granting the Petition would indefinitely stop both the lower court

matter and the Appeal. St. Paul would then have to initiate a new appeal, and this Court would then have to determine how—if at all—the two appeals should be combined, reconciled, and decided. Any appellate victory for St. Paul would result in a remand back to the lower court to restart a case that began almost five years ago. All of the work that St. Paul has done, and that Aspen allowed the parties to do, over the last year would be paused, while the evidence grows more stale. The simplest, most expedient use of judicial resources would be to allow the lower court matter and the Appeal to continue in the normal course

(3) Aspen makes arguments that are fundamentally inconsistent with those in the Appeal, which would only complicate matters.

Aspen maintains that its case is no different than the Appeal. But Aspen contradicts itself by making arguments that clash with those made by both National Union and Marquee in the fully briefed Appeal, including:

- Aspen claims that insurers should not be able to subrogate bad-faith refusal to settle claims against other insurers. (Pet. at 21-24.) National Union and Marquee also generally argue against insurer v. insurer subrogation claims (Ans. Br. at 38.) But they base their argument largely on the equitable positions of the insurers, and not on Aspen's alleged "violation[s] of public policy." (Pet. at 21.) Aspen's broadside against so-called "hindsight allegations" and "Monday morning quarterback[s]" (Pet. at 21-22) implicates every bad-faith-

refusal-to-settle claim. Would Cosmopolitan's direct claims survive? If so, so too should St. Paul subrogated claims. National Union and Marquee stake out rather radical positions on the availability of subrogation, but Aspen flies solo here. National Union and Marquee even admit that St. Paul "may be equitably superior to Aspen." (Ans. Br. at 50.)

- Aspen maintains that an "insurer does not have the same duties and responsibilities to an additional insured as it would to its own primary insured." (*Id.*, at 29; *see also* at 30-33.) Even after accepting the defense of both Marquee and Cosmopolitan, Aspen believes it had the right (and duty) to favor Marquee, a startling contention. Nation Union makes no such claim, nor does it ever admit to treating Marquee better than Cosmopolitan. In fact, National Union argues that the two carriers, in effect, treated Marquee and Cosmopolitan the same. (Ans. Br. at 51-52.)
- Aspen blames National Union for the failure to settle. (*Id*, at 37.) National Union argues that such blame is irrelevant, as St. Paul cannot subrogate Cosmopolitan's claims under any scenario. (Ans. Br. at 17 n.5, 49-50.)

- Aspen argues that equitable subrogation requires a showing that "the co-insurer engaged in wrongful conduct that caused the loss." (*Id.*, at 34). National Union and Marquee claim that one's conduct—right or wrong—does not matter when determining equitable superiority. (Ans. Br. at 17 n.5, 49-50.)

Aspen's conflicting arguments are without merit, but they also highlight why granting the Petition will not save judicial resources.

C. Laches Bars Aspen's Request.

In addition to the reasons above, this Court should reject Aspen's writ based on Aspen's decision to wait *13 months* to file this writ. "[A]s extraordinary remedies, [writs of mandamus] are subject to the doctrine of laches." *Buckholt v. Second Jud. Dist. Ct.*, 94 Nev. 631, 633, 584 P.2d 672, 673 (1978), *overruled on other grounds by Pan*, 120 Nev. at 228, 88 P.3d at 844; *see also State v. Eighth Jud. Dist. Ct.*, 116 Nev. 127 135, 994 P.2d 692, 697 (2000) ("The doctrine of laches applies to a petition for a writ of mandamus.").

"In determining whether the doctrine of laches should be applied to preclude consideration of the present petition, we must determine whether (1) there was an inexcusable delay in seeking the petition; (2) an implied waiver arose from petitioners' knowing acquiescence in existing conditions; and, (3) there were

circumstances causing prejudice to respondent." *Buckholt*, 94 Nev. at 633, 584 P.3d at 673-74.

During the 13-month delay, the case proceeded, and discovery continued. The parties even agreed on two separate trial dates, first in the spring of 2022, then in the spring of 2023. During that same time, the Appeal also moved closer to conclusion.

It is now far too late in both the matter pending in the lower court, and the Appeal. Granting Aspen's petition will disrupt and confuse both matters.

2. The Petition Fails on the Merits.

A. Both Contractual and Equitable Subrogation are Valid and Proper.

Equitable and contractual subrogation are not mutually exclusive. *See* 73 Am. Jur. 2d Subrogation § 3; *Phillips v. State Farm Mut. Auto. Ins. Co.*, 73 F.3d 1535, 1538 (10th Cir. 1996). But they have different applications. "[A] subrogee invoking contractual subrogation can 'recover without regard to the relative equities of the parties.'" *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 647 (Tex. 2007).

Of course, St. Paul had contractual subrogation rights under its excess insurance policy, which granted St. Paul the right to pursue reimbursement from the responsible parties in exchange for payment of a loss. *See* 73 Am. Jur. 2d Subrogation §4; *Fortis*, 234 S.W.3d at 646.

Moreover, Nevada law presumes equitable subrogation claims are valid unless shown otherwise. Aspen incorrectly flips the presumption, arguing subrogation is prohibited where this Court has not specifically already allowed it. Generally, though, Nevada courts allow subrogation unless this Court or state statutes specifically prohibit such a claim. Nevada's federal courts have also recognized the right of insurer v. insurer subrogation. *See Zurich American Ins. Co. v. Aspen Specialty Ins. Co.*, 2021 WL 3489713 (D. Nev. August 6, 2021) ("Under Nevada law, courts have full discretion to fashion and grant equitable remedies . . . Consequently, I predict the Supreme Court of Nevada would allow equitable subrogation between insurance companies when appropriate."); *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2016 WL 3360943 *5 (D. Nev. 2016) ("Colony I"); and *Colony Ins. Co. v. Colorado Cas. Ins. Co*., 2018 WL 3312965 (D. Nev. July 5, 2018) ("Colony II").

St. Paul has a claim for equitable subrogation under the commonly recognized test. California law, which Nevada state and federal courts have often looked to for guidance, has established the elements for equitable subrogation:

> (a) the insured suffered a loss for which the defendant 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; (b) the claimed loss was one for which the insurer was not primarily liable; (c) the insurer has compensated the insured in whole or in part for the same

> loss for which the defendant is primarily liable; (d) the insurer has paid the claim of its insured to protect its own interest and not as a volunteer; (e) the insured has an existing, assignable cause of action against the defendant which the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer; (f) the insurer has suffered damages caused by the act or omission upon which the liability of the defendant depends; (g) justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer; and (h) the insurer's damages are in a liquidated sum, generally the amount paid to the insured.

See Eichacker v. Paul Revere Life Ins. Co., 354 F.3d 1142, 1145 (9th Cir. 2004); *Zurich*, 2021 WL 3489713 at *3 (*quoting Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1292 (Cal. Ct. App. 1998) (emphasis omitted)).

St. Paul has met all of the elements for equitable subrogation:

- Aspen caused Cosmopolitan's loss.
- Aspen (with National Union) was primarily liable for that loss.[1]
- St. Paul compensated Cosmopolitan in whole for that loss.
- St. Paul did not voluntarily pay Cosmopolitan's claim.
- Cosmopolitan had an existing, assignable cause of action against Aspen that Cosmopolitan could have asserted on its own.

[1] Judge Gordon rejected the argument that by "primarily liable" the test

- St. Paul suffered damages based on the amount it paid in settlement (which is confidential).
- Justice requires that the loss be entirely shifted from St. Paul to the wrongdoer, Aspen (along with National Union).
- St. Paul's damages are in a liquidated sum.

There is nothing to indicate that this Court would deviate from the *Fireman's Fund* test. Indeed, National Union and Marquee rely on *Fireman's Fund* in the Appeal. RAB 39 of their Answering Brief in Case No. 81344. Furthermore, no Nevada statute or decision from this Court limits St. Paul's ability to subrogate Cosmopolitan's claims.

Aspen contends that the St. Paul subrogation claims would create strict tort liability. (Pet. at 23.) This issue has already been resolved in *Allstate v. Miller*, 125 Nev. 300, 322-23, 212 P.3d 318, 333-34 (2009), under which there is no such thing as strict bad-faith liability in the case of an excess verdict.

Aspen further accuses St. Paul of sitting idly on its hands in the defense of its insured in the underlying action that gives rise to this bad-faith dispute. It then reasons that St. Paul now only seeks reimbursement where its own interests are concerned. (Pet. at 29.) This is an estoppel argument. Aside from the fact that

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refers to the primary insurance. "Primarily liable" could also mean the "party

Aspen's argument conveniently ignores the fact that it and National Union assumed the right and duty to control the defense of its additional insured, the Cosmopolitan, estoppel is always a question of fact. *See Quon v. Niagara Fire Ins. Co. of N. Y., 190 F.2d 257, 260 (9th Cir. 1951).* Writ relief is not warranted here.

Moreover, Aspen's argument is a straw man: St. Paul is not advocating for a rule of "strict liability situation" for "all primary insurers, in *every* claim." (Pet. at 22.). St. Paul's claim is no stricter or looser than the one established by this Court in *Allstate*. Aspen owed Cosmopolitan a duty of good faith, and a fact finder will decide whether Aspen honored that duty. This Court has already endorsed the "factors" for determining whether an insurer acted in bad faith when refusing to settle:

> (1) the probability of the insured's liability; (2) the adequacy of the insurer's investigation of the claim; (3) the extent of damages recoverable in excess of policy coverage; (4) the rejection of offers in settlement after trial; (5) the extent of the insured's exposure as compared to that of the insurer; and (6) the nondisclosure of relevant factors by the insured or insurer.

Allstate, 125 Nev. at 312, 212 P.2d at 327 (emphasis omitted). This test is not one for strict liability.

In *Zurich*, Judge Gordon rejected the arguments Aspen made both in that litigation and here (through the same counsel). All of Aspen's protests about

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primarily responsible for causing the loss." *Zurich*, 2021 WL 3489713 *4.

"hindsight allegations" and "Monday morning quarterback[s]" (Pet. at 21-22.) implicating public policy are really just arguments against anyone having a right to challenge Aspen's failure to settle in good faith. But if a duty to negotiate and settle in good faith exists in Nevada—and it does—then someone must have the right to assert it when the duty is breached. Who other than Cosmopolitan has that right? And if Cosmopolitan has a claim, then it should be able to subrogate it. No policy reasons counsel otherwise.

(1) Public policy favors equitable subrogation in this context.

Aspen's argument is largely policy based, believing that allowing any excess insurer to subrogate bad-faith-failure-to-settle claims against a primary insurer would be a "violation of public policy." (Pet. at 21.) Twenty-nine states allow such subrogation. *See National Sur. Corp. v. Hartford Cas. Ins. Co.*, 493 F.3d 752, 757 n.2 (6th Cir. 2007) (subrogation between insurers is the "overwhelming majority" rule, citing cases from twenty-seven jurisdictions); *see also* two subsequent cases joining the crowd: *Preferred Prof'l Ins. Co. v. Doctors Co.*, 419 P.3d 1020 (Colo. 2018); *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818 (Mo. 2014).

Aspen, therefore, believes that a majority of states follows a rule that violates public policy. In Aspen's view, only one other state, Alabama, has seen the light. *See, e.g.*, *Fed. Ins. Co. v. Travelers Cas. & Sur. Co.*, 843 So. 2d 140, 145-

46 (Ala. 2002). But in rejecting the majority rule, Aspen goes even further, arguing for a position that calls into question all claims involving a failure to settle in good faith. In Nevada, though, a party that has the right to control settlement discussions for someone else has a "duty of good faith and fair dealing during [settlement] negotiations." *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 309, 212 P.3d 318, 324-25 (2009). Thus, "[u]nder Nevada law, an insurer is liable to its insured for any bad faith refusal to settle." *Tweet v. Webster*, 610 F.Supp. 104, 105-106 (D. Nev. 1985).

To the extent that it has not already, Nevada should join the 29 other states (and the District of Nevada) in recognizing the right of insureds to subrogate Nevada's recognized bad-faith-failure-to-settle claims against other insurers.

(2) Aspen's attempt to remove an insurer's duty to an additional insured is not supported by Nevada law.

Aspen's most radical and revealing argument and admission is that it was somehow allowed to treat Cosmopolitan differently than Marquee even though they were both insured by Aspen and both defended, jointly, by Aspen's selected counsel. Again, this is not a contest between co-equal excess insurance carriers or competing "towers" of insurance, an entirely unhelpful and distracting construct. A single "tower" of insurance is at issue – consisting of the general liability policy issued by Aspen to Marquee and the excess liability insurance policy issued by

National Union to Marquee. *Cosmopolitan is an additional insured under both policies*.

As an "additional insured," Cosmopolitan was not a second-class citizen, inferior to Marquee. In the *Moradi* litigation, Cosmopolitan had the same rights as Marquee. Aspen claims that"[a]n insurer does not have the same duties and responsibilities to an additional insured as it would have to its own primary or excess insured." (Pet. at 28.) Aspen cites no authority --- neither Nevada nor non-Nevada, federal nor state --- for this bold proposition.

Aspen goes further.

> [W]hile primary and excess insurers have shared indivisible and aligned duties and interests in the defense of their common insured, an insurer covering both a named and an additional insured must consider the interests of *both* in its strategic decisions within the underlying claim. Conflicts of interest may arise in the defense of such claims where an insurer is defending multiple insureds, including its own contracted policy holder and an additional insured.

Pet. at 30(emphasis in original.)

According to Aspen, it not only *may* favor one insured over another, but there may also be times when disparate treatment of two insureds is *required*. "Conflicts of interest may arise . . . ." True. And conflicts of interest *did* arise in this case, and Aspen *did* put Marquee's interests ahead of Cosmopolitan's. And that is one of the reasons Aspen breached its duty to Cosmopolitan. But Aspen

contends that it was St. Paul's duty to protect Cosmopolitan from Aspen's own conflict-of-interest and favoritism, and not Aspen's duty to prevent such conflicts and favoritism in the first place.

Aspen provides no legal authority for the breath-taking claim that it can include Cosmopolitan as an insured under Aspen's insurance policy, agree to defend it in the *Moradi* litigation, select its counsel for that purpose, and then promote Marquee's interests over Cosmopolitan's—all without ever informing Cosmopolitan of Aspen's divided loyalties and favoritism. That is not, and cannot, be the law. *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251, 253-55 (10th Cir. 1993), illustrates how the majority of courts determine the scope of additional insured coverage and the rights of additional insured parties. *See, e.g., USF Ins. Co. v. Smith's Food and Drug Center, Inc.*, 921 F.Supp.2d 1082, 1090-91 (D. Nev. 2013) (recognizing that under Nevada law, insurer violated its duty to defend and indemnify additional insured, even though additional insured lacked an express contractual relationship with insurer).

(3) Aspen's two tower distinction is a red-herring; Cosmopolitan was in Aspen's "tower."

Aspen owed Cosmopolitan insurance coverage for the *Moradi* litigation. Aspen owed Cosmopolitan a defense, and National Union voluntarily assumed the defense of the *Moradi* case. Both breached their defense duties by selecting and engaging conflicted counsel. Both breached their duties to settle on behalf of

Cosmopolitan, which resulted in a verdict that exceed their policy limits by many tens of millions of dollars. As a result, Cosmopolitan had the legal right to sue both Aspen and National Union, just like any other insured has the right to legally pursue its insurer for breach, and bad faith breach, of its obligations under an insurance policy.

This case is not about St. Paul's position in a so-called "second tower" of Aspen's illustration. (Pet. at 6.) This case is defined by Aspen and National Union's breach of duties in the "first tower" of the illustration, and by Cosmopolitan's right to hold Aspen and National Union—its own insurers—accountable for their tortious conduct. When St. Paul protected Cosmopolitan from the disaster caused by Aspen and National Union's handling of the *Moradi* case, St. Paul was subrogated to and assumed Cosmopolitan's claims and recovery rights.

This is not new law. It is application of well-established subrogation principles to the facts of this case.

(4) St. Paul and Cosmopolitan are equitably superior to Aspen.

Cosmopolitan and St. Paul are equitably superior because Aspen breached duties owed to the Cosmopolitan and exposed it to liability and damages. Nevada courts have "full discretion" to apply subrogation as an equitable remedy "based

on the facts and circumstances of each particular case." *American Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538-39 (2010).

Aspen argues that St. Paul and Cosmopolitan are not equitably superior to Aspen or National Union and, therefore, there is no valid equitable subrogation claim. (Pet. at 34.) This argument is wrong and, moreover, it underscores the need for discovery and a decision by a trier of fact. The case Aspen relies on for its contention that St. Paul must establish its equitable superiority, *State Farm Gen. Ins. Co*, 143 Cal.App. 4th 1107, supports this conclusion. There, the California Court of Appeals determined that summary judgment was improper on the issue of equitable superiority because the trial court failed to consider and resolve the factual issues in dispute. Aspen's simple assertion that no facts support an equitable superiority claim is inapposite. St. Paul alleges that its losses occurred because of Aspen's failure to settle the case prior to verdict. 1 AA 13-14. These issues of fact require resolution in the district court.

(5) Aspen's reliance on the Colony I case is misguided.

The *Colony I* court incorrectly held that Nevada does not recognize contractual subrogation between insurers. (Pet. at 39-40.) However, St. Paul's claim against Aspen is not as an insurer but as a subrogee of Cosmopolitan, which is the insured of Aspen. Moreover, in Nevada, contractual subrogation is a valid and available claim. It has been barred only in the limited context of med-pay

cases, as this Court explained in *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005). In *Canfora*, this Court enforced a contractual subrogation clause and distinguished the case of *Maxwell v. Allstate Ins. Companies*, 102 Nev. 502, 506 (1986), which held contractual subrogation was not available in the med-pay context as a matter of public policy because of concerns the insured would not be fully compensated. *See Canfora*, 121 Nev. at 778, 121 P.2d at 604. ("We have previously prohibited an insurer from asserting a subrogation lien against medical payments of its insured as a matter of public policy."). However, "where an insured receives 'a full and total recovery,' *Maxwell* and its public policy concerns are inapplicable." *Id*. In other words, this Court held that where the insured is fully compensated, contractual subrogation is permitted.

(6) Aspen's "empty shoe" rule is unpersuasive and wrong.

Aspen seeks to persuade this Court to adopt an "empty shoes" rule from the State of Texas. *See* Pet. at 42. In support of this argument, Aspen cites to *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 775 (Tex. 2007). However, *Mid-Continent*, has been significantly limited in recent years. As the Fifth Circuit Court of Appeals explains in *Continental Cas. Co. v. North American Capacity Ins. Co.*: "Since the district court's decision in this case, we have recognized that the *Mid–Continent* bar to recovery is narrow and limited to the

facts of that case." 683 F.3d 79, 85, (5th Cir. 2012): The Fifth Circuit there rejected *Mid-Continent's* analysis, explaining "that the shoes of the insured are purportedly 'empty' of rights against the primary carrier does not necessarily bar an excess insurer from recovering under a theory of subrogation from the primary carrier." *Id.* at 88.

Nevada never has recognized this "empty shoe" rule, but has embraced both contractual and equitable subrogation to the extent necessary to ensure parties have the right to pursue reimbursement from responsible parties in exchange for payment of a loss. *See e.g., American Sterling Bank*, 126 Nev. at 428, 245 P.3d at 538-39.

CONCLUSION

The Petition is untimely and unnecessary considering the imminent decision by this Court on the Appeal. Moreover, it does not address the narrow and extraordinary circumstances justifying the issuance of extraordinary writ relief.

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The Petition also fails on the merits. It characterizes this case as an insurer versus an insurer in different "towers" of insurance. This is factually and legally wrong. This case is about a subrogee pursuing claims and rights of an insured against its insurer for tortious and bad-faith conduct—a well-established subrogation claim under Nevada law.

Therefore, the Petition should be denied.

DATED this 21st day of March, 2022.

By: /s/ Mark A. Hutchison

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ATTORNEY'S CERTIFICATE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 6979 words.

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

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The event of accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21st day of March, 2022.

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on the 21st day of March 2022, the foregoing ***ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF*** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list below.

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