No. 89228

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORTH RIVER INSURANCE COMPANY,

Appellant,

v.

JAMES RIVER INSURANCE COMPANY,

Appellee.

Electronically Filed
May 23 2025 11:39 AM
Elizabeth A. Brown
Clerk of Supreme Court

Certification from the United States Court of Appeals for the Ninth Circuit – Case No. 23-55757

APPELLANT'S REPLY BRIEF

Sabrina H. Strong
sstrong@omm.com
Zoheb P. Noorani
znoorani@omm.com
Jessica A. Snyder
jsnyder@omm.com
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071
Telephone: (213) 430-6000
Facsimile: (213) 430-6407

J. Colby Williams (5549)
jcw@cwlawlv.com
CAMPBELL & WILLIAMS
710 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540

Attorneys for Appellant The North River Insurance Company

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

INTRODUCTION

When primary insurer James River had the chance to settle the underlying claim for an amount at or below its $1 million policy limits, James River gambled. Over the course of three-plus years, it fielded multiple offers to settle the claim against its insured—first for $1 million, then for $990,000, and then for $975,000—and, each time, James River balked. Even after the counsel James River hired to defend the insured valued the case at over $1 million, James River still refused to settle, putting its own interests above its insured's financial security and peace of mind. James River's refusal to effectuate a prompt, fair, and equitable settlement despite its knowledge that there was a substantial likelihood of a recovery in excess of James River's limits caused the damages North River now seeks to recover.

In its opening brief, North River explained that under Nevada law North River has stated a claim for equitable subrogation against James River based on these well-pleaded facts. James River disputes that Nevada law recognizes equitable subrogation in these circumstances, where the underlying lawsuit settled within the insurers' combined policy limits. That is the question the Ninth Circuit certified and that this Court agreed to answer.

James River's brief does everything it can to forestall this Court's analysis, devoting more than half of its argument—nearly 24 pages—to various excuses for avoiding the Ninth Circuit's question altogether. James River offers no authority for

declining to provide an answer where, as here, the facts alleged are assumed to be true and the answer would determine the issue on appeal—whether North River's action can proceed.

James River attempts to dodge the certified question because its substantive answer boils down to one argument: that an excess *settlement* alone cannot be evidence of damages to the insured; there must first be an excess *judgment*.

James River's position finds no support in established Nevada law. In Nevada, when a primary insurer violates its duty to defend or of good faith and fair dealing, it is liable for all consequential damages arising from that breach, including a judgment or settlement exceeding its policy limits. James River cites no binding Nevada authority holding that an excess settlement cannot be consequential damage of the primary insurer's breach. Absent North River's payment, Alhambra Place would have had to cover the excess settlement itself—a loss that it could have sought to recover from James River.

This Court should answer the certified question it accepted from the Ninth Circuit affirmatively and correct James River's mischaracterizations of Nevada equitable subrogation principles.

ARGUMENT

I. THIS COURT CAN AND SHOULD ANSWER THE CERTIFIED QUESTION

The Ninth Circuit certified its question to the Nevada Supreme Court because the answer would "be determinative of the cause pending" before it. (2 JA 271.)

This Court, with the Ninth Circuit's certification order and the full record before it, accepted the question. There are no missing details from the record that prevent this Court from understanding the impact of its decision on North River's case. The answer, whether affirmative or negative, will allow the Ninth Circuit to resolve North River's appeal. And there are no published decisions answering the question before this Court that would render the question moot.

A. Circumstances Where the Court May Decline to Answer a Certified Question It Already Accepted Are Not Present Here

James River offers no authority for its assertion that this Court, having already accepted certification and ordered briefing, should now do an about-face and reject the Ninth Circuit's question. The only three cases James River cites all rest on distinguishable facts and circumstances. *See Mack v. Williams*, 138 Nev. 854, 857, 138 Nev. Adv. Op. 86, 522 P.3d 434, 440–41 (2022) (declining to answer two of four questions certified after denial of summary judgment related to due-process claim because certification order failed to include sufficient information, requiring the Court to "conceive of the claim in the abstract and to apply a framework to factual and legal uncertainty"); *Magliarditi v. TransFirst Group, Inc*., 135 Nev. 681, 450 P.3d 911, 2019 WL 5390470, at *1, *6 (Oct. 21, 2019) (declining to answer two of seven questions certified after grant of preliminary injunction related to whether alter ego doctrine applies to different types of trusts because the record lacked sufficient information about the nature of the trusts); *Volvo Cars of N. Am., Inc. v.*

Ricci, 122 Nev. 746, 750–51, 137 P.3d 1161, 1163–64 (2006) (declining to answer question that would resolve only a "discrete evidentiary issue" and thus would have only "a speculative impact in determining the underlying case").

Here, the certifying order does not lack any key details. Because the certified question comes on appeal of a motion to dismiss, all allegations in North River's complaint are accepted as true and the only question is whether Nevada law would or would not find that an excess insurer has stated a viable claim for equitable subrogation in these circumstances. This Court's answer to the certified question is determinative of the issue because it is the sole basis on which the District Court dismissed North River's complaint.

B. This Court's Answer Will Allow the Ninth Circuit to Resolve North River's Appeal

James River is also wrong that the certified question is improper because it would purportedly resolve "only part of a preliminary step in California's choice-of-law analysis." (Answering Brief ("A.B.") at 31.)[1] The Ninth Circuit stated unequivocally that "California law permits such claims" under these circumstances. (2 JA 276.) If this Court confirms that equitable subrogation is available under these circumstances, then Nevada law will conform with California law and North River's

[1] James River cites only one irrelevant case for its argument. (A.B. at 28–29 [citing *Romero v. Allstate Ins. Co.*, 52 F. Supp. 3d 715, 734 (2014) (finding a particular issue unsuited for class certification because the plaintiffs "failed to demonstrate that the unconscionability question is fit for certification under Rule 23(c)(4).")]).

claim proceeds under either state's laws. If Nevada law, as determined by this Court, deviates from California's equitable subrogation law, the answer to the certified question bears on further steps in California's choice-of-law analysis that ask the Ninth Circuit to "determine the relative commitment of the respective states to the laws involved and consider the history and current status of the states' laws and the function and purpose of those laws." *Washington Mutual Bank, FA v. Superior Court*, 24 Cal. 4th 906, 920, 15 P.3d 1071, 103 Cal. Rptr. 2d 320 (2001). Thus, the answer to whether Nevada recognizes equitable subrogation in this circumstance is relevant to all steps of California's choice-of-law analysis.

C. *St. Paul, Aspen,* and *Protective* Do Not Answer the Ninth Circuit's Question

James River insists this Court's unpublished decisions in *St. Paul* and *Aspen* "make certification unnecessary." (A.B. at 17.) But the Ninth Circuit did not see it that way. As the Ninth Circuit observed, because *St. Paul* and *Aspen* are unpublished and not "mandatory precedent," neither has compulsory binding effect here. (2 JA 278.) That distinguishes this case from the cases James River cites where this Court declined to answer certified questions when controlling precedent already answered the question. *See U.S. Bank, N.A. v. SFR Invs. Pool 1*, 137 Nev. 973, 489 P.3d 514, 2021 WL 2646064, at *1 (June 25, 2021) (declining to accept certified questions because there was controlling precedent on the issues and the answers would "merely involve applying already established law to the facts"); *Nalder v. United*

Auto. Ins. Co., 135 Nev. 692, 449 P.3d 1268, 2019 WL 5260073, at *1 (Sept. 20, 2019) (declining to answer certified question after the Court issued a published opinion in another case answering the question presented).

Indeed, the Ninth Circuit found *St. Paul* and *Aspen* have "some meaningful differences" with the case at hand. (2 JA 279.) In *St. Paul*, same-level excess insurers negotiated a settlement after a jury verdict but before any award of punitive damages; the appeal arose from the grant of summary judgment. In the related *Aspen* matter, a three-justice panel was bound to follow *St. Paul* as law of the case. Here, the underlying litigation was decided on a Rule 12(b)(6) motion to dismiss without the benefit of discovery, much less a presentation of evidence at trial.[2] James River argues that "it is not the Ninth Circuit's role to disagree with Nevada's approach, or to cajole this Court into abrogating *St. Paul* and *Aspen* via a certified question." (A.B. at 21.) But there is no evidence that the Ninth Circuit is either disagreeing with or cajoling this Court—or seeking any particular answer at all.

Nor does this Court's decision in *Protective Ins. Co. v. Comm'r of Ins.,* 562 P.3d 215, 141 Nev. Adv. Op. 3 (2025), issued after it accepted the Ninth Circuit's certified question, provide an answer. In *Protective*, this Court addressed an entirely separate issue: the prioritization of claims in the liquidation of an insolvent insurance

[2] *St. Paul* and *Aspen* were also both decided, of course, without input from the full Nevada Supreme Court. (2 JA 279.)

company under N.R.S. 696B.420, specifically whether the subrogee insurer's payment on the insured's claim fell within the statute's "high-priority" classification. Contrary to James River's assertion, the Court did ***not*** analyze whether the subrogee insurer had subrogation rights against the insolvent company. *Protective* thus has no bearing on the equitable subrogation issues here, where the insured suffered damages after a primary carrier failed to settle a claim and forced an excess settlement.

II. NEVADA'S EXISTING EQUITABLE SUBROGATION PRINCIPLES SUPPORT AN EXCESS INSURER'S CLAIM FOR AN INSURED'S PREJUDGMENT LOSS

Contrary to its position before the District Court and Ninth Circuit, James River concedes in its Answering Brief that equitable subrogation can exist between insurers even where the underlying claim is settled within collective policy limits. But to avoid an affirmative answer to the certified question, James River then argues that equitable subrogation is not available under the circumstances here, where James River's alleged failure to settle caused an excess settlement to resolve the claim against Alhambra Place. James River's argument falls flat as it is entirely at odds with published Nevada authority that recognizes where an insurer breaches its duty to defend or the duty of good faith and fair dealing, it is liable for *all* consequential damages, including excess judgment *or settlement*, and that Nevada law requires courts to apply subrogation flexibly to achieve an equitable result.

A. James River Concedes that the Answer to the Certified Question Is Yes

Not until page 35 of its brief does James River actually address the Ninth Circuit's question. Having devoted most of its argument to avoiding an answer, James River reluctantly suggests one: "Everyone agrees the answer is likely 'yes,' depending on the circumstances." (A.B. at 29.) This Court should take James River's equivocation for what it is—a concession to an affirmative answer. As long as the possibility exists, then yes, an excess insurer can in fact state an equitable subrogation claim under Nevada law against a primary insurer where the underlying lawsuit settled within the combined policy limits of the insurers.

James River also mischaracterizes the question the Ninth Circuit certified. James River repeatedly asserts that the Ninth Circuit asked whether Nevada would "*ever*" allow an excess insurer to state a subrogation claim against the primary insurer following an in-limits settlement, (*see, e.g.,* A.B. at 5, 22, 29), and then urges this Court to reject such an "overbroad" question, (*id.* at 6.) But the insertion of an emphatic "*ever*" is entirely of James River's doing. That adverb appears nowhere in the Ninth Circuit's question. To the contrary, the Ninth Circuit acknowledged that its question turns on whether Nevada would allow an excess insurer to state a subrogation claim against the primary insurer under "***these circumstances***" (2 JA 276) and wanted the Nevada Supreme Court to be the first to determine that question "***in this context***" (2 JA 279).

James River identifies multiple scenarios that it believes would permit such a claim, but fails to meaningfully distinguish its imagined scenarios from the circumstances presented by this case. (A.B. at 35–36.) James River's alleged failure to settle the claim against Alhambra Place within limits when presented with multiple opportunities to do so caused the underlying claimant's settlement demand to balloon and exposed Alhambra Place to a loss in excess of James River's policy limits. Moreover, James River's attempt to create exceptions only validates the fundamentally equitable foundation of Nevada subrogation law and militates against a bright-line rule.[3] As explained in North River's opening brief, Nevada courts have consistently "balance[d] the equities based on the facts and circumstances of each particular case" and applied subrogation to the extent necessary to "grant an equitable result between the parties." *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538 (2010) (internal quotation marks omitted).

B. North River's Payment Reflects Alhambra Place's Loss, Even for an In-Limits Prejudgment Settlement

After conceding that Nevada law would recognize subrogation between insurers following an in-limits settlement in certain circumstances, James River

[3] In its opening brief, North River offered an example of how its aggregate limit was impaired by James River's alleged bad-faith conduct to show how a court could find an insured was damaged and did not receive all the benefits of its bargain, even where a claim against it settles within collective policy limits. James River misses the mark by arguing why North River would not succeed with its claim on the merits. North River's complaint was dismissed at the pleading stage, depriving it of the opportunity to present evidence to support its subrogation theories.

proceeds to mischaracterize Nevada law to try to distinguish the circumstances of this case. James River uses North River's payment as the reason Alhambra Place never suffered a loss; that flips Nevada law on its head. James River also insists that only an excess *judgment* (not settlement) can evidence damages arising from its alleged failure to settle, despite published Nevada law to the contrary. And James River fails to overcome the unfair result of incentivizing primary insurers to gamble with their insureds' assets—here, their excess insurance—which James River admits Nevada bad-faith law seeks to avoid.

1. North River became subrogated to the insured's claim against James River independent of North River's payment

As North River explained in its opening brief, where an excess insurer steps in to pay the damages caused by the primary carrier's failure to settle, existing Nevada law principles dictate that the excess insurer is subrogated to the insured's claim against the offending primary insurer. When deciding whether the insured has a claim to which the excess insurer can subrogate, Nevada courts look at the loss *before* the excess insurer steps in. *See Arguello v. Sunset Station, Inc*., 127 Nev. 365, 368, 252 P.3d 206, 208, 127 Nev. Adv. Op. 29 (2011).

James River turns that principle on its ear. Relying on *St. Paul* and *Aspen,* James River argues that "[e]quity should not aid an excess insurer" that facilitates a settlement "*before* the insured suffers a loss." (A.B. at 69 (emphasis in original).) But that has it exactly backward. In their dissent to the majority opinion in *St. Paul*,

two current members of this Court expounded on Nevada's equitable subrogation principles, explaining that the question in that litigation was not whether the insured suffered a literal out-of-pocket loss. What mattered was that the insured "would have unquestionably been subject to liability" if its excess insurer had not stepped in and contributed to the settlement. *St. Paul Fire & Marine Ins. Co. v. Nat'l Union Fire Ins. Co*., 521 P.3d 418, 2022 WL 17543613, at *6 (dissent) (Nev. Dec. 8, 2022). Consider the insured's predicament if it had not fortuitously obtained more than one applicable policy. The settlement would have exceeded the limits of its only policy, saddling the insured with a significant loss. Had the insured paid the remaining portion of the settlement, it could have independently sued the offending insurer to recover those damages. (A.B. at 7.) There is nothing "hypothetical" about that scenario. (*Id*. at 18.) Nor does it fail to reflect "the insured's actual position." (*Id.* at 26.) The very fact of St. Paul's payment "reflects the loss suffered by the insured." *St. Paul,* 2022 WL 17543613, at *5 (dissent).

The same principle applies here. As described more fully in North River's opening brief, James River had multiple opportunities to settle the claim against its insured within James River's $1 million policy limits but chose to gamble with its insured's money instead. After a 2017 murder at the insured location, the decedent's estate sued the insured for negligence and wrongful death. On March 28, 2019, the plaintiff in the underlying action made a settlement demand for $1 million. James

River rejected it. In or about May 2021, the plaintiff made an offer of judgment for $990,000. James River—despite learning additional facts about the insured location's troubled history and chronic contact with law enforcement—again declined to settle. On November 3, 2021, the plaintiff reduced its settlement demand to $975,000. Once more, James River did not accept it, despite its own defense counsel on or about that same date—and then again in February 2022 and July 2022—valuing the case at over $1 million.

On or about August 30, 2022, after James River had allowed more than three years to elapse without settling for its policy limits or even less, the plaintiff increased its settlement demand to $5 million. At that point, rather than continue to pursue trial, James River agreed to settle the claim. That settlement thus exposed the insured to liability it would not have faced had James River settled within its policy limits while it had the chance and provided the insured with grounds for a claim against James River for bad-faith failure to settle—independent of whether the insured had an excess policy with North River. James River is wrong that the insured "lack[ed] a ripe claim" at that stage. (A.B. at 22.) Had Alhambra Place paid the excess settlement, it could have sought reimbursement from James River for its injurious conduct. That is the claim to which North River subrogates. While North River's $4 million contribution helped protect the insured, it did not change the fact that James River exposed the insured to liability it would not otherwise have faced.

2. Alhambra Place had a claim against James River even though the case settled before an excess judgment

James River insists that at the time of a prejudgment in-limits settlement, the insured was not reimbursed by the excess insurer for an existing loss because it never experienced one. But James River fails to meaningfully distinguish an excess settlement from an excess judgment as evidence of a loss to the insured. Indeed, the Nevada Supreme Court has previously recognized that an insurer that violates its duty to defend or the duty of good faith and fair dealing is liable for *all* consequential damages, including excess judgment *or settlement*. *See Allstate Ins. Co. v. Miller*, 125 Nev. 300, 313–14, 212 P.3d 318, 327 (2009) ("If an insurer violates its duty of good faith and fair dealing by failing to adequately inform the insured of a reasonable settlement opportunity, the insurer's actions can be a proximate cause of the insured's damages arising from a foreseeable settlement or excess judgment."); *Century Sur. Co. v. Andrew*, 134 Nev. 819, 824, 432 P.3d 180, 185 (2018) (such damages may include "the amount of the judgment or settlement against the insured plus interest, even in excess of the policy limits…").

James River commits the same error as the *St. Paul* majority in arguing California's authorities require excess judgment to establish an insured's bad-faith claim. (A.B. 30–31 [citing *Hamilton v. Maryland Cas. Co*., 27 Cal. 4th 718, 41 P.3d 128, 133, 117 Cal. Rptr. 2d 318 (2002); *Safeco Ins. Co. v. Superior Court*, 71 Cal. App. 4th 782, 787, 84 Cal. Rptr. 2d 43, 46 (1999); and *RLI Ins. Co. v. CNA Cas. of*

Cal., 141 Cal. App. 4th 75, 45 Cal. Rptr. 3d 667, 671–72 (2006)]). As the Court of Appeal in *Ace American* already explained when faced with the same arguments James River makes here, these cases concerned whether "a plaintiff has a reliable basis for alleging that damages have resulted from the insurer's alleged breach of the duty to settle within policy limits." *Ace Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 2 Cal. App. 5th 159, 175, 206 Cal. Rptr. 3d 176, 188 (2016). The settlements achieved in both *Hamilton* and *Safeco* could not be used as evidence of damages against the primary insurer because they were entered without the primary insurer's consent, which the policies required. *Id.* at 176; *see Safeco*, 84 Cal. Rptr. 2d at 46. The focus of these cases was not whether damages came in the form of an excess judgment versus an excess settlement. While a judgment may be reliable evidence of damages, "it does not follow that a judgment is the only manner by which an insured or subrogee may prove damages resulting from an unreasonable failure to settle within policy limits." *See Ace Am.*, 2 Cal. App. 5th at 175 (internal citations omitted). Similarly, that the settlements were not reliable evidence of damages in *Hamilton* and *Safeco* does not mean settlements are *never* evidence of damages. The court in *Ace American* thus rejected *RLI* for its mistaken reading of *Hamilton* as requiring an excess *judgment* for equitable subrogation to proceed. *Id.* at 171.

There is no support for James River's contention that only an excess judgment can provide reliable evidence of damages such that a claim in these circumstances is

categorically barred.[4]

3. Excess coverage does not relieve James River of its duty to reasonably settle a claim within its policy limits

James River fails to rebut the policy considerations favoring recognizing equitable subrogation between insurers where the claim settles within collective limits. To argue that an insured suffers no damages from a primary carrier's failure to settle when an excess carrier steps in to pay an excess settlement is to encourage the exact harms that James River acknowledges Nevada's bad-faith failure-to-settle law seeks to avoid—incentivizing primary insurers to undervalue claims and put the insured at risk. If the primary insurer knows that it cannot be responsible for its failure to settle a claim within limits as long as there is sufficient excess coverage, it is incentivized to undervalue the claim, refuse to settle, and gamble with the insured's assets. That the insured had the foresight and ability to pay for excess coverage does not make the primary carrier's failure to accept a reasonable settlement within limits any less unfair to that insured.

CONCLUSION

Under established Nevada equitable subrogation principles, this Court should answer "yes" to the Ninth Circuit's certified question.

---

[4] James River's attempt to distinguish the national consensus in favor of subrogation between insurers, even in the context of in-limits settlements, on the same basis fails. Those cases do not hold that equitable subrogation is recognized only when the settlement came after entry of excess judgment and James River has not shown why the timing of the settlement matters when deciding whether that settlement is reliable evidence of damages to the insured.

DATED this 23rd day of May, 2025

CAMPBELL & WILLIAMS

By: */s/ J. Colby Williams*
J. Colby Williams, Esq. (5549)
710 South Seventh Street
Las Vegas, Nevada 89101

O'MELVENY & MYERS LLP
Sabrina H. Strong
Zoheb P. Noorani
Jessica A. Snyder
400 South Hope Street
Los Angeles, CA 90071

Attorneys for Appellant The North River Insurance Company

CERTIFICATE OF COMPLIANCE

1. I hereby 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:

[X] Microsoft Word 2016 in Times New Roman 14;

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) and NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionally spaced, has a typeface of 14 points or more, and contains 4,463 words; or

[ ] Does not exceed pages.

3. Finally, I hereby certify that I have read this appellate 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 and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 23rd day of May, 2025.

/s/ J. Colby Williams
J. Colby Williams (#5549)

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 23rd day of May, 2025, I caused true and correct copies of the foregoing Appellant's Reply Brief to be filed via the Court's electronic filing system, which will provide electronic notification to the following:

Benjamin D. Brooks
bbrooks@sheppardmullin.com
Sheppard Mullin Richter & Hampton, LLP
501 W. Broadway, 18th Floor
San Diego, CA 92101

Abraham G. Smith
Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

/s/ J. Colby Williams
An employee of Campbell & Williams