IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CENTRAL MUTUAL INSURANCE COMPANY,

Plaintiff-Petitioner,

v.

Supreme Court No. S-1-SC-39715
Ct. App. No. A-1-CA-39306

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Respondent.

DEFENDANT-RESPONDENT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S ANSWER BRIEF

Appeal from the Second Judicial District Court in Bernalillo County
District Court No. D-202-CV-2019-04741
The Honorable Lisa Chavez Ortega Presiding

ORAL ARGUMENT REQUESTED

Todd A. Schwarz
Kelsey D. Green
Miller Stratvert P.A.
Attorneys for State Farm Mutual Automobile Insurance Company
P.O. Box 25687
Albuquerque, New Mexico 87125
Telephone: (505) 842-1950
Facsimile (505) 243-4408
tschwarz@mstlaw.com
kgreen@mstlaw.com

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I hereby certify that this brief complies both with the page limitation of Rule 12-318(F)(2) NMRA and with the type-volume of Rule 12-318(F)(3) NMRA. The brief was prepared using Times New Roman 14-point print. According to Microsoft Word 2013, the body of this Answer Brief contains 6653 words.

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Defendant-Respondent State Farm Mutual Automobile Insurance Company ("State Farm"), by and through its attorneys Miller Stratvert, P.A. (Todd A. Schwarz and Kelsey D. Green), hereby responds and answers Plaintiff-Petitioner Central Mutual Insurance Company's ("Central Mutual") Brief-in-Chief, filed herein May 10, 2023. The Court of Appeals is properly affirmed.

Contrary to Central Mutual's assertions, this appeal does not present a matter of first impression under New Mexico law. **[BIC 1]** State Farm filed its Motion to Dismiss for Failure to Join an Indispensable Party ("Motion to Dismiss") asking the District Court to apply well-settled principles of New Mexico law to consider whether the alleged tortfeasor was an indispensable party in this action between two (2) insurers. See Little v. Gill, 2003-NMCA-103, ¶¶ 1, 21, 134 N.M. 321, 76 P.3d 639. The sole question presented by Central Mutual's appeal to the Court of Appeals was whether New Mexico law requires joinder of a tortfeasor, known or unknown, as a necessary party in an action brought by an uninsured/underinsured motorist ("UM") insurer against a liability insurer for declaratory judgment, unjust enrichment, and equitable contribution, when no determination of liability for the motor vehicle accident or alleged damages has been made, thus triggering the liability insurer's duty to indemnify. State Farm notes that any such joinder cannot now be accomplished and would be futile. Central Mutual does not contest that the statute of limitations has run on any claim for either personal injury or property

damages by Central Mutual's insured. See NMSA 1978, §§ 37-1-4 (1880), 37-1-8 (1976). **[See, generally id.]**

New Mexico law requires joinder of the tortfeasor in any action against an insurer to establish liability for damages. See Little, 2003-NMCA-103, ¶¶ 1, 21. Central Mutual's position ignores that State Farm has no duty to provide coverage or indemnify an insured unless an adjudication of liability has occurred and judgment entered. Such adjudication requires presence of the insured or the alleged tortfeasor. Central Mutual's position also would change well-settled law and ask a district court to make factual determinations on a case-by-case basis whether the alleged tortfeasor was a necessary party in a direct action against an insurer by an insurer where liability was undetermined, if the "unique circumstances" of the case warranted, and extend the law so that an insurer would enjoy benefit that an individual third-party claimant did not. **[Id.]** This is not a question of equity. State Farm's obligations under its policy are only triggered when its insured is adjudged liable for damages. The tortfeasor is necessary, and in this case, indispensable to this action. See Rule 1-019 NMRA.

Moreover, the Court of Appeals did not apply the law of subrogation in its analysis. **[Id. 2]** Nor did the Court of Appeals perform " a superficial analysis under inapposite authorities." **[Id.]** The Court of Appeals reviewed each of Central Mutual's claims. Even if this Court were to determine that the Court of Appeals

erred in stating that New Mexico does not recognize equitable contribution, the Court of Appeals correctly determined that Central Mutual's claim for equitable contribution failed as a matter of law because Central Mutual and State Farm do not insure the same insured. The District Court did not err in dismissing Central Mutual's Complaint for Declaratory Judgment, Equitable Contribution, and Unjust Enrichment ("Complaint"). **[Record Proper ("RP") 1-32, 164]** And the Court of Appeals did not err in affirming that decision. See Cent. Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., No. A-1-CA-39306, 2022 WL 17413621, at ¶¶ 1-9 (Ct. App. Dec. 5, 2022). State Farm respectfully requests that this Court affirm the Court of Appeals.

I. SUMMARY OF PROCEEDINGS[1]

State Farm responds to and supplements Central Mutual's Summary of Proceedings pursuant to Rule 12-318(B) NMRA in order to include material State Farms deems necessary for a complete understanding of this matter's posture before this Court:

Central Mutual filed its Complaint on June 18, 2019 against State Farm. **[Id. 1-32]** In that Complaint, Central Mutual states that both it and State Farm are insurers. **[Id. 1 ¶¶ 1-2]** Central Mutual asserted that it issued a motor vehicle policy

[1] State Farm cites to the transcript and Record Proper of the proceedings pursuant to Rule 23-112 NMRA.

to Albert Perez that included UM coverage. **[See id. 2 ¶ 5]** State Farm provided motor vehicle liability insurance to Jeremiah Partin as the named insured. **[See id. 2 ¶ 6]** On or around December 24-25, 2015, Mr. Partin called for roadside assistance and when someone arrived holding themselves out as responding to that call, Mr. Partin gave them his keys. **[See id. 2-3 ¶¶ 9-10]** It is State Farm's position that both Mr. Partin's keys and possession of his vehicle were obtained by pretext and fraud. **[See id. 69 ¶¶ 9-10]** Although Central Mutual states in its Summary of Proceedings that a tow truck arrived, the record citation does not support such an assertion.[2] **[BIC 3]**

On December 26, 2015, Central Mutual's insured, Mr. Perez, was involved in a two-car accident with the unknown driver of Mr. Partin's vehicle. **[RP 2 ¶ 7]** On February 29, 2016, Mr. Perez made a claim to State Farm for his alleged damages resulting from the accident. **[See id. 3 ¶ 14]** State Farm denied that claim on March 7, 2016, "because the [Partin] vehicle was being used outside the scope of [its] insured's consent and [was] taken by an unknown individual." **[Id. ¶ 15]** Central Mutual states Mr. Perez made a bodily injury claim to Central Mutual under his UM coverage in June 2018. **[See id. ¶ 16]**

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[2] Central Mutual cites to nothing in the Record to support its statement that the alleged roadside assistance representative was in a tow truck. **[BIC 3]** Central Mutual cites to nothing in the Record to support its statement that Mr. Partin's truck was newly-repaired, had Mr. Partin's business name on it, or that his tools were inside. **[See id. 3-4]**

Central Mutual states:

> As a result of the accident caused by the driver of Partin's truck, Central Mutual has paid Mr. Perez $6,113.00 in property damages and $16,898.55 in medical payments coverage. Mr. Perez also has made a bodily injury claim which is still presently being investigated, but further sums may be paid by Central Mutual.

[Id. ¶ 17] Central Mutual additionally states that "[u]nder New Mexico law, an automobile liability insurance benefit is the primary source of payment for damages caused to an injured person by the liability insurer's covered driver, and the injured person's [UM] insurance benefit is the possible secondary source of payment for those same damages." **[Id. 4 ¶ 22]** In its Complaint, Central Mutual sought declaratory relief regarding State Farm's duty to pay stating that State Farm owed liability insurance policy benefits to Mr. Perez as primary protection for the damages caused to Mr. Perez by the driver of Mr. Partin's truck, and, as the UM carrier, Central Mutual provided secondary protection for those same damages. **[See id. 5 ¶ 25]** Central Mutual asked the Court to determine whether State Farm had a duty under its liability insurance policy to reimburse and pay Central Mutual for the monies it had paid to Mr. Perez. **[See id. 5 ¶ 26]**

In Count II of its Complaint, Central Mutual alleged that State Farm had been unjustly enriched because it did not pay liability benefits and that it was entitled to equitable contribution from State Farm because it had paid, and may pay in the future, "certain sums of Mr. Perez's damages caused by the driver of Mr. Partin's

truck." **[Id. 6 ¶¶ 31-32]** In its request for relief, Central Mutual asked that the District Court grant it judgment "that State Farm's auto liability insurance policy provides liability protection to the driver of Mr. Partin's truck for the December 26, 2015 accident with Mr. Perez" and that State Farm is required to reimburse and pay Central Mutual up to its policy limits for the damages Central Mutual has paid, and/or may pay in the future, to Mr. Perez. **[See id. ¶¶ A-B]**

On June 2, 2020, State Farm filed its Motion to Dismiss. **[See id. 74-78]** In that Motion, State Farm argued that dismissal was proper because Central Mutual had failed to join the alleged tortfeasor, a necessary party under New Mexico law and that now, any such joinder could not be accomplished and would be futile as the statute of limitations had run on any claim for either personal injury or property damage by Central Mutual's insured. **[See id.]** State Farm asserted that, instead of seeking subrogation when Central Mutual had paid its insured in full, Central Mutual sought declaratory judgment that State Farm owed it reimbursement or equitable contribution for the damages it had paid or would potentially pay to its insured Mr. Perez. **[See id.]** State Farm sought dismissal as New Mexico law requires joinder of the tortfeasor in any action against the tortfeasor's insurer for damages resulting from the liability of the tortfeasor. **[See id.]**

Central Mutual responded that the underlying tortfeasor was not a necessary party to any action for equitable contribution, declaratory judgment, and unjust

enrichment. **[Id. 114-19]** Central Mutual contended that its claims did not "result 'from the liability' of the unknown tortfeasor who collided with the vehicle driven by [Central Mutual's] insured." **[Id. 115]** Rather, its "Complaint arises from the liability of State Farm to contribute toward the satisfaction of [Central Mutual's] insured Albert Perez's timely claim for insurance benefits . . . " **[Id. (emphasis in original)]** Central Mutual concluded that "[t]he fault of the unknown driver - i.e. the 'party primarily liable for the loss'- is irrelevant to [Central Mutual's] claims against [State Farm]." **[Id. 118]** State Farm replied. **[See id. 121-25]**

Central Mutual complains in its Summary of Proceedings that many of the facts in this matter remain unknown and that it had a pending Motion to Compel Discovery Responses when the Court decided State Farm's Motion. **[BIC 3 n.1, 4-5]** Central Mutual filed its Motion after State Farm filed its Motion to Dismiss. **[RP 74-113]** State Farm's Motion presented solely a legal question to the Court and the facts underlying the automobile accident beyond those alleged in Central Mutual's Complaint were irrelevant to that determination.

The District Court granted State Farm's Motion for failure to join an indispensable party after hearing on August 19, 2020. **[8-19-20 Tr. 17:24-18:4]** The Court found "that Central Mutual . . . cannot trigger coverage under a third-party liability insurance policy without a claim against the tortfeasor." **[Id. 18:1-3]** The Court questioned how Central Mutual could proceed without a determination of

the driver's fault to establish State Farm's liability for that risk and noted that the Complaint contained several allegations speaking directly to the wrongful actions of the driver of Mr. Partin's truck. **[See id. 10:10-21, 11:10-25]** The District Court entered its Order Granting Motion to Dismiss on August 31, 2020. **[RP 164]** Central Mutual appealed. **[See id. 166-69]**

The Court of Appeals affirmed the District Court in a Memorandum Opinion. Reviewing the District Court's decision under an abuse of discretion standard, the Court of Appeals began its analysis with Rule 1-019(A)(1), noting that "[t]ypically, in an action against an insurer for damages resulting from the liability of a tortfeasor, that tortfeasor must be joined," citing Little, 2003-NMCA-103, ¶¶ 1, 17, 21. Cent. Mut. Ins. Co., 2022 WL 17413621, at ¶ 2. The Court of Appeals stated that, although New Mexico has not recognized a claim for equitable contribution, even it had, Central Mutual and State Farm covered different insureds and equitable contribution would not be a proper remedy. See id. at ¶¶ 3-4. The Court of Appeals noted that Central Mutual cited no binding authority and failed to argue "why [New Mexico] should both expand [its] jurisprudence to recognize the doctrine of equitable contribution and expand the doctrine of equitable contribution to apply under the atypical circumstances of this case." Id. at ¶ 4.

The Court of Appeals further concluded that the District Court had not abused its discretion in determining that the unknown tortfeasor was an indispensable party

to the declaratory judgment action, stating that "[s]uch a determination . . . would require a conclusion that the unknown driver of the State Farm-insured vehicle was responsible for the crash and Perez's sustained injuries." Id. at ¶¶ 6-7. The Court similarly found Central Mutual's claim for unjust enrichment lacking as Central Mutual had not demonstrated that State Farm knowingly and unjustly benefitted at Central Mutual's expense. See id. at ¶ 8. The Court stated: "Without some judgment of liability against the tortfeasor, there is simply no basis upon which we could conclude that [Central Mutual's] payment on Perez's claim constitutes unjust enrichment for State Farm." Id. at ¶ 9. Central Mutual's Petition to this Court followed.

II. ARGUMENT

A. STANDARD OF REVIEW

The Court "review[s] dismissal under Rule 1-019 for an abuse of discretion." Little, 2003-NMCA-103, ¶ 4. "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." Gallegos v. Pueblo of Tesuque, 2002-NMSC-012, ¶ 39, 132 N.M. 207, 46 P.3d 668 (internal quotation marks and quoted authority omitted). "[T]he trial court abuses discretion when it applies an incorrect standard, incorrect substantive law, or its discretionary decision is premised on a misapprehension of the law." Aragon v. Brown, 2003-NMCA-126, ¶ 9, 134 N.M. 459, 78 P.3d 913; see also Harrison v. Bd.

of Regents of Univ. of N.M., 2013-NMCA-105, ¶ 14, 311 P.3d 1236. When the dispositive issue on appeal is a legal question, the Court applies de novo review. Id. "If [the Court] concludes that the district court erred as a matter of law, then it necessarily follows that the district court abused its discretion . . . because the decision was based on a misapprehension of the law." Id.

B. THE COURT OF APPEALS DID NOT APPLY A SUBROGATION ANALYSIS NOR DID IT RULE THAT THE LIABILITY INSURER OF AN AT-FAULT VEHICLE MAY DECLINE TO PAY OR INVESTIGATE A CLAIM BY AN INJURED PARTY IF THE DRIVER OF THE AT-FAULT VEHICLE CANNOT BE LOCATED OR IDENTIFIED DURING THE APPLICABLE STATUTE OF LIMITATIONS.

Central Mutual asks this Court to find error on an issue the Court of Appeals did not consider and on a ruling the Court of Appeals did not make. **[BIC 7-11]** The Court will note that Central Mutual includes no citation to the Court of Appeals' opinion holding as such. Review of the Court of Appeals' opinion indicates no mention of subrogation. Review of the Court of Appeals' opinion reveals no consideration regarding the duties of a liability insurer of an "at-fault" vehicle to an UM insurer.[3] Neither were before the Court. Rather, the Court of Appeals considered whether application of Rule 1-019 compelled dismissal of Central Mutual's Complaint because it did not join a tortfeasor-insured and thus no

[3] State Farm has never contested that Mr. Partin's vehicle was in the accident. State Farm denied coverage because the driver was not an insured and was not operating the vehicle with the permission of the insured Mr. Partin. Whether the vehicle was at-fault is a non-issue.

adjudication of any fault could be had thereby triggering State Farm's duty to indemnify.

The District Court neither abused its discretion nor committed legal error in dismissing Central Mutual's Complaint. The Court of Appeals did not err in affirming that decision. Central Mutual failed to join the tortfeasor in its attempted direct action against State Farm for the monies it paid its insured as a result of the accident. Instead of seeking subrogation when Central Mutual had paid its insured in full, Central Mutual's Complaint sought a declaratory judgment that State Farm owes it reimbursement or equitable contribution for the damages Central Mutual paid or may pay to its insured Mr. Perez.

Well-established New Mexico law requires joinder of the tortfeasor in any action against the tortfeasor's insurer for damages resulting from the liability of the tortfeasor where that liability has not been determined. See Little, 2003-NMCA-103, ¶¶ 1, 17, 21. As Central Mutual has not joined the tortfeasor and the applicable statutes of limitation now bar such joinder, which is undisputed, dismissal was appropriate.

In Little, which is not a subrogation case, the Court of Appeals concluded that the tortfeasor was a necessary party to any case seeking damages allegedly resulting from his actions and simultaneously seeking to hold his insurance company liable for those damages. 2003-NMCA-103, ¶¶ 1, 4, 17, 21 (stating that Rule 1-019 has

been "synthesized into a three-part analysis: (1) whether a party is necessary to the litigation; (2) whether a necessary party can be joined; and (3) whether the litigation can proceed if a necessary party cannot be joined"). In that case, the plaintiff initially joined the tortfeasor as a party along with his insurance company. Id. ¶ 2. The tortfeasor died while the matter was pending, and the plaintiff was served with a suggestion of death. Id. The plaintiff did not timely move to substitute another party, and the district court dismissed the matter. Id. The Court of Appeals affirmed the dismissal. See id. ¶¶ 1, 21.

The Court reasoned that no basis exists for the plaintiff to bring "a direct action against a tortfeasor's insurer . . . ," and in the tortfeasor's absence, "complete relief cannot be accorded among those already parties." Id. ¶¶ 13, 17 (citing Rule 1-019(A)(1)). "[The insurer] does not have the obligation to pay a third-party claim until there is a judgment imposing liability against [the tortfeasor.]" Id. ¶ 18. Because the tortfeasor was deceased and joinder was impossible, the tortfeasor became indispensable to the action, and the court properly dismissed it. Id. ¶¶ 1, 18, 21.

Central Mutual did not join or attempt to join the tortfeasor or even State Farm's insured in this matter. No question exists that any alleged tortfeasor is a necessary party to this litigation. See id. ¶ 17 ("In the present case, however, [the tortfeasor] was a necessary party under Rule 1-019(A)(1) because [the injured

plaintiff] could not recover from [the liability insurer] unless [the plaintiff] also sued [the tortfeasor.]"). The fact that Central Mutual is an insurance company does not change this conclusion. Central Mutual cannot recover from State Farm without an adjudication of liability against a tortfeasor-insured, a loss for which State Farm would have a duty to indemnify. As stated in Central Mutual's Complaint, State Farm denied coverage "because the [Partin] vehicle was being used outside the scope of [its] insured's consent and taken by an unknown individual." **[Id. 3 ¶ 15]**

The tortfeasor must be a named party and is necessary to any action so that a jury can decide whether and for what amount of damages he is responsible. "Raskob does not extend to allow an action against an insurance company without its insured." Id. ¶ 21. Under New Mexico law, an insurance company is not obligated to pay a third-party claim or is not responsible for any third-party claim absent a judgment against its insured. Id. ¶ 18. Central Mutual cannot proceed directly against State Farm, as the tortfeasor's potential liability carrier, without the tortfeasor.

Central Mutual asserts that its claims arise from State Farm's "failure to perform an adequate investigation prior to denying the claim" of Mr. Perez, from "State Farm's failure to meet its obligations under an automobile liability insurance policy it issued to [Mr.] Partin," and because all of Central Mutual's information indicated that State Farm had improperly denied Mr. Perez's claim. **[BIC 3, 8]** State

Farm has no duty to Central Mutual. Central Mutual cites no authority that it does. See In re Adoption of Doe, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329. Neither does State Farm owe any obligation to Central Mutual's insured Mr. Perez. Mr. Perez is not its insured. State Farm has duties to its insured. No one has ever attempted to invoke those duties and trigger State Farm's duty to indemnify.

Central Mutual never disputed in this action its insured's entitlement to UM benefits. See NMSA 1978, § 66-5-301(A) (1983) (stating that UM coverage or "[i]nsurance against uninsured and unknown motorists" is "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . ."). Rather, Central Mutual seeks to compel State Farm to reimburse it for benefits Central Mutual paid to its insured as a result of an accident with an unknown motorist for which its insured paid premiums and to which he is contractually entitled. Central Mutual seeks reimbursement from State Farm without any determination against a State Farm insured on liability.

Central Mutual attempts to re-characterize its action from an action seeking to recover for the tortfeasor's harm to one for State Farm "shirk[ing]" its responsibilities, "stonewall[ing]," exploiting a legal "loophole," and engaging in "obstructive conduct." **[Id. 2, 9-10, 17]** Central Mutual implies that State Farm acted with bad intent and states that it wrongfully and unjustly denied coverage. **[See id. 9-10 ("By all appearances, State Farm simply denied the Perez claim because**

it knew the at-fault driver could not be located, and perhaps also surmised that Mr. Perez's treatment – and [Central Mutual's] concomitant payment obligations – would continue beyond the expiration of the three-year statute of limitations for [Central Mutual] to claim against State Farm. In other words, it appeared that State Farm denied the Perez claim, not for any valid reason under its policy, but merely because it had found a loophole that might render it effectively immune to suit.")] Central Mutual contends that it is unfair that it has to pay its insured's UM claim and has lost the potential for any offset of applicable liability coverage. **[See id. 9]** However, none of Central Mutual's claims arise from any specific conduct of State Farm other than the denial of liability coverage and refusal to pay Central Mutual. **[Id. 8]** Central Mutual seeks reimbursement for the benefits it paid to its own insured arising out of a motor vehicle accident with an uninsured vehicle. Such claims necessitate the presence of the tortfeasor under the authorities cited herein.

The Court of Appeals correctly applied established New Mexico law. Although Central Mutual contends that Little is inapposite, Central Mutual provides this Court no authority that supports its interpretation of Rule 1-019 in the procedural scenario presented. **[See id. 10-11]** This Court can assume none exists. See In re Adoption of Doe, 1984-NMSC-024, ¶ 2. Central Mutual requests that the appellate courts ignore this state's precedent and instead "adjudicate [its] claims against State

Farm 'in equity and good conscience.'" **[Id. 10 (quoting Rule 1-019)]** State Farm respectfully requests that this Court decline Central Mutual's invitation to expand its jurisprudence on direct actions against insurers.

As the District Court stated: "Central Mutual . . . cannot trigger coverage under a third-party liability insurance policy without a claim against the tortfeasor." **[8-19-20 Tr. 18:1-3]** The Court of Appeals' affirmance of that decision finds a sound basis within New Mexico law regarding direct actions against insurers. Central Mutual has failed to join a necessary party to its action and cannot now, and does not contest that it cannot, cure that failure as the applicable statutes of limitation now bar any action against the tortfeasor. See §§ 37-1-4, -8. Those statutes run from the time of the accident or when the insured's cause of action arose. See, e.g., Liberty Mut. Ins. Co. v. Warren, 1995-NMCA-009, ¶¶ 7-8, 119 N.M. 429, 891 P.2d 570. The accident in this matter occurred December 26, 2015, over seven (7) years ago. Central Mutual can no longer pursue claims against the tortfeasor. Because the tortfeasor cannot be joined, and this litigation cannot proceed without him as a party, the Court of Appeals correctly affirmed the District Court. See Little, 2003-NMCA-103, ¶¶ 1, 21.

C. THE COURT OF APPEALS DID NOT ERR IN ITS CONCLUSION THAT CENTRAL MUTUAL COULD NOT PURSUE A CLAIM FOR EQUITABLE CONTRIBUTION.

The Court of Appeals determined that "[e]quitable contribution claims involve two insurance carriers each covering the same insured." Cent. Mut. Ins. Co., 2022 WL 17413621, at ¶ 3. As Central Mutual's insured was Mr. Perez and State Farm's Mr. Partin, the Court of Appeals concluded as a matter of law that equitable contribution was not a proper remedy. See id. The Court of Appeals did not err.

As stated in Hartford Casualty Insurance Co. v. Trinity Universal Insurance Co. of Kansas, 158 F. Supp. 3d 1183, 1201-02 (D.N.M. 2015):

> The doctrine of equitable contribution applies to insurers who share the same level of obligation on the same risk as to the same insured. This right of equitable contribution belongs to each insurer individually. It is not based on any right of subrogation to the rights of the insured, and is not equivalent to standing in the shoes of the insured. Instead, the reciprocal contribution rights of coinsurers who insure the same risk are based on the equitable principle that the burden of indemnifying or defending the insured with whom each has independently contracted should be borne by all the insurance carriers together, with the loss equitably distributed among those who share liability for it in direct ratio to the proportion each insurer's coverage bears to the total coverage provided by all the insurance policies.

(Internal quotation marks and quoted authority omitted; emphasis in original.); see also Great West Cas. Co. v. Canal Ins. Co., 901 F.2d 1525, 1527 (10th Cir. 1990) ("As an initial matter, we note that the district court correctly began its analysis of equitable contribution between co-insurers with the requirement that the interests covered must be common to both insurers."). And as stated by the California Court

of Appeal in Fireman's Fund Insurance Co. v. Maryland Casualty Co., 65 Cal. App. 4th 1279, 1289 (Cal. Ct. App. 1998):

> We conclude that where two or more insurers independently provide primary insurance on the same risk for which they are both liable for any loss to the same insured, the insurance carrier who pays the loss or defends a lawsuit against the insured is entitled to equitable contribution from the other insurer or insurers, without regard to principles of equitable subrogation.

(Emphasis added.) The California Court continued: "Where multiple insurance carriers insure the same insured and cover the same risk, each insurer has independent standing to assert a cause of action against its coinsurers for equitable contribution when it has undertaken the defense or indemnification of the common insured." Id. at 1293 (emphasis added).

The principles of equitable contribution provide no remedy to Central Mutual. Central Mutual cannot dispute that its claim involves two (2) different insureds. And although Central Mutual asserts that it and State Farm are concurrent insurers insuring the same risk, the facts belie such a contention. **[BIC 12]** Central Mutual provides UM coverage to Mr. Perez; State Farm provides liability coverage to Mr. Partin. Contrary to Central Mutual's contention that "both insurers were obligated to indemnify the same claimant," these two policies do not provide primary insurance for the same risk, and they do not cover the same insureds. **[See id.]**

This is not a case of single insured covered by concurrent or double insurance. See Am. Family Mut. Ins. Co. v. Regent Ins. Co., 846 N.W.2d 170, 184 (Neb. 2014)

("Among insurers, the right to contribution arises in two basis circumstances: . . . (2) a single insured is covered by concurrent or 'double' insurance, and one insurer paid all, or greater than its share, of a loss."); see also United Servs. Auto. Ass'n v. Agric. Ins. Co., 1960-NMSC-093, ¶ 9, 67 N.M. 333, 355 P.2d 143 ("In determining whether the policies in question are primary or concurrent, the test is whether they insure the same property, the same interest, and against the same risk. . ."); Am. Auto. Ins. Co. v. First Mercury Ins. Co., Civ. No. 13-439, 2018 WL 1896545, at * 5 (D.N.M. April 19, 2018) (concluding that primary and excess insurers are not concurrent insurers).[4] Central Mutual's own Complaint establishes that the two types of insurance are distinct, with the liability coverage being primary and the UM coverage being secondary. **[RP 4 ¶ 25]** Central Mutual cites no authority that UM coverage and liability coverage cover the same risks or that equitable contribution applies when the insurers do not cover the same insureds or cover the same risk. **[BIC 11-15]** See In re Adoption of Doe, 1984-NMSC-024, ¶ 2. Central Mutual's request that this

[4] Central Mutual cites to American General Fire & Casualty Co. v. Progressive Casualty Co., 1990-NMSC-094, 110 N.M. 741, 799 P.2d 1113, indicating that the Court applied principles of equitable contribution between insurers of a common risk and the same named insured and did not join the underlying tortfeasor. **[BIC 13]** This case involved one insurer suing another seeking to recover the costs of defense based on allegations that the defendant insurer had failed to defend the tortfeasor in the underlying action. Unlike here, no need existed to join the tortfeasor because no question existed as to the tortfeasor's liability, but rather the question presented was regarding an insurer's duty to defend. Indeed, the underlying matter had settled.

Court "expand equitable contribution . . . to apply in situations such as that at issue here" is without basis. **[Id. 15]**

To the extent that the Court of Appeals indicated that New Mexico does not recognize equitable contribution, such determination does not change the outcome and is unnecessary to its ultimate conclusion. See Cent. Mut. Ins. Co., 2022 WL 17413621, at ¶ 4. Accepting the principles of equitable contribution as posited by Central Mutual, its claims fails as a matter of law.

Even if a claim for equitable contribution were to lie, Central Mutual cites no authority that such a claim can proceed in a procedural posture analogous to the instant case. **[See id. 11-15]** Central Mutual ignores that no determination exists in this case that State Farm or a State Farm "insured" bears any liability for the underlying accident. No determination exists in this case, by trial or settlement, of the damages paid by Central Mutual and that a State Farm "insured" is responsible for those damages. See, e.g., Am. Family Mut. Ins. Co., 846 N.W.2d at 188 ("The inquiry between concurrent insurers is simply whether, under its policy with the insured, the nonparticipating coinsurer had a legal obligation to provide a defense or indemnity coverage for the claim or action prior to the settlement. In this sense, equity provides no right for an insurer to seek contribution from another insurer who has no obligation to the insured."). No determination exists that State Farm is liable for indemnity, and the fault of the unknown driver and the quantification of any

resultant damages are not irrelevant to Central Mutual's claims for equitable contribution. The Court of Appeals did not err.

D. THE COURT OF APPEALS DID NOT ERR BY CONCLUDING THAT CENTRAL MUTUAL'S FAILURE TO JOIN AN INDISPENSABLE PARTY BARRED ITS CLAIMS FOR DECLARATORY JUDGMENT AND UNJUST ENRICHMENT.

The Court of Appeals concluded that the District Court had not abused its discretion in determining that the unknown tortfeasor was an indispensable party under Rule 1-019 to the declaratory judgment action, stating that "[s]uch a determination . . . would require a conclusion that the unknown driver of the State Farm-insured vehicle was responsible for the crash and Perez's sustained injuries." Cent. Mut. Ins. Co., 2022 WL 17413621, at ¶¶ 6-7. The Court found Central Mutual's claim for unjust enrichment equally lacking as Central Mutual had not demonstrated that State Farm knowingly and unjustly benefitted at Central Mutual's expense. See id. at ¶ 8. The Court stated: "Without some judgment of liability against the tortfeasor, there is simply no basis upon which we could conclude that [Central Mutual's] payment on Perez's claim constitutes unjust enrichment for State Farm." Id. at ¶ 9. Central Mutual asks this Court to reverse these conclusions because fault of unknown parties is routinely litigated and its claims find their basis in State Farm's conduct, not that of the absent driver. **[See id. 16-18]** Central Mutual does not address the elements of either cause of action. **[See id.]** State Farm requests that this Court affirm the Court of Appeals.

The Court of Appeals properly affirmed the District Court's dismissal of its count for declaratory judgment as the tortfeasor was a necessary party not only pursuant to New Mexico case law but also pursuant to the express language of the Declaratory Judgment Act. See NMSA 1978, §§ 44-6-1 to -15 (1975). Section 44-6-12 provides in pertinent part: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." (Emphasis added.) "This means that any person or entity with an existing or potential interest in the outcome of the action must be named . . ." Gallegos v. Nev. Gen. Ins. Co., 2011-NMCA-004, ¶ 9, 149 N.M. 364, 248 P.3d 912 (internal quotation marks and quoted authority omitted). As such, the tortfeasor, whose liability for the accident is a required antecedent to invoke State Farm's coverage under its policy, is a necessary party as he "[has] or [could] claim any interest which would be affected by the declaration" as to the coverage provided by his policy. Id.; see, e.g., Pueblo of Tesuque., 2002-NMSC-012, ¶¶ 37-48 (concluding that insured tribe was necessary party to action between third-party claimant and tribe's insurer for claims of, inter alia, negligent conduct of tribe, breach of contract of insurer, and insurance bad faith).

In its Complaint, Central Mutual sought declaratory relief regarding State Farm's duty to pay Central Mutual's claim. **[RP 5 ¶¶ 24-28]** Central Mutual stated:

> Central Mutual contends that State Farm owes its liability insurance policy benefits to Mr. Perez as primary protection for the damages caused to Mr. Perez by the driver of Mr. Partin's truck. Central Mutual further contends that it is entitled to an offset for State Farm's liability insurance policy limits, and that any remaining available underinsured motorist benefit under the Central Mutual policy is secondary protection for the damages caused by Mr. Perez by the driver of Mr. Partin's truck.

[Id. ¶ 25] Central Mutual thus asked the District Court to declare that State Farm as the tortfeasor's potential liability insurer owed indemnity for the damages allegedly caused to Mr. Perez. Such a determination requires the conclusion not only that the tortfeasor is an insured but is also responsible for the damages claimed. Little makes clear that New Mexico requires joinder of the tortfeasor as a necessary party under Rule 1-019. 2003-NMCA-103, ¶¶ 1, 21; see also Rhodes v. Lucero, 1968-NMSC-137, 79 N.M. 403, 444 P.2d 588 (concluding no actual controversy existed between plaintiff and defendant insurer where plaintiff held no judgment against defendant tortfeasor).

"The district court is vested with broad discretion to grant or refuse claims for declaratory relief." Headen v. D'Antonio, 2011-NMCA-058, ¶ 6, 149 N.M. 667, 253 P.3d 957 (internal quotation marks and quoted authority omitted). "[This Court] cannot say the trial court abused its discretion by its ruling unless [it] can characterize it as clearly untenable or not justified by reason." Id. (internal quotation marks and quoted authority omitted). In this case, neither Central Mutual nor its insured has a judgment against the tortfeasor or any potential insured under State

Farm's policy. In this case, Central Mutual has not joined the tortfeasor or any putative insured in its action against State Farm for such a determination to be made. The Court of Appeals concluded that Central Mutual could not trigger coverage under third-party liability insurance policy without a claim against the tortfeasor. Cent. Mut. Ins. Co., 2022 WL 17413621, at ¶ 1. Such a conclusion is grounded in New Mexico law and justified by logic and reason. Indeed, without a judgment against the tortfeasor, the declaratory judgment action cannot lie.

For the same reasons, Central Mutual's claim for unjust enrichment fails for failure to join an indispensable party. An equitable remedy, an unjust enrichment claim necessitates that a party "show that: (1) another has been knowingly benefitted at one's expense (2) in a manner such that allowance of the other to retain the benefit would be unjust." Ontiveros Insulation Co. v. Sanchez, 2000-NMCA-051, ¶ 11, 129 N.M. 200, 3 P.3d 695. Central Mutual fails to cite any authority that it can directly proceed against State Farm for unjust enrichment without the joinder of the tortfeasor or any adjudication of liability that triggers State Farm's duties and obligations to its insured under its policy. See In re Adoption of Doe, 1984-NMSC-024, ¶ 2.

Central Mutual has no legal rights as to State Farm as Mr. Partin's liability carrier in this matter and has not triggered State Farm's rights and obligations under Mr. Partin's policy with State Farm. State Farm's duty to defend and indemnify its

insured would be triggered if Central Mutual had filed suit or made a claim against the insured, which it has not done and now cannot do. Central Mutual has not disputed that the statutes of limitations have run on any bodily injury and property damage claims its insured may have had against any alleged tortfeasor in this matter. There is simply no way for Central Mutual to invoke coverage under Mr. Partin's policy at this time, and even if Central Mutual could, such rights and obligations would flow between State Farm and its insured, not State Farm and Central Mutual.

Central Mutual complains that the Court of Appeals failed to recognize that New Mexico allows actions to proceed when a tortfeasor is unknown, citing Bartlett v. New Mexico Welding Supply, Inc., 1982-NMCA-048, ¶ 39, 98 N.M. 152, 646 P.2d 579. However, allowing apportionment of fault to an "empty chair" among other concurrent tortfeasors is distinct from concluding that an insurer has a duty to indemnify a non-joined party against whom no fault has been adjudicated. Central Mutual only sued State Farm. Central Mutual did not even join the insured.

Central Mutual further states that if the Court of Appeals is correct then no insurer would be able to perform any coverage determination: "After all, if adjudication of liability were required in order to support a coverage determination, then State Farm should not have applied a stolen-vehicle exclusion absent a 'judgment of liability against' a vehicle thief." **[BIC 16]** Central Mutual's statement fails to appreciate the distinction between an insurer determining coverage when a

third-party makes a claim and a judicial determination that the insurer is legally liable for indemnification and payment of damages pursuant to its policy for the conduct of its insured.

Contrary to Central Mutual's further assertion, State Farm is not attempting to "escape" its policy obligations. **[Id. 17]** State Farm's policy obligations do not extend to Central Mutual. State Farm's contract is with its insured, and any duties thereunder as to indemnification are triggered by a judgment of liability against that insured. "[An insurer] does not have the obligation to pay a third-party claim until there is a judgment imposing liability against [the tortfeasor.]" Little, 2003-NMCA-103, ¶ 18.

III. CONCLUSION

Mindful of its standard of review, the Court of Appeals did not err and applied well-settled New Mexico law. Joinder of the tortfeasor is a necessary prerequisite to pursue any action against a liability insurer seeking payment of damages under its liability policy. See id.; see also Rule 1-019(A)(1). The fact that Central Mutual is an insurer does not change this requirement or alter the nature of State Farm's contractual obligations. The Court of Appeals is appropriately affirmed.

WHEREFORE, for the above-stated reasons, State Farm respectfully requests that this Court affirm the Court of Appeals and grant it any such other relief this Court deems just and proper.

Respectfully submitted,

MILLER STRATVERT P.A.

By: */s/ Todd A. Schwarz*
Todd A. Schwarz
Kelsey D. Green
Attorneys for State Farm Mutual
Automobile Insurance Co.
Post Office Box 25687
Albuquerque, NM 87125-0687
Telephone: (505) 842-1950
Facsimile: (505) 243-4408
tschwarz@mstlaw.com
kgreen@mstlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was e-filed and served by electronic means on the following this 12th day of June, 2023, to the following parties and counsel of record:

Lisa Entress Pullen
David M. Wesner
Civerolo, Gralow & Hill, P.A.
Attorneys for Central Mutual
Insurance Co.
P.O. Drawer 93940
Albuquerque, NM 87199

/s/ Todd A. Schwarz
Todd A. Schwarz