IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CENTRAL MUTUAL INSURANCE COMPANY,

Plaintiff/Petitioner,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant/Respondent.

Supreme Court No. S-1-SC-39715

Ct. App. No. A-1-CA-39306

BRIEF IN CHIEF

of

Central Mutual Insurance Company, Plaintiff/Petitioner

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
District Court No. D-202-CV-2019-04741
LISA CHAVEZ ORTEGA, District Judge

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ORAL ARGUMENT REQUESTED

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This brief complies with the type-volume limitations set forth in Rule 12-213(F)(3) NMRA, as it is prepared in 14-point Times New Roman, and the body of the brief contains 4,894 words, as indicated by Microsoft® Word for Microsoft 365.

I. INTRODUCTION

COMES NOW Plaintiff/Appellant, Central Mutual Insurance Company ("CMIC") and, pursuant to Rule 12-318(A) NMRA, files its Brief in Chief in the matter captioned above. In this matter of first impression under New Mexico law, the Court of Appeals erred in affirming the district court's grant of a motion to dismiss CMIC's Complaint filed by Defendant/Appellee, State Farm Mutual Automobile Insurance Co. ("State Farm"). The Court of Appeals failed to tailor its ruling to the unique circumstances of this case, where the at-fault driver in the subject vehicle collision cannot be located or identified, medical treatment has continued longer than three years, and the liability carrier for the at-fault vehicle wrongfully refused coverage. Recognizing that its claim did not fit squarely into the common forms of action, CMIC sought relief in the alternative, under theories of equitable contribution, unjust enrichment, and declaratory judgment, based on State Farm's failure to meet its obligations under an automobile liability insurance policy it had issued to the owner of the at-fault vehicle in a collision that injured CMIC's insured, Albert Perez. The only reasoning the district court provided for its ruling was its statement on the record that CMIC "cannot trigger coverage under a third-party liability insurance policy without a claim against the tortfeasor." **[Tr. 18:1-3]**

The Court of Appeals failed to apply appropriate principles of both law and equity where it determined that the at-fault motorist was an indispensable party to

CMIC's claims, despite the fact that none of CMIC's claims required the presence of the at-fault motorist as a party. In affirming the district court's grant of State Farm's Motion to Dismiss, the Court of Appeals applied principles of subrogation, rather than properly applying the elements of CMIC's stated causes of action: equitable contribution, unjust enrichment, and declaratory judgment. The Court of Appeals also based its holding on the mistaken belief that New Mexico does not recognize a cause of action sounding in equitable contribution. On the contrary, as is discussed below, New Mexico has recognized the principles at issue – whether or not explicitly termed "equitable contribution" – for at least 60 years.

The Court of Appeals failed even to address, let alone to answer, the ultimate question presented by this action: is an uninsured-motorist carrier simply without recourse against a liability insurer that wrongfully denies a claim, as long as the person who caused the underlying collision flees the scene and evades identification? Whether under a theory of equitable contribution, of unjust enrichment, or in an action for a declaratory judgment, the uninsured-motorist carrier should have recourse against a liability carrier that shirks its policy obligations. The Court of Appeals erred in performing only a superficial analysis under inapposite authorities, giving *carte blanche* to liability insurers to deny claims without investigation where their at-fault drivers are unidentified. The inequity of that decision can only result in needlessly increased premiums for uninsured/underinsured-motorist

("UM/UIM") insurance, as UM/UIM carriers underwrite coverage for New Mexicans knowing they will be forced to shoulder liability carriers' burdens under circumstances such as those at issue here. The decisions of the Court of Appeals and of the district court should be reversed, and CMIC's claims should be allowed to proceed on their merits.

II. SUMMARY OF PROCEEDINGS

CMIC's claims against State Farm arise from State Farm's failure to meet its obligations under an automobile liability insurance policy it issued to Jeremiah Partin. **[RP 2 ¶¶ 6-7]** On Christmas Eve 2015, Mr. Partin called for roadside assistance to change a flat tire. **[RP 2 ¶ 9; RP 69 ¶ 9]** When a tow truck arrived, Mr. Partin turned the vehicle over to the driver, apparently[1] on the understanding that the vehicle would be repaired and returned to Mr. Partin's home. **[RP 3 ¶ 10; RP 69 ¶ 10]** Two days later, in icy conditions on Interstate 40, at the exit leading to Mr. Partin's home, the newly repaired Partin vehicle rear-ended the vehicle of CMIC's insured, Albert Perez, who sustained serious injuries. **[RP 2 ¶¶ 7-8; RP 3 ¶¶ 11-12, 17]** The driver of the Partin vehicle fled the scene, and his or her identity is unknown. **[RP 2 ¶ 8]** No effort had been made to remove the name of Mr. Partin's business

[1] Many of the facts of this matter remain unknown to CMIC, and are stated only on information and belief, due to State Farm's failure to meet its discovery obligations in the district court, where CMIC's Motion to Compel Discovery Responses was fully briefed and awaiting oral argument at the time the court dismissed CMIC's Complaint. **[RP 79-113; RP 131-149; RP 152-163]**

from the truck, his tools remained in the vehicle, and Mr. Partin never reported the vehicle to the police as stolen. **[RP 2 ¶ 7; RP 3 ¶ 13; RP 69 ¶ 13]**

Within three years after the collision, Mr. Perez presented State Farm with a claim for bodily injury and property damage. **[RP 3 ¶ 14; RP 69 ¶ 14]** State Farm refused to honor the claim, alleging that the truck was a stolen vehicle, and therefore was excluded under Mr. Partin's State Farm policy. **[RP 3 ¶ 15; RP 69 ¶ 15]** Following State Farm's rejection of the liability claim, CMIC began – and is continuing – to protect Mr. Perez under the uninsured/underinsured-motorist (UM/UIM) coverage in Mr. Perez's CMIC policy. **[RP 3 ¶ 17]**

CMIC attempted to obtain information, and – ultimately – to recover its expenditures, from State Farm, because the little information available to CMIC indicated that State Farm had rejected liability coverage on inadequate grounds, based on little or no investigation. **[RP 3 ¶¶ 15, 18 RP 4 ¶ 20, RP 96, INT 3]** State Farm rebuffed all of CMIC's efforts to recoup its losses, and refused to provide CMIC with a copy of its policy on the at-fault Partin vehicle, or even disclose its policy limits. **[RP 4 ¶ 19; RP 70 ¶ 19; RP 80; RP 87; RP 99-100; RP 105-106]**

Having reached a dead end in its attempts to recover from State Farm, CMIC filed its Complaint in the district-court lawsuit on June 18, 2019, seeking equitable contribution or recompense for State Farm's unjust enrichment, and a declaratory judgment as to coverage. **[RP 1-32]** When State Farm continued in its refusal to

produce its policy, and any other relevant documents and information CMIC sought in written discovery, CMIC filed its Motion to Compel Discovery Responses. **[RP 79-113]** The Motion to Compel was fully briefed and awaiting the scheduling of oral argument at the time the district-court action ended. **[RP 131-149; RP 152-163]** On June 2, 2020, State Farm moved the district court to dismiss CMIC's Complaint. **[RP 74-78]** Rather than addressing CMIC's claims on their merits, State Farm alleged that CMIC could not recover without joining the unknown at-fault driver as a defendant, an argument arising in subrogation, a theory on which CMIC did not claim. *Id.* By a written Order Granting Motion to Dismiss, the district court granted State Farm's Motion, stating only that "the motion is well-taken and should be granted." **[RP 164-65]**

CMIC timely filed its Notice of Appeal in the district court on September 30, 2020 **[RP 166-169]**, and timely filed its Docketing Statement in the Court of Appeals on October 30, 2020. **[RP 170-184]** The Court of Appeals assigned the matter to the general calendar, and CMIC timely filed its Brief in Chief on October 4, 2021. **[BIC, *passim.*]** State Farm filed its Answer Brief on November 22, 2021 **[AB, *passim.*]**, and CMIC timely filed its Reply Brief on December 23, 2021 **[RB, *passim.*]**. In a Memorandum Opinion filed on December 5, 2022, the Court of Appeals affirmed the district court's grant of State Farm's Motion to Dismiss. **[DOA, *passim.*]**

The Court of Appeals held that equitable contribution did not apply to the facts of the case because the insurers did not share a common named insured **[DOA 4]**, and that "New Mexico does not currently recognize the remedy of equitable contribution." *Id.* As to CMIC's claim for unjust enrichment, the Court of Appeals did not apply a *de novo* standard to the district court's mistakes of law or application of law to the facts **[DOA 7]**, and held that CMIC failed "to present facts, evidence, or argument that State Farm knowingly benefitted at CMIC's expense resulting in an unjust benefit for State Farm." **[DOA 8]** *See Aragon v. Brown*, 2003-NMCA-126, ¶ 9, 134 N.M. 459, 78 P.3d 913 (stating that "even when we review for an abuse of discretion, our review of the application of the law to the facts is conducted *de novo*. Accordingly, we may characterize as an abuse of discretion a discretionary decision that is premised on a misapprehension of the law"). The Court further held that "[w]ithout some judgment of liability against the tortfeasor, there is simply no basis upon which we could conclude that CMIC's payment on Perez's claim constitutes unjust enrichment for State Farm." *Id.* The Court also appears to have based its ruling in part on its characterization of CMIC as arguing that "the discrepancy in the statute of limitations was unjust" (*id.*), but CMIC never took such a position below. Instead, CMIC's position is that *State Farm's denial of coverage* was unjust where, even if the tortfeasor could have been sued, CMIC would still have been unable to

sue in subrogation due to the disparity in the statute of limitations, because Mr. Perez had not finished treating. **[BIC 23-24]**

Finally, as to CMIC's claim for a declaratory judgment, the Court, applying only an abuse-of-discretion standard, rather than applying a *de novo* standard to the district court's mistakes of law or application of law to the facts, held that no "actual controversy" was present because no judgment had been rendered against the unavailable tortfeasor. **[DOA 6]** *See Aragon v. Brown*, *supra*, at ¶ 9. In so doing, the Court of Appeals held that CMIC's cited authority that an "actual controversy" may exist absent an underlying judgment was inapplicable simply because it did not involve the "question . . . whether an unknown, third-party tortfeasor is an indispensable party." **[DOA 6-7]** (*citing Baca v. New Mexico State Highway Department*, 1971-NMCA-087, ¶ 22, 82 N.M. 689, 486 P.2d 625). The flaws in the Court of Appeals' rulings are discussed in detail below.

III. ARGUMENT

In affirming the district court's grant of State Farm's Motion to Dismiss, the Court of Appeals erred in three principal ways. First, by limiting its analysis to principles of subrogation, it erred in ruling that the liability insurer of an at-fault vehicle may decline to pay or investigate a claim by an injured third party if the driver of the at-fault vehicle cannot be located or identified during the applicable statute of limitations. Second, by declining to apply the principles of equitable contribution, it

erred in ruling that the uninsured/underinsured-motorist carrier of a driver injured in a collision has no recourse as against the liability carrier of the at-fault vehicle that refuses to pay the injured motorist's claim, if the driver of the at-fault vehicle cannot be located or identified during the applicable statute of limitations. Finally, by reading into CMIC's claims for unjust enrichment and declaratory relief a nonexistent indispensable-party element, the Court of Appeals erred in ruling that an unidentifiable at-fault driver is an indispensable party to an action by the uninsured/underinsured-motorist carrier of an injured motorist against the liability insurer of the at-fault vehicle for unjust enrichment, or for a declaratory judgment. Each of those errors has multiple components, each of which is discussed below.

A. By limiting its analysis of CMIC's claims to a cause of action CMIC had not, and could not have, pled, the Court of Appeals erred in ruling 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.

CMIC's briefing below made it abundantly clear that its claims arose, at least in large part, from State Farm's failure to perform an adequate investigation prior to denying the claim of Albert Perez. All information available to CMIC indicated that the Partin vehicle had not been stolen, meaning that the policy exclusion on which State Farm relied in denying coverage to Mr. Perez was inapplicable. State Farm's failure to investigate unfairly made CMIC the primary insurer for the fault of State Farm's driver, harm done to CMIC by State Farm, and State Farm alone.

CMIC explained the unfairness of State Farm's conduct to the Court of Appeals:

> State Farm's denial of Mr. Perez's claim obligated CMIC to pay "first dollar" on an **un**insured-motorist claim – as opposed to paying *after State Farm* on an **under**insured-motorist claim – and eliminated CMIC's setoff as against State Farm's policy proceeds. NMSA 1978 Section 66-5-301; *see Schmick v. State Farm Mut. Auto. Ins. Co.*, 1985-NMSC-073, ¶ 28, 103 N.M. 216, 704 P.2d 1092. Moreover, because Mr. Perez's treatment has taken longer than three years, CMIC would have been unable to wait until such treatment was complete before pursuing its claims against State Farm.

[BIC 23-24] (emphases in original). Because State Farm successfully stonewalled in discovery, securing dismissal of CMIC's claims before it could be made to respond to CMIC's written discovery requests, CMIC was never able to determine whether State Farm had any reasonable ground on which to conclude that the Partin truck had been stolen.

Information available to CMIC strongly suggested that the vehicle had *not* been stolen. The truck still bore the name of Mr. Partin's business at the time of the collision, which happened on the exit leading to Mr. Partin's home, consistently with the vehicle's being repaired and returned as Mr. Partin had evidently been promised. And the truck still contained Mr. Partin's tools, which surely would have been removed had the truck spent two days in the hands of thieves. 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 CMIC's

concomitant payment obligations – would continue beyond the expiration of the three-year statute of limitations for CMIC 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.

With that backdrop, it was incumbent on the district court, and on the Court of Appeals, to adjudicate CMIC's claims against State Farm "in equity and good conscience." **[BIC 9]** (*citing* Rule 1-019 NMRA). Instead, the district court – with virtually no explanation of its reasoning – granted State Farm's Motion to Dismiss, endorsing State Farm's indispensable-party arguments based on the law, not of CMIC's stated causes of action, but of subrogation. **[BIC 13]** The Court of Appeals, knowing that CMIC was unable to sue the at-fault driver or claim in subrogation while its payment obligations were ongoing, nonetheless deemed the driver a "necessary party," relying – as had State Farm – on the inapposite decision in *Little v. Gill*, 2003-NMCA-103, 134 N.M. 32, 76 P.3d 639. **[DOA 2]** Based on that flawed analysis, the Court of Appeals affirmed the dismissal of CMIC's claims for unjust enrichment and for a declaratory judgment.

The Court never explained how, for example, "in equity and good conscience," it could permit State Farm's apparently reflexive denial of Mr. Perez's claim to stand, simply because CMIC could not locate the at-fault driver of State Farm's insured

vehicle. **[DOA 2]** The Court of Appeals stated that, "**[t]ypically**, in an action against an insurer for damages resulting from the liability of the tortfeasor, that tortfeasor must be joined" (emphasis added), but did not acknowledge the unique facts that bring this case outside the realm of the "typical." **[DOA 3]** Citing the inapposite *Little*, the Court noted that "**an injured party** must **generally** join the insured tortfeasor in an action against the tortfeasor's insurer." *Id.* (emphasis added). Again, the Court did not show how rules that "generally" apply in injured-third-party actions such as *Little* would apply here, where CMIC is not – and does not stand in the shoes of – an "injured party," but sues in its own capacity for redress of the inequity inherent in State Farm's treatment of CMIC's insured. The Court of Appeals' and district court's decisions lack merit, and should be reversed.

B. By declining to apply the principles of equitable contribution to CMIC's claims, the Court of Appeals erred in ruling that the uninsured/underinsured-motorist carrier of a driver injured in a collision should have no recourse as against the liability carrier of the at-fault vehicle that refuses to pay the injured motorist's claim, if the driver of the at-fault vehicle cannot be located or identified during the applicable statute of limitations.

Recognizing that its claims did not fall neatly within the usual confines of claims between insurers, CMIC sought relief on equitable theories – in the alternative – that best fit the facts. Subrogation was unavailable due to CMIC's continuing obligations to Albert Perez, and because subrogation *would* require joinder of the at-fault driver. CMIC proceeded in equitable contribution, then, as the doctrine most

closely related to the facts, and claimed in unjust enrichment and for declaratory relief in case those theories were more palatable to the courts than an atypical claim in contribution. Ultimately, as CMIC informed the Court of Appeals, "[f]ar more important than the name of the doctrine applied is the necessity that justice be done." **[RB 10]**

While the district court's ruling is all but entirely unexplained, the Court of Appeals did make some effort to elucidate its reasoning, but its explanation merely underscores the error of its holdings. As to CMIC's claim in equitable contribution, the Court did not examine the outcome that would result if it applied the doctrine despite the fact that CMIC and State Farm only insured the same *risk*, and not the same *named insured*. Instead, the Court simply declared that "[e]quitable contribution claims involve two insurance carriers each covering the same insured." **[DOA 3]**, *citing Hartford Cas. Ins. Co. v. Trinity Universal Ins. Co. of Kansas*, 11 158 F. Supp. 3d 1183, 1201 (D.N.M. 2015) for the proposition that ". . . the right to equitable contribution arises when several insurers are obligated to indemnify or defend **the same loss or claim**" (emphasis added). Rather than showing that covering the "same insured" is more important to equitable contribution than covering the "same loss or claim" where, as here, both insurers were obligated to indemnify the same claimant, the Court simply stopped its analysis there.

The Court of Appeals also held – *sua sponte* – that CMIC could not claim in equitable contribution for an additional reason that had not been briefed, either in the district court or on appeal. Specifically, the Court stated that "New Mexico does not currently recognize the remedy of equitable contribution . . . ." **[DOA 4]** With all due deference to the Court of Appeals, that statement is simply incorrect. Whether or not presented under the label of "equitable contribution," New Mexico *has* long applied the principle that *pro rata* apportionment of payments may be available when two concurrent insurance policies, *e.g.*, "insure the same property, the same interest, and against the same risk." *United Servs. Auto. Ass'n v. Agric. Ins. Co.*, 1960-NMSC-093, ¶ 9, 67 N.M. 333 (1960). *See also Am. Gen. Fire & Cas. Co. v. Progressive Cas. Co.*, 1990-NMSC-094, 110 N.M. 741, 799 P.2d 1113 (incorrectly identifying as subrogation a claim between insurers of a common risk [and named insured], but instead applying the principles of equitable contribution, and not joining an underlying tortfeasor); *Farmers Ins. Exch. v. Fed. Ins. Co.*, 2011 WL 13116736 (D.N.M. Nov. 21, 2011) (adjudicating claim for equitable contribution under New Mexico law); *Am. Auto. Ins. Co. v. First Mercury Ins. Co.*, 2018 WL 1896545, at *5 (D.N.M. Apr. 19, 2018) (*citing Farmers Ins. Exch.* and acknowledging that "New Mexico recognizes *pro rata* apportionment of payment for loss based on the total insurance when two concurrent insurance policies insure the same property, the same interest, and against the same risk") (internal punctuation marks omitted). CMIC had

not cited New Mexico decisions applying equitable contribution because no such decisions were sufficiently analogous to the facts of this case. Moreover, because neither the district court nor the parties had previously alleged that New Mexico has no decisions applying the principles of equitable contribution, CMI was unaware of the need to notify the Court of Appeals that such decisions exist.

The district court's error may be attributable to the confusion inherent among several related concepts including equitable contribution. *See, e.g., Steadfast Ins. Co. v. Agric. Ins. Co.*, 475 Fed. Appx. 683, 690 (10th Cir. 2012) (noting that in a prior case, "the Utah Supreme Court used the term contribution interchangeably with subrogation . . ., in addressing circumstances that, under Oklahoma law, would have presented a claim for equitable contribution between equal insurers" (citation omitted). *See also Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS*, 2016-NMSC-009, ¶ 11, 368 P.3d 389 (noting that the "doctrines of indemnity are perplexing as a result of their often misunderstood relationship to contribution"); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Tokio Marine & Nichido Fire Ins. Col, Ltd.*, 2016 WL 5390523, at *4 (S.D. Cal. Sept. 27, 2016) (noting that a prior decision "distinguishes between inter-insurer claims for equitable contribution and claims based on equitable subrogation [in light of the] appellee's contention that 'contribution is merely a subset or type of equitable subrogation' and noting that confusing the doctrines can have the unintended result in some cases of defeating

their distinct policy goals)" (citation and internal punctuation marks omitted); *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1300, 77 Cal. Rptr. 2d 296, 308 (1998) (collecting cases where – as with *Am. Gen. Fire & Cas. Co.*, *supra*, "our research has identified several cases [that] do appear to confuse the concepts of equitable subrogation and contribution").

In any event, CMIC does not ask the Court to "consider expanding our jurisprudence to recognize claims of equitable contribution," because our jurisprudence already does recognize equitable contribution. CMIC *does* ask the Court to expand equitable contribution – if an expansion it is – to apply in situations such as that at issue here. Equitable contribution should afford relief to a UM/UIM carrier that, through no fault of its own, is forced to shoulder the burden of – and has no recourse against – an underlying liability carrier that denies a claim without an adequate investigation, and the underlying tortfeasor cannot be sued.

C. By grafting an indispensable-party element onto CMIC's claims, the Court of Appeals erred in ruling that an unidentifiable at-fault driver is an indispensable party to an action by the uninsured/underinsured-motorist carrier of an injured motorist against the liability insurer of the at-fault vehicle, for unjust enrichment, or for a declaratory judgment.

As is noted above, although the district court did orally rule that CMIC "cannot trigger coverage under a third-party liability insurance policy without a claim against the tortfeasor," it did not explain why it believed that was so, where CMIC had not sued under any theory that necessarily involved the at-fault driver. The Court of

Appeals did discuss the driver to some extent in its Memorandum Opinion, applying the inapposite "injured third party" decision in *Little* to determine that the at-fault driver was indispensable to CMIC's claims for unjust enrichment and declaratory relief. (It does not appear that the Court held that an underlying tortfeasor was indispensable to a claim sounding in equitable contribution.)

With respect to CMIC's claim for unjust enrichment, the Court of Appeals held, without citation to authority, that "[w]ithout some judgment of liability against the tortfeasor, there is simply no basis upon which we could conclude that CMIC's payment on Perez's claim constitutes unjust enrichment for State Farm." **[DOA 8]** The Court did not address CMIC's showing that in "countless other contexts, courts allow actions to proceed when a tortfeasor is unknown. *See, e.g., Bartlett v. New Mexico Welding Supply, Inc.*, 1982-NMCA-048, ¶ 39, 98 N.M. 152, 646 P.2d 579 (finding it an accepted practice to include all tortfeasors in the apportionment of liability, including unknown tortfeasors and phantom drivers)." **[RB 12]** (emphasis in original). The Court therefore did not explain how it believed it would be impossible to determine the fault of the "unknown tortfeasor and phantom driver[]" here, in a straightforward rear-end collision on an icy freeway, from which the driver fled on foot. 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. State Farm should

not be permitted to escape its policy obligations due to the absence of the at-fault driver in a collision that undeniably happened, while denying coverage altogether based on a vehicle theft that, by all appearances, State Farm simply imagined.

Ultimately, CMIC's claim for unjust enrichment was bottomed, not on any judicially established fault of the absent driver, but on *State Farm's* conduct in failing to perform an adequate *investigation* of the collision before denying Mr. Perez's claim. **[RP 3 ¶¶ 15, 18 RP 4 ¶ 20, RP 96, INT 3]** The Court of Appeals' perfunctory treatment of CMIC's claims merely serves to reward State Farm's cynical claims practices, based as they are, not on a clear-eyed evaluation of the collision at issue, but evidently on the exploitation of a loophole to deny a meritorious claim simply because it could. And by affirming the dismissal, entered before CMIC's Motion to Compel could be heard, the Court also rewards State Farm's obstructive conduct in litigation.

In deciding CMIC's claim for a declaratory judgment, the Court of Appeals held that any determination of State Farm's liability to Mr. Perez "would require a conclusion that the unknown driver of the State[-]Farm-insured vehicle was responsible for the crash . . . ." **[DOA 6]** Again, the Court did not address CMIC's showing that the fault of "unknown tortfeasors and phantom drivers" has long been determinable under New Mexico law. **[RB 12]** And again, State Farm clearly decided that the Partin vehicle had been stolen without benefit of any adjudication;

no reason is evident why adjudication should be needed to apportion fault as between Mr. Perez and the "unknown tortfeasor and phantom driver[]" at issue here. By terminating CMIC's lawsuit before any discovery had been completed, the district court rewarded State Farm's claims and litigation practices, and punished CMIC for timely meeting its obligations to its insured. CMIC, having approached the district court for the exercise of its powers in equity, deserved the opportunity to present its claims on their merits, with the benefit of an evidentiary showing fully fleshed out in discovery. This case should be remanded to the district court to afford CMIC that opportunity.

IV. CONCLUSION AND RELIEF REQUESTED

At State Farm's urging, the district court dismissed CMIC's Complaint before its merits could fully be seen, on a single ground – failure to join an underlying tortfeasor – that applied to *none* of CMIC's stated causes of action. The Court of Appeals provided the gloss of legal reasoning where the district court had not, but as is discussed above, its analysis was flawed, and failed to accomplish the equity for which CMIC approached the district court in the first instance. Both lower courts' rulings would, if allowed to stand, not only reward State Farm's abusive claims practices and obstructive litigation conduct, but also embolden other liability carriers to shunt the burdens of legitimate liability claims onto blameless UM/UIM carriers.

Whatever the merits of CMIC's claims, the merit of *the claims CMIC actually pled* should be the standard by which they are judged. This case should be remanded and tried on its own merits, not on the merits of a cause of action CMIC did not assert. The district court should be permitted an opportunity to correct its error. Regardless of whether CMIC's claims are analyzed through the lens of equitable contribution, of unjust enrichment, or of declaratory relief, State Farm did not show that any indispensable party was absent from this action, because this action is – and is properly styled as – one exclusively between insurance companies, sounding in equity. New Mexico *does* apply the principles of equitable contribution, an action that may properly proceed as between insurers alone, without the involvement of an underlying tortfeasor. *See Am. Gen. Fire & Cas. Co. v. Progressive Cas. Co., supra.* Whether or not under the name "equitable contribution," New Mexico's judiciary does, and should continue to, apply the equitable principles underlying CMIC's claims. And no tortfeasor need be joined to one insurer's claim for unjust enrichment against, or a declaratory judgment on the coverage of, another. Neither State Farm's briefing nor the Court of Appeals' Memorandum Opinion shows to the contrary.

For the reasons discussed hereinabove, upholding the dismissal of CMIC's claims would create an unjust result contrary to the principles of equity and fairness, and to the public policy of the State of New Mexico. As such, the district court's grant of State Farm's Motion to Dismiss should be reversed with instructions on

remand to reinstate the case, and to apply the elements of CMIC's stated causes of action without the requirement of joining the unknown tortfeasor, so that CMIC may continue discovery and otherwise prosecute its claims in this matter on their merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2023, a true copy of the foregoing Brief in Chief was filed electronically through the Court's electronic filing system and served electronically through that system on all counsel of record, as well as an additional courtesy copy being provided by electronic mail to counsel as follows:

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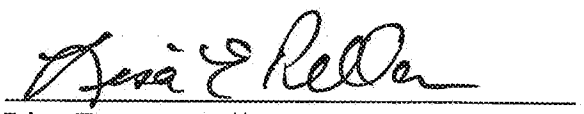

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