IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PADILLA CONSTRUCTION COMPANY OF NEVADA, A NEVADA CORPORATION,
Appellant,
vs.
TROY AND PAULA BURLEY; PAUL ACKERMAN AND JUDY ACKERMAN AS TRUSTEES OF THE ACKERMAN FAMILY TRUST; CHARLES AND CHARLOTTE COOPER AS TRUSTEES OF THE COOPER LIVING TRUST; PETER BRUNT AND JANE MELLORS; DAVID AND MARTINA CARROLL; DAVID AND STACY MILLER; ALLEN AND TINA IFTIGER; RICHARD AND RHONDA MUSCI; STEVEN AND MENDY ELLIOTT; DAVID AND CLAUDIA CROSS AS TRUSTEES OF THE CROSS FAMILY TRUST; KEVIN AND HEATHER ANDREWS AS TRUSTEES OF THE ANDREWS FAMILY TRUST; RONALD AND DONNA KAY SWANSON; GERALDINE PAIGE; NOBUO AND VIRGINIA FURUMOTO AS TRUSTEES OF THE NOBUO AND VIRGINIA FAMILY TRUST; GORDON AND GINEVRA RAGAN AS TRUSTEES OF THE RAGAN FAMILY TRUST; KEVIN AND MARJORIE BURNETT; DONALD AND JOANNE COUDRIET AS TRUSTEES OF THE COUDRIET FAMILY TRUST; ROB DOTSON AND RONETTA CLARK; JASPAR AND CARRIE VAN SOLINGE; DION GIOLITO, AS ASSIGNEES OF CALIFORNIA TRADITIONS, INC. D/B/A SILVERSTAR DEVELOPMENT AND SUBROGREES OF CLARENDON

No. 65854

FILED

MAY 10 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK



16-900556

AMERICA INSURANCE COMPANY,
Respondents.

*ORDER OF AFFIRMANCE*

This is an appeal from a final district court judgment after a jury verdict in a construction defect action. Second Judicial District Court, Washoe County; Charles M. McGee, Senior Judge.

This appeal stems from the construction of single-family homes in the Chantalaine subdivision at Arrowcreek in Reno, Nevada. On appeal, appellant Padilla Construction Company of Nevada (Padilla) asserts several assignments of error, each stemming from the district court's realignment of the parties following a settlement and ruling on the triable claims. First, Padilla argues the district court erred in allowing the homeowners to pursue subrogation because the subrogation claim was not ripe for adjudication. Second, Padilla argues the district court erred in allowing the homeowners to pursue subrogation because the homeowners lacked standing to assert the claim. Padilla also argues that the homeowners lacked standing to assert Silverstar's indemnity claim. Third, Padilla argues that the district court erred in denying its motion for directed verdict on the indemnity claim. Fourth, Padilla argues the district court abused its discretion by not providing the jury with a special verdict form, and alternatively, by not submitting written interrogatories with the general verdict form. We find no error and therefore affirm the judgment of the district court.

In January 2012, a group of homeowners brought suit against the developer of the subdivision, California Traditions, Inc. doing business as Silverstar Development (Silverstar), asserting various claims based on alleged negligent construction of their homes. Silverstar then filed a

third-party complaint against all of its subcontractors, including the stucco subcontractor, Padilla. The case proceeded through discovery until November 29, 2013, during which time the homeowners amended their complaint four times and Silverstar amended its third-party complaint four times.

On March 18, 2014, the homeowners settled with Silverstar and all of the subcontractors, except Padilla, at a settlement conference before District Judge Brent Adams. As part of the settlement, Silverstar's insurer, Clarendon American Insurance Company (Clarendon), agreed to pay, on Silverstar's behalf, its policy limit of $2 million to the homeowners in exchange for a full release of all claims against Silverstar. Additionally, Silverstar assigned its indemnity rights against Padilla to the homeowners and Clarendon assigned its subrogation rights against Padilla to the homeowners.

On March 24, 2014, Silverstar filed its motion for determination of good faith settlement, along with a motion for an order shortening time. Padilla did not oppose Silverstar's motions. On April 14, 2014, Silverstar filed a request for submission of its motion and Judge Charles McGee signed an order pursuant to a stipulation to transfer the matter to Department 6 for Judge Adams *to implement and enforce the settlement agreement.* That same day, the homeowners filed a sixth-amended complaint, which added a subrogation claim and Clarendon as a party. Padilla moved to strike this amended complaint, arguing that the homeowners filed it in violation of both NRCP 15(a) and the district court's prior ruling denying the homeowners' request to assert direct claims against Padilla. Padilla also argued that permitting the amendment four

days before trial was unfairly prejudicial because Padilla did not have prior notice of the claim.

The district court convened on April 17 and 18, 2014, for a pre-trial motion hearing before Judge McGee. At the hearing, Judge McGee ruled that the settlement agreement effectuated an "omnibus" assignment and took everything Silverstar had and gave it to the homeowners. As a result, the district court "realign[ed] the parties" to allow the homeowners to proceed against Padilla as Silverstar's assignee and pursue "both aspects of the claim, as subrogee and as an indemnitee." The district court declined to add Clarendon as a party because Clarendon was not a party of record.

The case proceeded to trial as scheduled four days later, and lasted seven days. On April 29, 2014, the jury returned a verdict in favor of the homeowners and awarded $308,330.57 in damages. That same day, Clarendon sent the homeowners $2 million pursuant to the settlement agreement and the homeowners acknowledged receipt of the payment on April 30, 2014. On May 5, 2014, Judge Adams granted Silverstar's motion for determination of good faith settlement, and Judge McGee entered judgment on the verdict the following day. This appeal followed.

*Padilla waived the issue of ripeness*

First, Padilla argues the district court erred in allowing the homeowners to pursue subrogation because the subrogation claim was not ripe for adjudication. Specifically, Padilla argues that (1) Clarendon had not signed the settlement agreement assigning its rights to the homeowners prior to the date the homeowners filed the sixth-amended complaint, and further (2) Clarendon's right to subrogation did not mature until the last day of trial when it paid the homeowners. The homeowners

argue that Padilla has waived the issue of ripeness because it did not raise it before the district court. We agree with the homeowners.

Below, Padilla objected to the homeowners' sixth-amended complaint only on the basis that the subrogation claim constituted a direct claim against Padilla and that the homeowners failed to comply with NRCP 15(a) in filing their amended complaint. We conclude this objection did not encompass a challenge to the ripeness of the claim. Therefore, we decline to consider this issue on appeal.[1] *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

*The homeowners had standing to assert Silverstar's and Clarendon's rights*

Padilla argues that the homeowners lacked standing to assert Silverstar's indemnification rights because the settlement agreement evinces a total subrogation. Further, Padilla argues the homeowners

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[1]Even if we considered Padilla's argument, we would likely conclude the homeowners' subrogation claim was ripe for adjudication. "A case is ripe for review when 'the degree to which the harm alleged by the party seeking review is sufficiently concrete, rather than remote or hypothetical, [and] yield[s] a justiciable controversy.'" *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 38 n.1, 175 P.3d 906, 907 n.1 (2008) (quoting *Herbst Gaming Inc. v. Heller*, 122 Nev. 877, 887-88, 141 P.3d 1224, 1230-31 (2006)). Clarendon's right to subrogation matured on April 16, 2014, when it executed the settlement agreement obligating itself to pay $2 million to the homeowners in exchange for a full release of the homeowners' claims against its insured, Silverstar. *See Smith v. Parks Manor*, 243 Cal. Rptr. 256, 259 (Cal. Ct. App. 1987) ("The creation of the obligation by execution of the settlement agreement was in itself a sufficient loss to give rise to a mature right of subrogation."). Therefore, the harm to Clarendon was sufficiently concrete to yield a justiciable controversy on April 17, 2014.

lacked standing to assert Clarendon's subrogation rights because Clarendon's right to subrogation did not mature until it tendered payment.[2] The homeowners argue that Padilla waived the issue of standing because it did not raise it before the district court.[3]

"Standing is a question of law reviewed de novo." *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011). Under NRCP 17(a), "[e]very action shall be prosecuted in the name of the real party in interest." "A real party in interest is one who possesses the right to enforce the claim and has a significant interest in the litigation."

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[2]To the extent Padilla argues the homeowners lacked standing because Clarendon sent an e-mail nine months after trial that shows Clarendon lacked intent to assign its rights to Padilla in the settlement agreement, we conclude this issue is not properly before this court because the e-mail did not exist at the time of trial and was never presented to the district court. *See Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (providing that this court cannot consider documents that were not part of the district court's record).

[3]In the view of our concurring colleague, the issue of standing warrants further explanation. We have chosen, however, to address the issue of standing in the way it is analyzed in this order for three reasons. First, we emphasize that while the parties labeled their argument as one of standing, they have briefed and argued the issue as one of real parties in interest. Accordingly, we respond to the parties' argument as it was presented to us. *See Otak Nev., LLC v. Eight Judicial Dist. Court*, 129 Nev. ___, ___, 312 P.3d 491, 498 (2013) (providing that "this court has consistently analyzed a claim according to its substance, rather than its label"). Second, we emphasize that at no time on appeal did the parties mention the conditional language in the settlement agreement, on which our concurring colleague bases his analysis. Third, although we could address standing sua sponte because it is a jurisdictional issue, we are not convinced that we should under the circumstances of this case as the parties chose not to raise it and it has not been briefed.

*Arguello*, 127 Nev. at 368, 252 P.3d at 208 (internal quotation marks omitted). "The inquiry into whether a party is a real party in interest overlaps with the question of standing." *Id.*

"Subrogation is '[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.'" *Id.* (alteration in original) (quoting *Black's Law Dictionary* 1563-64 (9th ed. 2009)). There are two types of subrogation—total and partial. *Id.* at 368-69, 252 P.3d at 208. Total subrogation occurs when an insurer pays its insured *in full* for a claimed loss. *Id.* Where this happens, the insurer is the only real party in interest and must sue in its own name. *Id.*; *see United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 381 (1949).

On the other hand, partial subrogation occurs when the insurer pays only a part of the insured's loss. *Arguello*, 127 Nev. at 369, 252 P.3d at 208. When this occurs, the insured and the insurer "each have substantive rights against the tortfeasor which qualify them as real parties in interest." *Id.* The insured may bring an action against the tortfeasor for the entire loss or the insurer may bring an action to recover the amount of its loss. *See Arguello*, 127 Nev. at 369, 252 P.3d at 208 ("When the amounts paid by the insurer under the policy cover only part of the insured's loss, leaving an excess loss to be made good by the tortfeasor, the insured retains the right of action for the entire loss." (quoting *Amica Mut. Ins. Co. v. Maloney*, 903 P.2d 834, 838 (N.M. 1995))); *Garcia v. Hall*, 624 F.2d 150, 152 (10th Cir. 1980) (providing that where both the insurer and insured are real parties in interest, the insured may bring suit for the entire loss and the "partially subrogated insurance

company need not be named a party to the suit under [FRCP] 17(a)"); *Va. Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 84 (4th Cir. 1973) ("Where there is partial subrogation . . . . [e]ither party may bring suit—the insurer-subrogee to the extent it has reimbursed the subrogor, or the subrogor for either the entire loss or only its unreimbursed loss.").

Under the terms of the settlement agreement, which the district court admitted into evidence, Clarendon agreed to pay, on Silverstar's behalf, its policy limit of $2 million to the homeowners in exchange for a full release of all the homeowners' claims against Silverstar. Although the settlement agreement did not indicate that Silverstar had or would pay any part of the loss, the homeowners presented evidence at trial that Silverstar paid a $40,000 self-insured retention (SIR).[4] Accordingly, because Clarendon and Silverstar each proved that they had paid part of the loss,[5] the settlement effectuated a partial subrogation and thus Silverstar and Clarendon each maintained substantive rights against Padilla that qualified them as real parties in interest. *See Arguello*, 127 Nev. at 369, 252 P.3d at 208; *Valley Crest Landscape Dev., Inc. v. Mission Pools of Escondido*, 189 Cal. Rptr. 3d 259, 266 (2015) (allowing insured and insurer to proceed together where

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[4]A self-insured retention is "[t]he amount of an otherwise-covered loss that is not covered by an insured policy and that usu. must be paid before the insurer will pay benefits." *Black's Law Dictionary* 1566 (10th ed. 2014).

[5]*See Smith v. Parks Manor*, 243 Cal. Rptr. 256, 259 (Cal. Ct. App. 1987) (providing that "i[t] was not necessary for cross-complainants actually to pay the settlement sum out-of-pocket . . . to suffer a loss. The creation of the obligation by execution of the settlement agreement was in itself a sufficient loss to give rise to a mature right of subrogation").

insured had paid the first $250,000 in losses as a SIR pursuant to the terms of the insured's insurance policy). Therefore, Silverstar had standing to assert a claim against Padilla for the entire loss, which the homeowners acquired by virtue of the assignment in the settlement agreement.[6]

*The motion for directed verdict*

Padilla next argues that the district court erred in denying its motion for directed verdict because the homeowners failed to prove indemnity. The homeowners respond that they provided substantial evidence to support their indemnity claim and thus, the district court properly denied Padilla's motion for directed verdict. We agree with the homeowners.

"This court reviews a district court's order [denying] judgment as a matter of law de novo." *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 341, 255 P.3d 268, 275 (2011). "Under NRCP 50(a)(1), the district court may grant a motion for judgment as a matter of law if the opposing party has failed to prove a sufficient issue for the jury, so that his claim cannot be maintained under the controlling law." *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420, 424 (2007) (internal

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[6]We note that Padilla never challenged the validity of the settlement agreement and thus, the assignment. Specifically, Padilla did not oppose Silverstar's motion for determination of good faith settlement, motion for an order shortening time on its motion for determination of good faith settlement, Silverstar's request for submission of its motion for determination of good faith settlement, or the order entered pursuant to a stipulation "[t]o transfer matter to Department 6 for purposes of implementing and enforcing the settlement reached on March 18, 2014." Moreover, at the pretrial motion hearing, Padilla agreed that the homeowners had "all the right, title and action of Silverstar."

quotation marks omitted). "In . . . deciding whether to grant a motion for judgment as a matter of law, the district court must view the evidence and all inferences in favor of the nonmoving party." *Id.* "To defeat the motion, the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party." *Id.* at 222-23, 163 P.3d at 424. "This court applies the same standard on review that is used by the district court." *Id.* at 223, 163 P.3d at 424.

On appeal, Padilla argues that the homeowners failed to meet their burden in proving contractual indemnity.[7] In particular, Padilla argues that because its contract with Silverstar did not require Padilla to indemnify Silverstar for Silverstar's own negligence, the homeowners had to prove that Padilla's negligence contributed to Silverstar's damages. Padilla then argues that the homeowners failed to prove that Padilla was negligent with respect to the defects in which Silverstar suffered damage. The homeowners argue that they presented sufficient evidence to prove that Padilla was negligent. We agree with the homeowners.

"[C]ontractual indemnity is where, pursuant to a contract provision, two parties agree that one party will reimburse the other party for liability resulting from the former's work." *Reyburn Lawn &*

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[7]Padilla also argues that the homeowners failed to meet their burden in proving implied and equitable indemnity. The record, however, shows that the district court only instructed the jury on the issue of contractual indemnity. *See Reyburn Lawn & Landscape Designers, Inc.*, 127 Nev. at 339, 255 P.3d at 274 ("When the duty to indemnify arises from contractual language, it generally is not subject to equitable considerations; rather, it is enforced in accordance with the terms of the contracting parties' agreement."). Therefore, we only consider the contractual indemnity claim.

*Landscape Designers, Inc.*, 127 Nev. at 338, 255 P.3d at 274. Here, Padilla's contract with Silverstar contained an indemnity clause, in which Padilla agreed to indemnify Silverstar for "any and all actions, damages, liabilities, claims, and expenses, including without limitation attorneys' fees asserted against and/or, paid or incurred by [Silverstar]," arising out of "any such failures, negligence, carelessness or violations committed by [Padilla] in the execution or performance of the work hereunder." The contract explicitly stated that Padilla would not have to indemnify Silverstar for Silverstar's own negligence. Therefore, in order to trigger the indemnification provision, the homeowners had to show that Padilla was negligent. *Cf. Reyburn Lawn & Landscape Designers, Inc.*, 127 Nev. at 340, 255 P.3d at 275 (concluding that where an indemnity clause does not expressly or explicitly state that a subcontractor would indemnify the general contractor for its own negligence, "there must be a showing of negligence on [the subcontractor's] part prior to triggering [the subcontractor's] duty to indemnify [the general contractor]").

At trial, the homeowners presented testimony from several expert witnesses, homeowners, and also Silverstar's purchasing manager, whose collective testimony we conclude created a sufficient issue for the jury on the issue of Padilla's negligence. First, Alexander Carpenter, a licensed architect and certified building inspector, testified that his investigation revealed a complete failure of the stucco system and that the type of damage he observed indicated that the stucco contractor had improperly installed the stucco. Second, William DeBerry, a civil engineer and chemist, testified that the laboratory testing results revealed that the stucco mixture had a thin base coat and was poorly hydrated. DeBerry testified that if the stucco sample had met the higher standards for the

base coat and hydration, he would not have expected the stucco to soften and crumble.

Third, three of the homeowners each testified that the stucco on their homes had initially bubbled, peeled, and fell off, and even continued to bubble and fall off after they effectuated repairs. Finally, Anthony Abreu, Silverstar's purchasing manager testified that Padilla was the only stucco subcontractor working on the construction of the Chantalaine subdivision. Accordingly, we conclude the homeowners presented sufficient evidence of Padilla's negligence to trigger the indemnification provision in the subcontract. Therefore, the district court did not error in denying Padilla's motion for directed verdict on the indemnity claim.

*The verdict form*

Padilla argues that the district court abused its discretion by not using a special verdict form, or alternatively, by not submitting written interrogatories with the general verdict form. The homeowners respond that Padilla waived this issue of whether the district court should have used a special verdict form because it neither presented a special verdict form to the district court nor argued that the case required the use of a special verdict form. As to the use of written interrogatories, the homeowners respond that (1) NRCP 49(b) by its language does not require interrogatories, (2) Padilla neither requested nor proposed interrogatories, and moreover (3) the matter did not warrant the use of interrogatories. We review a district court's decision in choosing a verdict form for an abuse of discretion. *Ross v. Giacomo*, 97 Nev. 550, 555-56, 635 P.2d 298, 302 (1981).

We cannot reach the merits of Padilla's first argument regarding the district court's failure to use its special verdict form because

Padilla failed to include the proposed special verdict form in the record. As a result, we presume the record supports the district court's choice of the verdict form. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (providing that when the appellant fails to provide portions of the record relevant to an issue on appeal, we must presume "that the missing portions support the district court's decision"). As to Padilla's second argument, Padilla neither requested nor proposed written interrogatories at trial. Accordingly, we conclude Padilla waived its argument that the district court abused its discretion by not submitting written interrogatories with the general verdict form to distinguish damages or to clarify the theories of liability for which the jury awarded damages. *See Bldg. Trades Council of Reno v. Thompson*, 68 Nev. 384, 409, 234 P.2d 581, 593 (1951) (providing that "objections to the form of verdict are deemed waived if no objection is made at the time"); *see also Scott v. Chapman*, 71 Nev. 329, 331, 291 P.2d 422, 423 (1955) (providing that plaintiffs waived any error resulting from the jury's failure to answer interrogatories because they did not timely object before the district court).

Accordingly, we ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Silver

TAO, J., concurring:

I agree with much that the majority writes, but believe that the question of jurisdiction is considerably more complicated than the parties acknowledge and warrants further explanation. Padilla argues that the homeowners were not the "real parties in interest" in this litigation as required by Rule 17 of the Nevada Rules of Civil Procedure, an argument that the majority addresses. But underlying Padilla's argument is a question of standing that the parties do not adequately address.

Shortly before trial, several of the original parties entered into a settlement agreement that was intended to resolve their claims and defenses but, by its own terms, was expressly "conditioned upon the parties' ability to obtain an order from the Court granting the Motion for Determination of Good Faith Settlement." A motion seeking the court's approval of the settlement was filed, but the district court did not approve the settlement until after the trial ended.

Yet the district court and the parties conducted the trial as if the settlement had been finalized and approved: the settling parties did not participate in the trial, the trial pleadings were amended in accordance with the terms of the settlement, and the district court permitted the homeowners to enter the case as assignees and assert subrogation claims under the theory that the settlement agreement imposed an obligation upon Clarendon to pay the settled claims.

The problem here is that because the court did not approve the settlement until after the trial ended, no obligation to pay any settled claim existed at the time the trial took place, and therefore no insured loss and no right to subrogation existed either. Additionally, other parties

with pending claims did not participate in the trial because they prematurely believed their claims to have been settled, so in a technical sense their claims went unlitigated.

Consequently, at the time of the trial, a serious question existed regarding who had standing and who did not, and who should have participated in the trial and whose claims were resolved. The homeowners might not have had legal standing to assert Clarendon's subrogation claims because Clarendon had not yet suffered an actual loss and would not suffer any actual loss until the settlement was finally approved after the trial. Indeed, as far as anyone knew when trial commenced, Clarendon might not ever have suffered any loss because the district court could theoretically have denied the request to approve the settlement and forced all of the parties back to the drawing board. Had the court done so, the claims of all parties – those actually litigated by parties who might not have had standing to pursue them, and those not litigated because they were erroneously believed settled – would have been thrown into legal limbo.[8]

During oral argument, the homeowners argued that the settlement should be considered valid before trial because the district court had no reason to refuse to approve it when the motion for approval was unopposed by any party. But logically, that only means that the district court was *likely* to approve the settlement; it doesn't mean that the district court actually *did* approve it before trial. Concluding that a

[8]Interestingly, the insurance company paid its settlement obligation before the settlement agreement was approved by the court, but it did so on the very last day of the trial, well after all of the questions about standing and jurisdiction should normally have been clarified.

contingency is likely to occur is not legally the same as concluding that it has already occurred at a specific time. Furthermore, that the parties were specifically required to seek court approval at all means that approval was no automatic thing and the district court possessed the power to refuse to give its approval if necessary to protect any non-settling parties. *See In re MGM Grand Hotel Fire Litigation*, 570 F.Supp. 913, 927 (D. Nev. 1983) ("In order to further protect the non-settling defendant, the Court must find that the settlement was in 'good faith.'").

As it turns out the district court eventually approved the settlement, but not until after the trial ended. The question for us is what that means about the validity of the trial which was conducted by parties whose legal standing depended entirely upon a right to subrogation that did not exist until after the trial ended.

Whether a party has standing is a question that goes to the court's jurisdiction, and questions of jurisdiction are never waived and may be raised at any time, even *sua sponte* by the court on appeal. *See Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 964-65, 194 P.3d 96, 105 (2008); *Vaile v. Eighth Jud. Dist. Ct.*, 118 Nev. 262, 276, 44 P.3d 506, 515-16 (2002). This is so because questions of jurisdiction go to whether the court has the fundamental power to grant the requested relief and enforce its own judgment. If the court has no power to grant relief – either because it lacks jurisdiction over the subject matter, an indispensable party is absent from the litigation, the dispute is moot or not yet ripe, or a party does not have the legal right to seek or receive the requested relief – then its ruling is legally void and not much more than a meaningless advisory opinion whether or not any party raised a timely objection below. *See State Indus. Ins. Sys. v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273,

1274 (1984) ("There can be no dispute that lack of subject matter jurisdiction renders a judgment void"). *See generally* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983). A failure of subject matter jurisdiction cannot be waived because parties cannot artificially invest a court with a power it does not constitutionally have by ducking their heads and pretending the problem doesn't exist. *Vaile*, 118 Nev. at 276, 44 P.3d at 515-16 (2002) ("subject matter jurisdiction cannot be waived"); *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990) (subject matter jurisdiction "cannot be conferred by the parties").

"Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief. Moreover, litigated matters must present an existing controversy, not merely the prospect of a future problem." *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986). Therefore, if the execution of the settlement agreement only created the prospect of future obligation to pay (or the prospect of a future insured loss) contingent upon the prospect of the district court giving its stamp of approval, and *no* actual obligation existed until after the trial, then we may have a serious standing problem on our hands.

Questions of standing are reviewed de novo. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011). Furthermore, the doctrine of standing overlaps with, but is not the same as, the doctrine of "real party in interest" embodied in Rule 17 of the Nevada Rules of Civil Procedure ("NRCP"). A party which lacks standing cannot be a real party in interest under NRCP 17; but merely because a

party qualifies as a real party in interest under NRCP 17 does not by itself mean that it also possesses legal standing.

In the federal courts, standing is a constitutional requirement originating in the "case or controversy" clause of Article III of the United States Constitution. Thus, if we were a federal court, our inquiry would end and reversal would be our only option once we conclude that standing is absent, because constitutional requirements trump everything else to the contrary – statutes, administrative regulations, court rules, and common-law judicial doctrines – and no other legal doctrine could possibly save the trial.

But the Nevada Constitution does not contain a "case or controversy" clause. In the courts of Nevada, the doctrine of standing is not a constitutional command, but rather merely a judicially-created doctrine of convenience. *See In re Amerco Derivative Litigation*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011) ("Although state courts do not have constitutional Article III standing, Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief.") (internal quotation marks omitted).

Thus, in the hierarchy of sources of law in which the United States Constitution stands at the top and pre-empts everything else that conflicts with it, judicially-created doctrines of prudence are at the bottom and yield to all other superior sources of authority that conflict with them. State court standing exists at the lowest rung of the ladder, and if any constitutional provision, statute, regulation, or court rule can be read to confer standing upon the insurers here, or can be read to permit waiver of the standing requirement, then we must follow that superior source of authority rather than the inferior doctrine of convenience.

And in this case there is such an authority. NRCP 61 states:

> RULE 61. HARMLESS ERROR
>
> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

NRCP 61, the "harmless error" rule, is not normally thought of by judges and attorneys as an exception to any jurisdictional requirement, because it usually isn't: most jurisdictional requirements derive from a superior authority such as the constitution or a statute, or at the very least from an equal authority such as another procedural rule (for example, NRCP 17 or 19). A mere rule of procedure can never trump a constitutional command, and so with most questions of subject-matter jurisdiction, there is no such concept as "harmless error."

But state court standing is *sui generis*; it's a "jurisdictional" requirement that exists nowhere in the state constitution, any statute, any regulation, or even any other procedural rule. In Nevada, it's an entirely judge-made doctrine created by case law. Like everything else except the U.S. Constitution, it must yield to any superior source of authority that conflicts with it. Court procedural rules are pretty low on the totem pole and don't pre-empt much, but they do prevail over doctrines of convenience created solely through case law with no other legal authority behind them.

Accordingly, in this case, even if proper legal standing didn't actually vest in the insurer at the time of trial, we can affirm the verdict if we conclude that the error was harmless. I can think of few other instances in which a jurisdictional defect might be truly harmless because jurisdiction, by its very nature, is almost never a mere technicality; it's usually a question of fundamental power. But under the highly unique circumstances of this case, I think the defect was harmless and technical, and might now even be considered moot in view of all that has happened since the trial. The district court did approve the settlement agreement, albeit after the trial ended; had it simply signed the order of approval a few weeks earlier, there would have been no question of standing, the same parties would have litigated the same claims, and the trial would almost certainly have been the same in every important respect.

This is an unusual case presenting an unusual set of facts and alleging an unusual kind of judicial error, requiring us to resolve it by examining an unusual set of legal principles. Under the circumstances, I concur with the majority's conclusion.

Tao, J.

Tao

cc: Chief Judge, Second Judicial District Court
Hon. Charles M. McGee, Senior Judge
Paul F. Hamilton, Settlement Judge
Ferris & Associates
Maddox, Segerblom & Canepa, LLP
Washoe District Court Clerk