IN THE

Supreme Court of Virginia

RECORD NO. 160805

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY
and
NATIONWIDE MUTUAL INSURANCE COMPANY,

Appellants,

v.

ERIE INSURANCE EXCHANGE,
MOISES RODRIGUEZ MANZUR,
and
STEPHANIE KLAIBER, as Personal Representative
of the Estate of Martin C. Klaiber, Deceased,

Appellees.

BRIEF OF APPELLEES

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A Division of Lantagne Duplicating Services

SCV: Submitted on 11-21-2016 15:54:17 EST for filing on 11-21-2016

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COME NOW, Erie Insurance Exchange ("Erie") and Moises Rodriguez Manzur ("Manzur"), by counsel, and state as follows:

I. COUNTERSTATEMENT OF THE CASE

This is an insurance dispute over the order of applicable coverages to a motor vehicle accident. Stephanie Klaiber, as personal representative of the Estate of Martin C. Klaiber, deceased, filed suit against Moises Rodriguez Manzur, employee of Rodriguez Construction ("Rodriguez"), and East Coast Insulators ("East Coast"), for the wrongful death of Martin C. Klaiber. Joint Appendix ("JA") 275, 523. At the time of accident, Manzur was operating an East Coast owned vehicle, lent to Rodriguez for the performance of work pursuant to a subcontract between Rodriguez and East Coast. JA 275-276.

The subcontract contained two relevant clauses. One was an insurance provision requiring Rodriguez to obtain primary insurance to cover bodily injury caused by accident. JA 280-281. Rodriguez purchased the required policies of insurance from Nationwide Mutual Fire Insurance Company and Nationwide Mutual Insurance Company (collectively referred to as "Nationwide"). The second required Rodriguez to indemnify East Coast. JA 281. It is these provisions, and their effect on the policies of insurance, which are key to the issues on Appeal.

Defense of the underlying action was tendered to Erie and subsequently to Nationwide. Erie provided a defense. Nationwide refused to acknowledge any coverage, resulting in the Declaratory Judgment Action being filed. The Declaratory Judgment Action initially sought declaration of coverages of four insurance policies. However, Nationwide filed a Counter-Claim identifying a fifth policy, which Nationwide had not previously disclosed. The five policies are as follows:

1. A Business Auto Insurance Policy ["Nationwide Auto Policy"], policy #ACP BA 2452801182, issued by Nationwide to Rodriguez. JA 358-410.

2. A Commercial General Liability Policy ["Commercial Policy"], policy #ACP GLGO 2452801182, issued by Nationwide to Rodriguez. JA 283-326.

3. A Commercial Auto Policy ["Erie Auto Policy"] issued by Erie Insurance, policy #Q09 0740033, to East Coast. JA 411-477.

4. A Commercial Umbrella Liability Insurance Policy ["Excess Policy"], policy #ACP CAF 2452801182, issued by Nationwide to Rodriguez. JA 327-357.

5. A Business Catastrophe Liability Policy ["Umbrella Policy"], policy #Q33 0770183 MV, issued by Erie Insurance to East Coast. JA 478-522.

In its Counter-Claim and Answer, Nationwide argued that the Nationwide insurance policies were secondary to the Erie Auto Policy and Erie Umbrella Policy. Nationwide did not take the position prior to or at

trial that there was any cap on coverage of $2,000,000.

The parties entered into a Stipulation of Facts for the bench trial on April 22, 2015, before the Honorable Carroll A. Weimer, Jr. Nationwide posited that both the Erie Auto Policy and the Nationwide Auto Policy were "written and issued in accordance with § 38.2-2204 of the Code of Virginia". (See trial brief Nationwide, ¶12). Erie argued that Nationwide's three policies were primary. First, Erie and Manzur argued that both the subcontract's insurance and indemnification clauses separately controlled priorities. In its trial brief, Nationwide neither responded to this argument nor opposed it. Nationwide did not dispute that a subcontract can determine the priority of insurance coverage. Rather, Nationwide argued that because Erie's Auto Policy was issued for the vehicle, Nationwide's Auto Policy, issued pursuant to the same Virginia Code section, could not be primary. See JA 582.

Second, Erie and Manzur argued that the excess insurance clauses for the Umbrella/Excess Policies would control and that under Virginia precedent, the language in the Erie Umbrella Policy made it secondary to the Nationwide Excess Policy.

Lastly, Erie argued that the subcontract was an "insured contract" as defined in Nationwide's Commercial Policy. Because it was an "insured

contract", all the obligations to indemnify under that contract applied to the accident, regardless of any other exclusion in the policy, so Nationwide's Commercial Policy applied.

Judge Weimer ruled:

> So I first must determine whether the indemnification provision of the contract between East Coast Insulators and its subcontractor Rodriguez Construction is enforceable and as plaintiffs argue, shifts the primary liability coverage to Rodriguez Construction's insurer.
>
> One of the cases that was advocated in that regard was Travelers Property Casualty Company of America versus Liberty Mutual Insurance, 444 F.2d 217, at page 224, which states in part, before the insurance coverage can be determined and allocated, the liability of insurance needs to be determined, including contractual liability created by an indemnification clause between the two insurers. Indemnity is similar to contribution except that it must necessarily grow out of a contractual relationship as found in Virginia Electric Power versus Wilson, 221 Virginia 279, at pages 981 and 982.
>
> The terms of the contract required Rodriguez Construction to maintain a certain level of insurance which Rodriguez construction obtained from Nationwide. The contract further provided under an additional indemnification provision that Rodriguez Construction would indemnify East Coast Insulators for any claims arising out of the acts of Rodriguez Construction's employees.
>
> The indemnification provision in this case is enforceable and establishes East Coast Insulators' right to indemnification from Rodriguez Construction through its insurer Nationwide. Such a provision is nothing more than a contract between the parties to predetermine the allocation of potential risk of loss and Virginia law favors such contracts between competent

> parties for a valid purpose as set forth in Farmers Insurance Exchange versus Enterprise Leasing Company, 281 Virginia 612, at page 619, which further cites Estes Express Lines, Incorporated, versus Chopper Express, Incorporated, 273 Virginia 358, at page 366; W.R. Hall, Incorporated versus Hampton Roads Sanitation District, 273 Virginia 350, at page 355, which also cites St. Paul Fire Insurance Company versus America International Specialty Lines Company, 365 F.3d 263, at pages 270 and 271, which states, the general rule is that an indemnity agreement between the insurers or a contract with an indemnification clause may shift an entire loss to a particular insurer, notwithstanding the existence of another insurance clause in its policy.

JA 584-586.

Second, the Court determined that Nationwide's Commercial Policy provided coverage because the subcontract was an "insured contract." The Court found an ambiguity between provisions related to coverage for liability assumed under a contract and coverage for a motor vehicle accident. Finding two possible constructions, the court ruled the construction most favorable to providing coverage should be adopted. Therefore, Nationwide's Commercial Policy followed its Auto Policy. JA 589-590.

Third, the Court found that the Nationwide Excess Policy had priority over the Erie Umbrella Policy. JA 532.

Nationwide filed a Motion to Reconsider which was denied. A Final Order was entered on June 26, 2015. Nationwide then filed a Motion to

Modify and Clarify the Court's June 26, 2015 Order. The Final Order was suspended, to give the Court an opportunity to consider newly raised arguments at a July 17th hearing. Prior to the hearing, Nationwide voluntarily settled the underlying case for $2.9 million dollars. By Order dated July 10, 2015, that settlement was approved. There was no written funding agreement between Nationwide and Erie, and no agreement to the settlement amount. Nationwide paid the settlement amount in full. Erie disputes any obligation to reimburse Nationwide for its voluntary payment and takes the position such payment moots this appeal. After the July 17, 2015 hearing and Nationwide's voluntary settlement, the Court found that there was only $2,000,000 in Nationwide coverage, due to the application of an endorsement to the Nationwide policies that regardless of the number of policy forms, the most coverage available was $2,000,000. Nationwide then petitioned for appeal.

II. COUNTERSTATEMENT OF FACTS

At the time of the accident, Manzur was operating an East Coast vehicle, while working for Nationwide insured, Rodriguez. Pursuant to a subcontract between East Coast and Rodriguez, in relevant part:

> Section 9. INSURANCE. Subcontractor [Rodriguez] shall provide and maintain Worker's Compensation Employer's Liability Insurance for the protection of his employees, as

required by law. **The Subcontractor shall also provide and maintain in full force and effect during the term of this Subcontract insurance (including but not limited to motor vehicle insurance)** with a company satisfactory to the Contractor **protecting the Subcontractor, the Owner and the Contractor against liability from damages because of injuries, including death, suffered by persons other than employees of the Subcontractor** and liability from damages to property, arising from or growing out of the Subcontractor's operation in connection with the performance of this Subcontractor. Subcontractor shall also provide a Certificate of Insurance to Contractor naming Contractor and Owner as additional insured. . . .

Section 10. INDEMNIFICATION. To the fullest extent permitted by law, **Subcontractor hereby agrees to indemnify, hold harmless, and defend (at Subcontractor's sole expense) Contractor**, the Owner, affiliated companies of Contractor, their partners, joint ventures, representatives, members, designees, officers, directors, shareholders, employees, agents, successors, and assigns ('Indemnified Parties'), **from and against any and all claims for bodily injury, death**, damage to property, losses, theft, damages, actions, causes of action, suits, losses, judgments, obligations and any liabilities, costs and expenses (including but not limited to investigative and repair costs, attorneys' fees and costs, and consultants' fees and costs, and expert witness fees and costs) ('Claims') **which arise or are in any way connected with the Work performed, materials furnished, or services provided under this Agreement by Subcontractor, and/or its employees, agents, Sub-subcontractors and/or suppliers. These indemnity and defense obligations shall apply to any acts or omissions, negligent or willful misconduct of Subcontractor and/or its employees**, agents, Sub-subcontractors and suppliers, whether active or passive. . . .

JA 280-281. (Emphasis added).

The Nationwide Auto Policy is one of the policies required by the subcontract. It provides primary coverage not only for the vehicle as a "borrowed" vehicle, but also for liability assumed by contract:

SECTION II – LIABILITY COVERAGE

A. Coverage

> We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'.

JA 368. The Nationwide Auto Policy Exclusion does not exclude coverage for the accident.

B. Exclusions

2. Contractual

> Liability assumed under any contract or agreement.
>
> *But this exclusion does not apply to liability for damages*:
>
> **a.** Assumed in a contract or agreement that is an 'insured contract' provided the 'bodily injury' or 'property damage' occurs subsequent to the execution of the contract or agreement; or
>
> **b.** That the 'insured' would have in the absence of the contract agreement.

JA 369. (Emphasis added).

The Nationwide Auto Policy provisions make the policy primary because of the liability assumed under the subcontract.

SECTION IV - BUSINESS AUTO CONDITIONS

B. General Conditions

5. Other Insurance

a. For any covered 'auto' you own, this Coverage Form provides primary insurance. For any covered 'auto' you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance. However, while a covered 'auto' which is a 'trailer' is connected to another vehicle, the Liability Coverage this Coverage Form provides for the 'trailer' is:

(1) Excess while it is connected to a motor vehicle you do not own.

(2) Primary while it is connected to a covered 'auto' you own.

. . .

c. *Regardless of the provisions of Paragraph* ***a.*** *above, this Coverage Form's Liability Coverage is primary for any liability assumed under an 'insured contract'.*

. . .

JA 375. (Emphasis added).

SECTION V – DEFINITIONS

H. "Insured contract" means: . . .

5. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another to pay for 'bodily injury' or 'property damage' to a third party or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement;

JA 377.

The subcontract between East Coast and Rodriguez squarely falls within the definition of "insured contract."

With regard to other insurance, the Erie Auto Policy provides:

5. Other Insurance

a. For any covered "auto" you own, this Coverage Form provides primary insurance.

. . .

d. When this Coverage Form and any other Coverage Form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the proportion of that the Limit of Insurance of our Coverage Form bears to the total of the limits of all the Coverage Forms and policies covering on the same basis.

JA 447.

III. ARGUMENT

A. Introduction.

The Rodriquez/East Coast subcontract controls the priority of coverage. The subcontract also compels the conclusion that all Nationwide policies must be exhausted before Erie Insurance pays. In the alternative, between the umbrella/excess policies, the Erie Umbrella Policy is secondary to the Nationwide Excess Policy. Nationwide does not take exception with the concept that the priority of coverages between two insurance policies can be controlled by a contract between the parties. Rather, it takes the position that because the parties seeking coverage were Erie and Manzur, not East Coast, there was no obligation to indemnify, and the contract priority language would not apply. That argument should be rejected. Nationwide ignores the clause in the insured contract which determines the priority of coverages and ignores the language in its policy determining priority of coverage.

B. The Trial Court Did Not Err by Ruling that the Erie Auto Policy and the Erie Excess Policy Apply Only on a Secondary Basis, After the Nationwide Policies are Exhausted. [Assignment of Error 2]

1. Standard of Review.

Appellees agree the issue presented is a question of law involving interpretation of contracts subject to *de novo* review. See *Copp v. Nationwide Mut. Ins. Co.,* 279 Va. 675, 692 S.E.2d 220 (2010).

2. The Subcontract is Valid and Enforceable.

Agreements that indemnify another for that party's negligence are not against public policy. *Estes Express Lines, Inc. v. Chopper Express, Inc.*, 273 Va. 358, 641 S.E.2d 476 (2007); *W. R. Hall, Inc. v. Hampton Roads Sanitation District*, 273 Va. 350, 641 S.E.2d 472 (2007). Parties can determine prior to a potential loss, even involving personal injury, how the loss will be distributed between potentially liable parties.

In *Estes*, the issue was whether an indemnity provision in a vehicle lease agreement was void as against public policy because it entitled a party to indemnification for liability resulting from personal injuries caused by its own negligence. As here, the indemnification agreement was very broad. It required indemnification by the lessee of the lessor of "liability by reason of injury (including death) to persons or damage to property arising

out of the use, operation, ownership, maintenance or control of a [leased] vehicle" and for "any liability by reason of any claim asserted by an agent or employee of the lessee."

This court ruled that such indemnification agreements between private parties were different than pre-injury release/exculpatory agreements signed by individuals that in essence foreclose their rights to recover in the event of injury by the negligent party. Rather, an indemnification agreement does not preclude recovery by the injured party, it just allocates, pre-loss, who will pay any damages.

Likewise, in *W. R. Hall, Inc.*, the court ruled that an indemnification agreement in a construction contract was not void as against public policy even where it provided for indemnification for negligence, in whole or in part, by the indemnitee.

3. The Subcontract's Insurance Indemnification Clauses Control the Determination of the Order of Priority of Coverage.

The subcontract's insurance and indemnification clauses control in determining priority of coverage. The indemnification agreement is an "insured contract," as defined by the Nationwide Auto Policy. This insured contract trumps the "other insurance" clauses found in the contracts of insurance. In *St. Paul Fire & Marine Ins. Co. v. American Inat'l Specialty*

Lines Ins. Co., 365 F.3d 263 (4th Cir. 2004) construing Virginia law*,* the court found the "other insurance" provisions in the respective contracts irrelevant, where there was an indemnification agreement.

Use of an indemnification agreement to determine priorities of insurance policies is the majority rule in the United States. See *Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583 (8th Cir. 2002) (predicting that Arkansas would follow the going trend of jurisdictions that allowed valid and enforceable indemnification agreements to determine the allocation of liability in an insurance dispute). See *Chandler v. Liberty Mut. Ins. Group*, 2005 U.S. Dist. Lexis 44426 (E.D. Ky. 2005) citing *American Indemnity Lloyds v. Travelers Property & Casualty Ins*., 335 F.3d 429, 436 (5th Cir. 2003) (indemnification language in lease agreement supported finding that policy excess).

The issue is not whether the policy is labeled excess or primary, but rather who is required to pay first, and an indemnity agreement setting forth one party's obligations to another must be consulted to determine the liability in an insurance dispute. *Wal-Mart*, 292 F.3d at 590. In *Wal-Mart*, insurance companies brought a declaratory judgment to seek the resolution of coverages. The court rejected the proposition that an indemnity clause could not be used to determine liability. The Court noted that, as in the

case in bar, the contract between the insureds requires the insurance arrangement at issue. The Court went on to explain that consideration of the indemnity agreement would reflect the intention and the relationship of the parties and thus did not prejudice the insurers.

In *St. Paul,* owner of Lansdowne Resort agreed to indemnify its operator for liability arising from simple negligence. A settlement agreement was reached related to injuries from food poisoning. Because these claims arose from simple negligence, the court found that the insurance for the owner was primary. 365 F.3d 263, 275. See *KBS, Inc. v. Great Amer. Ins. Co. of New York*, 2006 U.S. Dist. LEXIS 88520 (E.D. Va. 2006) (enforceable indemnification agreements should be considered by the court to determine the allocation of liability in an insurance dispute). Thus, "an indemnity agreement between insureds or a contract with an indemnification clause . . . may shift an entire loss to a particular insurer notwithstanding the existence of an 'other insurance' clause in its policy." *St. Paul*, 365 F.3d at 270-71.

In *Travelers Prop. Cas. Co. of Amer. v. Liberty Mut. Ins. Co.*, 444 F.3d 217, 224 (4th Cir. 2006), the Fourth Circuit summarized the *St. Paul* decision as follows:

> . . . *before* the insurance coverage could be determined and allocated, the liability of the insureds needed to be determined, including contractual liability created by an indemnification clause between two of the insureds. [St. Paul, 365 F.3d] at 268. When the analysis for underlying liability was conducted, it was determined that final responsibility for the food poisoning was shifted by reason of an indemnification clause from the insured of one insurance company to the insured of another. We held therefore that coverage followed, because the insurance covered the liability of the insureds as determined not only by law but also by application of their indemnification agreements. As we said, "An indemnity agreement between the insureds or a contract with an indemnification clause . . . may shift an entire loss to a particular insurer notwithstanding the existence of an '**other insurance**' clause in its policy." Id. at 270-71[]. Thus, responsibility for insurance coverage followed the liability of the insureds.

See also *Clarendon Nat'l Ins. Co. v. United Fire & Cas. Co.*, 571 F.3d 749 (8th Cir. 2009) (where responsibility for a loss is determined by an indemnification clause in a lease covering an auto, the lessee's insurance company is obligated to pay both its primary and umbrella policy out to exhaustion, prior to any obligation of the vehicle's owner); *Occidental Fire & Cas. Co. v. Internat'l Ins. Co.*, 804 F.2d 983 (7th Cir. 1986) (where lease specified full responsibility for injuries arising out of the operation of the vehicle, the indemnitor's insurance company provided primary coverage). Nationwide's Auto Policy is first, and then Nationwide's Excess Policy. Erie's policies only apply after all the available Nationwide coverage is

exhausted.

Nationwide argues that the shifting provisions of the contract do not apply, because East Coast was not seeking indemnification. The argument ignores the insurance clause in the subcontract which creates priority of the Nationwide policy regardless of the indemnification clause.

Nationwide's argument, as to the indemnification clause, has been rejected by other courts. In *Clarendon*, the court found that with broad indemnification language, the priorities of the insurance would be determined by the presence of the language even if the direct beneficiary of the duty to indemnify was not a party to the tort lawsuit.

In *Clarendon*, the Eighth Circuit addressed facts similar to those present here. There, the owner of the truck, McCormack Painting Company ("McCormack"), entered into a lease agreement with Arkansas Painting & Specialties ("Arkansas Painting"). Pursuant to the lease agreement, Arkansas Painting was obligated to defend McCormack against any and all claims, actions, suits, etc., arising out of the use or operation of the vehicle. While the lease agreement was in effect, an Arkansas Painting employee driving the McCormack vehicle was involved in an accident. The issue before the court was whether or not the policy issued to the lessee, Arkansas Painting, had priority over the owner's policy, even though the

owner was not subject to suit under Arkansas law. Arkansas's insurer argued, as here, that the indemnification agreement was not an "insured contract," as McCormack did not have direct tort liability. The court rejected this argument, stating that the assumption of responsibility for "any and all liability for injury . . . caused by the operation, use, control, handling, or transportation of the [truck]" compelled a finding that the contract was an insured contract and shifted the priority of coverage. See also *Star Ins. Co. v. Cont'l Res., Inc.*, 89 F. Supp.3d 1015 (D.N.D. 2015) (An indemnitor and its insurer bear responsibility for covered indemnification payments, even if the indemnitee has other insurance covering the same loss).

The rationale for this is simple. If the insurer for the indemnitee was required to participate in the defense and indemnification of the underlying action, it would then be subrogated to the rights of its insured to seek indemnification from the indemnitor under the subcontract, triggering the insured contract provision. See *Star Ins. Co.* at 1029. See also e.g., *Farmers Ins. Exchange v. Enterprise Leasing Co.,* 281 Va. 612, 708 S.E. 2d 852 (2011) (Self-insured had a right to seek indemnification from indemnitor's insurer pursuant to lease indemnification agreement). It does not make any difference whether the corporation being indemnified was the named defendant, if the intent of the contract is to shift priority. Otherwise,

an indemnitor could circumvent its obligations by compelling the indemnitee's coverage to pay first.

Nationwide argues that Virginia's Omnibus Statute, Virginia Code § 38.2-2204 controls, so Erie's policy pays first. However, Nationwide has agreed that its policy was issued pursuant to the Omnibus Statute and applies to the vehicle in question. (See trial brief Nationwide ¶ 12).[1] Further, the function of the Omnibus Statute is to ensure that there is coverage for an injured party. *Lumbermens Mut. Cas. Co. v. Indem. Ins. Co.*, 186 Va. 204, 42 S.E.2d 298 (1947) (statute was for the benefit of a party who had suffered damage by the negligent use of the insured's car when operated by another with the permission of the owner). *Farmers Ins. Exchange v. Enterprise Leasing*, 281 Va. at 618. Here, there is coverage

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[1] Nationwide cannot argue to the circuit court that its policy was issued pursuant to Virginia Code §38.2-2204, and on appeal make the opposite argument. A litigant is not allowed to "approbate and reprobate." *Hurley v. Bennett*, 163 Va. 241, 252, 176 S.E. 171 (1934). This Court has stated that a party may not "in the course of the same litigation occupy inconsistent positions." *Id.; see also Rowe v. Commonwealth*, 277 Va. 495, 502, 675 S.E.2d 161 (2009), citing *Cangiano v. LSH Bldg. Co.,* 271 Va. 171, 181, 623 S.E.2d 889 (2006) and *Powell v. Commonwealth*, 267 Va. 107, 144, 590 S.E.2d 537 (2004). It is improper for a litigant to invite error and take advantage of the situation created by her own wrong. *Rowe*, 277 Va. at 502 (2009). The prohibition against approbation and reprobation forces a litigant to elect a particular position, and confines a litigant to the position that she first adopted. *Hurley*, 163 Va. at 252 (1988); *Matthews v. Matthews*, 277 Va. 522, 528, 675 S.E.2d 157 (2009).

under Nationwide's Auto Policy, so the statute's purpose is not thwarted, and there is nothing in the Omnibus Statute which precludes the parties from setting priorities between the coverages that are available. Rather, the only restriction is that a policy cannot limit coverage for a permissive user. See, *City of Norfolk v. Ingram*, 235 Va. 433, 367 S.E.2d 725 (1988) (policy could not restrict the manner of operation of the vehicle). With Nationwide providing the first level of coverage, the coverage is expanded, not limited.

4. The "Other Insurance" Language in the Erie Umbrella Policy Surpasses Nationwide Excess Policy Language, so Nationwide's Excess Policy Applies First.

Pursuant to the indemnification agreement, Nationwide, the insurer for the indemnitor, would be responsible for any excess amount. Even if the court does not find that the indemnification agreement controls priority, a comparison of "other insurance" provisions of the policies compels the same result as to these policies.

The Erie Umbrella Policy states:

> **5. Other Insurance**
>
> a. This insurance is excess over, and shall not contribute with any of the other insurance, *whether primary, excess, contingent or on any other basis*. This condition will not apply to insurance

specifically written as excess over this Coverage Part…. (emphasis added)

b. When this insurance is excess over other insurance, we will pay only our share of the "ultimate net loss" that exceeds the sum of:

1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
2) The total of all deductible and self-insured amounts under all that other insurance.

JA 513. (Emphasis added).

This language from the Erie Umbrella Policy is commonly referred to as an "other insurance escape clause." S*ee Gov't Employees Ins. Co. v. Universal Underwriters Ins. Co.*, 232 Va. 326, 350 S.E.2d 612 (1986). It pays after any Excess Policy.

In contrast, the Nationwide Excess Policy provides:

10. "Other Insurance"

If "other insurance" applies to claims covered by this policy, the insurance under this policy is excess and we will not make any payments until the "other insurance" has been exhausted by payment of claims. This insurance is not subject to the terms or conditions of any "other insurance."

"Other insurance" is defined as:

A policy of insurance affording coverage that this policy also affords. "Other insurance" includes any type of self-

> insurance or other mechanism by which an "insured" arranges for funding of legal liabilities. [p. 12 of 19].

JA 349.

The Erie Umbrella Policy makes clear that it does not share excess exposure or contribute where an excess policy is available. It pays last. In contrast, the Nationwide Excess Policy language is much narrower. It does not limit itself to paying last, but only pays as an excess carrier after "other insurance" – that which affords the same coverage as the Nationwide Excess Policy. By its terms, the Erie Umbrella Policy does not afford the same coverage as the Nationwide Excess Policy, so the above section in the Nationwide Excess Policy is not triggered, and it pays before the Erie Umbrella Policy.

In *Gov't Employees Ins. Co.*, the question was whether GEICO or Universal had primary UM coverage. Both policies contained excess language and "other insurance" escape clauses. The GEICO policy stated that it was "excess insurance over any other similar insurance available to such insured and applicable to such vehicle as primary insurance." The Universal policy stated that a garage customer is not an insured, "if there is other valid and collectible Insurance whether primary, excess or contingent, available to the GARAGE CUSTOMER and the limits are sufficient to pay

damages . . . up to the amount of the APPLICABLE FINANCIAL RESPONSIBILITY LIMIT" and if "the limits of such insurance are insufficient . . . this insurance shall apply to the excess of damages . . . up to such limit." In trying to reconcile these provisions to determine priority, this Court reasoned that the Universal Policy was clear and excluded coverage if another excess policy existed. Since GEICO's policy was an excess policy, the Court found that the existence of the GEICO policy triggered the exclusionary language in the Universal policy. GEICO therefore became primary.

Applying this reasoning to the Nationwide and Erie Policies: (1) Erie's Umbrella Policy is clearly secondary to any excess policy; (2) the existence of the Nationwide Excess Policy triggers the exclusionary provision in the Erie Umbrella Policy and makes Nationwide's Excess Policy first in line as between these policies. The language in the Nationwide Excess Policy does not warrant a different conclusion, because it only purports to be excess over a policy that provides the same type of coverage, which is not what the Erie Umbrella Policy provides.

C. The Trial Court Did Not Err by Ruling the Nationwide Commercial General Liability Provides Liability Coverage to Moises Rodriguez Manzur, Notwithstanding the Exclusion of the Policy for Claims Arising Out of the Use of Automobiles. [Assignment of Error 1]

1. Standard of Review.

Appellees agree the issue presented is a question of law involving interpretation of contracts subject to *de novo* review. See *Copp v. Nationwide Mut. Ins. Co.,* 279 Va. 675, 692 S.E.2d 220 (2010).

2. Argument.

Although the Commercial Policy excludes coverage arising out of the use of an auto, it provides coverage for liability assumed by contract.

2. Exclusions

b. Contractual Liability

> "Bodily Injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> **(2)** Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement . . .

JA 216.

See also definition of insured contract at Section V, 9(f) at JA 302.

The Commercial Policy provides:

> **4. Other Insurance**
>
> If other valid and collectible insurance is available to the insured for a loss we cover under coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:
>
> **a. Primary Insurance**
>
> This insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below.

JA 300.

Paragraph "**b**", referenced above in the Nationwide policy, is not applicable, so the clear terms of the Nationwide policy dictate that it is a primary policy if coverage is afforded. See JA 300.

The contractual liability exception does not refer back to the automobile exclusion, and in light of the indemnification agreement, the court should read the policy in the light most favorable to the insured, Manzur, and effectuate the intent of the parties. See *Lower Chesapeake Assoc. v. Valley Forge Ins. Co.,* 260 Va. 77, 532 S.E.2d 325 (2002).

However, under the endorsement capping the maximum liability that Nationwide would provide under any of its policies, combined, there can be no more than $2,000,000 in coverage. This issue was not initially raised by

Nationwide until the Court found that Nationwide's three policies applied. The ruling by the Court that there is only $2,000,000 in coverages is not the subject of a cross-appeal. Thus, if a Court finds coverage under Nationwide's Auto and Excess Policies, which is undisputed, the issue of the application of the Commercial Policy is moot.

IV. CONCLUSION

This Court should affirm the trial court's findings with regard to priority of coverage.

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Certificate of Compliance

I HEREBY CERTIFY that this brief complies with Va. Sup. Ct. Rules 5:26 and 5:29, and that on this 21st day of November, 2016 I have caused to be filed ten (10) copies and an electronic PDF of Brief of Appellees with the Clerk of the Supreme Court of Virginia and by causing a PDF of the Brief of Appellees to be emailed to and one (1) copy to be mailed to:

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