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IN THE

Supreme Court of Virginia

RECORD NO. 160805

NATIONWIDE MUTUAL
FIRE INSURANCE COMPANY, *et al.*,

Appellants,

v.

ERIE INSURANCE EXCHANGE, *et al.*,

Appellees.

OPENING BRIEF OF APPELLANTS

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ASSIGNMENTS OF ERROR

1. The trial court erred by ruling that the Nationwide Commercial General Liability Policy provides liability coverage to Moises Rodriguez Manzur, notwithstanding the exclusion in that policy for claims arising out of the use of automobiles. **Preserved:** Joint Appendix ("JA") at 214, 217, 534 (endorsement noting objections), 558 (endorsement noting objections); see also *Nationwide's Trial Brief* ("*Nat. Trial Brf*."), ¶¶ 1, 16, 48-50, 52; *Transcript, April 22, 2015* ("*Trial Tr*.") at 42, 54; *Nationwide Memorandum of Points and Authorities in Support of Motion to Continue and Reconsider* ("*Nat. Memo/Reconsider*"), ¶ 6; *Transcript, June 26, 2015* ("*Tr. 6/26/15*") at 4, 6-7; *Transcript, February 19, 2016* ("*Tr. 2/19/16*") at 17-20.

2. The trial court erred by ruling that the Erie Auto Policy and the Erie Excess Policy apply on a secondary basis, after the Nationwide Auto Policy, the Nationwide Commercial General Liability Policy, and the Nationwide Commercial Umbrella Policy. **Preserved:** JA at 212, 215-218, 534 (endorsement noting objections), 558 (endorsement noting objections); see also *Nat.Trial Brf.*, ¶¶ 1, 20, 29-47, 51-52; *Trial Tr.* at 31-32, 36, 38-43, 50-54, 58, 76, 86; *Nat. Memo/Reconsider*, ¶¶ 6-10; *Tr. 6/26/15* at 4, 6-7, 9-11; *Tr. 2/19/16* at 17-20.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This insurance coverage dispute arises from a motor vehicle accident that occurred on October 4, 2013, when a vehicle owned by East Coast Insulators, Inc. ("East Coast") and operated by Moises Rodriguez Manzur ("Manzur") struck a vehicle operated by Martin Klaiber ("Klaiber"). Klaiber died as a result of injuries allegedly sustained in the accident ("Accident"). Stephanie Klaiber, the Personal Representative of Klaiber's Estate (the

"Estate") filed a wrongful death action against Manzur in the Loudoun County Circuit Court on December 10, 2013 (the "Tort Action").[1]

At the time of the Accident, there were in force certain insurance policies issued to East Coast by Erie Insurance Exchange ("Erie"), including a Commercial Auto Policy specifically insuring the vehicle operated by Manzur. There also were in force certain insurance policies issued by Nationwide Mutual Fire Insurance Company and Nationwide Mutual Insurance Company (collectively "Nationwide") to Rodriguez Construction ("Rodriguez"), which employed Manzur.

Erie and Manzur filed the present lawsuit against Nationwide and the Estate in the Prince William County Circuit Court on August 11, 2014, seeking a declaration regarding priorities of liability coverage between the Erie and Nationwide policies for the wrongful death claim against Manzur.[2]

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[1] The Complaint in the Tort Action initially named East Coast as a defendant, alleging vicarious liability. However, East Coast was nonsuited from the Tort Action on July 24, 2014, as it is clear that Manzur was not an employee of East Coast. East Coast was nonsuited from the Tort Action prior to the commencement of the present lawsuit. Thus, insurance coverage for East Coast was never an issue in this lawsuit.

[2] Erie's Complaint referenced only the Nationwide Commercial General Liability Policy and the Nationwide Umbrella Policy. Nationwide's Counterclaim/Cross-Claim also brought the Nationwide Auto Policy before the court.

Erie and Manzur are both represented by the Bancroft, McGavin, Horvath & Judkins law firm.

Nationwide filed a Counterclaim/Cross-Claim against Erie, Manzur and the Estate, also seeking a declaration as to the priorities of coverage under the applicable Erie and Nationwide policies, and including a request that the court declare that the Nationwide Commercial General Liability ("CGL") Policy is inapplicable. JA at 215-218.

A bench trial was conducted before Judge Carroll A. Weimer, Jr., based upon stipulated facts. Erie argued that the indemnification provision in a subcontract between East Coast and Rodriguez controls the priorities of coverage under the insurance policies, such that coverage provided to Manzur under the Erie policies is secondary to the coverage provided to Rodriguez under all of the Nationwide policies. Nationwide argued that its CGL Policy is inapplicable in light of the policy's standard exclusion for claims arising from the use of automobiles. Nationwide also argued that the subcontract between East Coast and Rodriquez is inapplicable, and that Virginia's Omnibus Statute (Code § 38.2-2204) and the "other insurance" provisions in the Erie and Nationwide policies control, such that Erie must provide the sole primary layer of liability coverage to Manzur under Erie's Commercial Auto Policy. Nationwide further argued that

Nationwide's Commercial Auto Policy, Nationwide's Umbrella Policy, and Erie's Excess Policy provide coverage to Manzur on a secondary or excess basis, after application of the primary Erie Commercial Auto Policy.

Judge Weimer ruled from the bench in favor of Erie at a hearing on June 12, 2015. Specifically, Judge Weimer held that the indemnification provision in the subcontract between East Coast and Rodriguez "establishes East Coast Insulators' right to indemnification from Rodriguez Construction through its insurer, Nationwide," such that the Erie policies are excess over the Nationwide policies. JA at 585. Judge Weimer further held that the Nationwide CGL Policy provides coverage to Manzur, notwithstanding that policy's auto exclusion. Lastly, Judge Weimer ruled that Virginia's Omnibus Statute is not applicable under the facts of this case.

On June 17, 2015, in light of Judge Weimer's rulings, counsel for Erie/Manzur wrote to Nationwide's counsel, Daniel Robey, stating that Nationwide should "make every effort to see if the [Tort Action] could be resolved short of trial." JA at 550.

Nationwide filed a Motion to Continue and Reconsider on June 23, 2015, asking Judge Weimer to reconsider his rulings of June 12, 2015. Judge Weimer denied that motion by Order entered June 26, 2015. An

initial final Order was entered on the same date, which memorialized Judge Weimer's bench rulings of June 12, 2015.

Counsel for Erie/Manzur wrote to Mr. Robey again on June 29, 2015, following entry of the orders of June 26, repeating his request that Nationwide settle the Tort Action. JA at 551-552. Counsel stated that Manzur "has made it clear he wants this matter settled, if at all possible" and that "it is important that you [Nationwide] realize the request being made by your insured to get this matter resolved." JA at 551. At that time, there was a pending time-limited settlement demand of $2.9 million by the Estate, and trial of the Tort Action was scheduled for July 13, 2015. JA at 551-552.

Nationwide reached a settlement agreement with counsel for the Estate on June 29, 2015, agreeing to pay $2.9 million in exchange for a full release of all claims in the Tort Action. The settlement was approved by the court in the Tort Action on July 10, 2015. *See Transcript of 7/10/15 Hearing on Approval of Settlement in Tort Action* at 24 (made part of the record in this case as Exhibit N during the July 17, 2015 hearing on Nationwide's Motion to Modify and Clarify the Court's June 26, 2015 Order; or in the First Alternative, to Reconsider; or in the Second Alternative, to Suspend the June 26, 2015 Order).

On July 9, 2015, Nationwide filed a Motion to Modify and Clarify the Court's June 26, 2015 Order; or in the First Alternative, to Reconsider; or in the Second Alternative, to Suspend the June 26, 2015 Order. In that motion, Nationwide asked the court to modify the final Order to reflect the $2.9 million settlement, and to further reflect that Nationwide's maximum exposure under all three Nationwide policies is $2 million, in light of the "two or more policies" provision in the Nationwide CGL Policy. JA at 538-539. Nationwide also requested that the final Order reflect that Nationwide's settlement of the Tort Action was pursuant to an agreement with Erie that the parties continued to reserve all rights to further litigate the coverage issues. JA at 539.

Judge Weimer heard Nationwide's motion on July 17, 2015, and took the matter under advisement. Judge Weimer also entered an Order suspending the June 26, 2015, final Order, pending consideration of Nationwide's motion.

By letter to counsel dated November 20, 2015, Judge Weimer provided his ruling on Nationwide's Motion to Modify/Clarify the Court's June 26, 2015 Order. He ruled that the "two or more policies" provision in the Nationwide CGL policy applied to limit Nationwide's total exposure to $2 million – *i.e.*, that the total limit of coverage under the Nationwide CGL

Policy and the Nationwide Auto Policy is $1 million, followed by an additional $1 million under the Nationwide Umbrella Policy. JA at 567. Judge Weimer declined, however, to rule on Nationwide's request that the final Order reflect that the settlement in the Tort Action was made pursuant to an agreed reservation of rights between Erie and Nationwide as to the coverage issues. He stated:

> My ruling should in no way be interpreted as prejudicing or precluding Erie from contesting Nationwide's authority to settle the underlying wrongful death case. Whether Nationwide may be obligated for the entire $2.9 million settlement under a different theory is a separate matter for a separate proceeding.

JA at 567. Thus, Judge Weimer ultimately concluded that the priorities and limits of coverage are as follows, and "bearing in mind that the total primary limit between the Nationwide Auto and the Nationwide [CGL] Policies is $2 million":

1) Nationwide Auto Policy – $1 million

2) Nationwide CGL Policy – $1 million

3) Nationwide Umbrella Policy – $1 million

4) Erie Auto Policy – $1 million

5) Erie Excess Policy – $5 million

JA at 567. The court entered a Final Judgment Order on February 26, 2016. Nationwide filed a timely notice of appeal the same day.

STATEMENT OF FACTS

A. The Subcontract

East Coast and Rodriguez entered into a Subcontract Agreement ("Subcontract") on March 30, 2011, whereby Rodriguez agreed to perform construction work on East Coast projects. JA at 278-282. The Subcontract contained an indemnification provision in which Rodriguez agreed to "indemnify, hold harmless, and defend" East Coast from any and all claims arising from the work performed under the Subcontract. JA at 281.

B. The Insurance Policies

Erie issued the following policies to East Coast as named insured:

1) A Commercial Auto Policy with a liability coverage limit of $1 million per accident ("Erie Auto Policy"). JA at 411-477.
2) A Business Catastrophe Policy with a liability coverage limit of $5 million per occurrence ("Erie Excess Policy"). JA at 478-522.

Nationwide issued the following policies to Rodriguez as named insured:

1) A Commercial General Liability Policy with a per occurrence liability coverage limit of $1 million ("Nationwide CGL Policy"). JA at 283-326.

2) A Business Auto Policy with a liability coverage limit of $1 million per accident ("Nationwide Auto Policy"). JA at 358-410.

3) A Commercial Umbrella Liability Policy with a liability coverage limit of $1 million per occurrence ("Nationwide Umbrella Policy").[3] JA at 327-357.

C. The Accident and the Underlying Tort Action

On October 4, 2013, Manzur was an employee of Rodriguez and was operating a truck owned by East Coast in the course of his employment with Rodriguez and pursuant to the Subcontract. JA at 275-276. The truck is specifically listed as a scheduled covered automobile under the Erie Auto Policy. JA at 275. While operating the truck, Manzur was involved in a multi-vehicle accident with a car operated by Klaiber. JA at 275-276. Klaiber died of injuries allegedly sustained during the accident. JA at 275. The Estate filed the Tort Action for wrongful death against Manzur in the Loudoun County Circuit Court on December 10, 2013. JA at 275, 523-526.

[3] Nationwide Mutual Insurance Company issued the Nationwide Auto Policy, and Nationwide Mutual Fire Insurance Company issued the Nationwide CGL Policy and the Nationwide Umbrella Policy. Those two entities are referred to collectively as "Nationwide."

D. The Coverage Action and Settlement of the Tort Action

As discussed above, the assembled pleadings in this action seek declaratory judgments establishing the priorities of liability coverage between the Erie and Nationwide policies for the wrongful death claim asserted against Manzur in the Tort Action. The trial court ruled that the Erie policies are excess over the Nationwide policies.

Counsel for Erie/Manzur wrote to Nationwide's counsel on June 17, 2015, and again on June 29, 2015, urging Nationwide to settle the Tort Action. Nationwide reached a settlement agreement with the Klaiber Estate on June 29, 2015, sixteen days before the Tort Action was scheduled for trial. The settlement was approved by the court in the Tort Action on July 10, 2015. Subsequent proceedings in this action are described above.

ARGUMENT

I. The trial court erred by ruling that the Nationwide CGL Policy provides liability coverage to Manzur, notwithstanding the exclusion in that policy for claims arising out of the use of automobiles. (Assignment of Error 1)

Standard of review: This issue presents a question of law, which the Court should review *de novo*. *E.g.*, *Copp v. Nationwide Mut. Ins. Co.*, 279 Va. 675, 681-82, 692 S.E.2d 220, 223-24 (2010) (interpretation of

contracts, including insurance policies, is a question of law subject to *de novo* review).

The Nationwide CGL Policy contains the standard exclusion for injury or damages "arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft owned or operated by or rented or loaned to any insured." JA at 293. The Policy also contains the standard exclusion for injuries or damages "for which the insured is obligated to pay by reason of the assumption of liability in a contract or agreement." JA at 291. Both exclusions include exceptions for "insured contracts," which are defined in the Policy to include a "contract or agreement pertaining to your business … under which you assume the tort liability of another …." JA at 302. However, as explained below, the auto exclusion's insured contract exception applies only to an insured contract "for the ownership, maintenance or use of an **aircraft** or **watercraft**." It does **not** apply to an insured contract for the ownership, maintenance or use of "**autos**." JA at 293 (emphases added).

The trial court concluded that the indemnification provision in the Subcontract constituted an "insured contract" for purposes of the insured contract exception to the contractual liability exclusion. JA at 588. It further stated that "while liability for a motor vehicle collision is ultimately at issue,

Nationwide's obligation occurs primarily as a result of the indemnification clause in the [Subcontract]," such that the auto exclusion does not apply. JA at 590. Respectfully, that ruling is in error.

It is axiomatic that an auto policy and a CGL policy provide coverage for distinct risks and that the purpose of the standard auto exclusion in CGL policies is to exclude coverage for risks covered under auto policies. *E.g.*, *McQuirter v. Rotolo*, 77 So.3d 76 (La.App. 1 Cir. 2011). Although not directly addressed by this Court, courts in other jurisdictions have recognized the distinction between auto and CGL policies in rejecting the reasoning employed by the trial court. For example, under facts similar to the present case, the Court of Appeals of Louisiana held in *McQuirter* that the auto exclusion in a CGL policy applied to bar coverage for claims arising from an auto accident, notwithstanding the existence of an indemnification agreement (*i.e.*, an insured contract) in which the named insured agreed to indemnify another contractor for claims arising out of the insured's work. In so holding, the court noted that the auto exclusion was unambiguous and applied to all claims arising from the auto accident, including the indemnification claim. *Id*. at 82. The court also ruled that the contractual liability exclusion has no bearing on, and does not override, the auto exclusion, stating:

> Reading the policy as a whole, the contractual indemnity exclusion has no bearing on the interpretation or the application of the automobile liability exclusion…. The result is logical and equitable, as most exclusions from insurance policies are designed to eliminate risks which should be covered under other policies…. The risk associated with the operation of automobiles is such a risk that was not intended to be covered by a CGL policy…. The wording of the exception set forth in paragraph 4 of the auto exclusion additionally supports our conclusion that the parties intended to exclude coverage for bodily injury or property damages "arising out of the … use of any … 'auto' … operated by … any insured." This exception provides that the auto exclusion does not apply to liability assumed under an "insured contract" for the use of an "aircraft" or a "watercraft." Noticeably, this exception does not reference an "auto."

Id. at 82-83 (citations omitted); *see also Nautilus Ins. Co. v. Johnny Clark Trucking, LLC*, 2014 WL 1365836 (S.D. W.Va. 2014); *Liberty Surplus Ins. Corp. v. Allied Waste Systems, Inc.*, 758 F.Supp.2d 414 (S.D. Tex. 2010).

As in the cases cited above, the Nationwide CGL Policy's auto exclusion contains an exception for insured contracts, but the exception specifically applies only to aircraft and watercraft, **<u>not autos</u>**. Reading the insured contract exception to the contractual liability exclusion to supplant the auto exclusion would make the auto exclusion's own limited insured contract exception superfluous. Further, an exception to an exclusion does not extend or grant coverage, but merely limits the application of the exclusion itself. *Nationwide Mut. Ins. Co. v. Wenger*, 222 Va. 263, 267,

278 S.E.2d 874, 876 (1981). Thus, the trial court erred in finding coverage under the Nationwide CGL Policy based on the insured contract exception to the contractual liability exclusion, notwithstanding the Policy's auto exclusion. Rather, because the claim against Manzur in the Tort Action arises from the use of an auto, the auto exclusion in the Nationwide CGL Policy applies to bar coverage to Manzur.[4]

II. The trial court erred by ruling that the Erie Auto Policy and the Erie Excess Policy apply on a secondary basis, after the Nationwide Auto Policy, the Nationwide CGL Policy, and the Nationwide Commercial Umbrella Policy. (Assignment of Error 2)

Standard of review: This issue presents a question of law, which the Court should review *de novo*, for legal error. *Copp v. Nationwide Mut. Ins. Co.*, *supra*; *Chacey v. Garvey*, 291 Va. 1, 7-8, 781 S.E.2d 357, 359 (2015).

A. The Erie Auto Policy provides the sole, primary layer of liability coverage to Manzur, followed by secondary coverage under the Nationwide Auto Policy.

The Erie Auto Policy specifically insures the East Coast vehicle involved in the Accident (i.e., that vehicle is included in the list of covered

[4] Further, as explained below, the insured contract provisions of the Nationwide CGL Policy are not implicated at all, because the Tort Action did not involve a claim against East Coast, the party to be indemnified under the Subcontract.

autos specifically insured under the Erie Auto Policy). JA at 275, 415-416. That policy's "other insurance" provision states that its coverage is primary for vehicles owned by its named insured, East Coast. JA at 447. The trial court nevertheless held that the Nationwide policies provide primary coverage based upon the indemnification provision in the Subcontract, in which Rodriguez agreed to indemnify East Coast for any claims arising out of Rodriguez's work under the Subcontract. According to the trial court, "the indemnification provision in this case is enforceable and establishes East Coast Insulators' right to indemnification from Rodriguez Construction through its insurer, Nationwide." JA at 585. In support of its ruling, the trial court relied on *St. Paul Fire & Marine Ins. Co. v. Am. International Spec. Lines Ins. Co.*, 365 F.3d 263 (4th Cir. 2004).

In *St. Paul*, several defendants were sued for injuries arising from food poisoning. The defendants' insurers settled with the plaintiff and then instituted a separate action to determine the allocation of liability coverage between the applicable policies. The Fourth Circuit held that before insurance coverage could be determined and allocated, the liability of the insureds must be determined, including establishment of liability between the insureds based on an indemnification agreement between the insureds. The court determined that final responsibility for the claim rested with one

insured because of an indemnification agreement in which that insured agreed to indemnify the other. The court stated:

> [A]n indemnity agreement between the insureds of 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. Respectfully, the trial court's reliance on the indemnification provision in the Subcontract, and the *St. Paul* case, is in error.

First, unlike *St. Paul*, this case did not involve a claim against a party to be indemnified under the Subcontract. Thus, the Subcontract is not implicated in this matter. The indemnification provision in the Subcontract required Rodriguez to indemnify **East Coast** for claims arising from Rodriguez's work. JA at 281. The Tort Action was not a case against East Coast. It was against Manzur, who was an employee of Rodriguez.[5] Because the Tort Action did not include a claim against East Coast (or any employee of East Coast), the indemnification provision in the Subcontract is irrelevant. *See Travelers Prop. Cas. Co. of Am. v. Liberty Mut. Ins. Co.*,

[5] The Subcontract specifies that Rodriguez is an independent contractor. JA at 281. Further, as stipulated, Manzur was an employee of Rodriguez, not East Coast, and was acting within the scope of his employment with Rodriguez at the time of the accident. JA at 275-276. Indeed, East Coast was nonsuited from the Tort Action prior to the commencement of this lawsuit.

444 F.3d 217, 224-25 (4th Cir. 2006) (indemnification agreement is irrelevant, and *St. Paul* analysis does not apply, where coverage for the party to be indemnified is not at issue).

Also unlike *St. Paul*, the present case involves auto policies that are governed by Virginia's mandatory Omnibus Statute, Code § 38.2-2204. Contrary to the trial court's ruling, the Omnibus Statute applies to all auto policies issued in Virginia. Code § 38.2-2204(A).[6] Neither Erie nor the trial court provided any support for the proposition that the Omnibus Statute does not apply to the Erie Auto Policy. The Omnibus Statute requires the insurer of a specific vehicle to furnish permissive users the same coverage

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[6] Code § 38.2-2204(A) provides, in pertinent part:

> No policy or contract of bodily injury or property damage liability insurance, covering liability arising from the ownership, maintenance, or use of any motor vehicle, aircraft, or private pleasure watercraft, shall be issued or delivered in this Commonwealth to the owner of such vehicle, aircraft or watercraft, or shall be issued or delivered by any insurer licensed in this Commonwealth upon any motor vehicle, aircraft, or private pleasure watercraft that is principally garaged, docked, or used in this Commonwealth, unless the policy contains a provision insuring the named insured, and any other person using or responsible for the use of the motor vehicle, aircraft, or private pleasure watercraft with the expressed or implied consent of the named insured, against liability for death or injury sustained, or loss or damage incurred within the coverage of the policy or contract as a result of negligence in the operation or use of such vehicle, aircraft, or watercraft by the named insured or by any such person ….

as is afforded the named insured. *Id*.; *American Motorists Ins. Co. v. Kaplan*, 209 Va. 53, 58, 161 S.E.2d 675, 679 (1975).

Consistent with the Omnibus Statute and this Court's ruling in *Kaplan*, the "other insurance" provisions of the Erie Auto Policy and the Nationwide Auto Policy are substantially similar, each stating that coverage is primary for vehicles owned by the named insured and excess for non-owned vehicles. JA at 447, 375.[7] Virginia courts routinely resolve issues relating to the priority of coverage based on the terms of "other insurance" clauses where more than one policy applies to a loss. *See, e.g.*, *Government Employees Ins. Co. v. Universal Underwriters Ins. Co.*, 232 Va. 326, 331, 350 S.E.2d 612, 615-16 (1986); *see also Kaplan*, 209 Va. at 58, 161 S.E.2d at 679.[8]

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[7] It is clear (and the parties did not argue otherwise) that the Erie Excess Policy and the Nationwide Umbrella Policy are excess liability policies that do not provide primary liability coverage to Manzur.

[8] In *Kaplan*, this Court ruled that an excess insurer was entitled to recover from the primary insurer expenses incurred in defending the insured, based on "other insurance" clauses. The permissive driver's policy contained an "excess other insurance" clause with regard to non-owned vehicles, and the vehicle owner's policy contained an "escape other insurance" clause. The Court first concluded that the "escape other insurance" clause in the owner's policy was void because it conflicted with Virginia's Omnibus Statute. 209 Va. at 58, 161 S.E.2d at 679. The Court then enforced the plain language of the "excess other insurance" clause in the driver's policy and concluded that the trial court was correct in holding that the vehicle

(footnote continued)

The "other insurance" provisions in the Erie Auto Policy and the Nationwide Auto Policy are standard provisions in Virginia commercial auto policies. They also are easily harmonized under the facts of this case. Because the vehicle operated by Manzur was an owned auto under the Erie Auto Policy issued to East Coast, and a non-owned auto under the Nationwide Auto Policy issued to Rodriguez, the "other insurance" provisions dictate that the Erie Auto Policy provides primary coverage to Manzur, while the Nationwide Auto Policy's coverage is secondary.[9] *See Kaplan,* 209 Va. at 58, 161 S.E.2d at 679.

B. The Erie Excess Policy and the Nationwide Umbrella Policy apply on a co-excess, *pro rata* basis.

As excess policies, the Erie Excess Policy and the Nationwide Umbrella Policy apply only after the limits of coverage under both the Erie

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owner's policy provided primary coverage, including coverage for "the expenses incurred … in defending" the underlying action. *Id.*; *see also Am. Cas. Co. v. United Servs. Auto. Ass'n, Inc.*, 24 Va. Cir. 544, 1989 WL 646369 (Fairfax 1989) (insurer with invalid "escape" clause was "primarily responsible" for defense and indemnity).

[9] While the "other insurance" provisions in the Erie Auto Policy and Nationwide Auto Policy provide that coverage is primary for "any liability assumed under an 'insured contract,'" the insured contract provisions do not apply in this matter. JA at 447, 375. As noted above, Rodriguez's indemnification obligations under the Subcontract are limited to East Coast. East Coast was dismissed from the Tort Action. Because Rodriguez has not assumed the tort liability of any party to this case, the insured contract provisions in the subject policies are not implicated.

Auto Policy and the Nationwide Auto Policy have been exhausted. The "other insurance" provision in the Erie Excess Policy provides, in pertinent part, that coverage under that policy is "excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis." JA at 513. The Nationwide Umbrella Policy's "other insurance" provision states, in pertinent part, that "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" and that "[t]his insurance is not subject to the terms or conditions of any 'other insurance.'" JA at 349. Thus, the "other insurance" provisions in the Erie Excess Policy and the Nationwide Umbrella Policy each dictate that the coverages under those policies are excess to the primary coverage afforded under the Erie Auto Policy and the secondary coverage afforded under the Nationwide Auto Policy.

While the "other insurance" provisions in the Erie Excess Policy and Nationwide Umbrella Policy are not identical, they are substantially similar in that each states that its coverage is excess to any other insurance. This Court has held that if "other insurance" clauses are repugnant or cannot be reconciled, it will ignore those clauses and require the insurers to share the coverage obligation on a *pro rata* basis. *Aetna Cas. & Sur. Co. v. Nat'l*

Union Fire Ins. Co., 233 Va. 49, 54, 353 S.E.2d 894, 897 (1987); *State Capital Ins. Co. v. Mutual Assurance Soc'y*, 218 Va. 815, 820, 241 S.E.2d 759, 762 (1978). Because the "other insurance" provisions in the Erie Excess Policy and Nationwide Umbrella Policy are mutually repugnant, the two policies provide coverage on a co-excess, *pro rata* basis, after application of the primary Erie Auto Policy and the secondary Nationwide Auto Policy.

C. The proper priorities of coverage.

In light of the above, the trial court erred in ruling that the Nationwide policies apply before the Erie policies. The proper priorities are as follows:

1) Erie Auto Policy – $1 million
2) Nationwide Auto Policy – $1 million
3) Erie Excess Policy – $5 million/Nationwide Umbrella Policy – $1 million; applicable on a co-excess, *pro rata* basis.

CONCLUSION

For the reasons stated above, the Court should reverse the judgment of the trial court as to the applicability of the Nationwide CGL Policy and the priorities of coverage between the remaining Erie and Nationwide policies, and enter final judgment declaring that the priorities of coverage are as set out above.

Respectfully submitted,

Nationwide Mutual Fire Insurance Company

and

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CERTIFICATE

I hereby certify that the foregoing Brief complies with Va. Sup. Ct. Rule 5:26.

I further certify that on this 28th day of October, 2016:

The correct number of true and accurate copies of this Brief were hand-filed with the Supreme Court of Virginia and an electronic copy was filed via VACES in PDF format; and

A copy of the foregoing Brief in PDF format has been emailed to counsel for appellees, and one copy of the foregoing Brief have been transmitted by US First Class Mail to counsel for appellees, named below.

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