In The

Supreme Court of Virginia

RECORD NO. 180572

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY,

Appellants,

v.

ERIE INSURANCE EXCHANGE,

Appellee.

BRIEF OF APPELLEE

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SCV: Submitted on 12-04-2018 13:49:00 EST for filing on 12-04-2018

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STATEMENT OF THE CASE

This is the second round of a dispute between these insurers relating to the same underlying insurance claim: a wrongful death claim arising out of an auto accident filed in 2013 against an individual insured by both Nationwide Mutual Fire Insurance Company (Nationwide) and Erie Insurance Exchange (Erie). In the first action, Erie sought to establish the priority of coverage as between Erie's and Nationwide's policies. After Erie prevailed in the circuit court, Nationwide appealed.

This Court reversed and held that Erie had primary coverage up to $1 million, as well as shared excess coverage, pro rata, with Nationwide beyond $2 million. *Nationwide Mut. Fire Ins. Co. v. Erie Ins. Exch.*, 293 Va. 331 (2017) (*Nationwide I*). Prior to this Court's ruling, however, Nationwide settled the underlying tort suit, a settlement in which Erie did not participate and to which it refused to contribute. This Court's opinion addressed neither the enforceability of the settlement against Erie, nor either insurer's rights or obligations under their respective policies.

Nationwide subsequently filed this action against Erie, seeking contribution from Erie for the amount it paid to settle the tort suit. Erie

demurred. Following established law from this Court, the circuit court sustained Erie's demurrer, holding that Erie's obligation to pay under its policies was conditioned on its consenting to settlement, a condition which was not met. The circuit court ruled that Nationwide had not pleaded the existence of a common obligation, a required element of an equitable contribution claim, and had paid the settlement voluntarily. The circuit court also ruled that Erie had not waived its consent-to-settlement rights by refusing to participate in Nationwide's settlement. Nationwide appeals each ruling, as well as the dismissal of its equitable subrogation claim on the same grounds.

FACTS and PROCEEDINGS

On appeal from the circuit court's sustaining of Erie's demurrer, the facts are as alleged in the Complaint and attached exhibits. *See Wards Equip. v. New Holland N. Am.*, 254 Va. 379, 383 (1997).

I. The tort suit and coverage case

This case originated with an auto accident that occurred in 2013. Prior to the accident, Rodriguez Construction and East Coast Insulators, Inc. ("East Coast"), executed a contract for work. Erie insured East Coast through two policies: a commercial auto policy ("Auto Policy") with

coverage limits of $1 million; and a business catastrophe policy ("Business Policy") with coverage limits of $5 million (collectively, the "Erie Policies"). Nationwide insured Rodriguez Construction through three policies: a commercial general liability (CGL) policy with coverage limits of $1 million; a business auto policy with coverage limits of $1 million; and a commercial umbrella liability policy with coverage limits of $1 million. JA 1-2. Each of these policies was attached to the Complaint. *See* JA 2.

At the time of the accident, Moises Manzur ("Manzur"), an employee of Rodriguez Construction, was operating one of East Coast's vehicles in the course of his employment. JA 3. Martin Klaiber was killed in the accident and his estate ("Klaiber Estate") filed suit against Manzur for his wrongful death in 2013 (the "Tort Suit"). *Id.*

In 2014, Erie and Manzur filed a declaratory judgment action against Nationwide to determine the priorities of Erie's and Nationwide's respective policies ("Coverage Action"). *Id.* Nationwide filed a counter-claim and cross-claim seeking reciprocal relief. *Id.* Meanwhile, Erie continued to defend Manzur in the Tort Suit, while Nationwide did nothing. JA 250-52 (exhibits attached to the Complaint).

In 2015, approximately one month before trial in the Tort Suit, the circuit court in the Coverage Action issued a ruling holding that Nationwide held primary coverage for the first $3 million in liability coverage for Manzur, and that Erie's policies provided only excess coverage (the "Coverage Ruling"). JA 4.

Following the Coverage Ruling, several letters, all of which are attached to the Complaint, were sent to Nationwide. Counsel for the plaintiff in the Tort Suit told Nationwide that he would ask for a $10 million judgment, that Manzur was clearly liable, and noted the Coverage Ruling. JA 250-51. Counsel also noted that, to that point, Nationwide had maintained that Manzur was "insured by Erie as to the primary coverage" and "was so certain of its position that no counsel [was] retained to represent [Manzur]." JA 251. Counsel stated that Nationwide had "utterly ignored" the Tort Suit since its filing, "despite having actual notice of the claim and the pending suit." *Id.* Noting Nationwide's intent to appeal, counsel demanded $2.9 million to settle the Tort Suit, a "gift" given Manzur's exposure "and your complete disregard of this claim." *Id.*

Counsel for Erie and Manzur[1] also wrote to Nationwide following the Coverage Ruling, stating that he had "tried to get Nationwide engaged in [the Tort Suit], both from a defense standpoint as well as possible resolution, but that has been ignored." JA 252. Citing the Coverage Ruling, counsel stated that Nationwide should "make every effort to see if the matter could be resolved short of trial." *Id.*

A week later, counsel for Erie and Manzur replied to Nationwide's request for Erie to participate in the settlement of the case. JA 253. Because the Coverage Ruling determined Nationwide was liable for the first $3 million in liability, and the demand was for $2.9 million, counsel stated that Erie rejected Nationwide's request. JA 253. Counsel also stated that Manzur had "made it clear he want[ed] the [Tort Suit] settled." Counsel stated it was "important" Nationwide understood this desire given that Nationwide had "made no effort to get involved in this case." *Id.*

Despite its intent to appeal the Coverage Ruling and Erie's refusal to participate, Nationwide paid the $2.9 million settlement demand. In 2015, Nationwide and the parties to the Tort Suit settled the wrongful

[1] Prior counsel represented both Erie and its insured.

death claim. In an order entered by that circuit court in 2015 ("Settlement Order"), Nationwide agreed to pay $2.9 million in settlement in exchange for being discharged and released of all claims arising from the underlying accident.[2] The Settlement Order was signed by the Klaiber Estate, Nationwide, and Manzur. Erie was not released by the Order and did not sign it. *See* Ex. A. Despite Erie's non-involvement and express refusal to participate in the settlement, Nationwide attached to its signature page on the Settlement Order a paragraph purportedly reserving its rights to recover from Erie. Ex. A at 4. This language was not incorporated in or in any way referenced in the Settlement Order. *Id.* at 1-2.

II. *Nationwide I*

This Court reversed the Coverage Ruling in *Nationwide I.* Nationwide's appeal of the Coverage Ruling asked the Court to "determine the priority of" Nationwide's and Erie's respective policies. After ruling that Nationwide's CGL policy did not provide coverage, the

[2] The Settlement Order was the subject of a Motion Craving Oyer unopposed by Nationwide and granted by the circuit court. Mot. Craving Oyer, July 14, 2017; JA 280-81 (court ruling that the Settlement Order is part of the Complaint); JA 335 (same). The Settlement Order is attached to this brief as Exhibit A.

Court held that Erie's auto policy ($1 million coverage limit) "provided primary coverage," Nationwide's auto policy ($1 million coverage limit) provided excess coverage, followed by Nationwide's and Erie's umbrella policies, distributed pro rata. *Nationwide I*, 293 Va. at 340-43. The Court's mandate indicates a reversal and final judgment. *Id.* at 343.

This Court did not address anything beyond the priority of coverage under the respective policies. The Court did not, for example, address either insurer's rights or duties pursuant to their policies, the Tort Suit, or Nationwide's settlement.

III. Nationwide's suit for contribution

Following the Coverage Ruling, Nationwide filed this action, seeking judgment in the amount of $1.75 million. JA 9. In its Complaint, Nationwide asserted four counts: equitable contribution, equitable subrogation, equitable indemnification, and unjust enrichment. The latter two claims are not at issue on appeal.

Erie demurred, arguing, *inter alia*, that Erie's consent-to-settlement rights were a condition to its contractual duties to pay, had not been met, and precluded recovery for equitable contribution. JA 272-74. Erie also argued that according to the Complaint, Nationwide's

payment in settlement was voluntary, and that Nationwide failed to allege a common obligation. *Id.*

The court sustained Erie's demurrer. The circuit court held that both of Erie's policies contained consent-to-settlement conditions. JA 336-40. According to the circuit court, Nationwide failed to plead this condition was met and, therefore, failed to plead a common obligation. *Id.* Rejecting Nationwide's counter-argument, the circuit court held that Erie had not waived the conditions by refusing to participate in its co-insurer's settlement. JA 339-40. The circuit court also held that Nationwide's decision to settle the Tort Suit without Erie's consent was unilateral and voluntary. *Id.* at 339. For the same reasons, the circuit court held Nationwide had failed to allege a claim for equitable subrogation.

SUMMARY OF ARGUMENT

The Complaint concedes the dispositive facts under this Court's case law: Erie is not legally obligated under its policies to fund any settlement to which it does not assent, and Erie did not assent to Nationwide's settlement. This alone is fatal to its claim for equitable contribution. In addition, as between co-insurers, a decision to settle a case cannot form the basis of an equitable contribution claim because co-

insurers have distinct rights and obligations under their respective agreements with their insureds.

Despite pleading itself out of an equitable contribution claim, Nationwide argues that this Court's decision in *Nationwide I* imposed an obligation to pay and that, in any event, Erie waived its consent-to-settlement rights. Both arguments fail for the same reason: coverage is not the same thing as settlement. Just as this Court's determination of the priority of coverage did not impose settlement duties on Erie, neither did Erie's refusal to contribute to the settlement amount to a denial of coverage or a waiver of its rights.

Nationwide made its bed and now must lie in it. Having made the strategic business decision to settle the Tort Suit rather than seeking a stay of the case to finalize coverage, Nationwide now asks this Court to bend the law in its favor to recoup some of what it paid. The Court should reject the invitation.

AUTHORITIES and ARGUMENT

Nationwide's first, second, and third assignments of error relate to its claim for equitable contribution. In its first assignment, Nationwide argues Erie has waived or is estopped from asserting its consent to

settlement rights and, therefore, had an obligation to settle the Tort Suit. Nationwide then argues that it pleaded a valid equitable contribution claim because it shared a common obligation with Erie (AOE 2) and that Nationwide was not a volunteer when it settled the Tort Suit (AOE 3). Because the issue of whether Nationwide stated a valid claim for equitable contribution analytically precedes the question of waiver and estoppel, this brief will address that issue first.[3]

I. Standard of Review

The circuit court's decision sustaining Erie's demurrer is reviewed *de novo*. *Harris v. Kruetzer*, 271 Va. 188, 196, 624 S.E.2d 24, 28 (2006). Nationwide's factual allegations, and any facts "reasonably and fairly implied" by those allegations, are assumed to be true; conclusions of law and unfounded inferences are not. *See Wards Equip. v. New Holland N. Am.*, 254 Va. 379, 383 (1997). This Court also ignores Nationwide's factual allegations if "contradicted by the terms of authentic, unambiguous documents that properly are part of the pleadings." *Id.*

[3] Nationwide's only argument with respect to AOE 4 is to cite its argument in support of its equitable contribution claims (AOEs 1-3). Op. Br. at 35. Therefore, Erie similarly relies on its arguments regarding equitable contribution in support of the circuit court's dismissal of the equitable subrogation claim.

II. Nationwide failed to allege a claim for equitable contribution (AOE 2)

A. Equitable contribution requires a shared obligation

A contribution claim is based on the equitable principle that "where two or more persons are subject jointly to liability, it should be borne by them equally." *Nationwide Mut. Ins. Co. v. Jewel Tea Co.*, 202 Va. 527, 531-32 (1961). The right of equitable contribution "does not arise out of an express contract or agreement between the parties." *Ohio Cas. Ins. Co. v. State Farm Fire & Cas. Co.*, 262 Va. 238, 241 (2001). Instead, the "law implies a contract between them to contribute ratably towards the discharge of the obligation." *Midwest Mut. Ins. Co. v. Aetna Casualty & Surety Co.*, 216 Va. 926, 929 (1976). A common obligation is fundamental to the claim: when "two or more persons *are liable* to pay a claim and one or more of them pays the whole of it . . . the one so paying may generally recover the ratable portion of the claim that each *ought* to pay." *Id.* (emphasis in original).

Nationwide spends much of its brief conflating the obligation to provide coverage with the obligation to settle. Under both the law of equitable contribution and Nationwide's Complaint, the specific question

in this appeal is whether Nationwide alleged that Erie had an obligation to contribute to the settlement of the Tort Suit.

B. The Complaint indicates that no common obligation existed between Nationwide and Erie

On its face, the Complaint alleges that: 1) Erie had consent to settlement rights as a condition to being obligated to pay under its contract with Manzur; and 2) that that condition was not met. This is fatal to Nationwide's claim for contribution.

To determine whether Erie "shared a common obligation" with Nationwide, this Court looks to the "conditions contained in [Erie's] polic[ies]." *See Allstate Ins. Co. v. USAA*, 249 Va. 9, 14 (1995) (looking to policy to determine whether co-insurers shared common obligation to support contribution claim). Nationwide attached Erie's Auto and Business policies to its Complaint. *See Wards Equip.*, 254 Va. at 383 (authentic documents attached to the Complaint are considered when ruling on a demurrer).

Both Erie Policies contain so-called "voluntary payments" clauses:

- "[Y]ou . . . must [a]ssume no obligation, make no payment or incur no expense without our consent, except at the 'insured's' own cost." JA 45 (Auto).

- "No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense . . . without our consent." JA 112 (Business).

The Erie Policies also expressly condition coverage on a final judgment at trial or Erie's consent:

- "No one may bring a legal action against us [for Liability Coverage] until . . . we agree in writing that the 'insured' has an obligation to pay or until the amount of that obligation has finally been determined by judgment after trial." JA 46 (Auto).

- "A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured[.] An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative." JA 112 (Business).

Consent to settlement clauses are conditions, rather than restrictions, on coverage. *Osborne v. National Union Fire Ins. Co.*, 251 Va. 53, 55 (1996). Such provisions "protect[] the insurer's power to preserve potential sources of recovery" and its rights of subrogation. *Virginia Farm Bureau Mut. Ins. Co. v. Gibson*, 236 Va. 433, 438 (1988) (upholding a consent-to-settlement clause in an uninsured motorist portion of a policy). In *Osborne*, the Court held that the plain language of a similar consent-to-settlement clause precluded the policy from applying

"to any claim settled without [the insurer's] consent," regardless of whether the insurer was prejudiced. 251 Va. at 56.[4]

In *Allstate*, this Court addressed a contribution claim between co-insurers involving a consent-to-settlement clause. USAA had primary liability coverage and an umbrella policy, both of which applied to the insurer's liability, and Allstate had an excess policy. 249 Va. at 11. Like Erie's in this case, Allstate's policy contained a consent-to-settlement provision that conditioned payment under the policy on either its agreement with the insured and claimant or a final judgment against its insured. *Id.* at 11-12. Like Nationwide, USAA asked Allstate to contribute to a settlement with the plaintiff and, like Erie, Allstate refused. *Id*. After USAA settled the case, it sued Allstate for contribution. *Id.*

On appeal, this Court held that USAA's claim failed because Allstate's "conditions require the existence of a settlement agreement to which Allstate is a party or a final judgment against an insured before Allstate becomes obligated to pay a covered claim," and it was

[4] "The General Assembly, obviously aware of the prejudice issue in connection with insurance policy conditions, has not taken such action with reference to consent-to-settlement clauses." *Osborne*, 251 Va. at 56.

"undisputed that these conditions were not met." *Id.* at 14. Accordingly, Allstate "never became obligated on the claim" and could not be "held to share a common obligation with USAA for settlement." *Id.*

This decision is controlling here. In fact, Nationwide does not dispute that a common obligation for contribution does not exist when an insurer with consent-to-settlement rights does not consent to settlement. Instead, Nationwide attempts to distinguish *Allstate* on the grounds that, unlike Allstate, Erie "claimed that it did not provide coverage" and "erroneously refuse[d] to honor its coverage obligations." Op. Br. 25. In other words, Nationwide argues that the holding in *Allstate* should not apply because Erie waived its consent-to-settlement rights. This argument is addressed *infra*, Part III.

Similarly, in *Midwest Mutual*, 216 Va. at 930, this Court held that no right to contribution arose between co-insurers of the same insured because a condition precedent to payment had not been fulfilled. Although the case involved the uninsured motorist statute, Aetna's duty to pay under its policy was expressly conditioned: it arose only if a judgment determined the insured was entitled to recover and if the insured served Aetna with the underlying action against the owner of the

uninsured vehicle. *Id.* at 929. Despite these conditions not being met, Midwest settled with their insured and sought contribution from Aetna. *Id.* at 928.

This Court held that serving process was a "condition precedent" to the insurer becoming liable to pay. 216 Va. at 929. Importantly, the Court noted that although the conditions originated in the uninsured motorist statute, the conditions "became a part of its policy contract." *Id.* at 930. The Court explained that Midwest's decision to waive the statutory requirements and voluntarily settle with its insured did "not affect Aetna's prerogative to insist that, as to its liability, there be compliance." *Id.* at 930. Because Aetna and Midwest had "separate policies of insurance covering [their insured], Aetna's contract liability could not be expanded by the unilateral conduct of Midwest." *Id.* Midwest settled the underlying claim without the conditions precedent being fulfilled or Aetna waiving them, thus "no right of contribution arose." *Id.* Like *Allstate*, then, *Midwest Mutual* stands for the proposition that failure to comply with a condition precedent to coverage precludes the existence of a common obligation between co-insurers.

As in *Allstate* and *Midwest*, Nationwide's allegations affirmatively establish that Erie's policy conditions were not satisfied. After receiving a settlement demand for $2.9 million, Nationwide asked Erie to contribute. JA 250-53. Exercising its rights and citing the Coverage Ruling, Erie refused. JA 253. Erie had the contractual right to do so. Nationwide cannot "impose on [Erie] an obligation that [it] had not contracted to assume," and Erie did not contract to assume Nationwide's strategic settlement decision. *See Dairyland Ins. Co. v. Douthat*, 248 Va. 627, 632 (1994) (finding that the circuit court had effectively rewritten the parties' insurance contract by requiring the insurer to pay post-judgment interest above the policy limits).

Nationwide does not dispute the validity of Erie's consent-to-settlement provisions or that the conditions were not met. Therefore, Nationwide failed to plead a common obligation and the circuit court did not err in so finding. *See Allstate*, 249 Va. at 14 (holding that failure to meet conditions precedent to coverage is dispositive unless the conditions in the policy violate a statute or public policy); *Creteau v. Phoenix Assurance Co.*, 202 Va. 641, 643-44 (1961) (holding that the plaintiff's claim was barred because she affirmatively pleaded a failure to comply

with statutory conditions precedent, unless such conditions were waived).

C. This Court's decision in *Nationwide I* did not impose an obligation to settle

Although Erie's consent-to-settlement rights were not satisfied, Nationwide nevertheless argues that this Court's decision in *Nationwide I* imposed an obligation on Erie to settle. Because this Court held that Erie had priority coverage obligations, Nationwide argues, "Erie was compelled to accept" the ruling and contribute ratably to the settlement. Op. Br. at 20-21.

This Court's ruling in *Nationwide I* imposed no such obligation. Rather, the issue before this Court was the priority of Erie's and Nationwide's respective policies, and whether the circuit court had erred in its determination of the priority of coverage. *Nationwide I* neither addressed nor resolved any duties Nationwide or Erie owed to their insured under their respective policies. *See* 293 Va. at 342-43 (holding that the trial court erred in its interpretation of the policies, listing "the order of priorities in this case," and stating the case was "reversed and final judgment."). Moreover, this Court did not address or vitiate Erie's consent-to-settlement rights and its conditions on payment. Following

the Court's ruling that Erie had primary coverage obligations, then, Erie's consent-to-settlement rights remained.

An obligation to provide coverage is not the same thing as an obligation to settle. Holding that Erie had priority of coverage did not thereby obligate Erie to settle the Tort Suit, which had already been settled by that time, or contribute to Nationwide's decision to settle.

D. As co-insurers to Manzur with distinct rights and responsibilities, Nationwide and Erie did not share a common obligation to settle

Nationwide also argues that a common obligation arose because, "just as Nationwide" did, "Erie had an obligation to exercise good faith and attempt to protect its insured from an excess judgment." Op. Br. at 23-24. Similarly, in its Complaint, Nationwide alleged that Erie had "coverage obligations to Manzur . . . including duties of good faith," and that Erie was required to "contribute its proportionate share of the settlement." JA 7.

The Court rejected this argument in *Allstate*. There, despite the unfulfilled condition precedent, USAA argued that Allstate's obligation to contribute to the settlement was based on its good faith duty to protect its insured from an excess judgment. *Allstate*, 249 Va. at 12-13. This

Court rejected the argument, stating that the duty of good faith "relates to the obligation of an insurer to its insured in a coverage context," not "from one insurer to another in a contribution setting." *Id.* at 13. As each insurer has its own duty of good faith to the insured, "the obligations resulting from the two relationships may differ." *Id.* The Court held that Allstate's duty of good faith was "an irrelevant issue" because the case was one for contribution between co-insurers and the insured was not before the Court arguing that Allstate had breached that duty. *Id.*[5]

The same is true here. Nationwide has not brought a claim alleging that Erie breached its duty of good faith to the insured, nor could it, and the insured is not before the Court making that claim either. Moreover, the premise of an equitable contribution claim is a *shared* liability. Assuming Erie's duty of good faith would have compelled it to settle the Tort Suit, it is not the same obligation that Nationwide has. Each insurer has its own duty to their insured, informed by the distinct circumstances of its relationship to the insured. Each insurer has its own rights to

[5] Notably, *Allstate* was decided after *Horace Mann Ins. Co. v. GEICO*, 231 Va. 426 (1986), on which Nationwide relies for the principle that Virginia may allow a bad faith claim by one co-insurer against another. *See* Op. Br. at 32.

investigate, negotiate, and settle a claim "as it deems expedient." *Aetna Cas. & Surety Co. v. Price*, 206 Va. 749, 760-61 (1966) (describing the insurer's duty of good faith).

While the interests of the insurer and insured "are parallel and to some extent overlapping," those interests "may diverge" and an insurer has the right "to protect its own interest." *State Farm Mut. Auto. Ins. Co. v. Floyd*, 235 Va. 136, 143 (1988). From this contractual relationship "of confidence and trust" arises the insurer's "duty to deal fairly with the insured in the handling and disposition of any claim covered by the policy." *Price*, 206 Va. at 760-61. "[W]ith respect to settlement," an insurer must "exercise good faith in dealing with offers of compromise, having both its own and the insured's interests in mind." *Id.* at 761.

By its very nature, then, one insurer's duty of good faith is distinct from another's. So too, therefore, is any duty to settle that one insurer might have; Nationwide may have had reasons to settle that Erie did not. Nationwide cannot ask this Court to wade through those distinct relationships, in the absence of the insured, in a contribution case between co-insurers. *See Allstate*, 249 Va. at 13. Because Erie's duties towards Manzur cannot constitute an obligation shared by Nationwide

on which it can base its contribution claim, the circuit court properly found that Nationwide failed to allege a common obligation.

III. Erie neither waived nor is estopped from asserting its consent to settlement rights (AOE 1)

In its first assignment of error, Nationwide argues that Erie cannot invoke its consent-to-settlement rights because it waived those rights or, alternately, is estopped from asserting them. Because Nationwide's waiver argument relates only to Erie's consent-to-settlement rights, it does not implicate Erie's argument under Part II.D that Nationwide failed to allege a common obligation.

A. Erie has not waived its consent-to-settlement rights

1. Waiver is an intentional relinquishment of an insured's contract rights through conduct directed at the insured

"Waiver is an intentional relinquishment of a known right." *Creteau*, 202 Va. at 644. To waive a right, one must have "both knowledge of its existence and an intention to relinquish it." *Id.* "A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights." *Id.* "Voluntary choice is of the essence of waiver." *May v. Martin*, 205 Va. 397, 404 (1964).

An insurer may waive contractual rights either expressly or "impliedly by inconsistent conduct" that "lull[s] his covenantee into security." *Id.* An insurer's conduct inconsistent with an intent to enforce strict compliance with its contract conditions amounts to a waiver of those conditions. *See Seaboard Fire & Marine Ins. Co. v. Hurst*, 186 Va. 21, 25-26 (1947). Conduct amounting to waiver is that which "lulls the insured into a feeling of security and renders it against good faith for the insurer subsequently to raise the objection that" conditions were not met. *See id.* (interpreting waiver in the context of the insured's failure to provide a proof of loss to the insured as required by the contract).

The primary example of such conduct is the insurer's denial of coverage. "Broadly stated, the rule is that if the [insurer] denies liability for a loss . . . it waives the right to insist" on the contract conditions. *Id.*; *see Creteau*, 202 Va. at 644-45 (holding that the insurer had not waived its condition of coverage – that it be served with process of the suit – by attending but not participating in the trial of the case). For example, "if the insurance company denies liability for a loss and refuses to pay for that reason . . . it waives the right to insist on the filing of the proof of loss." *Seaboard Fire*, 186 Va. at 26; *see Andrews v. Cahoon*, 196 Va. 790,

802-03 (1955) (holding that because an insured's duty to promptly forward notice of a claim to the insured is to allow the insured to investigate and defend the claim, "[c]ompliance . . . is unnecessary and serves no good purpose where the insurer has disclaimed liability.").[6]

This is basic contract law. An obligor's indication to an obligee that it will not perform relieves the obligee from its contractual obligations. *See* Restmt. 2d of Contracts § 255 cmt. A (If "it appears that the occurrence of a condition of a duty would not be followed by performance of the duty, the non-occurrence of the condition is generally excused."). As a result, the obligor waives the right to subsequently invoke such condition to bar coverage. *See id.* at Illustration 1 (example of an insurance company's denial of coverage waiving the coverage condition requiring written notice of claim); *Seaboard Fire*, 186 Va. at 27 ("[P]roof of loss under a policy of insurance need not be filed where the insurer

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[6] Nationwide cites two federal cases that stand for the same proposition. *See Builders Mut. Ins. Co. v. Dragas Mngmt. Corp.*, 709 F. Supp. 2d 441, 449 (E.D. Va. 2010) (holding that sufficient evidence was alleged that insurer waived its right under a "voluntary payments" provision by denying coverage under the policies); *Credit Gen. Ins. Co. v. Abateco Servs., Inc.*, 2000 U.S. Dist. LEXIS 23006, *7-10 (E.D. Va. 2000) (holding that insurer waived its consent to payment provision as it related to the insured's remediation efforts because the insurer "issued a letter denying liability").

within the period in which the proof should be filed denies liability.") (internal quotation marks omitted).

2. Erie's decision not to participate in settlement was not a denial of coverage that precludes it from relying on its contract rights

Erie neither expressly nor impliedly indicated an intent to relinquish its consent-to-settlement rights. Contrary to Nationwide's argument, Erie never denied liability or coverage. Nationwide's Complaint contains no allegations suggesting otherwise. Rather, through the letters between counsel attached to the Complaint, Nationwide affirmatively pleaded that Erie provided a defense in the Tort Suit and Nationwide did not. JA 251 (counsel for the plaintiff in the Tort Suit stating that "Nationwide was so certain of its position [on coverage] that no counsel [was] retained to represent [their insured]"); JA 252 (counsel for Erie stating that his efforts to get Nationwide "engaged in this case [had] been ignored").

Nationwide, however, equates Erie's decision not to contribute to the settlement and its letters urging Nationwide to settle as denials of coverage because they amounted to a denial of coverage within the $3 million. Op. Br. at Pet. at 13, 17-18. But these actions did not indicate an

intent to relinquish its contract rights; they merely indicated Erie's intent to rely on the then-governing Coverage Ruling as it applied to the Klaiber Estate's $2.9 million demand. If the refusal to participate in settlement of a case is a waiver of consent-to-settlement rights, the insurers in *Allstate* and *Midwest* also waived their rights by rejecting demands for settlement from their co-insurers.

Erie did not state or otherwise indicate that it no longer provided coverage; Erie did not state or otherwise indicate that it intended to relinquish its consent-to-settlement rights; and Erie did not tell its insured anything, much less "lull [Manzur] into a feeling of security" regarding whether he had coverage or not. *See Seaboard Fire*, 186 Va. at 26. Moreover, Nationwide knew Erie did not waive its rights because Erie made its rejection clear. Nationwide also subsequently affixed to its signature page on the Settlement Order a lengthy statement purporting to preserve its right to seek payment from Erie.

Instead of being an intentional relinquishment of its consent-to-settlement rights, Erie's refusal to participate in the settlement was an exercise of them. Holding otherwise would vitiate Erie's contractual rights, placing them at the mercy of its co-insurer's decision to settle. The

circuit court did not err, therefore, in finding that Erie had not waived its content-to-settlement rights.

B. Erie is not estopped from invoking its consent-to-settlement rights

Nationwide also argues that Erie is estopped from asserting its consent-to-settlement rights because it changed its position on coverage and this "reversal of position prejudiced Nationwide." Op. Br. at 19. Estoppel by inconsistent positions prevents a party from asserting "an inconsistent position to the prejudice of another who has been led to rely on his initial position." *Maxey v. Doe*, 217 Va. 22, 25 (1976).

1. Erie's positions related to the settlement were not inconsistent

According to Nationwide, "Erie previously took the position that it did not provide coverage for the first $3 million in liability coverage to Manzur." Op. Br. at 19. Contradicting that position, Nationwide argues, "Erie now argues that *because it did* provide coverage within the $3 million layer, it is not responsible for its portion of the settlement because it did not consent to the settlement." *Id.* This is incoherent.

Erie has never taken inconsistent positions and never maintained that it did not provide coverage. Yet again, Nationwide conflates the

refusal to participate in its settlement with a denial of coverage. Throughout the Tort Suit, the coverage case, and this litigation, Erie has always maintained that its insurance coverage applied to the Tort Suit. That is why Erie defended Manzur in the Tort Suit. Erie's alleged inconsistent position is, at most, two different reasons for declining to participate in the settlement of the Tort Suit. Whether the Coverage Ruling was correct or not, Erie had the right to decline to participate in the settlement. After the ruling in *Nationwide I*, Erie had the right to invoke its consent-to-settlement rights. These are two *independent*, not inconsistent, positions.

Moreover, Erie's priority of coverage is a legal question. *Nationwide I*, 293 Va. at 336. To the extent Erie took inconsistent positions, therefore, they are positions of law, not fact, and are not subject to estoppel. *See Bentley Funding Group, L.L.C. v. SK&R Group, L.L.C.*, 269 Va. 315, 327 (2005) ("[T]he position sought to be estopped must be one of fact rather than law or legal theory.") (quoting *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996)).

2. Nationwide did not rely on Erie's alleged inconsistent position

Nationwide argues it was "prejudiced" by Erie's refusal to contribute to the settlement of the Tort Claim. Op. Br. at 19. Prejudice alone is insufficient; Nationwide must have relied on the inconsistent position to its detriment. *See Employers Com. Union Ins. Co. v. Great Am. Ins. Co.*, 214 Va. 410, 413 (1973) (holding that estoppel applies to one who "assume[s] an inconsistent to the prejudice of another who has been led to rely upon his first position").

Nationwide alleges Erie's "first position" was its denial of coverage for the first $3 million in liability. Op. Br. at 19. According to the allegations in the Complaint, however, Nationwide did not rely on Erie's refusal to settle. It agreed to settle the Tort Suit *despite*, not *because of*, Erie's refusal to participate. JA 4-5. Because Nationwide has no basis to claim reliance on Erie's alleged inconsistent positions, Erie is not estopped from asserting its consent-to-settlement rights.

IV. The circuit court correctly found that Nationwide could not seek contribution because its settlement was voluntary (AOE 3)

The circuit court ruled that Nationwide was not obligated to settle the Tort Suit but "made the unilateral and voluntary decision" to do so.

JA 339. On appeal, Nationwide argues that the volunteer doctrine should not apply to reach an inequitable result and that Nationwide was not a volunteer.

The so-called volunteer doctrine posits that when a party has "full knowledge of the facts" and voluntarily pays a demand based on a mistake of law, the party is not entitled to recover. *See Williams v. Consolvo*, 237 Va. 608, 613 (1989). Nationwide's claim for equitable contribution implicates a similar principle: independent of the need to allege that *Erie* had an obligation to pay, Nationwide was required to allege that *its own* settlement payment was obligatory. *See Midwest Mut. Ins. Co.*, 216 Va. at 929 ("[I]n order to enforce contribution the payment must have been made by one obligated to pay the whole, as between himself and the payee."); 18 Am. Jur. 2d Contribution § 14 ("A voluntary payment which the co-obligor is not under a legal obligation to make does not give a right of action against the other co-obligors for contribution."); *id.* at § 15 (same).

Whether viewed through the lens of the volunteer doctrine or the elements of a claim for equitable contribution, the circuit court correctly found that Nationwide was under no obligation to pay the settlement

demand. Despite arguing that it had no choice but to settle, Nationwide was the architect of its own predicament: according to the Complaint, while Erie defended the Tort Suit, Nationwide did not. After the Coverage Ruling, and with the intention of appealing the Coverage Ruling, Nationwide asked Erie to contribute to the $2.9 million settlement demanded by the plaintiff in the Tort Suit. Fully aware of Erie's refusal to contribute, and with the intent to appeal the Coverage Ruling, Nationwide nevertheless settled the case. At no point during the pendency of the Tort Suit, including following the Coverage Ruling, did Nationwide seek a stay of the Tort Suit to resolve the issue of coverage and minimize its potential risk. Nationwide now seeks to couch its strategic decision to settle as an obligatory one to force Erie to contribute to it.

For these reasons, holding that Nationwide's payment of the settlement was voluntary does not amount to a "wholly inequitable result." *See Criterion Ins. Co. v. Fulgham*, 219 Va. 294, 300 (1978) (holding that the volunteer doctrine should not apply in case of mistaken insurance payment). Nationwide's Complaint alleges a settlement payment made in the ordinary circumstances of an insurance claim

during the pendency of an appeal regarding the priority of coverage governing that claim. This is the type of risk that insurance companies take in negotiating and voluntarily settling claims. Nationwide's settlement payment may have been prudent, and it may have had good reason to conclude the settlement was in its and its insured's best interests. But that does not make it an obligation capable of being shared by a co-insurer. *See Midwest Mut.*, 216 Va. at 929-30.

CONCLUSION

Despite seeking reversal of the Coverage Ruling and knowing of Erie's refusal to contribute, Nationwide settled the Tort Suit. Whether that was a prudent decision or in compliance with its duties to its insured, it is not the type of obligatory payment that can form the basis of an equitable contribution claim. Moreover, Nationwide's decision to settle cannot undermine Erie's contractual rights to agree to any settlement before being obligated to pay under its policies. Having failed to plead these basic elements of its contribution and subrogation claims, Nationwide's Complaint was properly dismissed, and the circuit court should be affirmed.

Date: December 4, 2018

Respectfully submitted,

ERIE INSURANCE EXCHANGE

By: _____
Counsel

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CERTIFICATE OF SERVICE
AND COMPLIANCE WITH RULE 5:28

I hereby certify that on this 4th day of December, 2018, pursuant to Rule 5:26, three paper copies of the Brief of Appellee Erie Insurance Exchange, have been hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of the Brief of Appellee was served, via email, upon:

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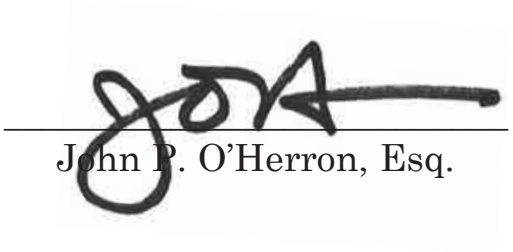

John P. O'Herron, Esq.

EXHIBIT A

EXHIBIT

A

VIRGINIA:

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

STEPHANIE KLAIBER, Personal Representative of the Estate of Martin C. Klaiber, Deceased Petitioner, v. MOISES RODRIGUEZ MANZUR, Respondent.	Case No. CL00085001-00

ORDER

CAME THIS DAY the petitioner, Stephanie Klaiber, Personal Representative of the Estate of Martin C. Klaiber, Deceased, and the respondent, Moises Rodriguez Manzur, by counsel, upon their joint motion under the provisions of §8.01-55 of the Code of Virginia for the approval of their proposed compromise settlement of a claim for death by wrongful act as provided for in §8.01-50, et. seq. of the Code of Virginia; and

IT APPEARING TO THE COURT after full inquiry, that the resolution, settlement and distribution is acceptable under the circumstances of this case; it is therefore

ADJUDGED and ORDERED that the settlement of this matter in the amount of $2,900,000.00 to be paid by Nationwide Mutual Fire Insurance Company and/or Nationwide Mutual Insurance Company on behalf of their insured, Moises Rodriguez Manzur, and distribution to the beneficiary and counsel for the plaintiff as hereinafter set forth is confirmed, ratified and approved as follows:

A. Kearney, Freeman, Fogarty & Joshi, PLLC for attorney's fees and costs ---------- $ 967,168.76

B. Stephanie Klaiber ---------- $ 1,302,831.24

C. Kearney, Freeman, Fogarty & Joshi, PLLC to be held in trust pending settlement of the workers' compensation lien ---------- $ 630,000.00

ADJUDGED and ORDERED that upon payment of the aforesaid sums, which shall be paid on or before July 17, 2015, Moises Rodriguez Manzur and Nationwide Mutual Fire Insurance Company and Nationwide Mutual Insurance Company are hereby discharged and released in full from any and all claims of whatever kind and nature and particularly for the alleged death by wrongful act of Martin C. Klaiber, deceased; and it is further

ADJUDGED and ORDERED that this case be dismissed with prejudice and removed from the Court's docket.

AND THIS ORDER IS FINAL

ENTERED this 10th day of July, 2015.

JUDGE

WE ASK FOR THIS:

KEARNEY, FREEMAN, FOGARTY & JOSHI, PLLC

By: _____

James K. Freeman, VSB# 43487
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(703) 691-8333 Fax (703) 691-8380
jfreeman@kffjlaw.com
Counsel for Petitioner

*The statements, reservations and qualifications on p4 of this Order, namely Nationwide Mutual Fire Insurance Company's signature page, represent Nationwide's counsel's objections only and are not part of the Court's decretal Order nor have the assent of other parties.

SEEN AND AGREED/ To pages 1-3; object to Nationwide's notations as stated and for the reasons placed on the record.

BANCROFT, MCGAVIN, HORVATH & JUDKINS, P.C.

By: _____

Steven W. Bancroft, Esq.
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Counsel for Respondent

SEEN AND AGREED:

ROBEY, TEUMER, DRASH, KIMBRELL & COUNTS

By: _____

Daniel L. Robey, Esq.
3975 Fair Ridge Drive, Suite 410 N
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(703) 591-7150 Fax (703) 591-7102
Counsel for Nationwide Mutual Fire Insurance Company

_____
Stephanie Klaiber, Personal Representative

Nationwide notes that this settlement agreement is entered into by Nationwide pursuant to the knowledge of, and agreement with Erie Insurance Exchange, Erie Indemnity Company, Erie Insurance Group and, or, Erie Insurance Company (collectively referred to as Erie), as a liability insurer for Moises Rodriguez Manzur, whereby Nationwide hereby reserves and preserves all rights that will allow for the settlement of this action, and the claims and causes of action that are the subject of this action, without prejudice to Nationwide and without waiving any rights under the policies of insurance written by Nationwide to or for Rodriguez Construction, or under applicable law, including, but not limited to Nationwide's right to pursue the recovery from Erie of money paid by Nationwide to fund this settlement in other legal proceedings. Nationwide asserts that the funding of this settlement does not constitute a waiver of its right to pursue and collect the reimbursement of all money paid, including costs and interest, from Erie.

Daniel L. Robey, Esq.
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Counsel for Nationwide Mutual Fire Insurance Company

A COPY-TESTE:
Gary M. Clemens, Clerk
By
Deputy Clerk