IN THE

Supreme Court of Virginia

RECORD NO. 180572

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

Appellants,

v.

ERIE INSURANCE EXCHANGE,

Appellee.

OPENING BRIEF OF APPELLANTS

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INTRODUCTION

These parties have previously been before this Court regarding this same insurance coverage dispute. *See Nationwide Mutual Fire Ins. Co. v. Erie Insurance Exchange*, 293 Va. 331 (2017) ("*Nationwide I*"). This Court held, reversing a judgment below, that an Erie Auto Policy provides primary coverage up to its coverage limit of $1 million; a Nationwide Auto Policy provides excess coverage, up to $1 million, after the Erie Auto Policy is exhausted; and Nationwide and Erie Umbrella Policies provide excess coverage, pro rata, for amounts above $2 million. *Id*. at 340, 342.

A correct application of this Court's decision in *Nationwide I* is that Erie is responsible for $1.75 million of a $2.9 million settlement made in the underlying tort action. Erie nevertheless refuses to contribute its share of the settlement that it repeatedly called upon Nationwide to accept, effectively rewarding itself for its own erroneous coverage position and forcing Nationwide to bring this action for reimbursement of Erie's proper share. On demurrer in the present case, the trial court accepted Erie's arguments that it was not responsible for any portion of the settlement, compelling Nationwide to appeal again to this Court so that its previous decision may be given its appropriate effect. The judgment below is erroneous and should be reversed.

ASSIGNMENTS OF ERROR

1. The trial court erred by ruling that Nationwide's Complaint failed to state a claim for equitable contribution on the ground that Erie's consent-to-settlement clause defeated Nationwide's claim as a matter of law, because **(a)** Erie waived its consent-to-settlement clause and **(b)** Erie is estopped from relying on its consent-to-settlement clause. **Preserved:** Mem. Opp. Dem. 1-10; Joint Appendix ("JA") 295–307 (Hr'g Tr., Nov. 7, 2017, at 20-32); JA 344 (Order, Dec. 7, 2017, at 12 ("[t]he Court notes the exceptions of the parties to this order …")); and JA 350, 351 (Final Order entered on March 9, 2018).

2. The trial court erred by ruling that Nationwide's Complaint failed to state a claim for equitable contribution on the ground that Nationwide's Complaint did not establish a "common obligation." **Preserved:** Mem. Opp. Dem. 1-15; JA 295-307 (Hr'g Tr., Nov. 7, 2017, at 20-32); JA 344 (Order, Dec. 7, 2017, at 12 ("[t]he Court notes the exceptions of the parties to this order …")); and JA 350, 351(Final Order entered on March 9, 2018).

3. The trial court erred to the extent that it ruled that Nationwide acted as a "volunteer," because **(a)** the volunteer doctrine does not apply under these circumstances and **(b)** Nationwide did not act as a "volunteer." **Preserved:** Mem. Opp. Dem. 1-4, 11-15; JA 295-307 (Hr'g Tr., Nov. 7, 2017, at 20-32); JA 344 (Order, Dec. 7, 2017, at 12 ("[t]he Court notes the exceptions of the parties to this order …")); and JA 350, 351 (Final Order entered on March 9, 2018).

4. The trial court erred by ruling that Nationwide's Complaint failed to state a claim for equitable subrogation for the same reasons it ruled that Nationwide did not state a claim for equitable contribution. **Preserved:** Mem. Opp. Dem. 1-15; JA 295-307 (Hr'g Tr., Nov. 7, 2017, at 20-32); JA 344 (Order, Dec. 7, 2017, at 12 ("[t]he Court notes the exceptions of the parties to this order …")); and JA 350, 351 (Final Order entered on March 9, 2018).

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Nationwide Mutual Fire Insurance Company and Nationwide Mutual Insurance Company (collectively "Nationwide") filed this lawsuit against Erie Insurance Exchange ("Erie") seeking reimbursement for Erie's share of a settlement of a tort action filed against the mutual insured of Nationwide and Erie. Concurrent with the tort action, Nationwide and Erie were engaged in a declaratory judgment action regarding the priorities of liability coverage (the "Coverage Action"), in which Erie took the erroneous position that its liability coverage obligations were limited to a settlement or judgment in excess of $3 million. Erie prevailed before the trial court in the Coverage Action. Specifically, that trial court held that Nationwide provided the first $3 million in liability coverage and that Erie's coverage obligations were not triggered until the first $3 million was exhausted by Nationwide.

Subsequent to that ruling, with trial in the tort suit scheduled to begin less than two weeks later, Nationwide received a non-negotiable, time-limited, $2.9 million settlement demand from the tort claimant — an amount that Erie claimed at the time (as it had throughout the pendency of the underlying actions) was exclusively within Nationwide's layer of coverage. In light of the trial court's determination in the Coverage Action, as well as

Erie's repeated urging that Nationwide settle that suit for $3 million or less, Nationwide agreed to settle the tort suit for $2.9 million.

Following the settlement and Nationwide's timely appeal, this Court reviewed the holding in the Coverage Action and reversed the trial court. Specifically, this Court held that Erie (and the trial court) were **wrong** — in fact, Erie was contractually obligated to provide **primary** liability coverage for the first $1 million and pro-rata beyond the $2 million layer. *Nationwide I*, 293 Va. at 340-43. Based on that decision, Erie's share of the $2.9 million settlement is $1.75 million.

Erie nevertheless persisted in its refusal to contribute to the settlement. Nationwide therefore was forced to file the instant action seeking reimbursement of Erie's $1.75 million share. Nationwide's Complaint contains four counts: equitable contribution (Count I), equitable indemnification (Count II), equitable subrogation (Count III), and unjust enrichment (Count IV). Erie demurred to all four counts. Following oral argument, on December 7, 2017, the trial court entered a Memorandum Opinion and Order ("Opinion") sustaining Erie's Demurrer in its entirety and dismissing the instant action with prejudice and without leave to amend. JA 333-344.

On December 28, 2017, the trial court entered an Order suspending the December 7, 2017, Order. JA 349. The Final Order was entered on March 9, 2018. JA 350, 351. Nationwide filed a timely Notice of Appeal on March 1, 2018, which is deemed filed on the day of entry of the Final Order—here, March 9, 2018. *See* Rule 5:9(a).

FACTS[1]

I. The Erie and Nationwide policies.

Erie issued the following liability insurance policies to its named insured, East Coast Insulators, Inc. ("East Coast"):

a. Commercial Auto Policy, number Q09 0740033, with a liability coverage limit of $1 million per accident;

b. Business Catastrophe Policy, number Q33 0770183, with a liability coverage limit of $5 million per occurrence.

Compl. ¶ 4, JA 1,2; *see Nationwide I*, 293 Va. at 333-35.

Nationwide issued the following policies to its named insured, Rodriguez Construction ("Rodriguez"):

a. Commercial General Liability Policy, number ACP GLGO 2452801182, issued by Nationwide Mutual Fire Insurance

[1] When reviewing a trial court's ruling on a demurrer, the Court considers the facts as set forth in the complaint, along with those reasonably and fairly implied from them, in the light most favorable to the plaintiff. *See, e.g., Mark Five Const. ex rel. Am. Econ. Ins. Co. v. Castle Contractors*, 274 Va. 283, 285 (2007).

Company, with a per occurrence liability coverage limit of $1 million;

b. Business Auto Policy, number ACP BA 2452801182, issued by Nationwide Mutual Insurance Company, with a liability coverage limit of $1 million per accident; and

c. Commercial Umbrella Liability Policy, number ACP CAF 2452801182, issued by Nationwide Mutual Insurance Company, with a liability coverage limit of $1 million per occurrence.

Compl. ¶ 5, JA 2; *see Nationwide I*, 293 Va. at 333-35.

II. The East Coast-Rodriguez subcontract.

East Coast and Rodriguez entered into a Subcontract Agreement on March 30, 2011, whereby Rodriguez agreed to perform construction work on East Coast projects. Compl. ¶ 6, JA 3.

III. The automobile accident and Tort Suit.

On October 4, 2013, Moises Rodriguez Manzur ("Manzur"), an employee of Rodriguez, was operating a truck owned by East Coast, with East Coast's permission, when he was involved in a multi-vehicle accident that resulted in the death of another driver, Martin Klaiber ("Klaiber"). Compl. ¶ 7, JA 3. The truck operated by Rodriguez and owned by East Coast was specifically insured under the Erie Auto Policy. Compl. ¶ 8, JA 3. The personal representative of Klaiber's Estate filed a wrongful death

action against Manzur (the "Tort Suit") in the Loudoun County Circuit Court on December 10, 2013.Compl. ¶ 9, JA 3.

IV. The Coverage Action and settlement negotiations.

On August 11, 2014, Erie and Manzur filed the Coverage Action against Nationwide in the Prince William County Circuit Court. Nationwide filed a Counterclaim/Cross-Claim. The Coverage Action concerned priorities of coverage among the Erie and Nationwide policies for the wrongful death claim against Manzur in the Tort Suit. Compl. ¶ 10, JA 3.

A trial was conducted before Judge Carroll A. Weimer, Jr., based upon stipulated facts. Compl. ¶ 12, JA 4. On June 12, 2015, Judge Weimer ruled from the bench in favor of Erie, holding that the Erie Policies were excess over all three Nationwide Policies. Thus, Judge Weimer concluded that Nationwide provided the first $3 million in liability coverage for Manzur. Compl. ¶ 13, JA 4.

Four days later, counsel for the Klaiber Estate sent a non-negotiable, time-limit demand to Nationwide, demanding $2.9 million to settle the Tort Suit. Compl. ¶ 14 and Ex. F, JA 4, 250, 251.

On June 17, 2015, counsel for Erie and Manzur wrote to Nationwide's counsel stating that Nationwide should "make every effort to see if the [Tort Action] could be resolved short of trial." Compl. ¶ 15 and Ex. G, JA 4, 252.

On June 26, 2015, Judge Weimer denied Nationwide's Motion to Reconsider and entered an order memorializing his rulings of June 12, 2015. Compl. ¶ 16, JA 4.

On June 29, 2015, counsel for Erie and Manzur again wrote to counsel for Nationwide, urging Nationwide to settle the Tort Action. Counsel for Erie and Manzur 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." Compl. ¶ 17 and Ex. H, JA 5, 253, 254. At the time of the above-referenced settlement demands, the Tort Suit was scheduled for trial on July 13, 2015. Compl. ¶ 18, JA 5.

Faced with Judge Weimer's rulings, the time-limited settlement demand, and Erie's repeated urgings, Nationwide agreed to the Klaiber Estate's demand. The settlement provided for a $2.9 million payment by Nationwide, which was made on July 10, 2015, at a court approval hearing in the Tort Suit. Erie did not contribute to the settlement. Compl. ¶ 19, JA 5.

V. *Nationwide I*.

Nationwide appealed from the trial court's ruling in the Coverage Action and this Court reversed. *Nationwide I, supra.* Specifically, this Court set forth the priority of liability coverage for Manzur as follows:

> a. The Erie Auto Policy ($1 million), primary;
>
> b. The Nationwide Auto Policy ($1 million), excess; and
>
> c. The Erie Excess Policy ($5 million) and Nationwide Umbrella Policy ($1 million) on a co-excess, *pro rata* basis.

Compl. ¶ 23, JA 5, 6; *Nationwide I*, 293 Va. at 340-43.

The proper priority and allocation of coverage for the $2.9 million tort settlement therefore is as follows:

> a. Erie is responsible for the first $1 million, under the Erie Auto Policy;
>
> b. Nationwide is responsible for the next $1 million, under the Nationwide Auto Policy;
>
> c. The remaining $900,000 is split between the Erie Excess Policy and Nationwide Umbrella Policy on a *pro rata* basis of 5-to-1. Erie is responsible for $750,000 and Nationwide is responsible for $150,000 of the remaining $900,000.

Compl. ¶ 25, JA 6. Erie is thus responsible for $1.75 million of the $2.9 million settlement, plus interest from the date of Nationwide's payment. Compl. ¶ 26, JA 6.

Following this Court's ruling, Nationwide demanded reimbursement from Erie reflecting its share of the settlement. Erie refused. Compl. ¶ 27, JA 6. This action followed.

SUMMARY OF ARGUMENT

Nationwide seeks to do nothing more than to hold Erie accountable for its proportional share of a settlement to which Erie wrongfully refused to contribute based on an incorrect coverage position. Erie argued, and the trial court erroneously agreed, that it was not responsible for any part of the settlement because Erie did not consent to the settlement and because Nationwide acted as a "volunteer." According to Erie, this meant that Nationwide could not establish the "common obligation" element of its equitable contribution and equitable subrogation claims, despite the fact that Nationwide specifically and repeatedly alleged in the Complaint that such a common obligation exists. For a number of reasons, the trial court erred in adopting Erie's arguments.

First, Erie waived its right to rely on the consent-to-settlement clauses of its policies because it erroneously asserted that it did not have **any** primary coverage obligations within the $3 million threshold. The fact that Erie's coverage position was incorrect is now beyond dispute in light of this Court's holding in *Nationwide I*. Because Virginia law dictates that an

insurer that wrongfully fails to meet its coverage obligations cannot rely on consent-to-settlement provisions, the trial court erred in sustaining Erie's demurrer on that ground.

Second, Erie is estopped from relying on its consent-to-settlement clauses because it has previously taken the inconsistent position that it provided no coverage whatever for the amount of the settlement demand. Erie cannot first take the position that any settlement for less than $3 million was **Nationwide's unilateral** responsibility and then defeat Nationwide's claim on the basis that the settlement should not have been made unilaterally.

The trial court also erred by adopting Erie's argument that Nationwide failed to state a claim because it acted as a "volunteer." The volunteer doctrine can only be invoked if its application will lead to an **equitable** outcome. Here, application of that doctrine creates a markedly **inequitable** result. Specifically, Erie, without contributing a cent to the settlement, is conferred the benefits of that settlement — *i.e.,* the release of its insured to whom it owed primary coverage duties — as a direct result of Erie's **incorrect** assertion that it did not provide primary coverage obligations. Conversely, Nationwide is punished for acting in good faith with respect to

its insured, even in the face of Erie's wrongful coverage position. In any event, the facts alleged in the Complaint demonstrate that Nationwide did not act as a "volunteer" when it reached a settlement agreement with the tort claimant.

Finally, because the trial court sustained Erie's demurrer on Nationwide's equitable subrogation claim on the same erroneous grounds that it sustained the Demurrer on Nationwide's equitable contribution claim, the trial court's dismissal with prejudice of the equitable subrogation claim was likewise in error.

STANDARD OF REVIEW

This appeal concerns the trial court's decision to sustain Erie's Demurrer. Accordingly, the issues in each assignment of error present questions of law, which the Court should review *de novo*. *See, e.g., Desetti v. Chester*, 290 Va. 50, 56 (2015).

ARGUMENT

I. The trial court erred by ruling that Nationwide's Complaint failed to state a claim for equitable contribution on the ground that Erie's consent-to-settlement clause defeated Nationwide's claim as a matter of law. (Assignment of Error 1)

Erie's primary argument on Demurrer, which was adopted by the trial court, was that it cannot be compelled to contribute its share of the

settlement because its policies contain consent-to-settlement clauses[2] and it did not consent to the settlement. The trial court erred in accepting this argument because Erie cannot rely on those provisions, as a matter of law.

A. The trial court erred by ruling that Erie did not waive its right to rely on the consent-to-settlement clause.

During the pendency of the Tort Suit and Coverage Action, Erie resolutely maintained that it was not responsible for any part of the first $3 million in liability coverage. *See* Compl. ¶ 10, JA 3. It continued to maintain that position up to, through, and beyond the July 10, 2015, settlement of the Tort Suit. *See* Compl. ¶¶ 10-23, JA 3, 4, 5. By taking the position with its insured (and Nationwide) that it did not provide any liability coverage for the first $3 million, Erie waived its right to require its consent for a settlement for less than that amount. Erie also waived its consent-to-settlement clause when it insisted that Nationwide attempt to settle the Tort Suit for less than $3 million.

Federal courts have held that under Virginia law, an insurer that declines to provide coverage has waived its right to rely on consent-to-

[2] When referring to the "consent-to-settlement" clause/provisions, Nationwide is also referring to the "no action" clause cited by Erie. It also refers to the "consent-to-settlement" clauses in **both** applicable Erie policies.

settlement provisions. *Builders Mut. Ins. Co. v. Dragas Mgmt. Corp.*, 709 F. Supp. 2d 441, 449 (E.D. Va. 2010) (denying motion for summary judgment on ground that plaintiff pled facts to support a conclusion that the insurer waived the voluntary payment/consent-to-settlement clauses); *see also Credit Gen. Ins. Co. v. Abateco Servs., Inc.,* No. 3:99CV516, 2000 WL 35792722, at *3 (E.D. Va. Feb. 25, 2000) ("Upon finishing their investigation, Credit General issued a letter denying liability, thereby effectively waiving the contract's consent requirement."), *aff'd in rel. part,* 11 Fed.Appx. 47, 50 (4th Cir. 2001) (affirming waiver by insurer of the policy's consent requirement "on the reasoning of the district court," but vacating summary judgment on other grounds).[3] The trial court held to the contrary in this action. Opinion at 7, JA 339.

By taking the position that it did not provide coverage for any settlement or judgment less than $3 million, Erie waived its consent-to-settlement clause *with respect to any settlement of less than $3 million.* Erie did not issue a blanket denial; but it denied that it provided coverage for the first $3 million in liability coverage and maintained that it only

[3] Erie suggested to the trial court that, based on *Osborne v. National Union Fire Ins. Co.*, 251 Va. 53, 55 (1996), consent-to-settlement clauses are not waived by a failure to provide coverage. *Osborne* does not support that proposition. The *Osborne* Court did not address waiver.

provided coverage *in excess* of $3 million, while urging Nationwide to accept a settlement demand for less than that amount. In other words, Erie advocated the settlement while denying that it provided any coverage for the settlement. For purposes of waiver, Erie's denial of coverage obligations for the settlement at the time of the settlement is dispositive. The fact that Erie apparently would have been willing to provide excess coverage above $3 million is of no moment because the settlement, which it urged Nationwide to enter, was for less than $3 million.

The trial court's error is underscored by its adoption of Erie's mischaracterization of Nationwide's waiver argument. Erie argued that Nationwide's position was that Erie waived its consent-to-settlement clause **by refusing to consent** to the settlement. That was a straw man. The trial court nevertheless adopted Erie's mischaracterization, stating that "[r]efusal to consent to a settlement by a co-insurer is not the same as a denial of coverage overall …." Opinion at 8, JA 340. That was not and is not Nationwide's position. Rather, Erie waived the clause **by asserting that it did not provide any indemnification coverage** for any settlement of the Tort Suit for less than $3 million.

The fact that Erie claims that it did not consent is neither here nor there, as it cannot require its consent for a settlement it claimed not to

cover. The suggestion is utterly illogical. Indeed, it is difficult to imagine the form such "consent" could take under the circumstances, as Erie consistently asserted that it had no role in any settlement under $3 million. *See* Compl. ¶ 17 and Ex. H, JA 5, 253, 254. (letter from counsel for Erie stating, "[b]ased on Judge Weimer's rulings and Order, Nationwide Insurance Company pays the first $3 million towards any settlement or judgment that might be entered in this case against your insured, Moises Manzur Rodriguez…. Please let me know the status of settlement negotiations between Nationwide and the Plaintiff …."). How (and why) would one ask permission from a party that denied any coverage responsibility?

Erie also waived its consent-to-settlement clause for any settlement under $3 million by insisting that Nationwide attempt to settle the Tort Suit unilaterally for less than $3 million. On June 17, 2015, as discussed above, counsel for Erie wrote to Nationwide's counsel stating that Nationwide should "make every effort to see if the [Tort Action] could be resolved short of trial." Compl. ¶ 17 and Ex. G, JA 5, 252. Counsel for Erie followed up the June 17, 2015, letter less than two weeks later. That letter stated in its entirety:

> Please be advised that Erie Insurance Exchange rejects the request of Nationwide Insurance Company to split the $2.9 million demand for settlement made by Plaintiff. Based on Judge Weimer's rulings and Order, Nationwide Insurance Company pays the first $3 million towards any settlement or judgment that might be entered in this case against your insured, Moises Manzur Rodriguez. In addition, all defense costs, including counsel fees that have been generated since the demand was made on Nationwide to defend and indemnify its insured, have also been awarded by Judge Weimer.
>
> Please let me know the status of settlement negotiations between Nationwide and the Plaintiff, since continued defense costs are being incurred daily.
>
> Your insured, Mosies [sic] Manzur Rodriguez, has made it clear he wants this matter settled, if at all possible. Since Nationwide has made no effort to get involved in this case, it is important that you realize the request being made by your insured to get this matter resolved.
>
> If you have any questions concerning or relating to this case, please direct that to me with a copy to Stephen A. Horvath and Dawn E. Boyce.
>
> As you know, this case goes to trial in Loudoun Circuit Court on Monday, July 13 and is scheduled for four (4) days.

Compl. Ex. H, JA 253, 254.

By repeatedly asserting that it was Nationwide's unilateral obligation to attempt to settle the case within $3 million, Erie waived its consent-to-settlement clause. More than "consenting" to Nationwide attempting to resolve the Tort Suit, Erie explicitly averred that it was Nationwide's sole

duty to do so, if such settlement could be reached for less than $3 million, and referred specifically to the claimant's $2.9 million demand. Having so directed Nationwide, Erie waived its right to later rely on the consent-to-settlement provisions of its policies.

Because Erie waived its consent-to-settlement clause, the trial court erred in finding that Erie could rely upon it in the instant action so as to defeat Nationwide's equitable contribution claim as a matter of law.

B. The trial court erred by failing to hold that Erie was estopped from relying on the consent-to-settlement clause.

The trial court acknowledged that Nationwide argued estoppel as well as waiver, but it did not address the merits of that argument and erred in failing to rule that Erie was estopped from relying on the consent-to-settlement clause.

Estoppel is distinct from waiver. *Employers Commercial Union Ins. Co. of Am. v. Great Am. Ins. Co.*, 214 Va. 410, 412–13 (1973). "Estoppel, as a doctrine in equity, is the consequence worked by operation of law which enjoins one whose action or inaction has induced reliance by another from benefiting from a change in his position at the expense of the other." *Id.* at 412. "Under the doctrine of 'estoppel by inconsistent positions' a party is estopped to assert 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). Here, the doctrine of estoppel by inconsistent positions directly applies.

It was alleged (and beyond dispute) that Erie previously took the position that it did not provide coverage for the first $3 million in liability coverage to Manzur, the parties' mutual insured. It took this position in pleadings, letters, and open court. Erie went further in repeatedly urging Nationwide to unilaterally settle the case for less than $3 million. Based on Erie's position, the trial court's ruling in the Coverage Action, and Erie's repeated communications urging unilateral settlement, Nationwide settled the Tort Suit for the $2.9 million demanded by the tort plaintiff. Subsequent to this Court's ruling in *Nationwide I*, however, Erie was compelled to recognize (for the first time) that its policies did in fact provide liability coverage within the $3 million layer. Contradicting its previous position, 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.

Erie's reversal of position prejudiced Nationwide, as Erie refuses to pay its share of the settlement consistent with the priorities of coverage set forth by this Court in *Nationwide I*. In the previous action and its

communications, Erie took the erroneous position that Nationwide was unilaterally responsible for any settlement under $3 million. On Demurrer in this action, Erie takes the **opposite** position — that its consent was required for a settlement as a condition of its liability. This new position is **necessarily** predicated on the now-adjudicated fact that Erie shares coverage responsibilities. But because Nationwide acted prudently, in the best interests of the parties' mutual insured and consistent with Erie's adamant rejection of any shared responsibility, Erie now claims — and the trial court agreed — that it is relieved of its established coverage obligations. The doctrine of estoppel will not allow for such a result, and the trial court erred in failing to hold that Erie was estopped from relying on the consent-to-settlement provision of its policies.

II. The trial court erred by ruling that the Complaint failed to state a claim for equitable contribution on the ground that the Complaint did not establish a "common obligation." (Assignment of Error 2)

The trial court erred by concluding "Nationwide did not establish that it and Erie had a common obligation to provide coverage to Manzur." Opinion at 7, JA 339. To the contrary, Nationwide's Complaint **expressly alleged** just such a common obligation, based on this Court's ruling in *Nationwide I*. Paragraph 23 of the Complaint specifically alleges that this

Court has conclusively determined that both Erie and Nationwide had coverage obligations to Manzur within the $3 million layer of coverage. *See* Compl. ¶ 23 and Ex. I, JA 5, 255-265. Erie can no longer contest that it and Nationwide had common coverage obligations to Manzur with respect to the first $3 million in liability coverage.

Because Erie was compelled to accept this Court's ruling, it attempted on demurrer to circumvent its obvious common obligation by relying on the consent-to-settlement provision. As discussed above, because Erie has waived and is estopped from relying on that provision, it cannot cite that provision as the basis for a lack of common obligation.

Moreover, all of the cases relied upon by Erie are distinguishable and otherwise inapplicable.[4] Erie relied on *Midwest Mut. Ins. Co. v. Aetna Cas. & Sur. Co.*, 216 Va. 926 (1976), for the premise that Nationwide and Erie lack a "common obligation," while failing to recognize that the Court's analysis was unique to uninsured motorist coverage and the uninsured motorist statute — Code § 38.1-381 (now § 38.2-2206). *Midwest Mutual* did not "involve [a] materially identical set of facts," as Erie stated (Mem.

[4] Although the trial court recounted the authorities relied upon by both parties on Demurrer, it did not specify what, if any, authorities it relied upon in ruling that Erie's consent-to-settlement clause defeated Nationwide's equitable contribution claim as a matter of law.

Supp. Dem. at 8), and the *Midwest Mutual* Court did not address the same legal issue. In *Midwest Mutual*, the non-contributing insurer argued that under Virginia's uninsured motorist statute, it had no legal obligations until judgment was entered against the uninsured motorist. *Id.* at 928. The Court emphasized at the outset that "[t]his problem must be solved within the strict confines of our uninsured motorist act …." *Id.*

The question before the *Midwest Mutual* Court was what event triggers a "legal entitlement to recovery" as the term was used by the General Assembly in the uninsured motorist statute. *Id.* at 929. The Court ultimately found that under the statute, an uninsured motorist insurer was not obligated to provide coverage until a judgment was entered against the uninsured motorist. *Id.*

Virginia's uninsured motorist statute, to which the *Midwest Mutual* Court "strict[ly] confin[ed]" its analysis, does not apply to the liability coverage claims at issue in this matter. An uninsured motorist insurer has no coverage obligations whatever until judgment is entered against the uninsured motorist. A liability insurer's duties, however, are broader and arise earlier.

Erie was incorrect in suggesting that it had no obligations to its insured until judgment or it consented to a settlement (and thus lacked a

mutual obligation with Nationwide). To begin with, a primary liability insurer (here, Erie) has the duty to defend its insured once a lawsuit is filed against its insured that contains allegations for which there is liability coverage (as it was in this case). *AES Corp. v. Steadfast Ins. Co.*, 283 Va. 609, 617 (2012). More to the point, however, an insurer in Virginia has a duty even prior to a judgment to negotiate in good faith to protect its insured from an excess judgment. *See Reisen v. Aetna Life & Cas. Co.*, 225 Va. 327, 335 (1983)*; Aetna Casualty & Surety Co. v. Price*, 206 Va. 749, 761 (1966). In the uninsured motorist context, there is no risk of an excess judgment against the insured because the insured is the plaintiff, not the defendant. Accordingly, the obligations of an uninsured motorist insurer and a liability insurer drastically differ.

Given the significant duties that a liability insurer owes its insured prior to judgment, Erie's reliance on Virginia uninsured motorist law was misplaced. The non-contributing insurer in *Midwest Mutual* shared no common obligation with the other insurer, because it had no obligations at all until judgment. Moreover, the insurer in *Midwest Mutual* **never claimed not to provide coverage** for the amount of the settlement, as Erie did here. Accordingly, waiver and estoppel were not at issue. In the end, pursuant to this Court's prior ruling, Erie had an obligation to exercise good

faith and attempt to protect its insured from an excess judgment, just as Nationwide did here. The fact that Nationwide was the insurer that ultimately honored that requirement makes the obligation no less "common."

Erie also relied on *Allstate Ins. Co. v. United Servs. Auto. Ass'n*, 249 Va. 9 (1995), which is readily distinguishable on its facts. That case simply applies a consent-to-settlement clause in favor of an insurer that never denied its coverage obligation. In *Allstate*, one liability insurer, USAA, sought contribution from a second liability insurer, Allstate. *Id.* at 10. USAA and Allstate both insured the same tort defendant. *Id.* at 11. It was undisputed that USAA provided the first $300,000 in liability coverage and that USAA and Allstate each provided $1 million in excess liability coverage, the practical effect being that USAA provided the first $300,000 in coverage, with the two insurers splitting any amount above $300,000, up to their respective limits.

Unlike Erie, Allstate never claimed that it did not provide coverage on a pro-rata basis after the primary USAA policy's $300,000 limit was exhausted. Nor did Allstate ever challenge the priorities of coverage. USAA nevertheless unilaterally settled the claim for $590,000 — meaning a payment of $290,000 into Allstate's acknowledged coverage

layer. *Id.* USAA then sought reimbursement from Allstate for one-half of the $290,000 based on the pro-rata divide. *Id.* Allstate successfully argued that because it did not consent to the settlement, it had no obligation to reimburse USAA. *Id.* at 12.

The reason Allstate prevailed and Erie should not is straightforward — Allstate did not challenge, let alone erroneously refuse to honor, its coverage obligations.[5] Allstate never claimed that it was not responsible for amounts in excess of $300,000, nor did it dispute the priorities of coverage. Likewise, Allstate never called on USAA to settle the case. Accordingly, when USAA crossed into Allstate's layer of coverage, it needed Allstate's consent, as Allstate acknowledged that it provided such coverage and never called upon USAA to pay it.

By contrast, Erie's position from the outset was that it had no coverage obligations under the $3 million threshold and adhered steadfastly to that erroneous position until this Court held that it was wrong. When Nationwide settled the underlying tort case for $2.9 million, it did so

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[5] The fact that Erie erroneously failed to honor its coverage obligations is beyond dispute. Erie refused to participate in any settlement of less than $3 million on the ground that it did not provide coverage for the first $3 million. Compl. Exs. G, H, JA 252, 253, 254. This Court has already held that Erie was incorrect. *See Nationwide I, supra*; Compl. ¶ 23 and Ex. I, JA 255-265.

in the face of Erie's adamant insistence that it provided no coverage for that layer. *See* Compl. ¶ 17, Ex. H, JA 5, 253, 254. For the reasons discussed above, Erie cannot disavow its coverage obligations for settlements under $3 million and then turn around and claim that its consent was required for a settlement of less than $3 million.[6]

III. The trial court erred to the extent that it ruled that Nationwide acted as a "volunteer." (Assignment of Error 3)

Although the trial court recounted the parties' arguments with respect to application of the volunteer doctrine, it is not clear whether it based its ruling on the volunteer doctrine. To the extent that it did, the trial court erred both because Nationwide did not act as a "volunteer" and because the volunteer doctrine is otherwise inapplicable.

A. Virginia does not recognize the volunteer doctrine unless it results in an equitable outcome.

The volunteer doctrine cannot be applied if it would result in an inequitable outcome. *See Criterion Ins. Co. v. Fulgham*, 219 Va. 294, 299 (1978); *Suffolk Lodging Partners, LLC v. Eastguard Ins. Co.,* No. 2:12CV546, 2014 WL 12597160, at *3, *4. (E.D. Va. Jan. 23, 2014).

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[6] As discussed above, irrespective of the holding in *Allstate*, under the facts of the present case, Erie has waived and/or is estopped from relying upon the policy conditions at issue in *Allstate*, rendering the case inapposite in any event.

Application of the volunteer doctrine in this case would grant Erie a windfall for taking an erroneous coverage position. Notwithstanding this Court's determination that Erie was obligated to pay the first $1 million in coverage and pro-rata excess coverage on a 5-1 basis, Erie continued to maintain on demurrer that it should not have to pay any amount towards the $2.9 million settlement that resulted in the release of Erie's and Nationwide's mutual insured.

Remarkably, Erie went as far as to argue on demurrer that "Nationwide's decision to unilaterally settle" the lawsuit was "made due to a mistake of law." Mem. Supp. Dem. at 10. The "mistake of law" to which Erie referred, of course, was its own erroneous coverage position, which was incorrectly adopted by the trial court in the Coverage Action. The result that Erie now seeks would be grossly inequitable, as it would both reward an insurer that improperly denied that it provided primary liability coverage to its insured (Erie) and punish an insurer that nonetheless stepped up to protect the mutual insured against a potential excess judgment (Nationwide). Virginia law will not permit the volunteer doctrine to lead to such a result.

As a federal district court for Virginia's Eastern District recently stated under very similar circumstances:

> [T]he Supreme Court of Virginia has refused to "blindly apply the [voluntary payment] doctrine … when it means reaching a wholly inequitable result." Instead, "the reasons underlying the rule should be examined, and when the reasons do not support its application, the rule will not be employed.
>
> * * *
>
> The Supreme Court of Virginia has noted that where the voluntary payment rule has been applied, it was "employed to obtain just results." As noted below, courts should "not blindly apply the same doctrine ... when it means reaching a wholly inequitable result."
>
> Because it would be inequitable to allow an insurer that wrongly refused to defend a claim covered by its policy to avoid having to pay the costs of that litigation while forcing that payment upon another insurer who gave its insured the benefit of the doubt, the Court will not "blindly apply" the equitable doctrine of voluntary payment to bar recovery in this case.

Suffolk Lodging, supra, 2014 WL 12597160, at *3, *4 (quoting *Criterion Ins. Co. v. Fulgham*, 219 Va. 294, 299 (1978) (internal citations omitted); *see also Dollar Tree Stores, Inc. v. Crum & Forster Specialty Ins. Co.*, 91 Va. Cir. 433 (2015) ("the Supreme Court has approved actions in which one insurer voluntarily settled a claim against its insured and subsequently sought reimbursement from another insurer for the amount it paid…. The definition of 'volunteer' that Crum & Forster urges this Court to adopt would be inconsistent with this relevant body of precedent.") (citing *United States*

Auto. Ass'n v. Travelers Indem. Co., 240 Va. 214, 217-19 (1990); *Cont'l Ins. Co. v. State Farm Fire & Cas. Co.*, 238 Va. 209, 211-12 (1989); *Aetna Cas. & Sur. Co. v. Nat'l Union Fire Ins. Co.*, 233 Va. 49, 52-53 (1987); and *Hardware Mut. Cas. Co. v. Gen. Accident Fire & Life Assurance Corp.*, 212 Va. 780, 781-84 (1972)).

If and to the extent that the trial court based its ruling on the volunteer doctrine, it did so in error, because application of that doctrine would result in Erie escaping its coverage obligations by maintaining a coverage position that this Court has rejected. Further, it would penalize Nationwide for taking action which Erie refused to take in order to protect their mutual insured against an excess judgment. Such a result would be manifestly inequitable, precluding the application of the volunteer doctrine in this case.

B. Even if the volunteer doctrine could be applied, Nationwide did not act as a volunteer.

Erie's argument that Nationwide acted as a volunteer is inconsistent with the facts of this case, as pleaded in the Complaint. From the outset, Erie took the position, later rejected by this Court, that it only provided excess liability coverage above $3 million. Compl. ¶ 10, JA 3. Nationwide contested Erie's position in the Coverage Action. The trial court in that

action ruled in favor of Erie, holding that Nationwide provided the first $3 million in coverage. Comp. ¶ 13, JA 4.

Days after that ruling, the tort plaintiff's counsel sent a non-negotiable, time sensitive letter to Nationwide, demanding that it settle the case for $2.9 million. Compl. ¶ 14, Ex. F, JA 4, 250, 251. In that letter, the tort plaintiff's counsel stated that he would present evidence at trial that the decedent's financial losses alone exceed $8 million and that he would ask the jury to award a verdict in excess of $10 million. Compl. Ex. H, JA 253, 254. A jury verdict in that amount would have subjected Manzur, Erie and Nationwide's mutual insured, to excess exposure — meaning an award for more than the total liability coverage available from all insurers. At the time of the demand letter, trial was scheduled to begin in less than a month. Compl. ¶ 18, JA 5.

Following claimant's counsel's letter, counsel for Erie sent Nationwide two letters. The first letter stated that Nationwide should "make every effort to see if the [Tort Action] could be resolved short of trial." Compl. ¶ 15, Ex. G, JA 4, 252. The second letter again urged Nationwide to settle the case for under $3 million and 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." Compl. ¶ 17, Ex. H, JA 5, 253, 254.

Erie's assertion that Nationwide settled the underlying tort action as a "volunteer" ignores the undisputed circumstances and sequence of events. The trial court in the Coverage Action had just ruled that Nationwide provided the first $3 million in coverage, which was immediately followed by the tort claimant's $2.9 million demand. The amount of claimant's demand was significant. Under Virginia law, an insurer has an obligation to settle a claim within its policy limits if required under good faith standards. *See State Farm Mut. Auto. Ins. Co. v. Floyd*, 235 Va. 136 (1988); *Aetna Cas. & Sur. Co. v. Price*, 206 Va. 749 (1966).

Erie's "volunteer" argument ignores Virginia's good faith standards. On demurrer, Erie suggested that Nationwide made a "bad bet" when it settled the Tort Suit before an appeal of the Coverage Action could be fully adjudicated. Memo. Supp. Dem. 14. Ignoring its own repeated importuning to Nationwide to settle the Tort Suit, Erie went on to assert that it "can only speculate why Nationwide undertook the risk that it may not recover from Erie [by settling the case] …." *Id.* (emphasis added). Erie and the trial court failed to recognize, however, that a liability insurer has a

legal obligation to settle a liability claim within its policy limits if required under good faith standards. *See Floyd*, 235 Va. 136; *Price*, 206 Va. 749.

The definition of bad faith in Virginia is when an "insurer act[s] in furtherance of its own interest, with intentional disregard of the financial interest of the insured." *Floyd,* 235 Va. at 144. The course of action which Erie suggests Nationwide should have taken — to forego settlement in order to protect its own interests — is contrary to Virginia's good faith principles. The trial court should have rejected Erie's arguments on that ground alone. In fact, this Court has assumed, without deciding, that Virginia law permits a claim by an excess insurer against a primary insurer for the primary insurer's bad faith refusal to settle within policy limits. *See Horace Mann Ins. Co. v. GEICO*, 231 Va. 426 (1986). Accordingly, Erie could potentially have pursued Nationwide for **failing** to settle.

Nationwide's settlement of the Tort Suit was not a "bad bet." To the contrary, Nationwide refused to bet on its own interests at the expense of its insured where neither insurer disputed the total amount of coverage available. The fact that Erie's proposed course of action runs counter to Virginia's good faith requirements evidences the foundational flaw in its overall position. The trial court should have recognized this flaw and

rejected Erie's arguments in support of Demurrer on the basis that they were irreconcilable with Virginia's good faith requirements.

Further, as at least one Virginia trial court has recognized, a liability insurer that settles a claim because another insurer wrongfully denied coverage is not a "volunteer," because such an insurer is acting under either a legal duty or the "necessity of self-protection." *Dollar Tree Stores, Inc. v. Crum & Forster Specialty Ins. Co.*, 91 Va. Cir. 433, 438 (2015) (quoting *Morgan v. Gollehon*, 153 Va. 246, 249 (1929)). In that case, like here, a liability insurer (American Guarantee) contributed to a settlement that would otherwise have been the responsibility of another liability insurer (Crum & Forster) but for Crum & Forster's erroneous denial of coverage. *Dollar Tree,* 91 Va. Cir. at 433-35. As in the instant case, American Guarantee subsequently sued Crum & Forster under a theory of equitable subrogation, seeking Crum & Forster's proper share.

In rejecting Crum & Forster's argument that American Guarantee acted as a "volunteer" by settling the underlying case, the *Dollar Tree* court relied partially upon *Morgan v. Gollehon*, 153 Va. 246. In *Morgan*, this Court stated that a party who pays the debt of another out of a legal duty **or** self-protection is **not** a volunteer and is entitled to subrogate. As the *Dollar Tree* properly held, by settling on behalf of an insured to whom Crum &

Forster wrongfully denied coverage, American Guarantee was either acting under a legal duty or out self-protection, and in either case was **not a volunteer** and thus entitled to subrogate. *Dollar Tree,* 91 Va. Cir. at 438-39. Here, Nationwide, like American Guarantee, was either acting under a legal duty to protect its insured or out of self-protection (or both) when it settled the Tort Claim, such that Nationwide was not a volunteer and has stated a claim for equitable subrogation.

Finally, Erie relied on *Amica Mut. Ins. Co. v. Liberty Mut. Fire Ins. Co.*, 72 Va. Cir. 154, 2006 WL 3012866 (Loudoun County 2006). *Amica* is distinguishable for two reasons. First, the *Amica* court relied heavily on the fact that the insurer seeking contribution failed to seek a judicial coverage determination before settling the underlying tort case. *Id.*, 2006 WL 3012866 at *3. The court went as far as to specifically criticize the insurer for failing to file a declaratory judgment action to determine the priorities of coverage before settling the tort claim. *Id.* at *6. Consequently, held the court, Amica's decision to forego a declaratory judgment action rendered it a volunteer. *Id.* Here, Nationwide not only litigated the coverage dispute in a declaratory judgment action, it did not settle until the trial court ruled against it. Moreover, Amica settled the underlying tort claim before the claimant ever engaged counsel, let alone brought suit. Here, the tort trial

was mere weeks away. Thus, the bases for the *Amica* holding are absent in the present case.[7]

IV. The trial court erred by ruling that the Complaint failed to state a claim for equitable subrogation for the same reasons it ruled that Nationwide did not state a claim for equitable contribution. (Assignment of Error 4)

The trial court sustained Erie's demurrer to Nationwide's equitable subrogation claim "for the same reasons that the Demurrer [was] sustained for Count I [equitable contribution]." Opinion at 9, JA 341. Accordingly, with respect to the equitable subrogation claim, Nationwide incorporates its arguments as set forth in Argument Sections I, II, and III, including all subparts. For those reasons, the trial court also erred in finding that Nationwide failed to state a claim for equitable subrogation.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the trial court sustaining Erie's Demurrer as to Nationwide's claims for equitable contribution (Count I) and equitable subrogation (Count III) and remand the case to the trial court for continued proceedings.

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[7] The *Amica* court also noted that the "equities do not favor Amica under these circumstances." *Id.* As discussed above, here, the equites favor Nationwide rather than Erie.

Respectfully submitted,

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CERTIFICATE

I hereby certify on this 9th day of November, 2018, that I have complied with Rule 5:26 and that this Opening Brief of Appellant has been filed with the Supreme Court of Virginia and a copy has been served on opposing counsel via email this same day.

/s/ *Robert F. Friedman*