In the Supreme Court of Virginia

Record No. 091495

UNIWEST CONSTRUCTION, INC., et al.
Appellants

v.

AMTECH ELEVATOR SERVICES, INC. n/k/a ABM AMTECH, INC., et al.
Appellees

Record No. 091496

AMTECH ELEVATOR SERVICES, INC. n/k/a ABM AMTECH, INC., et al.
Appellants

v.

UNIWEST CONSTRUCTION, INC., et al.
Appellees

PETITION FOR REHEARING

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INTRODUCTION

Petitioners Uniwest Construction, Inc. ("Uniwest") and its insurers, Pennsylvania Manufacturers' Association Insurance Company ("PMA") and United States Fire Insurance Company ("U.S. Fire") (collectively referred to as "Petitioners") respectfully request that this Court clarify and/or rehear its Opinion of September 16, 2010 (the "Decision"). This Petition addresses a single narrow issue concerning the scope of the Court's remand instructions as to Uniwest's entitlement to coverage as an additional insured under Subdivision E-7 of the policy issued to Amtech Elevator Services, Inc. ("Amtech") by AIU Insurance Company ("AIU"). Specifically, Petitioners respectfully request that this Court clarify that Uniwest's entitlement to additional insured coverage under Subdivision E-7 of the policy of insurance issued to Amtech Elevator Services, Inc. ("Amtech") by AIU does not require a finding of "relative liability" as between Amtech and Uniwest.

FACTUAL BACKGROUND

A. Subdivisions E-4 and E-7 of the AIU Policy

Section IV.E of the AIU policy (the "Policy") provides, in relevant part, as follows:

> Insured means each of the following, to the extent set forth:

> 4. Any person or organization . . . included as an additional insured in the policies listed in the Schedule of Underlying Insurance <u>but not for broader coverage than is available to such person or organization under such underlying policies</u>.
>
> 7. Any . . . organization . . . to whom [Amtech is] obligated by a written Insured Contract to provide insurance such as is afforded by this policy, <u>but only with respect to . . . liability arising out of operations conducted by you or on your behalf</u> . . . .

App., 1867, Section IV.E. (emphasis added)

The Continental Policy, which is the "underlying" primary policy beneath the AIU excess policy, provides in pertinent part, as follows:

> [If Amtech] is required to add a person or organization as an additional insured . . . under a written agreement or contract but . . . inadvertently fail[s] to issue such endorsement, that person or organization is included as an insured provided that
>
> 1. the additional insured is an insured <u>only to the extent that it is required to be indemnified by your written agreement or contract with the additional insured</u>;

App., 1789-1790 (emphasis added).

B. <u>This Court's Decision</u>

In its Decision, this Court held "that the Subcontract incorporated [the indemnification provision contained in] Paragraph 3.18.1 [of the Prime Contract]." Decision at 18. Moreover, this Court held that the incorporated

indemnity clause ("Paragraph 3.18.1") "imposed on Amtech a duty to defend and indemnify Uniwest." Id. The Court noted that "the Subcontract does not require Amtech to indemnify Uniwest for its own negligence." Id. Moreover, the Court held that "Uniwest was an insured under the CNA and AIU policies" and that "AIU had a duty to defend and indemnify Uniwest under both Subdivision E-4 and Subdivision E-7." Id. at 22 (emphasis added).

1. Subdivision E-4

Subdivision E-4 provides that an "insured" under the Policy means any organization "included as an additional insured in the policies listed in the Schedule of Underlying Insurance. . . ." Accordingly, this Court considered the terms of the "underlying" CNA policy, which provides that a person or organization is an additional insured if Amtech "is required to add a person or organization as an additional insured . . . ." The Court concluded that this requirement was satisfied. Id. at19-22. However, this Court also recognized that the insurance coverage afforded under E-4 is limited "to the extent that [Uniwest] is required to be indemnified by [the] written agreement." Id. at 19 (emphasis added).

2. Subdivision E-7

With respect to Subdivision E-7, this Court held that the trial court erred in ruling that the subcontract "did not impose on Amtech a duty to defend and indemnify Uniwest", Id. at 19-20, and, instead, the Court ruled that "Paragraph 3.18.1 of the General Conditions [of the Prime Contract] was incorporated into the Subcontract and created such a duty." Accordingly, this Court held that Uniwest is an additional insured under E-7. However, the Decision does not address the condition included in Subdivision E-7, which provides that the additional insured status applies "only with respect to . . . liability arising out of operations conducted by [Amtech] or on [Amtech's] behalf." (Emphasis added).

3. Damages and Remand

Finally, in the "Damages" section of the Decision, this Court concluded that,

> Amtech is not liable to contribute to Uniwest's settlement with the Employees to the extent, if any, the accident was caused by Uniwest's own negligence.
>
> Accordingly, we will remand for trial to determine the issue of relative liability for the accident and for entry of judgment against Amtech and AIU for compensatory damages based upon Amtech's relative liability.

Id. at 22-13. It is unclear whether this conclusion, as it applies to AIU, was intended to apply to both E-4 and E-7.

ARGUMENT

Petitioners seek a clarification, or, if necessary, a rehearing, with respect to the Court's remand instructions. In particular, Petitioner's respectfully submit that the Court's remand instructions with respect to Uniwest's entitlement to coverage under E-7 are susceptible to misinterpretation. Notably, Petitioners acknowledge the Court's determination that Uniwest's entitlement to indemnification under Paragraph 3.18.1 requires a finding of fact as to the "relative liability" of Amtech and Uniwest insofar as the Court ruled that the incorporated indemnity clause does not provide indemnification for Uniwest's own negligence.

Moreover, because the additional insured coverage afforded by E-4 is limited to "the extent that [Uniwest] is required to be indemnified by [Amtech's] written agreement or contract," the coverage afforded under E-4 of the Policy is coextensive with Amtech's contractual indemnity obligations under Paragraph 3.18.1 (thereby requiring a finding of "relative liability" on remand). Thus, with respect to E-4, a remand is appropriate because a finding of "relative liability" is needed to determine AIU's obligations to

Uniwest as an additional insured under E-4. However, since a finding of "relative liability" has no bearing on the insurance coverage afforded under E-7, Petitioners seek a clarification or rehearing concerning whether the remand instructions apply only with respect to E-4 and not as to E-7.[1]

Subdivision E-7 is comprised of two components. The first component of E-7 provides that an "insured means . . . any . . . organization . . . to whom [Amtech is] obligated by a written Insured Contract to provide insurance such as is afforded by this policy. . . ." The Court found that Paragraph 3.18.1 was an Insured Contract within the meaning of the Policy and, therefore, Uniwest is an additional insured pursuant to E-7. The second component of E-7 sets forth a condition to the coverage afforded thereunder. Specifically, the condition provides that an "entity or organization" that satisfies the Insured Contract requirement is an insured under the Policy "<u>but only with respect to . . . liability arising out of</u>

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[1] AIU/Amtech never presented any argument before the trial court or on appeal as to the significance of the limiting clauses contained in E-4 or E-7. That is, AIU/Amtech never argued that a remand was necessary with respect to either E-4 or E-7. In fact, Amtech/AIU argued for the first time in its opposition briefs submitted in this appeal that the indemnity clause contained in Paragraph 3.18.1 was a "contribution type" clause that required fact findings with respect to Uniwest's negligence. Accordingly, in the absence of these arguments by Amtech/AIU, Peititioners did not previously argue before this Court that E-7 does not require a finding of "relative liability."

operations conducted by [Amtech] or on [Amtech's] behalf." (Cmphasis added).

Paragraph E-7 does not require a finding of the "relative liability" of Amtech and Uniwest. Accordingly, having satisfied the Insured Contract component of E-7, the only question left is whether the underlying claims by Bruce and Stinson gave rise to "liability arising out of operations conducted by [Amtech] or on [Amtech's] behalf." The Petitioners respectfully request that the Court make clear that a finding of "relative liability" is not required with respect to E-7; instead, the finding on remand with respect to E-7 should be whether Uniwest's "liability [arose] out of operations conducted by [Amtech] or on [Amtech's] behalf."[2]

Virginia's anti-indemnity statute, Code § 11-4.1, expressly provides that it "shall not affect the validity of any insurance contract, workers' compensation, or any agreement issued by an admitted insurer." Accordingly, Uniwest may be indemnified under the AIU Policy for its own negligence. Moreover, although this Court has not previously interpreted

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[2] In the context of the relevant facts, it is simply illogical to conclude that Uniwest's entitlement to insurance under E-7 turns on a finding of the parties' relative liability. Such an interpretation of the remand instructions would wholly ignore the express language of E-7, which limits coverage to "liability arising out of operations conducted by [Amtech] or on [Amtech's] behalf." Petitioners contend that this Court did not intend that the trial court ignore this condition and apply another condition (relative liability) that has no basis in the policy language.

Subdivision E-7 or a similar provision, the plain wording of E-7 makes it clear that the coverage afforded is broad and extends to Uniwest's negligence, provided that the liability "aris[es] out of operations conducted by [Amtech]."[3]

Although the Court's Decision, as it now stands, does not specifically call for the trial court to consider the parties' "relative liability" in determining the scope of Uniwest's coverage as an additional insured under E-7, Petitioners believe that the silence of the Court's Decision on this issue may give rise to confusion regarding the scope of the remand instructions and potentially lead to a misinterpretation of those instructions. Moreover, the issue on which Petitioners seek clarification is discrete and amenable to a simple clarification.

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[3] In Mikula v. Miller Brewing Co., 701 N.W.2d 613, 622 (Wis. App. 2005), the court recognized that the "majority" rule concerning this type of additional insured provision, as reflected in the cases cited in the court's decision, is that "there need not be negligence alleged against the named insured for the additional insured to be covered." See also Florida Power & Light Co. v. Penn America Ins. Co., 654 So.2d 276, 279 (Fla. App. 1995); Dayton Beach Park No. 1 Corp. v. Nat'l Un. Fire Ins. Co., 573 N.Y.S.2d 700, 702 (N.Y. App. 1991); Casualty Ins. Co. v. Northbrook Property & Cas. Ins. Co., 501 N.E.2d 812, 815 (Ill. App. 1986).

CONCLUSION

For the foregoing reasons, and in the interests of fairness and judicial economy, the Petitioners request clarification and/or rehearing with respect to the Court's remand instructions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 5:37 WORD COUNT LIMITATION

I hereby certify that this Petition complies with the word count limit set forth in Va. Sup. Ct. R. 5:37(d)(1).

Edward W. Cameron

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of October, 2010 a copy of the foregoing was sent via electronic mail to:

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