In the

Supreme Court of Virginia

At Richmond

Record No. 091495

UNIWEST CONSTRUCTION, INC., et al.,

Appellants,

– v. –

ABM AMTECH, INC. F/K/A AMTECH ELEVATOR SERVICES, et al.,

Appellees.

REPLY BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

The Uniwest Parties submit this Reply Brief in response to the Amtech Parties' brief in opposition to Assignment of Errors 1 through 5. For the reasons set forth herein, the Amtech Parties have failed to present compelling arguments in opposition the points raised by the Uniwest Parties. The Amtech Parties' utter failure to refute these arguments is most evident in the inconsistent positions that they take with respect to Assignments of Error 1 and 2 – where the Amtech Parties simultaneously maintain: (i) that the Subcontract's indemnity clause is void and therefore a "a nullity in the first instance" (Assignment of Error 1); and (ii) that the voided indemnity clause somehow conflicts with the indemnity clause in the Prime Contract (Assignment of Error 2). Amtech cannot have it both ways.

ARGUMENT

A. Assignment of Error 1 – The Subcontract's Indemnity Agreement Is Valid and Enforceable

1. Section 11-4.1 Does Not Void an Indemnity Clause Unless the Indemnitee is in fact Solely Negligent

The Amtech Parties advance the argument that the Subcontract's indemnity clause is void and unenforceable on its face because it purports to indemnify Uniwest for Uniwest's sole negligence. In doing so, they attempt to downplay the significance of Utica Mut. Ins. Co. v. Atlantic

Foundations, Inc., 2007 WL 190682 (E.D. Va. Jan. 18, 2007), the only Virginia case that considers whether Section 11-4.1 of the Virginia Code applies to an indemnity provision in a vacuum and without regard for the facts. Although the Utica court decided the issue on two alternative grounds, the court made a clear statement as to the effect of Section 11-4.1, holding that it would not void the indemnity agreement because the statute, by its plain terms, requires a finding of damages resulting "solely from the negligence of such other party." The court noted that there had been no allegation of "sole negligence" on the part of the indemnitee and that, therefore, Section 11-4.1 did not void the indemnity clause at issue.

The Utica court's conclusion in this regard is consistent with the language of Section 11-4.1, which expressly requires that the damage is "caused by or resulting solely from the negligence of such other party or his agents or employees" in order for the subject provision to be voided. This clause, which addresses the "sole negligence" issue, is separated by commas from the balance of the statute and therefore stands as an independent clause. The only plausible explanation for the legislature's decision to separate the clause with commas is that it is intended to be independent and separate from the other language in the statute, including the phrase "purports to indemnify or hold harmless...." Accordingly, the

statute does not void an indemnity provision on the basis that the provision, on its face, purports to provide indemnification for damages "caused by or resulting solely from the negligence" of the indemnitee. Rather, the statute applies to void an indemnity provision only when there is, in fact, damage "caused by or resulting solely from the negligence of such other party or his agents or employees."

In addition to Utica, the Uniwest Parties' opening brief cited to seven cases decided throughout the Country that represent the majority rule with respect to the application of anti-indemnity statutes similar to Section 11-4.1. See James v. Burlington Northern Santa Fe Ry. Co., 636 F.Supp.2d 961 (D. Ariz. 2007) ("the court will adopt the majority rule . . . whereby an otherwise unenforceable indemnity agreement is permitted to remain in effect unless and until it is shown to violate the statutory proscription on the facts of each particular case").

In their opposition brief, the Amtech Parties wholly ignore all of the cases cited in the Uniwest Parties' opening brief that express the majority rule. The Amtech Parties' brief cites to two cases – Harnois v. Quannapowitt Dev., Inc., 619 N.E.2d 351 (Mass. App. Ct. 1993) and Healey v. J.B. Sheet Metal, Inc., 892 P.2d 1047 (Utah Ct. App. 1995) – that arguably stand contrary to some of the majority rule cases cited in the

Uniwest Parties' brief, such as James, supra. However, unlike Section 11-4.1, the particular language of the relevant Massachusetts and Utah anti-indemnity statutes makes them susceptible to an interpretation that would require voiding an indemnity provision without regard to whether the indemnitee is, in fact, solely negligent. For example, the anti-indemnity statute in Healey is similar to Section 11-4.1, except that the "sole negligence" clause is not separated from the balance of the statute by commas. Therefore, the operative phrase relating to "sole negligence" is not separated from the phrase "purporting to indemnify…." Furthermore, in addition to being distinguishable, Harnois and Healey clearly represent the minority rule insofar as they apply the respective anti-indemnity statutes of Massachusetts and Utah to the face of the indemnity clause without any regard for the actual existence of sole negligence by the indemnitee.

The Amtech Parties assert that the legislature's use of the word "purports," which they correctly note means "professes or claims," supports their position. Appellees' Brief, 22 – 23. Importantly, the Uniwest Parties' reading of Section 11-4.1 gives full meaning to the word "purport." A provision that "professes or claims" to provide indemnification in the context of a construction contract is void if the indemnitee is, in fact, solely negligent. That is, a provision may merely "purport" to provide

indemnification to another party to the extent that the provision "professes or claims" to provide indemnification, but such indemnification is not available, i.e., due to the application of Section 11-4.1. Thus, the legislature's use of the word "purport" in Section 11-4.1 does not support the Amtech Parties' position.

2. The Trial Court's Approach to Section 11-4.1 Does Not Serve Virginia's Public Policy Interests

In their opening brief, the Uniwest Parties clearly articulate how their proposed application of Section 11-4.1 to the facts at issue fully advances the public policy concerns behind the legislature's enactment of Section 11-4.1 as recognized by this Court in cases such as Estes Express Lines, Inc. v. Chopper Express, Inc., 273 Va. 358, 641 S.E.2d 476 (2007). Although Amtech purports to pay homage to legitimate public policy concerns, its proposed interpretation of Section 11-4.1, and more particularly its proposed application of Section 11-4.1 to the facts at issue in this matter, is illogical and directly contrary to Virginia's legislative goal of maintaining safety on construction sites. Specifically, the Amtech Parties have not and cannot explain how voiding an indemnity clause on its face, without regard to whether the indemnitee is solely negligent, advances any public policy interest.

The Amtech Parties argue that Uniwest spurns the legislative goal behind anti-indemnity statutes by urging this Court to "shift the burden of their own liability for worksite safety to their subcontractors." Appellees' Brief, 30. This position is without merit. First, according to the Amtech Parties, Uniwest could have successfully "shifted its burden" if it had merely included certain magic words in the indemnity provision, e.g., "to the fullest extent permitted by law…." These words would not change Uniwest's motivation to maintain a safe work place, but the Amtech Parties maintain that the existence (or non-existence) of those words controls the result. Second, the legislative goal behind Section 11-4.1 is fully served by voiding an indemnity clause where the indemnitee is, in fact, solely negligent. Third, as set forth in the Uniwest Parties' opening brief, the facts show that Amtech was primarily responsible for the injuries to its own employees. Appellants' Brief, 9 - 13; 30 – 31.[1] Accordingly, although Uniwest (as the prime contractor) may have been derivatively liable to the underlying plaintiffs as a result of it subcontractor's (Amtech) failure to perform the

[1] As detailed in the Uniwest Parties' opening brief: (i) Amtech and its employees were exclusively responsible for all elevator work on the job; (ii) Amtech agreed to bear responsibility for the safety of its employees; (iii) Amtech's employees failed to wear fall protection equipment throughout the job and particularly at the time of the accident; (iv) Amtech procured the materials and built the scaffold that failed; and, (v) Amtech's employee climbed a ladder on the scaffold (in violation of OSHA) and fell, thereby causing the scaffold to fail.

elevator work in a safe manner, Amtech nevertheless was primarily responsible for the accident.

Finally, the Amtech Parties argue that Uniwest's approach "creates a disincentive for litigants to settle." Appellees' Brief, 30. In particular, the Amtech Parties argue that, under Uniwest's approach to Section 11-4.1, "an indemnitee would always be compelled to establish at trial that it was not negligent in order to enforce the indemnity provision." Once again, however, the Amtech Parties' position is wholly without merit. In what the Uniwest Parties contend is the rare scenario on a large construction project with many parties and events as arguable contributors where a genuine basis exists for contending that a single party's negligence is the **one and only** cause of a workplace accident – a scenario that is belied in the case at bar by the many parties accused of causing the underlying accident, not to mention the facts and opinions that establish Amtech's own negligence – it may be it may be necessary to determine whether an indemnitee is solely negligent under the Uniwest Parties' approach to Section 11-4.1. However, the exact same "problem" (assuming it is a problem) would result under the Amtech Parties' approach to the statute. Amtech would require the indemnification clause to include an exception for sole negligence, yet this would yield the same "problem" that Amtech attributes to Uniwest's

approach, i.e., a need to determine whether the indemnitee is solely negligent. Accordingly, this Court's rejection of the Trial Court's ruling would not, in any way, create a disincentive for litigants to settle.

The Uniwest Parties respectfully maintain that this Court should reverse the Trial Court's ruling with respect to Assignment of Error 1.

B. Assignment of Error 2 – The Indemnity Clause of the Prime Contract Was Incorporated Into the Subcontract and Obligates Amtech to Indemnify Uniwest

The Amtech Parties next maintain that the Prime Contract's indemnity clause was not incorporated into the Subcontract because, they argue, the clause conflicts with the Subcontract's indemnity clause and, therefore, the Subcontract's indemnity clause controls. Appellee's Brief, 37-39. However, the Trial Court ruled that the indemnity clause of the Subcontract is void and, accordingly, ruled that "[g]iven that the indemnity provision in the subcontract between Uniwest and Amtech is void, the question is, does the indemnity provision in the [general] contract obligate Amtech to indemnify Uniwest." App., 3035. Of course, insofar as the Subcontract's indemnity clause was deemed void by the Trial Court, it is treated as if it never existed and therefore cannot be inconsistent with the clause in the Prime Contract as the Amtech Parties maintain.

Nevertheless, the Amtech Parties ignore the fact that the Trial Court

ruled that the Prime Contract's indemnity clause is incorporated into the Subcontract and argue that "the fact that the indemnity was thereafter determined to be void does not change the fact that Amtech never agreed to incorporation of the prime contract indemnity clause." Appellees' Brief, 38). However, Amtech cannot have it both ways. As it argued in its brief, if the indemnity clause is void it is "a nullity in the first instance." Appellee's Brief, p. 21-22. Accordingly, if the Trial Court is correct in voiding the Subcontract's indemnity provision pursuant to Section 11-4.1, then there clearly can be no conflict between the Subcontract's indemnity clause, which must be treated as if it never existed, and the Prime Contract's indemnity clause.

Finally, although the Trial Court correctly determined that the Prime Contract's indemnity clause is incorporated into the Subcontract, the Trial Court nevertheless proceeded to incorrectly determine that such incorporation "would make Amtech the subcontractor responsible to the <u>owner</u>, as Uniwest would be responsible to the owner . . . ." App., 3035-3036 (emphasis added). To the contrary, by the unambiguous terms of the Subcontract, Amtech agreed to "assume <u>toward Uniwest</u> all of the obligations and responsibilities that Uniwest has by said Agreement assumed toward the Owner." App., 1995, ¶ 3 (emphasis added). Nowhere

in the contract documents did Amtech agree to be bound to the owner. Indeed, the Amtech Parties never made this argument to the Trial Court and now the Amtech Parties' brief simply fails to offer an argument that would support the Trial Court's ruling.

Accordingly, the Uniwest Parties respectfully maintain that this Court should reverse the Trial Court's ruling with respect to Assignment of Error 2.

C. Assignment of Error 3 – Amtech Was Obligated to Defend and Indemnify Uniwest Pursuant to the January 2004 Agreement

Regarding Assignment of Error 3, the Amtech Parties maintain that the January 2004 Agreement entered into between Amtech and Uniwest, pursuant to which Amtech agreed to defend and indemnify Uniwest, was merely an acknowledgement of Amtech's indemnification obligations under the Subcontract. Appellee's Brief, 40-41. To the contrary, the evidence establishes that the January 2004 Agreement was an independent agreement whereby the parties achieved a settlement of disputed rights and obligations. Thus, rather than litigate the indemnification issue in connection with the Underlying Litigation, the parties amicably resolved their differences and Amtech and its insurers proceeded to defend Uniwest

and control its defense for over two years without reserving their rights in any way.[2]

Although the Amtech Parties expressed great concern about the "disincentive to settle" in their arguments relating to Section 11-4.1, they necessarily ignore the public policy considerations that favor settlement in the context of January 2004 Agreement. The Trial Court's ruling would allow Amtech to renege with impunity, and without regard to the law of Virginia, which favors the compromise and settlement of disputes without resort to litigation.

Finally, the Amtech Parties argue in their brief that Amtech should not be estopped from denying its contractual obligation to defend and indemnify Uniwest. Assignment of Error 3 relates to a contract claim, not an estoppel claim. Uniwest satisfied all of the requirements of contract formation; it does not have to prove "detrimental reliance" to prevail on this argument.

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[2] The Uniwest Parties' opening brief (Appellants' Brief, 13 - 18; 41 - 43) sets forth the facts that clearly demonstrate that: (i) there was a clear agreement; (ii) Uniwest provided consideration in connection with that agreement; and, (iii) the parties engaged in a prolonged course of dealing that is consistent with the existence of that agreement. The Trial Court's ruling that the agreement was merely "incidental to the indemnity provision in the contract" is erroneous, particularly given that, in return for Amtech's promises, Uniwest agreed not to pursue its indemnity claim as part of the underlying lawsuit.

Accordingly, the Uniwest Parties respectfully maintain that this Court should reverse the Trial Court's ruling with respect to Assignment of Error 3.

D. Assignment of Error 4 – Uniwest Is An Additional Insured Under the AIU Policy

As argued in the Uniwest Parties' opening brief, Uniwest is an additional insured under the AIU policy because Amtech was obligated by a written Insured Contract to provide such insurance. Although the Amtech Parties dispute whether there is a valid Insured Contract, they do not dispute the position that, in the event the Uniwest Parties prevail on Assignments of Error 1, 2 or 3, then Uniwest is an additional insured under Paragraph E(7) of the AIU policy.

E. Assignment of Error 5 – AIU Is Estopped From Disclaiming Coverage to Uniwest Because AIU Retained Counsel to Defend Uniwest Without Reserving Its Rights

Regarding Assignment of Error 5, despite the fact that AIU appointed counsel to defend Uniwest in the Underlying Litigation (App., 2409-2411, 2746), the Amtech Parties argue that they "never agreed to defend Uniwest." Appellee's Brief, p. 45. However, the Amtech Parties do not, because they cannot, cite to the trial record in support of their argument. Indeed, the trial evidence unequivocally establishes that AIU appointed counsel to defend Uniwest, and did so without reserving its right to deny

coverage. App., 891-892, 911-914, 2409-2411, 2421-2426, 2746. Next, the Amtech Parties maintain that Mr. Devine (counsel appointed by AIU to defend Uniwest) never controlled Uniwest's defense and that, therefore, it did not have to reserve its rights to deny coverage. Appellee's Brief, p. 45.

However, no case law exists, and the Amtech Parties do not cite to any, that stands for the proposition that defense counsel must be "lead counsel" in order for the insurer to be obligated to reserve its rights in order to later deny coverage. Moreover, even if such authority did exist, the trial evidence establishes that Mr. Devine did in fact take over the defense of Uniwest. App., 2626-2661, 2666-2673, 2678, 2684-2728, 2852-2884. Indeed, the record shows that AIU hired Mr. Devine to defend Uniwest without reserving its rights or even notifying Uniwest that it was assigning defense counsel, Mr. Devine and his firm billed over 300 hours over a three month period on such defense, and Mr. Devine was lead counsel with respect to the "damages." Then, after assigning Mr. Devine to defend Uniwest, presumably to protect its own interests, AIU now maintains that it never had any interest to protect.

Lastly, the Amtech Parties attempt to make the argument that as an excess insurer AIU did not have a duty to defend Uniwest and, therefore, cannot be estopped from denying coverage to Uniwest. However,

California law is clear that, although an excess insurer may not have a duty to defend until the primary policy is exhausted, if that carrier in fact agrees to defend, and does so without first reserving its rights, it is estopped from later denying coverage to the insured. The court's decision in State Farm Fire & Casualty Co. v. Jioras, 24 Cal.App.4th 1619, 626 (Cal. App. 1994), cited in Amtech Parties' brief, supports the Uniwest Parties' position insofar as the court noted that an insurer may be estopped if it defends without reserving its rights, but held that the insurer therein was not estopped from disclaiming under the umbrella policy because the insurer was defending under its primary policy.

The Uniwest Parties respectfully maintain that this Court should reverse the Trial Court's ruling with respect to Assignment of Error 5.

F. A New Trial is Not Necessary

With respect to Assignments of Error 1 and 2, the Amtech Parties argue that if this Court reverses the Trial Court's rulings, it should remand to the Trial Court for further proceedings. A remand is clearly not necessary. With respect to Assignment of Error 1, Uniwest is entitled to indemnification unless the evidence supports a finding that Uniwest was solely negligent. The Amtech Parties introduced no evidence on this issue at trial and, indeed, the only proferred evidence amply demonstrates that

just the opposite is so, i.e., that Amtech's negligence was a proximate cause of the subject accident. Likewise, with respect to Assignment of Error 2, the same analysis applies. Contrary to Amtech's contention, the indemnity provision in the Prime Contract is not a "contribution type" clause, but requires Amtech to indemnify Uniwest to the "fullest extent permitted by law." Moreover, the Amtech Parties never raised this argument before the Trial Court and, in fact, successfully objected to the Uniwest Parties' attempt to introduce evidence of the parties' relative fault for the accident. Accordingly, the Amtech Parties have waived this argument.

CONCLUSION

For the reasons stated above, in addition to the arguments set forth in the Uniwest Parties Opening Appellate Brief, Appellants Uniwest Construction, Inc., United States Fire Insurance Company and Pennsylvania Manufacturers' Association Insurance Company respectfully request that the Court reverse the Trial Court's rulings with respect to Appellants' Assignments of Error 1 through 5, and grant them such other and further relief as deemed appropriate.

Respectfully submitted,

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Per agreement of the parties and in compliance with Rule 5:26(d), three copies of the brief were mailed or delivered to each of the following party:

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In addition, all parties have received electronic copies the brief. Paper copies of the brief were mailed or delivered on this the 19th day of April, 2010 to the addresses above. This same date, 15 copies of the same were hand delivered to the clerk's office and a copy was filed electronically on CD.

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