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.

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Nature of the Case 1

Questions Presented for Review 4

Counterstatement of Facts 6

Argument 19

I. Standards Of Review 19

A. Assignments of Error 1, 2 and 4 19

B. Assignments of Error 3 and 5 19

II. The Subcontract's Broad Indemnity Provision That Purports To Indemnify Uniwest For Its Sole Negligence Is Void And Unenforceable Pursuant To Virginia Code § 11-4.1. (Response to Assignment of Error No. 1) 20

III. There Was No Incorporation Of The Prime Contract's Indemnity Clause Into The Subcontract. (Response to Assignment of Error No. 2) 37

IV. The Trial Court's Finding That The Correspondence Between Uniwest And Amtech Concerning The Indemnification Of Uniwest Under The Existing Indemnity Agreement In The Subcontract Did Not Constitute A Separate "Second" Indemnity Or Settlement Agreement Is Amply Supported By The Trial Evidence. (Response to Assignment of Error No. 3) 41

V. There Was No Insured Contract Upon Which Uniwest Was Entitled To Coverage. (Response to Assignment of Error No. 4) 43

VI. Uniwest Was Not Entitled To Coverage Under The AIU Policy Under A Theory Of Estoppel. (Response to Assignment of Error No. 5) 44

Conclusion 47

TABLE OF AUTHORITIES

Cases:

Aetna Cas. & Sur. Co. v. Marion Equip. Co.,
894 P.2d 664 (Alaska 1995).....30

All Am. Contractors, Inc. v Betonti,
No. 160538, 53 Va. Cir. 24, 2000 WL 977379 (Va. Cir. Ct. Feb. 8, 2000).....21

Bianculli v. Turner Constr. Co.,
640 A.2d 461 (Pa. Super. Ct. 1994).....42

Blake Constr., Inc. v. Upper Occoquan Sewage Auth.,
266 Va. 564, 587 S.E.2d 711 (2003).....24-26

Buick v. Jess DuBoy Adver., Inc.,
No. LM-1109-4, 14 Va. Cir. 298, 1989 WL 646173 (Va. Cir. Ct. Feb. 1, 1989).....21

Crosby v. Gen.Tire & Rubber Co.,
543 F.2d 1128 (5th Cir. 1976).....32

Davis v. Commonwealth Edison Co.,
336 N.E.2d 881 (1975).....29

Earley v. Landsidle,
257 Va. 365, 514 S.E.2d 153 (1999).....24

Estes Express Lines, Inc. v. Chopper Express, Inc.,
273 Va. 358, 641 S.E.2d 476 (2007).....33

Harnois v. Quannapowitt Dev., Inc.,
619 N.E.2d 351 (Mass. App. Ct. 1993).....27

Hays v. Centennial Floors, Inc.,
893 P.2d 564 (Or. Ct. App. 1995).....36

Healey v. J.B. Sheet Metal, Inc.,
892 P.2d 1047 (Utah Ct. App. 1995).....27-28

Hilfiger v. Transamerica Occidental Life Ins. Co.,
256 Va. 265, 505 S.E.2d 190 (1998).....21-22, 42

Hood v. Commonwealth,
269 Va. 176, 608 S.E.2d 913 (2005).....19

Hughes v. Cole,
251 Va. 3, 465 S.E.2d 820 (1996).....22

Infants v. Virginia Hous. Dev. Auth.,
221 Va. 659, 272 S.E.2d 649 (1980).....21

Kennedy v. Annandale Boys Club, Inc.,
221 Va. 504, 272 S.E.2d 38 (1980).....22

Kinney v. G.W. Lisk Co.,
556 N.E.2d 1090 (N.Y. 1990).....29

ManTech Int'l Corp. v. Analex Corp.,
No. CL-2008-5845, 75 Va. Cir. 354, 2008 WL 6759967 (Va. Cir.
Ct. July 18, 2008).....24

Marblex Design Int'l., Inc. v. Stevens,
54 Va. App. 299, 678 S.E.2d 276 (2009).....21

MSI Constr. Managers Inc. v. Corvo Iron Works, Inc.,
527 N.W.2d 79 (Mich. Ct. App. 1995).....40

Office of Comptroller v. Barker,
275 Va. 529, 659 S.E.2d 502 (2008).....19

Palumbo v. Bennett,
242 Va. 248, 409 S.E.2d 152 (1991).....22

Safeway, Inc. v. DPI Midatlantic, Inc.,
270 Va. 285, 619 S.E.2d 76 (2005).....33

State Farm Fire & Cas. Co. v. Jorias,
24 Cal. App. 4th 1619, 29 Cal. Rptr. 2d 840 (1994).....44-45

Street v. Street,
25 Va. App. 380, 488 S.E.2d 665 (1997).....19

Utica Mut. Ins. Co. v. Atl. Foundations, Inc.,
No. 06-cv-487, 2007 WL 190682 (E.D. Va. Jan. 18, 2007).....33-34

Washington County v. Washington Court Assoc. of Professional Employees, AFI-CIO,
948 A.2d 271 (2008) 42

Waynesboro Vill., L.L.C. v. BMC Props.,
255 Va. 75, 496 S.E.2d 64 (1998).....42

Williamsburg Peking Corp. v. Kong,
270 Va. 350, 619 S.E.2d 100 (2005).....20

Wilson v. Holyfield,
227 Va. 184, 313 S.E.2d 396 (1984).....37

Winn v. Aleda,
227 Va. 304, 315 S.E.2d 193 (1984).....37

W.R. Hall, Inc. v. Hampton Roads Sanitation Dist.,
273 Va. 350, 641 S.E.2d 472 (2007).....33

Statutes:

UTAH CODE ANN. § 13-8-1 (1992) 28

VA. CODE ANN. § 2.2-4335(A) (West 2010).....25

VA. CODE ANN. § 8.01-680 (West 2010) 11, 21

VA. CODE ANN. § 11-4.1 (West 2010) .....*passim*

VA. CODE ANN. § 18.4-334.2 (West 2010) 13-14

Other Authorities:

THE MERRIAM-WEBSTER DICTIONARY (6th Ed. 2004) 23

PROSSER, HANDBOOK OF THE LAW OF TORTS (4TH ED. 1971).....29

NATURE OF THE CASE

This declaratory judgment action and breach of contract counterclaim arise from a construction accident in which two employees of the subcontractor, Amtech Elevator Services, Inc., now known as ABM Amtech, Inc. ("Amtech"), were injured after falling from a scaffold in the elevator shaft. The injured plaintiffs in the underlying litigation settled with the general contractor, Uniwest Construction, Inc. ("Uniwest"), and other defendants for $17.5 million. Uniwest's portion of the settlement was $9.5 million, which was paid entirely by Uniwest's insurers to settle Uniwest's own liability. Uniwest sought indemnity from Amtech for the $9.5 million Uniwest paid to settle its own liability in the underlying litigation pursuant to an indemnity provision in the subcontract.

Uniwest tendered its defense to Amtech under the indemnity provision in the subcontract. The entire subcontract was drafted by Uniwest, including the indemnity and choice-of-law provisions stating that the subcontract is governed by Virginia law. Amtech initially accepted the tender, but later disputed the obligation after determining that the indemnity was void and against the public policy of the State of Virginia pursuant to Virginia Code § 11-4.1, because it purported to require Amtech to indemnify Uniwest for Uniwest's sole negligence.

Uniwest sued Amtech and its insurers, claiming Amtech owed indemnity and had breached a duty to procure insurance in Virginia state court. The Virginia state court ruled that the indemnity clause in the subcontract was void and against the public policy of the state of Virginia pursuant to Virginia Code § 11-4.1. Just before trial, Uniwest non-suited the case and re-filed in federal court. The federal court dismissed for failure to name a necessary party. In the interim, Amtech and its insurers reinstated the case in state court.

After a bench trial, the trial court held that Uniwest was not an additional insured under Amtech's policy because additional insured status extends only to entities Amtech was contractually required to indemnify. Amtech had no indemnity obligation because the subcontract's indemnity provision was void under Virginia law pursuant to Virginia Code § 11-4.1. The court also ruled that the indemnity agreement in the prime contract did not apply as between Uniwest and Amtech and that the parties did not enter into a second indemnity agreement. The court therefore found that the policies issued to Amtech do not afford coverage for Uniwest as an additional insured. Finally, the court denied Uniwest's claim for equitable estoppel based on facts establishing that AIU, an excess carrier, never agreed to defend Uniwest; that it timely reserved its rights; and that AIU's monitoring

trial counsel never controlled Uniwest's defense. Uniwest and its insurers now appeal from these rulings.

The court also held that Amtech had nevertheless breached its duty to procure insurance and entered judgment for Uniwest and its insurers and against Amtech for $9.5 million plus prejudgment interest. Amtech and its insurer, AIU, appeal from this ruling and judgment order, docketed as Record No. 091496.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a construction subcontract's indemnity provision that purports to indemnify the general contractor for its sole negligence is void and in contravention of the public policy of the State of Virginia as declared in VA. CODE ANN. § 11-4.1, and thus does not obligate Amtech to defend and indemnify Uniwest for the settlement of its own liability in the underlying action.

2. Whether the trial court correctly found that the indemnity provision in the prime contract does not obligate Amtech to defend and indemnify Uniwest under circumstances where there the conflicting prime contract provision was expressly not incorporated in the subcontract and the trial court determined that the obligation of the prime contract indemnity provision applied to the owner, Fountains, not Uniwest.

3. Whether the trial court correctly determined that there was no second indemnity agreement under circumstances where the correspondence between Uniwest and Amtech was only to finalize and implement Amtech's indemnification of Uniwest under the existing indemnity agreement, not to form a new separate agreement.

4. Whether the trial court properly held that Uniwest is not an additional insured under the AIU policy where there was no valid and enforceable indemnity provision or agreement that covered Uniwest's liability for the underlying action.

5. Whether the trial court correctly determined that AIU is not estopped from denying coverage to Uniwest where (1) AIU was Amtech's excess insurer without a defense obligation until the primary limits were exhausted; (2) Uniwest was defended by its primary carrier, Pennsylvania Manufacturers' Association, and Amtech's primary carrier, Continental Casualty Company; (3) AIU timely reserved its rights; and (4) AIU's monitoring counsel never controlled Uniwest's defense.

COUNTERSTATEMENT OF FACTS

Uniwest's statement of facts is inaccurate in several material respects. For instance, Uniwest asserts that Amtech was primarily at fault for the accident because it maintained control over the means and methods of its work and Uniwest's actions did not cause the accident. (Br. 12-13) Yet Uniwest omits all reference to the fact that it was cited by OSHA and sued for its own negligence in failing to enforce its own project safety manual and ignoring the fact that workers did not have fall protection. (JA 2089-92) In fact, one of the theories of liability asserted against Uniwest in the underlying tort action was that Robert Bruce, one of the injured workers, complained to Uniwest's job superintendent that there was no fall protection for the workers in the elevator shaft and was nonetheless ordered by Uniwest's job superintendent to keep working without protection. (JA 2646) Uniwest paid $9.5 million to settle its own negligence, as well as claims for punitive damages leveled against Uniwest. (JA 2636-37, 2890-91, 2898- 2900)

Uniwest ignores the subcontract's supremacy clause when arguing that the indemnity agreement in the prime contract could be pulled into the subcontract. (Br. 5-8, 36-41) That clause prohibits incorporation of an inconsistent provision and would thus prohibit incorporation of the prime

contract's indemnity provision, as it conflicts with the indemnity provision in the subcontract. (JA 1995)

Uniwest also asserts that correspondence between counsel for Uniwest and Amtech in 2002 and through January 2004 established the terms of the second agreement. (Br. at 14-15) The record shows, however, that the correspondence between Uniwest and Amtech only occurred to implement Amtech's indemnification of Uniwest under the existing indemnity agreement in the subcontract, and not to form a separate "second" indemnity agreement. (JA 2258, 2306, 2311, 2314) Uniwest also fails to acknowledge that AIU was not a party to the alleged second indemnity agreement.

In support of its estoppel arguments, Uniwest fails to mention that: (1) AIU was Amtech's excess insurer, which had no defense obligation until the primary limits were exhausted; and (2) Uniwest was defended by its primary carrier, Pennsylvania Manufacturers' Association ("PMA"), and Amtech's primary carrier, Continental Casualty Company ("CNA"). (JA 511, 615, 1673, 1863-64)

The record shows that Uniwest's primary insurer, PMA, hired attorney Joseph Gibley to defend Uniwest immediately after the accident in October 2001. (JA 615) Amtech later hired attorney James Lynn to defend Uniwest

in January 2002, pursuant to the subcontract's indemnity provision, with its own primary insurer's permission, but not the acceptance or agreement of AIU. (JA 631, 734-35, 1016-17)

The record shows that the trial court properly found that AIU never agreed to defend Uniwest; that it timely reserved rights; and that counsel retained by AIU, Robert Devine, never controlled Uniwest's defense. (JA 790-91, 821, 884-85, 866, 896, 899, 923-24, 3041-42) In fact, Lynn, the attorney hired by Amtech and not AIU, admitted at trial that he and his firm were lead counsel. (JA 802-03) Devine testified unequivocally that he was never lead counsel, having been hired right before the trial. (JA 866)

In short, Uniwest's "facts" are completely one-sided and fail to recognize that all reasonable inferences must be construed most favorably to AIU. Uniwest's need to omit the evidence supporting the trial court's findings is a concession that it cannot meet its burden on appeal of proving that the trial court was "plainly wrong." Uniwest ignores the facts regarding its culpability for the accident in affirmatively failing to enforce its own work site safety rules. In so doing, Uniwest seeks to shift the responsibility for its own negligence onto Amtech in direct violation of Virginia's anti-indemnity statute. Amtech and AIU therefore provide a complete statement of facts

on the issues raised by Uniwest so the trial court's holdings can be viewed in light of all of the evidence presented.

The Parties

Uniwest is a commercial general contractor. (JA 720) Pennsylvania Manufacturers' Association Insurance Company ("PMA"), United States Fire Insurance Company ("U.S. Fire") and Federal Insurance Company ("Federal") are Uniwest's liability insurers. (JA 2) Amtech is an elevator contractor. (JA 604) ABM Industries, Inc. ("ABM") is Amtech's parent company. (JA 2) AIU Insurance Company ("AIU") is Amtech and ABM's excess liability insurer. (JA 6) CNA, Amtech's primary liability insurer, is not a party to this action. (JA 465)

The Project And The Contracts

Uniwest contracted with the owner of The Fountains at Logan Square East ("Fountains") to act as general contractor in the renovation of that high-rise building. (JA 721, 1911) Fountains agreed to pay Uniwest $11.2 million for its work. (JA 1913) Under the contract ("prime contract"), Uniwest must procure liability insurance sufficient to protect it from claims that may arise from its own operations, as well as those of its subcontractors. (JA 1952-53)

The Policies: Uniwest Has $11 Million Of Its Own Insurance

At the relevant time, Uniwest had liability insurance totaling $11 million: a $1 million primary policy issued by PMA; a $5 million first-tier excess policy issued by U.S. Fire; and a $5 million second-tier excess policy issued by Federal. (JA 741)

Amtech and ABM had liability insurance totaling $26 million: a $1 million primary policy issued by CNA and a $25 million excess policy issued by AIU. (JA 1673, 1863)

Uniwest Subcontracts With Amtech For Elevator Work

Several months later, Uniwest subcontracted with Amtech to perform elevator work on the Fountains project. (JA 727, 1995) Amtech was to modernize three passenger elevators and install one new service elevator. (JA 609, 2014) The work was to be done under Uniwest's direction and to its satisfaction. (JA 1995) Uniwest agreed to pay Amtech $720,455 for its work. (JA 1996)

Uniwest Drafts An Indemnity Agreement That Purports To Indemnify It For Its Own Negligence

The subcontract contains an indemnity provision requiring Amtech to defend and indemnify Uniwest for Uniwest's own negligence:

> [Amtech] hereby assumes entire responsibility for any and all damage or injury of any kind or nature whatever …. If any claims for such damage or injury be made or asserted, whether or not such claims(s) are based upon the negligence of Uniwest

> or [Fountains], [Amtech] agrees to indemnify and save harmless Uniwest from any and all such claims ….

(JA 1997) The subcontract states it is governed by Virginia law. (JA 1999) Uniwest drafted the entire subcontract, including the indemnity and choice-of-law provisions. (JA 611) The subcontract incorporates by reference the same terms as the prime contract, but only to the extent they relate to Amtech's work:

> [Amtech] agrees to be bound to Uniwest by all the terms of the [prime contract] … so far as that [prime contract] relates to the work specified herein and to assume toward Uniwest all of the obligations and responsibilities that Uniwest has by the [prime contract] assumed toward [Fountains].

(JA 1995) Under the prime contract, Uniwest agreed to "indemnify and hold harmless [Fountains] … from any claims … arising out of or resulting from performance of the Work … but only to the extent caused in whole or in part by negligent acts of … [Uniwest]." (JA 1943) The subcontract expressly provides that the terms of the prime contract are not incorporated as to the subjects addressed and modified in the subcontract. (JA 1995) To the extent there is a conflict with the terms of the prime contract, the subcontract controls.[1] (JA 1995)

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[1] Uniwest claims at page 7 of its brief that the Zipf specifications required Amtech to name Uniwest as an additional insured, and that Amtech provided a certificate of insurance reflecting this. These statements, though not relevant to the issues raised by Uniwest, are wrong, as shown

Uniwest's Culpability For The Accident

Two Amtech employees, Robert Bruce and Thomas Stinson, were working on the project when a scaffold in an elevator shaft collapsed, causing them to fall. (JA 612-13, 2079) Bruce was severly injured; Stinson died. (JA 2079-80) Thereafter, the Occupational Safety and Health Administration ("OSHA") cited Uniwest for three safety violations, two of which were classified as serious. (JA 2636-37) Uniwest paid a fine as part of its settlement with OSHA. (JA 2636-37)

Bruce, his wife and the administrator of Stinson's estate sued Uniwest and 26 other defendants for compensatory and punitive damages. (JA 2089-2112) They alleged, among other things, that Uniwest had been negligent because: (1) as the project supervisor, Uniwest had failed to provide them with a reasonably safe work environment; (2) Uniwest had failed to inspect the scaffolding for defects; (3) Uniwest had failed to enforce or ensure that workers were using life lines; (4) Uniwest had failed to enforce or ensure that workers were using personal fall arrest systems or their equivalent; and (5) Uniwest had pressured workers to complete tasks to compensate for construction delays. (JA 2089-92)

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in Amtech and AIU's own brief filed with this Court on March 10, 2010.

Plaintiffs' liability theory was that Uniwest had permitted and/or ordered Bruce and Stinson to work in the elevator shaft without fall protection in violation of OSHA standards and Uniwest's own project safety manual. (JA 2646) In support of this theory, plaintiffs relied upon Bruce's testimony that he complained to Uniwest's job superintendent about working in the elevator shaft without fall protection and that the job superintendent had ordered him to do so anyway. (JA 2646) While Uniwest's job superintendent denied ordering Bruce to work without fall protection, he admitted he knew Bruce and Stinson were working without fall protection, but believed that fall protection was not required. (JA 2646) The job superintendent also admitted that he never implemented many requirements of Uniwest's safety plan for the project. (JA 2647) In support of their punitive damage claim, Bruce and Stinson further alleged that Uniwest had exerted pressure on the Amtech workers to work without taking adequate safety precautions because the elevator work was behind schedule. (JA 2647)

Amtech Defends Uniwest Under The Subcontract's Indemnity Agreement

Uniwest notified its carriers of the lawsuit. (JA 734-35) Uniwest's primary insurer, PMA, hired attorney Joseph Gibley to defend Uniwest. (JA 615) Both Uniwest and PMA informed Amtech that they expected Amtech

to defend and indemnify Uniwest pursuant to the subcontract's indemnity provision. (JA 631, 734-35) Amtech agreed to do so on the advice of counsel, Richard Hohn. (JA 614-15, 633, 657) Hohn advised the provision was "ironclad" under Pennsylvania law and the same appeared to be true under Virginia law. (JA 614-15, 633, 657)

Between 2002 and January 2004, Amtech and Uniwest continued to implement and finalize the terms of what Amtech thought at the time was its contractual obligation to defend and indemnify Uniwest under the subcontract. (JA 2258, 2306, 2311, 2314) AIU was not a party to these implementation discussions. (JA 2311) Pursuant to the agreement, Amtech hired attorney James Lynn to defend Uniwest. (JA 735)

AIU Never Controls Uniwest's Defense And Timely Reserves Its Rights

James Lynn undertook Uniwest's defense in January 2002. (JA 768) He was hired by Amtech, not AIU. (JA 631, 734-35) Three years later, in late 2005, AIU hired attorney Robert Devine to assist in Uniwest's defense because trial was approaching. (JA 817) This was after Lynn had conducted discovery and filed dispositive motions, and after the pleadings had been closed as trial was imminent. (JA 817-18, 821, 862, 864, 866) Lynn testified that he and his firm remained lead counsel. (JA 802-803) Both Lynn and Amtech's representative, David Clark, testified AIU had

advised them that only the primary carriers had accepted Uniwest's defense, and that AIU, as an excess insurer, had not. (JA 773, 1016-17)

AIU hired Devine because there was not yet a legal ruling as to the validity of the subcontract's indemnity provision. (JA 891) In December 2005, AIU concluded that the subcontract's indemnity provision was void under Virginia law. (JA 884-85, 908, 918, 923-24) AIU had previously communicated reservations about coverage, which Amtech acknowledged was a reservation of rights. (JA 2362, 2404) In fact, Uniwest first informed AIU that it considered itself an additional insured under Amtech's policy in early 2006. (JA 2472) AIU promptly denied Uniwest additional insured status. (JA 2500)

Devine testified about his role in Uniwest's defense. Devine was hired a month or two before trial was scheduled. (JA 817) He was hired to review the file and assist lead counsel, Lynn. (JA 821) Since Lynn had handled the case for several years, he was responsible for all client communications. (JA 839) Lynn was also responsible for settlement negotiations; Devine was not involved in these negotiations at all. (JA 825) Devine had limited involvement in selecting experts, as they were retained before he was hired. (JA 831-32) Devine agreed to present damages witnesses at trial, if required, because they were shared with other

defendants. (JA 834) Lynn was responsible for all liability issues. (JA 865) Devine never "replaced" Lynn as lead counsel:

> Q: Even after the case was continued … is it still your testimony that you were not there to replace Mr. Lynn to take control of the case?
>
> A: No, I did not replace Mr. Lynn.

(JA 866)

AIU Reserves Its Rights As The Indemnity Provision Is Void

In late 2005, several months before the tort action was scheduled for trial, AIU concluded that the subcontract's indemnity provision was void under Virginia law. (JA 884-85, 908, 918, 923) AIU advised Amtech it was reserving its rights under the policy. (JA 884-85, 908, 918, 923) AIU had orally reserved its rights earlier, even though Amtech had not inquired whether there was coverage. (JA 790-91, 896, 899, 921, 924)

Uniwest's Carriers Settle Its Liability

Bruce and the administrators of Stinson's estate settled their claims against all defendants for $17.5 million. (JA 2889, 2898) Uniwest's portion of the settlement was $9.5 million, which was paid entirely by Uniwest's insurers to settle Uniwest's liability. (JA 441, 742, 1092, 2889, 2898)

The Trial Court Finds The Subcontract's Indemnity Provision Void And There Is No "Second Agreement," Waiver Or Estoppel

In this coverage action, seeking defense and indemnity for Uniwest in the underlying lawsuit, the trial court first found that the subcontract's indemnity provision is void as against public policy under Virginia Code § 11-4.1 because it purports to indemnify Uniwest for its own negligence. (JA 3145-46) Consistent with the statute's language, the court correctly voided the provision because it facially purported to indemnify Uniwest under all circumstances, including where Uniwest is solely negligent, in contravention of public policy. (JA 3145-46) After this adverse ruling, Uniwest voluntarily non-suited the case and re-filed in the Federal District Court of the Eastern District of Virginia. (JA 256) The only difference in the new suit was that Uniwest did not sue defendant ABM Industries, Inc., the first named insured on the AIU policy, whose inclusion would have destroyed diversity jurisdiction. (JA 316) The federal court dismissed the case. (JA 316) Amtech re-filed the present action.

After a bench trial, the court found that Amtech and Uniwest had not formed a separate, "second" indemnity agreement in January 2004. (JA 3036-37) Rather, the negotiations that occurred were based on the subcontract's indemnity provisions and designed to determine how the contractual indemnity would be provided:

> The correspondence and communications that took place after the subject loss was concerned with whether

> Amtech would accept tender defense and would indemnify Uniwest. Its tender is predicated on the subcontract indemnity clause, which both parties believe are valid.… [T]he subsequent agreement of January 2004 was based on the subcontract provision and its obligations. The additional terms that were negotiated between the parties were to implement that provision and was incidental to the indemnity provision in the subcontract. The parties were not contemplating replacing the subcontract indemnity provision with a new indemnity provision.

(JA 3036-37)

The court also rejected, on numerous grounds, Uniwest's assertion of waiver and estoppel against AIU. (JA 3041-42) The court found that AIU had ultimately reserved its rights in writing in December 2005, and that Uniwest had not requested coverage of AIU at any prior time:

> Mr. Carucci sent a letter dated December 6, 2005 to Amtech where AIU asserted a full and complete reservation of rights. The evidence shows that counsel for Uniwest, Mr. Gibley, never contacted AIU directly to ascertain their position on coverage. Under the circumstances of this case and consistent with California law, there was no waiver or acquiescence by AIU.

(JA 3041-42) The court also found that AIU had never agreed to defend and indemnify Uniwest, and that the counsel hired by AIU, Devine, never took over or controlled Uniwest's defense as he never replaced Lynn as lead counsel. (JA 3041)

ARGUMENT

I. STANDARDS OF REVIEW

A. Assignments of Error 1, 2 and 4

This Court reviews *de novo* the interpretation of contracts. *Hood v. Commonwealth*, 269 Va. 176, 181, 608 S.E.2d 913, 916 (2005). Similarly, this Court reviews *de novo* the interpretation and application of statutes. *Office of Comptroller v. Barker*, 275 Va. 529, 536, 659 S.E.2d 502, 504 (2008).

B. Assignments of Error 3 and 5

This Court views the evidence and all reasonable inferences in the light most favorable to the prevailing party below. *Street v. Street*, 25 Va. App. 380, 387, 488 S.E.2d 665, 668 (1997). A trial court's factual findings made upon the evidence presented at a bench trial are entitled to great weight and will not be disturbed on appeal unless "plainly wrong or without evidence to support it." VA. CODE ANN. § 8.01-680 (West 2010); *Street*, 25 S.E.2d at 668. This is because the trier of fact ascertains the witnesses' credibility and the weight to be given their testimony, and has the discretion to accept or reject any part of that testimony. *Id*., 488 S.E.2d at 668.

II. THE SUBCONTRACT'S BROAD INDEMNITY PROVISION THAT PURPORTS TO INDEMNIFY UNIWEST FOR ITS SOLE NEGLIGENCE IS VOID AND UNENFORCEABLE PURSUANT TO VIRGINIA CODE § 11-4.1. (RESPONSE TO ASSIGNMENT OF ERROR NO. 1)

The trial court correctly found the subcontract's indemnity provision violates Virginia Code § 11-4.1, which renders void and unenforceable any provision in a construction contract that purports to indemnify another party to the contract for injuries resulting solely from the other party's negligence. Consistent with the language of the statute, the trial court properly voided the subcontract's indemnity provision, as it purports to afford Uniwest indemnification for its sole negligence in contravention of this state's public policy.

The General Assembly of Virginia has specifically addressed the propriety of clauses in construction contracts that purport to provide indemnity against a party's sole negligence, and has unequivocally told the Virginia judiciary that such a clause "is against public policy and is void and unenforceable," thereby departing from the common law rule allowing such contractual clauses. VA. CODE ANN. § 11-4.1. Indeed, the public policy of Virginia is "expressed by the General Assembly." *Williamsburg Peking Corp. v. Kong*, 270 Va. 350, 354, 619 S.E.2d 100, 102 (2005). Accordingly, Virginia courts may not usurp the role of law-makers on matters of

economics, sociology and public policy as "[t]hose considerations belong exclusively in the legislative domain." *Marblex Design Int'l., Inc. v. Stevens*, 54 Va. App. 299, 678 S.E.2d 276, 281 (2009), *citing Infants v. Virginia Hous. Dev. Auth*., 221 Va. 659, 671, 272 S.E.2D 649, 656 (1980). Here, in finding the subcontract's indemnity provision void and unenforceable, the trial court carried out the intent of the General Assembly in furtherance of this state's public policy.

Having found that the indemnity provision violated the statute, the trial court appropriately rejected Uniwest's attempt to enforce the provision against Amtech. Where a contract is illegal on its face because it violates a statute, an action cannot be maintained to enforce it. *All Am.Contractors, Inc. v. Betonti*, No. 160538, 53 Va. Cir. 24, 2000 WL 977379, *1 (Va. Cir. Ct. Feb. 8, 2000). Thus, "[w]henever the illegality of a contract appears, whether alleged in the pleadings or made known for the first time in the evidence, it is fatal to the case." *Buick v. Jess DuBoy Adver., Inc.*, No. LM-1109-4, 14 Va. Cir. 298, 301, 1989 WL 646173, *3 (Va. Cir. Ct. Feb. 1, 1989).

Indeed, contractual provisions such as the indemnity provision at issue here are void ab initio and thus a nullity in the first instance. *E.g., Hilfiger v. Transamerica Occidental Life Ins. Co.*, 256 Va. 265, 271, 505 S.E.2d 190,

193 (1998) (life insurance contracts in violation of statutory provisions are void ab initio); *Kennedy v. Annandale Boys Club, Inc.*, 221 Va. 504, 507, 272 S.E.2d 38, 39 (1980) *superseded by statute*, VA. CODE ANN. § 18.4-334.2, *as recognized in Hughes v. Cole*, 251 Va. 3, 465 S.E.2d 820 (1996) (under other grounds) ("A void contract is a complete nullity, one that has no legal force or binding effect."). "[A] contract to perform an act prohibited by a statute is void …" *Palumbo v. Bennett*, 242 Va. 248, 251, 409 S.E.2d 152, 153 (1991). Thus, the trial court properly found that the indemnity provision was void, rendering it a legal nullity and unenforceable against Amtech.

The trial court's proper finding that the indemnity provision fell within the scope of the statute is buttressed by the statute's plain language. Section 11-4.1 voids as against public policy any provision in a construction contract by which the party performing the work "purports" to indemnify another party to the contract for liability arising out of the other's sole negligence:

> ***Any provision*** contained in any contract relating to the construction, alteration, repair or maintenance of a building, structure or appurtenance thereto … ***by which the contractor performing such work purports to indemnify or hold harmless another party*** to the contract against liability for damage arising out of bodily injury to persons or damage to property suffered in the course of performance of the contract, caused by or resulting solely from the negligence of such other

> party or his agents or employees, is against public policy and is void and unenforceable.

VA. CODE ANN. § 11-4.1 (emphasis added).

By its clear mandate, the statute voids "any ***provision*** that … ***purports*** to indemnify" another party for its sole negligence. *Id*. The plain meaning of the term "purports" as used in § 11-4.1 is dispositive. "Purport" unambiguously means "to convey or profess outwardly as the meaning or intention." THE MERRIAM-WEBSTER DICTIONARY (6th ed. 2004).

Here, it can hardly be said that the indemnity provision does not *purport* to indemnify Uniwest for its sole negligence. The indemnity provision requires Amtech to assume the entire responsibility for all damage or injury based upon the negligence of Uniwest:

> [Amtech] hereby assumes entire responsibility for any and all damage or injury of any kind or nature whatever … If any claims for such damage or injury be made or asserted, whether or not such claims(s) are based upon the negligence of Uniwest or [Fountains], [Amtech] agrees to indemnify and save harmless Uniwest from any and all such claims …

(JA 1997) By unambiguously stating that Amtech must indemnify Uniwest from "any and all" claims "whether or not such claim(s) are based upon the negligence of Uniwest," Amtech's duty to indemnify Uniwest clearly applies irrespective of whether the claims are based on Uniwest's negligence. This signifies that the claims may be predicated entirely on Uniwest's negligence. The provision therefore necessarily *purports* – professes or

claims – to indemnify Uniwest for its sole negligence. If the General Assembly intended otherwise, it would not have specifically chosen the term "purport" to describe the type of provisions included within the ambit of the statute. *See Earley v. Landsidle*, 257 Va. 365, 370, 514 S.E.2d 153, 155 (1999) ("[W]hen the language in a statute is clear and unambiguous, the courts are bound by the plain meaning of that language.").

Moreover, and contrary to Uniwest's assertions, a determination as to the statute's application to the indemnity provision does not depend on any future allocation of fault. (Br. at 28-30) Rather, the determination of whether the statute applies is made by examining the face of the provision. *See, e.g., ManTech Int'l Corp. v. Analex Corp.*, No. CL-2008-5845, 75 Va. Cir. 354, 2008 WL 6759967, *2 (Va. Cir. Ct. July 18, 2008) (courts "can properly consider the validity of the clauses on their faces to determine if they are unenforceable per se"). Had the General Assembly intended an exception to the statute based on a future allocation of fault, it presumably would have provided such an exception in the statute's language. "We must assume the General Assembly, having specified exceptions to the statutory prohibition, intentionally excluded any others." *Blake Constr., Inc. v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 577, 587 S.E.2d 711, 718 (2003). Since the indemnity provision on its face purports to indemnify

Uniwest for its own negligence, it directly conflicts with § 11-4.1's precise prohibition and is therefore void.

In *Blake*, this Court was called upon to determine whether certain contract provisions violated Virginia's statutory prohibition against "no damage for delay" clauses – provisions in public construction contracts purporting to bar damages for unreasonable delays. *Id*. 266 Va. at 572. The statute, Virginia Code § 2.2-4335(A), renders void and unenforceable as against public policy "[a]ny provision contained in any public construction contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages for unreasonable delay … if and to the extent the delay is caused … by the public the body …" *Id*. at 572. One of the contract provisions at issue in *Blake* restricted the contractor's delay damages to an extension of time, affording no monetary recovery. The other provision at issue contained exceptions to the first provision's blanket prohibition and allowed recovery of delay damages only if the owner's unreasonable delay was coupled with bad faith, malice, gross negligence or abandonment of the contract. *Id*. at 573-74.

After examining the face of the two contractual provisions alongside the plain language of the statute, this Court held that the provisions violated the statute and were thus rendered void and unenforceable as against public

policy. *Id*. at 574-76. In so holding, this Court expressly rejected the owner's argument that the provisions did not violate the statute since the provisions did not extinguish *all* monetary relief in *all* possible circumstances. *Id*. at 575. The Court explained that the General Assembly did not create a statutory exception for instances where the owner's unreasonable delay is coupled with bad faith, malice, gross negligence or abandonment of the contract. This Court further noted that the legislature could have codified such an exception but did not, and "if any expansion or constriction of the blanket prohibition . . . is to be created, that authority must come from the General Assembly and not the parties or the judiciary." *Id*. at 576.

Here, just as in *Blake*, this Court should reject Uniwest's attempt to create an exception that does not appear in the statute. Uniwest argues that in order to find that the provision violates the statute, the trial court would have had to determine that the damages in question resulted from the sole negligence of Uniwest and that Uniwest was in turn seeking indemnification from Amtech for claims arising out of Uniwest's sole negligence. (Br. at 22) There is, however, no such exception in § 11-4.1 that allows for a provision, which would otherwise be void under the statute, to be saved or excepted based on a determination of whether the

indemnitee is, in fact, ultimately found to be solely negligent. Indeed, it is enough to find a violation where the provision on its face easily encompasses Uniwest's sole negligence.

The Massachusetts Court of Appeals used this very method to determine the application of a similar anti-indemnity statute, holding that a factual inquiry about the relative fault of the parties to the agreement is not only a misuse of judicial resources, but inconsistent with the face of the statute. *Harnois v. Quannapowitt Dev., Inc.*, 619 N.E.2d 351, 352 (Mass. App. Ct. 1993) In so ruling, the court observed that if the focus is on the indemnity agreement itself, rather than the facts of any particular accident, the purpose of the statute "would be achieved without unduly burdening the courts and the parties with time-consuming assessments of negligence and comparative negligence." (*Id.*) The trial court here thus upheld the purpose of the statute by analyzing the contractual indemnity provision at issue that on its face violates § 11-4.1.

Indeed, Uniwest could have drafted an indemnity provision consistent with Virginia's anti-indemnity statute, but did not and must be held to account for the consequences of its own draftsmanship. This point was articulated by the court in *Healey v. J.B. Sheet Metal*, 892 P.2d 1047 (Utah Ct. App. 1995), in which a broad indemnity provision similar to the one at

issue here required the subcontractor to indemnify the general contractor from "any and all" liability resulting from the subcontractors performance. *Id.* at 1051; UTAH CODE ANN. § 13-8-1 (1992). On appeal, the court held that the scope of the provision on its face violated Utah's anti-indemnity statute. The court explained that the provision does not by its terms limit the subcontractor's obligation to situations in which the general contractor is not the sole responsible party. 892 P.2d at 1052. On this basis, the court ruled the provision was void and unenforceable:

> In sum, we hold that the indemnity provision of the ABP/Clark Agreement violates section 13-8-1 and is therefore void and unenforceable. In so doing, we note that it would have been a simple matter for the parties to limit Clark's obligation so that the indemnity provision did not run contrary to section 13-8-1; a clause excepting those situations in which ABP's sole negligence resulted in ABP's liability would have been sufficient.

892 P.2d at 1052. The *Healey* court's statement applies with equal force in this case as to the indemnity provision Uniwest drafted.

Legitimate public policy concerns further support the trial court's conclusion that the indemnity provision is void and unenforceable. By nullifying such provisions, courts provide continuing motivation for all persons responsible for construction activities – particularly the general contractor who is the only one in the position to ensure safety throughout the worksite – to take accident prevention measures and provide safe

working conditions. *Kinney v. G.W. Lisk Co*., 556 N.E.2d 1090, 1092 (N.Y. 1990) (an agreement purporting to hold an owner or general contractor free from liability for its own negligence undermines strong public policy of placing and keeping responsibility for maintaining a safe workplace on those parties). The trial court's application of Virginia Code § 11-4.1, which places the risk on the culpable parties, therefore promotes, rather than reduces, work site safety.

The use of indemnity and hold-harmless agreements in the construction industry remove or reduce incentives to protect workers and others from injury by allowing culpable parties to avoid the consequences of failing to maintain a safe workplace. *See Davis v. Commonwealth Edison Co.*, 336 N.E.2d 881, 884 (1975) (citing PROSSER, HANDBOOK OF THE LAW OF TORTS § 4 (4th ed. 1971)). Anti-indemnification statutes are therefore directed at thwarting attempts to avoid the consequences of liability, thereby insuring a motivation for persons responsible for construction activities to take accident prevention measures and provide safe working conditions. *Id*. at 884.

Prior to the enactment of anti-indemnification statutes such as § 11-4.1, it was common practice for general contractors to obtain indemnity agreements from their subcontractors. State legislatures believed that

such agreements led the indemnitee to be less careful and thereby increase the incidents of worksite accidents. As explained in *Aetna Casualty & Surety Co. v. Marion Equipment Co*., 894 P.2d 664, 668 (Alaska 1995), the legislative response to this practice was to enact anti-indemnity statues.

Despite the legislative goal behind such anti-indemnity statutes, Uniwest urges this Court to take the opposite position and allow general contractors to shift the financial burden of their own liability for worksite safety to their subcontractors. The undesired result, however, inevitably will be to encourage what happened in this case – general contractors, shielded by indemnity agreements foisted upon their subcontractors, will have little or no incentive to enforce safety procedures thereby defeating the legislative purpose of such statutes.

Uniwest's assertion that the common sense approach is to excise that portion of the clause relating to indemnification for the sole negligence of the indemnitee and to permit indemnification in cases of "concurrent negligence," contravenes the clear legislative intent expressed by the statute and creates a disincentive for litigants to settle. (Br. at 28-30) Rather than settle, an indemnitee would always be compelled to establish at trial that it was not negligent in order to enforce the indemnity provision.

If, on the other hand, the indemnitee did settle, courts still would be required to conduct a trial of the settled case before the provision could be applied. Either scenario gives an incentive to litigation rather than encouraging settlement of claims.

Simply because the indemnification provision does not contain the word "solely" does not render it unenforceable as is now claimed by Uniwest. (Br. at 32) Here the broad overreaching indemnity provision shifts to Amtech Uniwest's "entire responsibility for any and all damage or injury of any kind and nature whatever" and requires indemnity "whether or not such claims are based upon the negligence of Uniwest." (JA 1997) This indemnity provision is susceptible to only one reasonable interpretation: Amtech must indemnify Uniwest even where Uniwest is solely negligent. The trial court thus properly found that the provision violated the Virginia anti-indemnification statute because it purports to indemnify Uniwest for its sole negligence.

Uniwest's contention that § 11-4.1 is inapplicable since fault is shared among both Uniwest and Amtech is likewise without merit. Uniwest's conclusory assertion that Amtech was "primarily responsible" for the accident ignores the fact that Uniwest settled and paid its own liability – including the claim that Uniwest directly ordered the workers to work

without fall protection because the elevator work was behind schedule, thereby putting profits over safety. (Br. at 30) This is not a case where Uniwest was simply a "controlling employer." (Br. at 31) Uniwest was not sued under a theory of vicarious liability for Amtech's conduct. Nor can Bruce or Stinson share in the fault for not wearing fall protection when they were ordered by Uniwest to keep working without any safety lines. Uniwest was thus charged with and settled claims for its own negligence. Uniwest was also charged with claims for punitive damages for Uniwest's deliberate indifference to safety. Ultimately, Uniwest paid $9.5 million to Bruce and Stinson to settle Uniwest's liability.

In settling the underlying action, Uniwest paid for its own negligence, a liability it now seeks to shift to Amtech. *Crosby v. Gen. Tire & Rubber Co.,* 543 F.2d 1128, 1131 (5th Cir. 1976) (settlement must be considered recompense for the indemnitee's own negligence, recovery for which was barred by Mississippi statute which rendered void agreements for indemnity against one's own negligence). It is however, this type of risk shifting that the State of Virginia prohibited in enacting § 11-4.1.

As shown above, Uniwest's argument that the trial court's ruling is contrary to the law of the state of Virginia has no support in the enactments of the legislature. Uniwest thus relies on inapplicable cases, none of which

involve construction contracts or the anti-indemnity statute. Rather, these cases simply make the unremarkable point that generally it is not against public policy for a party to contract against its own negligence. *E.g., Estes Express Lines, Inc. v. Chopper Express, Inc.*, 273 Va. 358, 641 S.E.2d 476 (2007) (truck lease agreement); *W.R. Hall, Inc. v. Hampton Roads Sanitation Dist.*, 273 Va. 350, 641 S.E.2d 472 (2007) (indemnification for sanitation district); *Safeway, Inc. v. DPI Midatlantic, Inc.*, 270 Va. 285, 290, 619 S.E.2d 76 (2005) (employer and employee indemnification). Section 11-4.1, however, clearly carves out an exception to that general rule in the case of construction contracts where a party overreaches and purports to extract from another party indemnity for its sole negligence, as Uniwest did here.

Uniwest, as it did in the trial court, relies upon a federal trial court decision in *Utica Mutual Insurance Co. v. Atlantic Foundations, Inc.*, No. 06-cv-487, 2007 WL 190682 (E.D. Va. Jan. 18, 2007). The Virginia trial court in ruling on this issue squarely rejected Uniwest's argument that under *Utica,* even if the provision falls within § 11-4.1, the statute does not void the provision, only the provision as applied under the facts of the case. (JA 3155-56) On the contrary, the trial court specifically found that the determination with respect to whether the statute violates § 11-4.1 is made

by examining the face of the indemnity provision, noting that the *Utica* was not persuasive authority. (JA 3155).

The trial court properly found that Uniwest's reliance on *Utica* was misplaced. The court in *Utica* noted that Va. Code Ann. § 11-4.1 by its express terms only applies to an agreement where the contractor performing the work purports to indemnify another party for its sole negligence. *Utica* thus found that § 11-4.1 did not apply to the indemnity agreement at issue there because the party seeking indemnity (the subcontractor) under a lease agreement was the party that performed the work. *Id*. at *3. The court went on to observe that even if the statute was applicable, it would not apply because the indemnitee and indemnitor both entered into separate settlement agreements resolving claims for their own liability. *Id*. at *3. This case, unlike *Utica*, involves a settlement of indemnitor's liability only. Moreover, the portion of the holding replied upon by Uniwest is *dictum*. The trial court thus properly determined that *Utica* was not persuasive because the terms of the indemnity agreement in the subcontract here, unlike the agreement in *Utica*, fell squarely within the scope of Va. Code Ann. § 11-4.1 and were thus, as declared by the Virginia legislature, void and against public policy.

At pages 28-30 of its Brief, Uniwest cites cases from other jurisdictions in support of its contention that even if the provision falls within the purview of section 11-4.1, the statute does not void the provision itself but permits enforcement of the provision if the facts demonstrate that the indemnitee is concurrently liable. In other words, Uniwest asks this Court to re-write the indemnity agreement by severing the unenforceable promise so it can shift the entire $9.5 million settlement to Amtech. The problem with this argument is that the statute does not provide that an indemnity agreement otherwise rendered void by the statute can be redrafted to avoid the application of the statute. The better reasoned approach adopted by the trial court here is to find the provision purporting to indemnify the indemnitee for its sole negligence void and against public policy as declared by the legislature in enacting § 11-4-1. To hold otherwise effectively renders the statute a nullity.

In sum, this Court should disregard Uniwest's attempt to resurrect the indemnity provision expressly rendered void by the plain terms of Virginia's anti-indemnity statute by relying on cases that do not supersede or supplant the will of the General Assembly in enacting Virginia's anti-indemnity statute. Consistent with the language of the Virginia statute and its legislative purpose, the trial court correctly voided the indemnity

provision in the subcontract because it purported to afford indemnification to Uniwest for its sole negligence in contravention of public policy. Accordingly, this ruling must be affirmed.

In The Alternative Only:

This argument is made in the alternative only in the event this Court overturns the trial court's ruling finding the indemnity clause void and accepts the arguments advanced by Uniwest and its insurers. Such a ruling would then require that Uniwest prove that the liability it settled did not arise out of Uniwest's sole negligence. In fact, *Hays v. Centennial Floors, Inc.*, 893 P.2d 564, 568 (Or. Ct. App. 1995), one of Uniwest's cited cases, so holds. In *Hays*, the court determined that an indemnitee's failure to meet its burden of proving the extent to which the settlement payments for which it sought indemnity pertained to claims other those relating to sole negligence was fatal to its claim for indemnity. *Id*. at 568. As shown above, Uniwest clearly settled claims for its own negligence and for punitive damages.

Because the trial court here found that the void indemnity provision did not provide a basis for Uniwest's contractual indemnity, a determination with respect to the extent to which the settlement payment pertained to claims other than Uniwest's sole negligence was not addressed below.

Accordingly, a remand to the trial court for further proceedings on this issue will be necessary in the event this court overturns the trial court's ruling.

III. THERE WAS NO INCORPORATION OF THE PRIME CONTRACT'S INDEMNITY CLAUSE INTO THE SUBCONTRACT. (RESPONSE TO ASSIGNMENT OF ERROR NO. 2)

This Court has declared that "The guiding light in the construction of a contract is the intention of the parties as expressed by them in the words they have use." *Wilson v. Holyfield,* 227 Va. 184, 187, 313 S.E.2d 396, 398 (1984). According to the rules of construction, "[c]ourts cannot read into contracts language which will add to or take away the meaning of words already contained therein." *Id.* 227 Va. at 184. Additionally, a contract will be construed more strictly against the party who prepared it. *Winn v. Aleda*, 227 Va. 304, 306, 315 S.E.2d 193, 195 (1984). Pursuant to the terms of the subcontract, that must be strictly construed against Uniwest, there was no incorporation of the of the indemnity clause of the prime contract. Such incorporation would be inconsistent with the existing indemnity provision in the subcontract, and, thus, would violate the subcontractor's supremacy clause, which does not allow incorporation of inconsistent provisions:

> In the event of a conflict between the terms of the Agreement and this Subcontract, the Subcontract will be deemed controlling.

(JA 1995, ¶3) Moreover, the Amtech subcontract expressly provides that the terms of the prime contract are not incorporated as to the subjects addressed and modified in the subcontract:

> Uniwest Construction, Inc., as Prime Contractor, has entered into an Agreement dated August 1999 with The Fountains as Owner, covering certain construction work on the following project:
>
> The Fountains at Logan Square East, 2 Franklintown Road, Philadelphia, PA 19103
>
> Which Agreement inclusive of all Drawings and Specifications … are incorporated herein to the extent **not otherwise excluded or modified** by the terms of this Subcontract.

(JA 1995, emphasis supplied) The subcontract drafted by Uniwest thus expressly provides that the conflicting prime contract indemnity provision was never incorporated in the subcontract. 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.

Uniwest's cited cases deal with incorporation. (Br. at 38) However, none of the cases involve a situation where, as here, the general contractor seeks to substitute a conflicting indemnity provision that the parties expressly agreed would not be incorporated into the agreement. Here the parties, by the terms of the contract, did not intend that the inconsistent provision of the prime contract could be pulled into the subcontract. The

trial court’s ruling that the prime contract indemnity clause is inapplicable was correct and must be affirmed, albeit on other grounds.

Moreover, even if the prime contract’s indemnity clause is incorporated into the subcontract as claimed by Uniwest, the court correctly determined that it was only Uniwest's obligations toward the Owner that Amtech could ever be deemed to have assumed; that provision would not require Amtech to indemnify Uniwest:

> [A]ssuming arguendo that the indemnification in the prime contract is an obligation owed from the subcontractor to the owner, then, all paragraph 3 does is require Amtech, the subcontractor, to indemnify the owner. It does not require the indemnification of Uniwest by Amtech.

(JA 3036)

The documents support this finding. Under the prime contract, Uniwest was only obligated to indemnify the Owner for any losses sustained by the Owner. At most then, Amtech agreed to assume Uniwest’s duties to do that – indemnify the Owner. The prime contract did not impose an obligation on Amtech to indemnify Uniwest for amounts Uniwest (or its insurers) paid on Uniwest’s own behalf. To reach its desired result, Uniwest asks the court to replace the word "Contractor" with "Subcontractor" and the word "Owner" with "Contractor" in the prime contract. Nothing supports that re-write here.

In The Alternative Only:

Alternatively, in the event this court finds that the prime contract indemnity clause was incorporated into the Amtech's subcontract, the case must be remanded to the trial court for a fault allocation because the prime contract's indemnity clause clearly reflects a "contribution type" clause limiting Uniwest's recovery, if any, to that portion of the settlement that was paid for claims arising out of the performance of the work "…but only to the extent caused in whole or in part by the negligent acts or omissions of [Amtech]." (JA 1943) Since Uniwest settled the underlying case and the trial court did not apply the prime contract indemnity provision, issues concerning the appropriate allocation of the settlement remain unresolved. *MSI Constr. Managers Inc. v. Corvo Iron Works, Inc*., 527 N.W.2d 79, 81 (Mich. Ct. App. 1995) (holding that the language did not require subcontractor to indemnify contractor for contractor's negligence "but only to the extent caused in whole or in part by the negligent act or omission of subcontractor"). Consequently, application of the prime contract indemnity provision would require a remand for a trial on these issues.

IV. THE TRIAL COURT'S FINDING THAT THE CORRESPONDENCE BETWEEN UNWEST AND AMTECH CONCERNING THE INDEMNIFICATION OF UNIWEST UNDER THE EXISTING INDEMNITY AGREEMENT IN THE SUBCONTRACT DID NOT CONSTITUTE A SEPARATE "SECOND" INDEMNITY OR SETTLEMENT AGREEMENT IS AMPLY SUPPORTED BY THE TRIAL EVIDENCE. (RESPONSE TO ASSIGNMENT OF ERROR NO. 3)

Uniwest next contends the trial court erred in making the factual finding that in January 2004 "[t]he parties were not contemplating replacing the subcontract indemnity provision with a new indemnity provision." (Br. at 42)

Uniwest's argument on this point is nothing more than a request to overturn the trial court's factual determination based upon Uniwest's different perception of what the facts demonstrate. Moreover, the evidence of record amply supports the trial court's factual finding. The correspondence between counsel for Amtech and Uniwest establishes that the parties were merely acknowledging what Amtech thought at the time was a contractual obligation to defend under the subcontract. (JA 2036, 2258, 2311, 2314) The parties did not form a "second" indemnity agreement to replace the subcontract's indemnity agreement or enter into a settlement agreement concerning the indemnification issues in the underlying litigation.

Whether described as a settlement agreement or second indemnity agreement, Uniwest cannot establish that the trial court's finding that there was no second agreement was "plainly wrong or without evidence to support it." VA. CODE ANN. § 8.01-680.

Uniwest's argument that Amtech should be estopped from denying its contractual obligation to defend and indemnify Uniwest is equally without merit for the reasons set forth below in Section VI. This Court holds estoppel cannot resurrect an agreement that is void on public policy grounds. *Hilfiger v. Transamerica Occidental Life Ins. Co*., 256 Va. 265, 273, 505 S.E.2d 190, 194 (1998). Moreover, Uniwest cannot demonstrate detrimental reliance, an essential element of estoppel. *Waynesboro Vill., L.L.C. v. BMC Props*., 255 Va. 75, 82, 496 S.E.2d 64, 82 (1998) ("Elements necessary to show equitable estoppel … are a representation, reliance, a change in position, and detriment"). Detrimental reliance is also a required element of a claim for estoppel under Pennsylvania law. *Washington County v. Washington Court Assoc. of Professional Employees, AFI-CIO,* 948 A.2d 271, 276 (2008).

When Uniwest was sued based upon its own conduct it could have brought the indemnity action either during or after the underlying action. *Bianculli v. Turner Constr. Co*., 640 A.2d 461, 465 (Pa. Super. Ct. 1994).

Uniwest suffered no detriment where it simply deferred suit for its indemnity action until after settling its own liability. Without detrimental reliance, there is no estoppel. Accordingly, the trial court's fact findings are supported by the evidence and should be affirmed.

Uniwest's request to overturn the trial court's findings of fact, which are supported by the evidence, should be denied.

V. THERE WAS NO INSURED CONTRACT UPON WHICH UNIWEST WAS ENTITLED TO COVERAGE. (RESPONSE TO ASSIGNMENT OF ERROR NO. 4)

Uniwest argues that because CNA entered into an agreed order in the trial court stating that Uniwest was an additional insured under CNA's primary policy, that CNA bound AIU to that agreed order. However, the order specifically provided that it was "without prejudice to any claims or defenses of any other party to this action." (JA 465 ¶1) The court found CNA's policy limits had been eroded. (JA 465 at ¶ 3) CNA no longer had reason to dispute whether or not Uniwest was an additional insured and only sought its expeditious removal from the litigation. Such an order does not bind AIU and does not create additional insured status for Uniwest under AIU's policy. Uniwest fails to cite to any portion of the record in support of its argument because CNA cannot bind AIU to such an agreed order.

The trial court's rulings also hold that Uniwest is not an additional insured under AIU's policy. (JA 3040-41) Paragraph E-7 of AIU's Policy only applies when its named insured, Amtech, assumes the tort liability of another party, such as Uniwest. However, the basis of Amtech's assumption of tort liability, the indemnity provision, was properly declared void; therefore, Paragraph E-7 does not provide coverage for Uniwest as an additional insured. Likewise, because the indemnity provision in the prime contract is not incorporated into the subcontract or alternatively applies only to the Fountain's liability if any, Paragraph E-7 does not provide coverage for Uniwest as an additional insured. Finally, the court correctly found there was no second indemnity agreement created by the parties' negotiations in January 2004. Accordingly, such negotiations do not qualify for an "Insured Contract." Thus, AIU submits to this Court that it should deny Uniwest's Assignment of Error 4, insofar as the trial court's ruling was correct.

VI. UNIWEST WAS NOT ENTITLED TO COVERAGE UNDER THE AIU POLICY UNDER A THEORY OF ESTOPPEL. (RESPONSE TO UNIWEST'S ASSIGNMENT OF ERROR NO. 5)

Uniwest concedes, as it must, that AIU issued an excess policy that did not have a defense obligation with respect to the underlying litigation. This is because under California law, "there was neither a duty to provide any

defense under the umbrella policy nor any obligation to respond to an alleged tender of the defense even had one been made, because an umbrella policy has no duty of defense until the primary policy is exhausted." *State Farm Fire & Cas. Co. v. Jorias*, 24 Cal. App. 4th 1619, 1626, 29 Cal. Rptr. 2d 840 (1994).[2]

Despite Uniwest's admission that AIU as an excess insurer had no duty to defend, Uniwest nevertheless claims AIU should be estopped from denying coverage because it hired defense counsel, who Uniwest claims "took control of the defense." (Br. at 49) This bald assertion is flatly contradicted by the trial evidence and the trial court's findings of fact.

The record reveals the trial court's findings that AIU never agreed to defend Uniwest; that it timely reserved rights; and that AIU-hired counsel, Devine, never controlled Uniwest's defense are supported by the evidence and the inferences to be drawn therefrom. AIU hired Devine because there was not yet a legal ruling as to the validity of the subcontract's indemnity provision. (JA 891)

Lynn – the attorney hired by Amtech and not by AIU – who had defended the case for several years testified at trial that he and his firm

[2] In the trial court the parties agreed California law applied. The court therefore applied California in ruling on this issue.

were lead counsel. (JA 802-803) Devine testified that he was hired right before trial making it impossible for him to become lead counsel. (JA 817) Devine had a limited role in monitoring the trial. (JA 821) Lynn was solely responsible for client communications and settlement negotiations. (JA 825) Thus, Devine testified unequivocally that he was never lead counsel and did not replace Lynn who controlled the defense of the case. (JA 866)

Uniwest's argument fails to recognize that all reasonable inferences from the evidence must be made in the light most favorable to AIU here. Accordingly, Uniwest's request for review that simply seeks to overturn the trial court's findings of fact and credibility determinations, which are amply supported by evidence, should be denied.

CONCLUSION

Appellees, Amtech Elevator Services, Inc., now known as ABM Amtech, Inc., ABM Industries, Inc. and AIU Insurance Company, respectfully request that this Court affirm the trial court's rulings or alternatively, if this Court overturns the trial court's ruling on points one and two, remand the matter to the trial court on the issue of fault allocation.

Respectfully submitted,

s/John D. McGavin

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CERTIFICATE OF SERVICE

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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 5th 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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