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.

OPENING BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

At issue in this appeal is a significant matter of Virginia public policy, which Appellants[1] respectfully submit should be resolved by this Court. The issues concern the allocation of risk in the context of a construction project and, more specifically, the financial responsibility for a serious accident that took place on a construction job in Philadelphia, Pennsylvania.

The primary issue, Assignment of Error 1, concerns the Trial Court's ruling that Va. Code § 11-4.1 renders void a crucial indemnification clause in a Subcontract between Uniwest, one of the Appellants, and Amtech, one of the Appellees. The Trial Court's ruling misconstrues § 11-4.1 and yields a result that blatantly misaligns public policy considerations and unnecessarily inhibits the common law right to freely enter into contracts. Moreover, the Trial Court's interpretation of the statute marks an illogical departure from the approach that other courts, including one Virginia federal court, have applied to § 11-4.1 and similar statutes in other states. The Trial Court's ruling is particularly inequitable given that Amtech is primarily at fault for the horrific accident that killed one of Amtech's workers and seriously injured another. Therefore, the Uniwest Parties respectfully

[1] Appellants may be referred to throughout this brief as "the Uniwest Parties", collectively.

submit that the Court should reverse the Trial Court's summary judgment ruling on the Subcontract's indemnity clause.

The other four Assignments of Error are closely related to the first. Assignment of Error 2 concerns the Trial Court's clear error in ruling that a second indemnification clause – not the clause deemed void under § 11-4.1 – did not provide indemnification to Uniwest. Although the court correctly ruled that the indemnity clause in the Prime Contract was incorporated into the Subcontract, it then proceeded to misinterpret the unambiguous language of the incorporated clause. Assignment of Error 3 concerns the enforcement of the agreement reached by various parties involved in the underlying construction project whereby they effectively settled their respective rights and obligations under the Subcontract's indemnity clause (the clause that the Trial Court years later deemed void), following months of negotiations through counsel. Despite the clear evidence of an agreement, the exchange of consideration and a lengthy course of performance consistent with that agreement, the Trial Court allowed Appellees[2] to renege on their express agreement to fully defend and indemnify Uniwest against the Underlying Litigation. These rulings are clearly erroneous and send a troubling message, i.e., that parties should

[2] Appellees may be referred to throughout this brief as "the Amtech Parties", collectively.

not attempt to amicably resolve their differences and, when they do, they cannot count on the enforcement of their agreements.

Assignment of Error 4 relates to AIU and, particularly, whether Uniwest is an additional insured under an insurance policy issued by to Amtech by AIU. This issue is closely related to Assignments of Error 1, 2 and 3. Simply, if any one of the contractual obligations at issue in Errors 1, 2 or 3 is enforceable, then Uniwest clearly qualifies as an additional insured under the AIU policy. Accordingly, to the extent that this Court holds in the Uniwest Parties' favor with respect to Errors 1, 2 or 3, it likewise must do so with respect to Assignment of Error 4.

Finally, with respect to Assignment of Error 5, AIU is obligated to defend and indemnify Uniwest because AIU appointed defense counsel for Uniwest without first reserving its right to deny coverage. The law is clear that when an insurer assumes an insured's defense without reserving its right to later deny coverage, the insurer is estopped from denying coverage. The evidence at trial established that AIU's counsel effectively assumed control of Uniwest's defense in the underlying litigation. Despite proving all of the elements of estoppel under compelling circumstances, the Trial Court held that AIU was not estopped. Again, this ruling is contrary to law and public policy and should not be allowed to stand.

ASSIGNMENTS OF ERROR

1. The Trial Court erred in holding that the indemnification clause in paragraph 10 of the Subcontract is void as against public policy and, therefore, does not obligate Amtech to defend and indemnify Uniwest for the Underlying Litigation.

2. The Trial Court erred in holding that the indemnity clause of the Prime Contract does not obligate Amtech to defend and indemnify Uniwest for the Underlying Litigation.

3. The Trial Court erred in holding that Amtech is not obligated to defend and indemnify Uniwest in the Underlying Litigation pursuant to the January 2004 Agreement.

4. The Trial Court erred in holding that Uniwest is not an additional insured under the AIU Policy and, therefore, that AIU does not owe Uniwest a defense and indemnification for the Underlying Litigation.

5. The Trial Court erred in holding that AIU is not estopped from denying coverage to Uniwest as a result of its assumption of the defense of Uniwest in the Underlying Litigation without first reserving its right to deny coverage.

STATEMENT OF FACTS

A. The Prime Contract Between The Fountains and Uniwest

On or about August 16, 1999, Uniwest Construction, Inc. ("Uniwest") entered into a work-plus fee contract with The Fountains at Logan Square, LLC ("The Fountains") to perform general contracting in connection with the renovation of The Fountains' building located in Philadelphia, Pennsylvania (the "Project"). App., 1911.[3] Thereafter, on or about March 29, 2000, Uniwest entered into a follow-on contract, which was specifically contemplated by the terms of the August 1999 contract, to serve as the general contractor in connection with the aforementioned Project (the "Prime Contract"). App., 1961. As discussed more fully below, the Prime Contract contains a standard AIA indemnification provision that no party in this case contends is invalid in any way.

B. The Uniwest-Amtech Subcontract Agreement

Uniwest, in turn, entered into a subcontract agreement with Appellee ABM Amtech Inc. f/k/a Amtech Elevator Services ("Amtech") on or about March 3, 2000 for work to be performed in connection with the Project (the "Subcontract"). App., 1995. Pursuant to the relevant contract documents, Amtech agreed to "furnish and install elevator work in accordance with

[3] References to the Joint Appendix shall be cited as "App." followed by the page number(s).

'Elevator Installation and Modernization Specifications for Logan Square East' as prepared by Zipf Associates and dated July 6, 1999." App., 2002, ¶2.1.

Amtech further agreed to "furnish safety equipment and protection per OSHA and local jurisdiction" (App., 2002, ¶ 2.10) and to "furnish adequate on-site supervision for its work." App., 1996, ¶ 4(c). Additionally, the Subcontract provided:

> 1. This subcontract includes the furnishing of all labor, materials, tools, equipment, **scaffolding** . . . and/or any other act or thing including proper competent supervision necessary and incidental to expeditiously install Elevator work . . . .
>
> 2. Elevator work shall include, but is not necessarily limited to, the following:
>
> * * *
>
> 10. Furnish safety equipment and protection per OSHA and local jurisdictions.

App., 2002, ¶¶ 1, 2 (emphasis added). The Subcontract also provided that the "extent of the work to be performed shall include all labor, equipment, material and services necessary to fully comply with these specifications" and defined the term "work" as "[l]abor, materials, equipment, apparatus, controls, accessories and other items required for proper and complete installation." App., 2010, ¶¶ 0.05.A.4. Furthermore, the Subcontract

included the following provisions:

> A. [Amtech] shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the work.
>
> B. [Amtech] shall take all responsible precautions for the safety of and shall provide all reasonable protection to prevent damage, injury or loss to all employees on the project and other persons affected thereby . . . .

App., 2013, ¶ 0.12.

Additionally, the applicable contract documents expressly provided that the obligations Uniwest assumed under the Prime Contract were incorporated into, and made a part of, the Subcontract, such that Amtech agreed "to assume toward Uniwest all of the obligations and responsibilities that Uniwest has by the [Prime Contract], assumed toward the owner." App., 1995, ¶ 3 (emphasis added). Moreover, the Subcontract requires that Amtech indemnify Uniwest in certain instances.[4]

The Elevator Installation and Modernization Specifications, which is part of the Subcontract, further required Amtech to name Uniwest as an additional insured under the policies issued to Amtech by Continental Casualty Company ("Continental") and AIU Insurance Company ("AIU").

[4] The full text of the subject provision is set forth and discussed, in detail, in the Argument section of this brief. App., 1997, ¶10.

App., 2016-2017, ¶ 1.07.F. Amtech provided Uniwest with a Certificate of Insurance reflecting the same. App., 1910. Importantly, the Trial Court concluded that, indeed, Amtech had the obligation to procure this coverage for Uniwest. App., 3037-3039.

C. <u>The Policies</u>

Pennsylvania Manufacturers' Association Insurance Company ("PMA") issued to Uniwest a primary commercial general liability policy under policy number 820100-91-21-61-7 and in effect from January 1, 2001 to January 1, 2002, providing Uniwest with limits of $1,000,000 per occurrence (the "PMA Policy"). App., 1390-1610. United States Fire Insurance Company ("U.S. Fire") issued to Uniwest a Commercial Umbrella Insurance Policy under policy number 553 080509 1 and in effect for the period of January 1, 2001 to January 1, 2002, and providing Uniwest with umbrella coverage in the amount of $5,000,000 per occurrence (the "U.S. Fire Policy"). App., 1611-1647. Federal Insurance Company ("Federal") issued to Uniwest a commercial excess policy under policy number 7966-74-82DCO and in effect from January 1, 2001 to January 2, 2002, which provided Uniwest with limits of $5,000,000 per occurrence (the "Federal Policy"). App., 1648-1672.

Continental issued to Amtech a primary commercial general liability

policy under policy number 1 95963239, and in effect for the period of November 1, 2000 to November 1, 2006 (the "Continental Policy"), the relevant policy year being November 1, 2000 through November 1, 2001. App., 1673-1862. AIU issued a commercial umbrella policy to Amtech, under policy number BE 701-75-30, and in effect for the period of November 1, 1999 to November 1, 2002, with limits of $25 million per occurrence and in the aggregate (the "AIU Policy"). App., 1863-1909. The first named insured under the AIU Policy is appellee, ABM Industries, Inc., a publicly traded industrial conglomerate and the parent company of Amtech. App., 1863. Amtech was a named insured on the aforesaid AIU Policy. App., 1905.

D. <u>Underlying Claims</u>

Robert Scott Bruce and Thomas Stinson were employees of Amtech, the elevator specialty contractor hired by Uniwest to perform all work relating to the elevator work on the Project. App., 7, ¶ 6. On January 15, 2001, Bruce and Stinson were performing elevator work for Amtech utilizing wood scaffolding in an elevator shaft. App., 435, ¶ 21; App., 451, ¶ 21; 2646. Amtech employees had constructed the temporary platform approximately one month prior to the accident. App., 2528, 2636; 2831. Amtech procured the lumber used to construct the platform. App., 2636;

2831. Amtech did not provide any drawings or plans with respect to the platform construction. Id. Mr. Bruce testified that he did not recall Amtech providing him with any fall protection and that he did not wear his hard hat. App., 2348. Amtech employees did not use fall protection while working in the elevator shaft. App., 2355. Mr. Bruce weighed an estimated 250 pounds and Mr. Stinson weighed approximately 340 pounds. App., 2528, 2356. Bruce and Stinson were alone in the elevator shaft working on the platform when Bruce fell from a 16-foot ladder onto the platform causing a 4x6 support beam to break and the platform to collapse. App., 2528, 2635. The scaffolding collapsed, causing Bruce and Stinson to fall down the elevator shaft. As a result of this accident, Stinson sustained fatal injuries and Bruce was seriously injured. Notably, at the time of the accident, neither Bruce nor Stinson were wearing fall protection equipment. Id.; App. 2831. Amtech had complete control over the means and methods of construction for its portion of the work, and the accident, which involved only Amtech's employees, took place in the elevator shaft over which Amtech had complete control. App., 2140-2142.

Following its investigation, OSHA cited Amtech and, to a much lesser extent, Uniwest, for violations of OSHA regulations. App., 2636. Amtech paid $46,000.00 in OSHA penalties; Uniwest paid $2,730.00 in OSHA

penalties. Id. OSHA cited Uniwest under the "multi-employer worksite" doctrine (App., 2141) whereby "a general contractor, which often will not have created the hazard but will be in control of the worksite and have authority to abate the hazard, may be cited under [OSHA] if it unreasonably fails to correct a hazard it created or unreasonably fails to direct a subcontractor to correct a hazard created by the subcontractor." Universal Const. Co., Inc. v. Occupational Safety and Health Review Comm'n, 182, F.3d 726, 730 (10th Cir. 1999). OSHA issued a total of nine citations to Amtech, including citations for: (i) failing to construct a scaffold capable of supporting the required load; (ii) failure to have a competent person inspect the materials for the scaffold; (iii) improper use of a ladder on a scaffold; (iv) failure to train employees working on elevated platforms to recognize hazards and procedures, and (v) lack of personal fall arrest systems, i.e., safety belts and lifelines. App., 2636.

Bruce and the Estate of Stinson instituted the Underlying Litigation in the Court of Common Pleas of Philadelphia County, Pennsylvania on or about October 30, 2002, naming as defendants Uniwest and The Fountains, among others (the "Underlying Litigation"). App., 2068-2112. Amtech was not named as a defendant in the Underlying Litigation due to the workers' compensation bar.

Notably, during the trial of this matter, Uniwest and its carriers were prepared to present the testimony of their expert witness, Joseph B. Mills, a Professional Engineer, with respect to the relative negligence of Amtech and Uniwest. App., 947-951; 1175-1177. Specifically, Mr. Mills was prepared to testify consistent with his report, dated September 19, 2005, that the accident arose out of Amtech's negligence and not out of any negligence on the part of Uniwest. Id. The Trial Court refused to admit the report or the testimony solely on relevance grounds (the only grounds relied upon by the Amtech Parties) due to the Trial Court's summary judgment ruling that the Subcontract's indemnity clause is void, thereby rendering the relative negligence of Amtech and Uniwest irrelevant. App., 947-951.; 1175-1177. The Trial Court's erroneous ruling on the admission of Mr. Mills' testimony, however, was premised on its earlier erroneous ruling regarding the validity of the indemnity clause. Accordingly, the relative negligence of the parties is relevant if the indemnity clause is given proper effect.

As set forth in his report, dated September 19, 2005, Mr. Mills was prepared to testify at trial as follows:

- Amtech had complete control over the means and methods of construction for its portion of the work;
- Amtech "had the responsibility to ensure that their

employees were not exposed to any surroundings or working conditions that were hazardous, or dangerous to their health or safety. Amtech had a duty to provide platforms that were designed by a qualified person and that the platforms were constructed and loaded in accordance with that design. There is no indication that the platforms that were installed conformed to a design that was provided by a qualified person";

- "The actions of Uniwest Construction did not cause this incident;"

- "The actions of [Amtech], Robert Bruce, Thomas Stinson, J.T. Riley and Strober-Haddonfield were significant contributing factors into the cause of this incident. It would not have occurred had either the requisite fall protection equipment been in place, the platform been designed by a qualified person, and materials used to construct that platform not been defective."[5]

App., 2141-2142.

E. <u>Tender of Underlying Litigation</u>

Pursuant to the terms and conditions of the Subcontract, Uniwest tendered the defense and indemnity of the Underlying Litigation to Amtech. App., 2194-2195. PMA assigned Joseph Gibley, a Pennsylvania attorney, to represent Uniwest's interests in connection with its lengthy

[5] J.T. Riley is a building supply store that sells building materials to customers and builders, and which has been selling materials to Amtech for ten years. Strober-Haddonfield sells lumber and other building materials to builders, contractors and individual retailers. The piece of lumber involved in the underlying accident was supplied to Amtech by Strober-Haddonfield through J.T. Riley. App., 2118, 2141.

negotiations with Amtech concerning the claim for defense and indemnity under the Subcontract. App., 2225; 1046-1047. On July 11, 2002, Richard Hohn advised Uniwest (through Mr. Gibley) that he had been retained by Amtech to "negotiate terms of such defense and indemnification [of Uniwest and] determine if Amtech's proposal is agreeable to PMA prior to formalizing our agreements." App., 2224.

Between November 14, 2002 and November 20, 2003, Gibley (on behalf of Uniwest) and Hohn (on behalf of Amtech) negotiated the terms of Amtech's agreement to defend and indemnify Uniwest. See, e.g., App., 2226-2227, 2236, 2237-2238, 2241, 2242-2243, 2244-2245, 2249-2250, 2258-2259, 2260, 2261-2262, 797-801, 666-675.[6] Ultimately, in January 2004, Amtech and Uniwest, through their respective representatives, reached an agreement whereby Amtech unconditionally agreed to defend and indemnify Uniwest in the Underlying Litigation in return for the right to control Uniwest's defense and to assign defense counsel to defend Uniwest (the "January 2004 Agreement"). App., 2311-2312, 2320-2329; 1067-1073. In return for this agreement, Uniwest and its insurers agreed

[6] On November 21, 2003, Wayne Renneisen, counsel appointed by Amtech to defend Uniwest, advised Amtech: "It is becoming increasingly important that the agreement you have been discussing with Uniwest be finalized . . . . Because Amtech is prepared to agree to indemnify Uniwest, it must have control over Uniwest's defense." App., 2271-2272.

not to assert any third-party claim for contribution or indemnification against Amtech in the Underlying Litigation, and not to assert claims against Amtech's insurers for breach of contract or bad faith. Id.; App., 2258-2259, 2320-2329; 811; 1060-1061.

Notably, the January 2004 Agreement was reaffirmed in various correspondence, including but not limited to, the following: (i) correspondence from Richard Hohn, counsel for Amtech, to AIU, dated June 29, 2004, stating that "Amtech, pursuant to its contract with Uniwest has agreed to provide Uniwest with defense and indemnification for [the Underlying Litigation]" (App., 2338-2339); and (ii) correspondence from David Clark, Esq., counsel for Amtech, to AIU, dated September 16, 2005, stating that "[w]e believe that under the circumstances of this matter, AIG/National Union is in no position at this late date to question Amtech's decision to defend and indemnify Uniwest. Amtech believes that it is contractually bound to do so, and AIG's long acquiescence in the arrangement stops it from doing so at this time." App., 2404-2405.

Pursuant to the January 2004 Agreement, Mr. Hohn directed Uniwest to turn over its file and its defense to the attorneys retained by Amtech. App., 2314-2315. In fact, through the eve of trial, Uniwest fully entrusted its defense to the lawyers hired by Amtech. Moreover, relying upon the

January 2004 Agreement, Uniwest refrained from following through on its threat to bring a joinder complaint against Amtech in the Underlying Litigation.[7] App., 2311-2312.

Furthermore, Amtech and its insurers – Continental on the primary level and AIU as an excess insurer – proceeded to defend Uniwest's interests in the Underlying Litigation for over two years and through the settlement of the Underlying Litigation. App., 2201-2223, 2228-2230, 2232-2233, 2237-2238, 2246-2248, 2251-2257, 2263-2268, 2271-2305, 2311-2313, 2316-2317, 2320-2362, 2364-2376, 2378-2401, 2403-2405, 2409-2411, 2413-2420, 2471-2474, 2752, 2772. Initially, Amtech and Continental hired James Lynn to defend Uniwest. App., 2311-2312. Thereafter, when the trial of the Underlying Litigation was impending, AIU hired, at its own cost, additional defense counsel, Robert Devine, to defend Uniwest's interests. App., 2224, 2258-2259, 2306-2307, 2311-2312, 2409-2411, 2746, 1046-1047, 1065-1070. According to the attorney who had been defending Uniwest throughout the Underlying Litigation, Mr. Devine "took over" the defense in September 2005. App., 834-840; 2674-2677.

[7] Such a complaint would have afforded Uniwest the opportunity to litigate any indemnity dispute with Amtech at that time and as part of the Underlying Litigation, an important right that was waived as part of the January 2004 Agreement.

Throughout the Underlying Litigation, AIU was kept fully apprised of Amtech's activities, including Amtech's decision to defend and indemnify Uniwest. App., 2201-2223, 2228-2230, 2232-2233, 2237-2238, 2246-2248, 2251-2257, 2263-2268, 2271-2305, 2316-2317, 2320-2362, 2364-2376, 2378-2401, 2403-2405, 2409-2411, 2413-2420, 2471-2474, 2752, 2772. Through December 2005 – two months before the scheduled trial of the Underlying Litigation – AIU never questioned Amtech's decision to honor its obligations under the Subcontract's indemnity clause. Moreover, by assigning defense counsel to defend Uniwest's interests in the Underlying Litigation without reserving its right to disclaim coverage, AIU implicitly confirmed its obligations to Uniwest: (i) as an additional insured under the AIU policy, and (ii) through its coverage obligations to Amtech, i.e., to provide Amtech with insurance coverage in connection with Amtech's contractual obligation to defend and indemnify Uniwest.

Nevertheless, AIU refused at the time of settlement of the Underlying Litigation to participate in protecting Uniwest. In December 2005, weeks prior to the scheduled trial of the Underlying Litigation, and after several years of its acquiescence in the defense of Uniwest, AIU, for the first time, advised Amtech that it would not agree to defend or indemnify Uniwest. App., 2421-2426. AIU, however, did not direct this

communication to Uniwest. Moreover, AIU continued to defend Uniwest following the December communication to Amtech. Uniwest ultimately learned of AIU's position in or around January 2006. App., 736-737.

Upon learning of Amtech's and AIU's breach of their obligations to Uniwest, and in the face of an impending trial, which financially threatened the very existence of Uniwest, Uniwest and its insurers began to explore the potential for settlement of the Underlying Litigation. While fully reserving all rights against Amtech and its insurers, U.S. Fire, PMA, and Federal settled the Underlying Litigation by paying $9,500,000.00 on behalf of Uniwest. App., 2889-2896, 2898-2905. U.S. Fire paid $5 million, PMA paid $1 million, and Federal paid $3.5 million. App., 2888; 2897; 2792, ¶1.e; 2793, ¶2.b; 2795; 2796; 2799, ¶¶1.e, 2.a-c. Uniwest's insurers were forced to effect this settlement to avoid a jury verdict that would have bankrupted Uniwest. Neither Amtech nor its insurers shared this concern, as they refused to contribute any funds to the settlement. App. 8, ¶ 11.

F. <u>The Original Action</u>

In October 2006, Uniwest and U.S. Fire commenced a suit against Amtech, ABM, and AIU, and also named Continental, PMA, and Federal as interested parties seeking reimbursement of the $5 million it contributed to the settlement of the Underlying Litigation (the "Original Action"). In late

April 2008, Appellants herein nonsuited the Original Action. App., 3161-3163.

G. <u>The Declaratory Judgment Action</u>

On or about May 5, 2008, Amtech and AIU filed suit in the Circuit Court of Fairfax County against Appellants herein (the "Declaratory Judgment Action"). App., 1-11. In the Declaratory Judgment Action, Appellees sought a declaration of their rights as against Uniwest, U.S. Fire, PMA and Federal. In turn, Appellants herein filed counterclaims against Appellees, seeking damages for breach of the Subcontract against Amtech, breach of the January 2004 Agreement against Amtech, and breach of contract against AIU. App., 318-342, 416-430, 431-447.

Importantly, all parties herein agreed to, and the Trial Court entered, an Order whereby the discovery and orders from the Original Action were deemed incorporated into the Declaratory Judgment Action. App., 460-464. The Order includes the incorporation of the Trial Court's September 21, 2007 ruling on the parties' motions and cross-motions for summary judgment, wherein the Trial Court held that the Subcontract's indemnity clause is void pursuant to Va. Code § 11-4.1. App. 3140-3146.

The trial of the Declaratory Judgment Action was held in February 2009. Following a four-day bench trial and one full day of deliberations, the

Trial Court ruled that Amtech had breached the Subcontract by failing to procure insurance on behalf of Uniwest and, therefore, entered judgment against Amtech only. The Trial Court held for Appellees on each of Appellants' six other theories of recovery. App., 3034-3051. This Appeal followed.

QUESTIONS PRESENTED

1. With respect to Assignment of Error 1, whether the Trial Court erred in awarding judgment in Appellees' favor in voiding the Subcontract's indemnity clause pursuant to Va. Code § 11-4.1.

2. With respect to Assignment of Error 2, whether the Trial Court erred in holding that the indemnity clause in the Prime Contract, which the Trial Court properly concluded is incorporated by reference into the Subcontract between Uniwest and Amtech, nevertheless does not obligate Amtech to defend and indemnify Uniwest.

3. With respect to Assignment of Error 3, whether the Trial Court erred in holding that Amtech is not obligated to defend and indemnify Uniwest for the Underlying Litigation pursuant to the January 2004 Agreement, despite the overwhelming evidence that the parties, through their respective attorneys, reached such an agreement and subsequently performed under that agreement for two years.

4. With respect to Assignment of Error 4, whether the Trial Court erred in holding that Uniwest is not an additional insured under paragraph (E)(4) or (E)(7) of the AIU Policy and, therefore, that AIU does not owe Uniwest a defense and indemnification for the Underlying Litigation.

5. With respect to Assignment of Error 5, whether the Trial Court erred in holding that AIU is not estopped from denying coverage to Uniwest under its policy as a result of assuming the defense of Uniwest in the Underlying Litigation without reserving its right to deny coverage.

ARGUMENT

A. Standard of Review – Assignments of Error 1, 2 and 4

With respect to Assignments of Error 1, 2 and 4, Appellants are relying principally upon: (i) the plain language of the Prime Contract, (ii) the plain language of the Subcontract, (iii) the plain language of the Continental Policy, and (iv) the plain language of the AIU Policy. The limited reliance on trial testimony with respect to these issues is primarily for purposes of adding relevant context. Accordingly, these assignments of error present questions of law concerning the Trial Court's application of the law to essentially undisputed facts to which a *de novo* standard of review is applied.[8]

[8] Hilton v. Martin, 275 Va. 176, 654 S.E.2d 572 (2008); Uninsured

B. Standard of Review – Assignments of Error 3 and 5

In Assignments of Error 3 and 5, Appellants argue that the Trial Court erred in determining that the January 2004 Agreement did not obligate Amtech to indemnify Uniwest for the Underlying Litigation regardless of the validity of the Subcontract's indemnity clause. This portion of the Appeal presents a question of fact to which a clearly erroneous standard of review is applied.[9]

C. Appeal As Against Amtech

1. Assignment of Error 1 – The Indemnification Agreement between Uniwest and Amtech is Valid and Enforceable

The indemnity provision contained in the Subcontract that was negotiated and executed between Amtech and Uniwest provides:

> The Subcontractor [Amtech] hereby assumes entire responsibility for any and all damage or injury of any kind or nature . . . to all persons, whether employees of the Subcontractor, its Subcontractors or agents. If any claims for such damage or injury be made or asserted, whether or not such claim(s) are based upon the negligence of Uniwest or the Owner, Subcontractor agrees to indemnify and save harmless Uniwest from any and all such claims, and further from any and all loss, costs, expenses, liability, damage or injury, including legal fees and disbursements, that Uniwest may sustain, suffer or incur as a result thereof.

Employer's Fund v. Gabriel, 272 Va. 659, 662-63, 636 S.E.2d 408, 411 (2006).

[9] M. Morgan Cherry & Associates, Ltd. v. Cherry, 37 Va. App. 329, 343, 558 S.E.2d 534, 541 (2002).

App., 1997, ¶ 10.

On September 21, 2007, the Trial Court in the Original Action entered partial summary judgment in favor of Amtech, holding that the Subcontract's indemnity provision was void as against public policy pursuant to Va. Code Ann**.** §11-4.1 because it operated to indemnify Uniwest for Uniwest's sole negligence. App., 3140-3146. Uniwest and its insurers contend that the Trial Court's ruling was clearly in error.

a. Applicable Law

Virginia law is well settled that it is not against public policy for a party to contract against its own negligence. Carpenter Insulation & Coatings Co. v. Statewide Sheet Metal & Roofing, Inc., 1991 WL 120315, *4 (4th Cir. July 9, 1991) ("it is not against the public policy of Virginia for a party to contract against its own negligence") (citing Chesapeake & Potomac Tel. Co. of Va. v. Sisson & Ryan, Inc., 234 Va. 492, 362 S.E.2d 723, 729 (1987); Appalachian Power Co. v. Sanders, 232 Va. 189, 349 S.E.2d 101, 106 n. 3 (1986) ("A private property owner . . . may lawfully contract to indemnify itself against its own negligence without offending public policy . . . ."); Chesapeake & Ohio Ry. Co. v. Clifton Forge-Waynesboro Tel. Co., 216 Va. 858, 862, 224 S.E.2d 317, 320-21 (1976) (private carrier may "contract against its liability for negligence"); Estes Express Lines, Inc. v.

Chopper Express, Inc., 273 Va. 358, 641 S.E.2d 476 (2007). As demonstrated herein, the Subcontract's indemnification provision is consistent with Virginia law, thereby entitling Uniwest to the protections contemplated therein.

The fact that the indemnification clause in the Subcontract is consistent with Virginia public policy is evidenced by Va. Code Ann**.** §11-4.1, which addresses this very issue. The statute provides as follows:

> **§11-4.1.** Certain indemnification provisions in construction contracts declared void. – any provision contained in any contract relating to the construction, alteration, repair or maintenance of a building . . . 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 . . . 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. (emphasis added).

Virginia's statute voids and renders unenforceable only those indemnification agreements in which the indemnitee is indemnified for its sole negligence. See Richardson-Wayland Elec. Corp. v. Virginia Power & Elec. Co., 219 Va. 198, 247 S.E.2d 465 (1978). An indemnification agreement whereby the indemnitor agrees to indemnify the indemnitee in cases of concurrent negligence by the indemnitee and the indemnitor does not violate Virginia's public policy and is, therefore, enforceable. Id.; W.R.

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

In Estes, this Court considered whether "indemnity agreements involving claims for personal injury are against public policy and void." 273 Va. at 362, 641 S.E.2d at 477. Because Estes concerned an indemnity provision in a lease agreement, rather than a construction contract, § 11-4.1 did not apply. Nevertheless, this Court thoroughly considered and addressed the same public policy considerations that are implicated here.

The Court began its analysis by noting that, "the law looks with favor upon the making of contracts between competent parties upon valid consideration and for lawful purpose." Id. at 364, 641 S.E.2d at 478 (quoting Shuttleworth, Ruloff & Giordano, P.C. v. Nutter, 254 Va. 494, 498, 493 S.E.2d 364, 366 (1997)). Moreover, the Court stated that "courts are averse to holding contracts unenforceable on the ground of public policy unless their illegality is clear and certain." Id. Addressing a line of cases holding that pre-injury releases[10] are void as against public policy, e.g., Hiett v. Lake Barcroft Community Ass'n, 244 Va. 191, 418 S.E.2d 894 (1992), the Court noted that:

[10] A "pre-injury release" in this context is an agreement whereby a prospective victim of a tortfeasor provides a release to the tortfeasor prior to the injury.

> The effects of [pre-injury releases] are twofold: a party suffering personal injury is barred from seeking a recovery from the tortfeasor, likely depriving the injured party of all possibility of recovery, and the released party's motivation to exercise ordinary care to prevent harm to the releasing party may be diminished because the possibility of legal liability is removed.

Id. at 365-366, 641 S.E. 2d at 479. The Court recognized, however, that an indemnity provision is different insofar as its purpose is to "pre-determine how potential losses incurred during the course of a contractual relationship will be distributed between the potentially liable parties." Id. at 366, 641 S.E.2d at 479. Accordingly, the Court concluded that:

> indemnity provisions, including those indemnifying a party against future liability for personal injury caused by its own negligence, do not invoke the same public policy concerns as pre-injury release agreements.

Id.

Although the Court acknowledged that the existence of an indemnity provision may cause an indemnitee to "have a diminished concern with being negligent," the Court noted that "the mere existence of an indemnity provision does not guarantee reimbursement by the indemnitor because, for example, it may have become insolvent." Id. at 366, 641 S.E.2d at 480. Accordingly, it is "highly unlikely that a party would neglect to exercise ordinary care simply in anticipation that it ultimately might not have to bear

the burden of any liability incurred" due to the existence of the indemnity contract. Id. at 366-67, 641 S.E.2d at 480. In this context, the Court concluded that "we cannot envision . . . any other reason why public policy would forbid a party from indemnifying itself against its own negligence through a contractual provision negotiated at arm's length with a willing indemnitor." Id. at 367, 641 S.E.2d at 480. Accordingly, the Court held that the indemnity provision was enforceable, "even to the extent that it would entitle [the indemnitee] to be reimbursed from [the indemnitor] in the amount of its loss . . . caused by [the indemnitee's] alleged negligence." Id.

In Utica Mut. Ins. Co. v. Atlantic Foundations, Inc., 2007 WL 190682 (E.D. Va. Jan. 18, 2007), the United States District Court for the Eastern District of Virginia determined that where there is no finding of damages resulting from the indemnitee's sole negligence, § 11-4.1 is inapplicable and does not act to void the indemnity clause. Specifically, the court in Utica found that § 11-4.1 did not apply to void the indemnity clause at issue for two reasons. First, the court determined that the clause did not, on its face, purport to bind a party to indemnify another for the other's sole negligence. Second, the court noted that even if it had found the statute applicable, it would not void the agreement because, by its plain terms, the statute 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, § 11-4.1 did not void the indemnity clause at issue. Thus, the Utica court concluded that, where the facts of a case make it clear that the "sole" negligence of the party seeking to enforce an indemnification clause is not established, § 11-4.1 does not void the agreement. Indeed, the Utica court's ruling implicitly recognizes that applying § 11-4.1 to void an agreement under such circumstances would yield an inequitable result that thwarts public policy and allows a party that is responsible for an accident (and who has agreed to indemnify another party for its actions) to be absolved of responsibility for it.

In addition to Utica, courts applying the laws of other states likewise have held that statutes similar to § 11-4.1 do not void indemnity clauses even where those clauses, on their face, would provide indemnification for the indemnitee's sole negligence. See, e.g., Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187, 192, 693 A.2d 1209, 1211 (App. Div. 1997) (despite anti-indemnity statute invalidating indemnification provisions that provide indemnification for the indemnitee's sole negligence, court enforced broad indemnity clause that, on its face, purported to provide indemnification for indemnitee's sole negligence where jury found

indemnitee to be contributorily negligent); George Sollitt Corp. v. Howard Chapman Plumbing & Heating, Inc., 67 Wash. App. 468, 471-72, 836 P.2d 851, 852-53 (Wash. Ct. App. 1992) (enforcing indemnity clause despite anti-indemnity statute that voids agreements purporting to indemnify for indemnitee's sole negligence because the court found that the indemnitee was not, in fact, solely negligent); Hays v. Centennial Floors, Inc., 893 P.2d 564, 567 (Or. Ct. App. 1995) (enforcing broad indemnity clause that purported to provide indemnification for indemnitee's sole negligence "to the extent that its application would [not] require the indemnitor to indemnify the indemnitee for its own sole negligence" but further holding that indemnitee was not entitled to indemnification because indemnitee made no showing that its settlement payment included claims against indemnitee other than those arising out of indemnitee's sole negligence); Rogers & Babler v. State, 713 P.2d 795, 798 (Alaska 1986) (despite anti-indemnity statute voiding agreements purporting to indemnify for indemnitee's "sole negligence," court held that "[t]he indemnity provision involved here is not against public policy as a general proposition, but is only against public policy in those instances that it purports to indemnify the [indemnitee] for its negligence in the absence of [the indemnitor's] negligence"); McDowell v. Austin Co., 710 P.2d 192,196 (Wash. 1985)

(applying anti-indemnity statute that voided agreements purporting to indemnify indemnitee for its sole negligence, court held that broad indemnity clause that, on its face, purported to indemnify the indemnitee for its sole negligence, was nevertheless enforceable insofar as the indemnitee was found to be concurrently liable); Trim v. Clark Equipment Co., 274 N.W.2d 33, 36 (Mich. Ct. App. 1979) (despite anti-indemnity statute voiding indemnification clauses that purport to provide indemnification for the indemnitee's sole negligence, court held that clause is nevertheless enforceable insofar as the indemnitee could be found concurrently or partially liable); Alesius v. Good Samaritan Hospital Medical and Dialysis Ctr., 23 A.D. 3d 508, 508, 806 N.Y.S. 2d 635, 636 (2d Dep't 2005) (applying anti-indemnity statute that voids agreements purporting to indemnify indemnitee for its sole or partial negligence, court held that a clause in a construction contract that purports to indemnify the indemnitee for its negligence "may nevertheless be enforced where the party to be indemnified is found to be free of any negligence.").

b. Uniwest Was Not Solely Negligent and Amtech's Negligence Caused the Underlying Injuries and Death

As detailed in Section D of the Statement of Facts (pp. 9-13), the admitted and uncontroverted evidence at trial demonstrates that Amtech was primarily responsible for the January 15, 2001 accident. Under its

contract with Uniwest, Amtech was responsible for performing all of the elevator work. This responsibility expressly included its obligation to "furnish safety equipment and protection per OSHA and local jurisdiction" (App., 2002, ¶ 2.10) and to "furnish adequate on-site supervision for its work." App., 13, ¶ 4(c). Moreover, consistent with Amtech's contractual obligation to furnish any scaffolding, the evidence shows that Amtech personnel designed, constructed and tested the platform that failed. App., 2528, 2636. The evidence also shows that Amtech personnel procured the allegedly defective lumber that failed. App., 2636. Finally, Amtech personnel – particularly the underlying plaintiffs, Bruce and Stinson – failed to use fall protection equipment. App., 2348, 2355, 2528, 2635.

Although Uniwest was cited for certain OSHA violations (App., 2636-2637), those citations were issued under OSHA's "multi-employer worksite" doctrine, which provides that general contractors, such as Uniwest, are responsible for failing to direct a subcontractor, such as Amtech, to correct a hazard, even where the subcontractor created the hazard. App., 2141. Moreover, there is no evidence that Uniwest was involved in performing any of the elevator work. Accordingly, the record is clear that Amtech was primarily negligent; Uniwest's negligence, if any, was its failure, as "controlling employer" to force Amtech to perform the elevator work in a safe manner.

c. The Trial Court's Ruling

The Trial Court erred in entering summary judgment in favor of Amtech, declaring that the Subcontract's indemnity provision is void as against public policy. The Trial Court did not offer any rationale for its decision. App., 3140-3146.

d. This Court Should Reverse the Trial Court with Respect to Assignment of Error 1

The Trial Court's ruling stems from an unfortunate misinterpretation of Va. Code § 11-4.1 that contravenes Virginia public policy. Worse still, it applied the statute to void a contractual provision in which the allegedly offending language – sole or solely – is nowhere to be found in the provision, notwithstanding the axiomatic principle that contracts are to be enforced, not voided, if at all possible. See Estes, 273 Va. at 364, 641 S.E.2d at 478. ("the law looks with favor upon the making of contracts between competent parties upon valid consideration and for lawful purpose"). If left to stand, the Trial Court's ruling would create a technical loophole that would permit savvy construction contractors to avoid liability for their contractual undertakings. Rather than motivating parties to enter into construction contracts to create safe work environments, the Trial Court's ruling turns § 11-4.1 on its head by absolving the culpable party (Amtech) and foisting liability on the relatively innocent party (Uniwest),

even though the culpable party freely entered into a contract whereby it agreed to defend and indemnify the innocent party. This result is particularly perverse in situations such as this, where, in the absence of an enforceable contractual indemnity provision, Amtech is immune from liability pursuant to the workers' compensation bar.

By contrast, Virginia public policy will be advanced by a ruling declaring that the party whose negligence actually caused the injuries and death at issue in the Underlying Litigation – i.e., Amtech – is obligated to defend and indemnify Uniwest. In particular, Uniwest advances an interpretation of the Subcontract's indemnity clause and § 11-4.1 whereby Uniwest would be entitled to indemnification unless it was, in fact, solely negligent. This approach would appropriately motivate both the indemnitor (Amtech) and the indemnitee (Uniwest) to create a safe work environment for construction workers in Virginia.[11] For example, under Appellants' proposed approach, Amtech, which had control over the work being performed by its employees, would be strongly motivated to ensure that the work was performed in a safe manner. Likewise, Uniwest would understand that it was not unconditionally absolved from responsibility if its

[11] In fact, by agreeing to defend and indemnify Uniwest after the accident, Amtech and its insurers recognized that the indemnification clause in the Subcontract was not void as against public policy.

conduct resulted in injury to third parties, such as Amtech's employees, because Uniwest would remain motivated to maintain a safe work environment due to the possibility that its conduct, or "sole negligence," could result in an accident.

Notably, the Uniwest Parties' proposed approach to § 11-4.1 squarely answers the public policy concerns raised by this Court in Estes, where the Court noted that the existence of an indemnity provision may cause an indemnitee to "have a diminished concern with being negligent." Estes, supra, 273 Va. at 366, 641 S.E.2d at 480. This Court determined that such concerns did not warrant a holding that the indemnity clause at issue in Estes was void.

Here, the Uniwest Parties' common sense approach to § 11-4.1 would provide further assurance that the indemnitee remains appropriately motivated to provide a safe work environment insofar as indemnification would not be available if the indemnitee is found to be solely negligent. This would give meaning to the "sole negligence" component of § 11-4.1, while avoiding a perverse result that would: (i) unnecessarily infringe upon the parties' right to freely enter into enforceable contracts; (ii) allow savvy contractors to use a technicality to avoid their contractual obligations; and (iii) diminish the motivation of such indemnitors to maintain a safe work

environment.

Other courts, most notably one Virginia federal court, have interpreted § 11-4.1 and similar statutes enacted in other states in a manner consistent with that advocated by the Uniwest Parties herein. See, e.g., Utica Mut. Ins., 2007 WL 190682. Moreover, by allowing parties to enforce the agreements into which they freely enter, particularly when those agreements do not contravene public policy, this Court would foster the efficient resolution of complex construction disputes. Estes, 273 Va. at 364, 641 S.E.2d at 478 ("courts are averse to holding contracts unenforceable on the ground of public policy unless their illegality is clear and certain"). A ruling in favor of the reasonable enforcement of indemnification clauses would allow parties to clearly allocate responsibility, risk and cost in the context of construction projects and would allow the responsible party to control the defense, avoid multiple cross-claims and third-party claims and therefore, avoid unnecessary litigation.

Accordingly, the Uniwest Parties respectfully submit that the Court should reverse the Trial Court's decision and hold that the Subcontract's indemnity clause, as applied to the facts of this matter, is valid and enforceable and requires Amtech to indemnify Uniwest for the Underlying Litigation.

2. Assignment of Error 2 – The Indemnity Clause of the Prime Contract Obligates Amtech to Defend and Indemnify Uniwest

The Subcontract between Uniwest and Amtech refers to the Prime Contract and states that Amtech is bound by its terms. Specifically, the Subcontract provides as follows:

> Subcontractor [Amtech] agrees to be bound to Uniwest by all of the terms of the Agreement [Prime Contract], above referenced, so far as that Agreement relates to the work specified herein and to assume toward Uniwest all of the obligations and responsibilities that Uniwest has by said Agreement assumed toward the Owner. . . In the event of conflict between the terms of the Agreement and this Subcontract, this Subcontract shall be considered controlling.

App., 1995, ¶ 3 (emphasis added).

In turn, the Prime Contract provides the following, in relevant part:

> **3.18.1** To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, expenses, including but not limited to the attorney's fees, arising out or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or

> anyone whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

App., 1943, ¶3.18.1; 1979, ¶3.18.1. Courts in Virginia have recognized the purpose of "incorporation" clauses and have given them full effect. See Hertz Corp. v. Zurich American Ins. Co., 496 F.Supp.2d 668, 675 (E.D.Va. 2007) ("Incorporation by reference is proper where the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and incorporation of the document will not result in surprise or hardship.") (citing Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 447 (3d Cir. 2003)); W. D. Nelson & Co. v. Taylor Heights Development Corp., 207 Va. 386, 391, 150 S.E.2d 142, 146 (1966) ("Writings referred to in a contract are construed as a part of the contract for the purpose and extent indicated."); Jackson Hewitt, Inc. v. Greene, 865 F.Supp. 1199 (E.D.Va. 1994) (franchise agreement specifically referenced to franchisor's operating manual and, therefore, the District Court read the manual as part of the agreement when interpreting the agreement); Steadfast Ins. Co. v. Brodie Contractors, Inc., 2008 U.S. Dist. Lexis 88448, *4 (W.D. Va. Oct. 31, 2008) (analyzing similar subcontract incorporation language to the subcontract at issue in this case, and stating: "It is clear that all contracting parties intended for the general

conditions of the Prime Contract to be integrated with the Subcontract.") (applying Virginia law); Bd. of Trustees v. DCI Signs & Awnings, Inc., 2008 U.S. Dist. LEXIS 17115, *8-9 (E.D. Va. 2008); C & P Telephone v. Sisson and Ryan, Inc., 234 Va. 492, 494-495, 362 S.E.2d 723 (1998) ("The site work contract consisted of several writings that were incorporated by reference …"). Indeed, courts throughout the country routinely have held that the terms of general contracts, including their indemnification provisions, may be incorporated by reference into a subcontract and, therefore, bind the subcontractor to the same terms. See Maxum Foundations v. Salus Corp., 779 F.2d 974 (4th Cir. 1985) (applying Virginia law) (a prime contract's arbitration clause was incorporated by reference into a subcontract); Whittle v. Pagani Bros. Const. Co., Inc., 383 Mass. 796, 798, 422 N.E.2d 779, 780 (Mass. 1981) (indemnity clause in a general contract was incorporated by reference into a subcontract); Binswanger Glass Co., Inc. v. Beers Const. Co., 141 Ga.App. 715, 715-716, 234 S.E.2d 363, 364 (Ga.App. 1977) (same); Arthur Pew Const. Co., Inc. v. Bryan Const. Co., Inc., 148 Ga.App. 114, 251 S.E.2d 105 (Ga.App. 1978) (same); Gibbons v. Graves Const. Co., Inc., 727 F.2d 753 (8th Cir. 1984) (applying Iowa law) (same).

Importantly, the Amtech Parties conceded during the trial that the

Prime Contract's indemnity provision is not illegal or void as against Virginia public policy. App., 1277-1278. Indeed, insofar as the indemnity obligation is expressly limited to claims "caused in whole or in part by negligent acts or omissions of [Amtech]," the provision is clearly not illegal or void as against Virginia public policy pursuant to Va. Code Ann. 11-4.1.

The Trial Court ruled that the indemnity clause of the Subcontract is void, rendering it void *ab initio*. Given that the Trial Court had voided the Subcontract's indemnity clause, the Trial Court ruled that the indemnity clause in the Prime Contract was incorporated into the Subcontract. Specifically, the Court stated 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 [Prime] contract obligate Amtech to indemnify Uniwest." App., 3035. In reaching its conclusion, the Trial Court rejected the Amtech Parties' argument that the Prime Contract's indemnity clause was not incorporated due to a "conflict between the terms of the [Prime Contract] and [the] Subcontract…." App., 1995, ¶ 3. The Trial Court clearly recognized that, insofar as the Subcontract's indemnity clause is void, there can be no "conflict." See Rollins Outdoor Advertising v. W.C.A.B., 506 Pa. 592, 597, 487 A.2d 794, 796 (1985) (an agreement that is declared null and void must be treated as though it never existed);

Richard L. Deal and Associates, Inc. v. Com., 224 Va. 618, 623, 299 S.E.2d 346, 348 (1983) (a contract that is declared void ab initio is "wholly void, and of no legal effect").

However, the Trial Court erroneously ruled that the incorporation of the Prime Contract's terms into the Subcontract "would make Amtech the subcontractor responsible to the owner, as Uniwest would be responsible to the owner . . . ." App., 3035-3036. (emphasis added). This interpretation of the undisputed contract terms is plainly wrong. In fact, the Amtech Parties did not even argue that the incorporated clause would create an obligation by Amtech to the owner rather than to Uniwest.

Contrary to the Trial Court's ruling, and pursuant to the clear terms of the Subcontract, the incorporation clause provides that Amtech is "to assume toward Uniwest all of the obligations and responsibilities that Uniwest has by said Agreement [the Prime Contract] assumed toward the Owner." App., 1995, ¶ 3 (emphasis added). Thus, if the Prime Contract included a provision that bound Uniwest to the owner, such as the Prime Contract's indemnity clause, then upon incorporation of that provision into the Subcontract, that same obligation is owed by Amtech to Uniwest rather than by Amtech to the owner.

Applying this clear requirement to this situation, whereby the

indemnity clause in the Prime Contract is incorporated into the Subcontract, the incorporated indemnity clause would read as follows:

> To the fullest extent permitted by law, [Amtech] shall indemnify and hold harmless [Uniwest] . . . from and against claims, damages, losses and expenses, including but not limited to the attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury . . . or death, but only to the extent caused in whole or in part by negligent acts or omissions of [Amtech], a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

The Uniwest Parties submit that the Trial Court committed a clear error in the interpretation of unambiguous and straightforward contract terms. Moreover, the Uniwest Parties submit that Virginia should hold parties to the terms of the contracts into which they freely enter. Accordingly, the Uniwest Parties respectfully submit that the Court should reverse the Trial Court's ruling with respect to Assignment of Error 2.

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

The January 2004 Agreement between Amtech and Uniwest is governed by Pennsylvania law insofar as: (i) the negotiation of the agreement took place entirely within Pennsylvania, and (ii) the agreement

concerned a project, an accident, victims and an underlying lawsuit located in Pennsylvania. See C.I.T. Corp. v. Guy, 170 Va. 16, 22, 195 S.E. 659, 661 (1938); see also Lexie v. State Farm Mut. Auto. Ins., 251 Va. 390, 394, 469 S.E.2d 61, 63 (1996).[12]

The Uniwest Parties refer to its Statement of Facts, Section E. (pp. 13-18), for a recitation of the facts relevant to the January 2004 Agreement. These facts 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.

Nevertheless, the Trial Court determined that:

> the 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 were incidental to the indemnity provision in the contract. The parties were not contemplating replacing the subcontract indemnity provision with a new indemnity provision.

App., 3037.

[12] Under Pennsylvania law, a contract "is formed when the parties to it 1) reach a mutual understanding, 2) exchange consideration, and 3) delineate the terms of their bargain with sufficient clarity." Weavertown Transport Leasing, Inc. v. Moran, 834 A.2d 1169, 1172 (Pa. Super. 2003). Similarly, Virginia law requires the following for the formation of an enforceable contract: offer, acceptance and consideration. See Legal Services Corp. v. Client Centered Legal Services of Southwest Virginia, Inc., 217 F.Supp.2d 706, 712 (W.D. Va. 2002).

Based on the clear facts established at trial, however, Amtech and Uniwest entered into a valid and enforceable agreement in January 2004. 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. Public policy clearly favors the enforcement of such settlements and Amtech and its insurers should not be permitted to induce Uniwest's reliance and then concoct an after-the-fact argument to avoid their obligations. See Stamie E. Lyttle Co., Inc. v. County of Hanover, 231 Va. 21, 26, 341 S.E.2d 174, 178 (1986) ("The law favors the compromise and settlement of disputes without resort to litigation.") (citation omitted). Likewise, Uniwest and its insurers should be able to rely on the enforceability of such agreements, especially when they are not entered casually, but through the dealings of attorneys and in the context of an ongoing lawsuit.

Importantly, in the absence of the January 2004 Agreement, the parties' dispute over the enforceability of the indemnity agreements (in both the Subcontract and the Prime Contract) would have been litigated in Philadelphia as part of the Underlying Litigation. By entering the January 2004 Agreement, however, Amtech and its insurers precluded a

Philadelphia court from deciding whether those provisions were enforceable. Moreover, the issues, including the relative negligence of Amtech and Uniwest, would have been litigated in the underlying case and perhaps decided by a jury. Clearly, avoiding these circumstances was invaluable to Amtech and its insurers. Accordingly, the Uniwest Parties respectfully maintain that this Court should reverse the Trial Court's ruling with respect to Assignment of Error 3.

D. Appeal as Against AIU

1. Assignment of Error 4 – Uniwest Is an Additional Insured Under the AIU Policy Pursuant to Paragraphs (E)(4) and (E)(7) of the AIU Policy

Section IV.E of the AIU 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 but not for broader coverage than is available to such person or organization under such underlying policies.
>
> . . . .
>
> 7. Any … organization … to whom [Amtech is] obligated by a written Insured Contract to provide insurance such as is afforded by this policy, but only with respect to … liability arising out of operations conducted by you or on your behalf …

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

The AIU Policy defines "Insured Contract" as:

> [a]ny oral or written contract or agreement entered into by [Amtech] and pertaining to [Amtech's] business under which [Amtech] assume[s] the tort liability of another party to pay for Bodily Injury … to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

App., 1867, Section IV.F.

With respect to Paragraph (E)(4), the Uniwest Parties presented evidence of two alternative ways that Uniwest qualifies as an additional insured under the Continental Policy. Also, the evidence is clear that the Continental Policy is, in fact, "listed in the Schedule of Underlying Insurance" in the AIU Policy. App., 1881. First, Uniwest and its insurers demonstrated that Uniwest is "included as an additional insured in the [Continental Policy]" insofar as Continental continued to defend Uniwest in the Underlying Litigation through the settlement and, in connection with this action, entered into an "Agreed Order," whereby the Trial Court determined that, "[f]or purposes of all claims asserted in this action against Continental . . . only, the Court finds that Continental has admitted that Uniwest . . . was an additional insured under [the Continental Policy]." App., 465. Second, under the Continental Policy:

> [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 only to the extent that it is required to be indemnified by your written agreement or contract with the additional insured;

App., 1789-1790. Under this provision, if Amtech is obligated to indemnify Uniwest "by [Amtech's] written agreement or contract," Uniwest is an additional insured under the Continental policy. Here, the relevant "written agreement[s] or contract[s]" are the Subcontract (Assignment of Error 1), the Prime Contract (Assignment of Error 2) and the January 2004 Agreement (Assignment of Error 3). Thus, in the event that any one or more of these conditions is satisfied, and Uniwest thereby qualifies as an additional insured under the underlying Continental policy, then Uniwest likewise would qualify as an additional insured under the AIU policy pursuant to Section E(4) of that policy.

Similarly, with respect to Paragraph (E)(7) of the AIU policy, Uniwest is an additional insured under the AIU policy if Amtech is "obligated by a written Insured Contract to provide insurance such as is afforded by" the AIU policy. The Uniwest Parties presented evidence that Amtech was obligated by a written "Insured Contract" to indemnify Uniwest. Specifically,

as noted above, the indemnity provisions contained in both the Subcontract, Prime Contract and the January 2004 Agreement each qualify as "Insured Contracts" because they are "agreement[s] entered into by [Amtech] and pertaining to [Amtech's] business under which [Amtech] assume[s] the tort liability of another party to pay for Bodily Injury . . . to a third person or organization." App., 1979, ¶3.18.1; App., 1997, ¶10.

The Trial Court rejected the Uniwest Parties' arguments. With respect to Paragraph (E)(4) of the AIU policy, the Trial Court ruled that Uniwest's status as an additional insured "is limited to circumstances where there is a written agreement to indemnify Uniwest . . ." and because "such an obligation to indemnify was held void, . . . [Continental] does not recognize Uniwest as an additional insured under its policy . . ." App., 3040. Likewise, with respect to Paragraph (E)(7), the Trial Court ruled that "Paragraph E-7 of the AIU policy is not applicable because it applies only in the event Amtech was obligated to another by [Insured Contract]." App., 3040-3041. The Trial Court concluded that "Amtech could not have an obligation under an insured contract when the indemnity provision thereunder is held invalid, so E-7 does not provide coverage." App., 3041.

Accordingly, the Trial Court's rulings with respect to Uniwest's status as an additional insured under the AIU policy are directly tied to its rulings

that the indemnification agreements are void or otherwise unenforceable. The Uniwest Parties' Assignments of Error 1, 2 and 3 address the relevant indemnification agreements. Accordingly, in the event that this Court holds in the Uniwest Parties' favor with respect to Assignments of Error 1, 2 or 3, such an outcome would necessarily require this Court to reverse the Trial Court's ruling with respect to Assignment of Error 4.

2. Assignment of Error 5 – AIU is Estopped From Disclaiming Coverage to Uniwest Because AIU Retained Counsel to Defend Uniwest

AIU is estopped from disclaiming coverage to Uniwest because, in September 2005, AIU retained counsel to represent Uniwest in the Underlying Litigation without reserving its right to disclaim coverage to Uniwest and continued to provide an active, unqualified defense to Uniwest through the remainder of the Underlying Litigation.[13] App., 891-892, 911-914. Notably, although AIU issued an excess policy without any defense obligation, AIU has the right under that policy to participate in the defense

[13] Both Virginia and California law hold that there is a well-established exception to the general rule that neither waiver nor estoppel can create coverage; namely, when an insurer assumes and conducts the defense on behalf of an insured without reserving its right to disclaim coverage. Garamendi v. Cade, 116 Cal. App. 4th 694, 719-20 (2004); Maryland Casualty Co. v. Aetna Casualty & Surety Co., 191 Va. 225, 60 S.E.2d 876 (1950); Nationwide Mutual Insurance Company v. Gentry, 202 Va. 338, 117 S.E.2d 76 (1960). Importantly, there is no indication under California or Virginia law that an insurer must appoint "lead counsel" in order for the doctrine of estoppel to be triggered.

of its insured if its policy limits are potentially implicated by the claim. App., 1864, Section II. Here, in a clear recognition of Uniwest's entitlement to coverage under the AIU policy, AIU exercised that right by appointing counsel to defend Uniwest. App., 2409-2411, 2746. After defending Uniwest for three months, AIU issued an after-the-fact reservation of rights to Amtech on December 6, 2005. App., 2421-2426.

The Trial Court ruled that "although AIU provided Mr. Devine to be damages counsel for Uniwest, he had a defined role in the litigation and did not replace [lead defense counsel]." App., 3041-3042. However, the evidence at trial contradicts this ruling. Indeed, the evidence at trial, including Mr. Devine's own testimony, establishes that AIU was substantially involved in the defense of Uniwest and essentially took control of the defense. App., 2626-2661, 2666-2673, 2678, 2684-2728, 2852-2884.[14]

Accordingly, the Trial Court erred in finding that, despite Mr. Devine's

[14] Mr. Devine was heavily involved in the handling of Uniwest's defense. Indeed, Mr. Devine testified at trial that he was retained to take over the damages portion of the Underlying Litigation. App., 834. Among other things, Mr. Devine drafted and filed motions, including a summary judgment motion and motions in limine, made decisions with regard to experts, and prepared witnesses for trial. App., 831-838. Indeed, over a period of three months, Mr. Devine's office billed three hundred (300) hours in the defense of Uniwest. App., App., 836-837. Furthermore, Mr. Lynn, defense counsel for Uniwest retained by Amtech, testified that Devine took over the case. App., 779.

involvement as defense counsel assigned by AIU without any reservation of rights, AIU is not estopped from denying coverage to Uniwest. In fact, the inconsistent and unavailing nature of AIU's position in this litigation is plainly evident in its conflicting positions whereby it assigned defense counsel to defend Uniwest, but then denied that it owed any obligation to Uniwest under its policy. Neither California law nor Virginia law require that an insurer appoint "lead counsel" in order for the insurer to be estopped from denying coverage. Thus, AIU is estopped from denying coverage to Uniwest under the AIU Policy.

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

CONCLUSION

For the reasons stated above, 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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In addition, all parties have received electronic copies of both the briefs and the appendix. Paper copies of the briefs and appendix were mailed or delivered on this the 10th day of March, 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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