In the

Supreme Court of Virginia

At Richmond

Record No. 091521

FEDERAL INSURANCE COMPANY,

Appellant,

– v. –

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

Appellees.

BRIEF OF APPELLEES

BARBARA I. MICHAELIDES, *Pro Hac Vice*
AGELO L. REPPAS, *Pro Hac Vice*
BATES & CAREY LLP
191 North Wacker Drive, Suite 2400
Chicago, Illinois 60606
T: (312) 762-3100
F: (312) 762-3200
bmichaelides@batescarey.com
areppas@batescarey.com

JOHN D. MCGAVIN, VSB# 21794
TRICHILO, BANCROFT, MCGAVIN, HORVATH & JUDKINS, P.C.
3920 University Drive
Fairfax, Virginia 22030
T: (703) 385-1000
F: (703) 385-1555
jmcgavin@tbmhjlaw.com

Counsel for Amtech Elevator Services n/k/a ABM Amtech, Inc., ABM Industries, Inc. and AIU Insurance Company

Additional Counsel on Inside Cover

COUNSEL PRESS • VA – (800) 275-0668

JOHN C. BONNIE, *Pro Hac Vice*
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
950 East Paces Ferry Road, NE, Suite 3000
Atlanta, Georgia 30326
T: (404) 876-2700
F: (404) 875-9433
jbonnie@wwhgd.com

HOWARD J. RUSSELL, *Pro Hac Vice*
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
3773 Howard Hughes Parkway, Suite 390N
Las Vegas, Nevada 89169
T: (702) 938-3810
F: (702) 938-3864
hrussell@wwhgd.com

Counsel for Amtech Elevator Services n/k/a ABM Amtech, Inc., ABM Industries, Inc. and AIU Insurance Company

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 18

I. Standards Of Review 18

A. Assignments of Error 1, 2 and 4 18

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) 19

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 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 Assignmnet of Error No. 4) 43

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

Conclusion 48

TABLE OF AUTHORITIES

Cases:

Aetna Cas. & Sur. Co. v. Marion Equip. Co.,
894 P.2d 664 (Alaska 1995).....29-30, 44

Aetna Cas. & Sur. Co. v. Richmond,
76 Cal. App. 3d 645, 143 Cal. Rptr. 75 (Cal. Ct. App. 1977) 38

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

Bethlehem Steel Corp. v. G.C. Zarnas & Co.,
498 A.2d 605 (Md. 1985) 35

Bianculli v. Turner Constr. Co.,
640 A.2d 461 (Pa. Super. Ct. 1994).....43

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).....32-33

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

Earley v. Landsidle,
257 Va. 365, 514 S.E.2d 153 (1999).....23-24

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

Garamaldi v. Golden Eagle Ins. Co.,
116 Cal. App. 4th 694, 10 Cal. Rptr. 3d 724 (Cal. Ct. App.
2004).....46

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) 37

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, 42-43

Hood v. Commonwealth,
269 Va. 176, 608 S.E.2d 913 (2005) 18

Hughes v. Cole,
251 Va. 3, 465 S.E.2d 820 (1996) 21

Infants v. Va. Hous. Dev. Auth.,
221 Va. 659, 272 S.E.2d 649 (1980) 20

Kennedy v. Annandale Boys Club, Inc.,
221 Va. 504, 272 S.E.2d 38 (1980) 21

Kinney v. G.W. Lisk Co.,
556 N.E.2d 1090 (N.Y. 1990) 28

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) 20

Miller Brewing Co. v. Morgan Mech. Contractors, Inc.,
368 S.E.2d 438 (N.C. Ct. App. 1988) 31-32

MSI Constr. Managers Inc. v. Corvo Iron Works, Inc.,
527 N.W.2d 79 (Mich. Ct. App. 1995) 41

Norman v. Ins. Co. of N. Am.,
218 Va. 718, 239 S.E.2d 902 (1978) 46

Office of Comptroller v. Barker,
275 Va. 529, 659 S.E.2d 502 (1997)..... 18

Palumbo v. Bennett,
242 Va. 248, 409 S.E.2d 152 (1991)..... 21

Safeway, Inc. v. DPI Midatlantic, Inc.,
270 Va. 285, 619 S.E.2d 76 (2005)..... 34

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

Steadfast Ins. Co. v. Brodie Contractors, Inc.,
No. 07-cv-058, 2008 WL 4780099 (W.D. Va. Oct. 31, 2008).....19-20

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).....34-35

Washington County v. Washington Court Assoc. of Professional Employees, AFI-CIO,
948 A.2d 271, 276 (2008) 33

Waynesboro Vill., L.L.C. v. BMC Props.,
255 Va. 75, 496 S.E.2d 64 (1998)..... 43

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

Wilson v. Holyfield,
227 VA. 184, 187, 313 S.E.2D 396, 398 (1984)..... 37

Winn v. Aleda,
227 VA. 304, 306, 315 S.E.2D 193, 195 (1984)..... 37

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

Statutes:

SUP. CT. R. 5:18 31

UTAH CODE ANN. § 13-8-1 (1992) 27

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

VA. CODE ANN. § 8.01-680 (West 2010) 19

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

VA. CODE ANN. § 18.4-334.2 (West 2010) 21

Other Authorities:

THE MERRIAM-WEBSTER DICTIONARY (6th Ed. 2004) 22

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 refiled 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

Federal's statement of facts is incomplete and misleading. For instance, Federal asserts, without record support, that Uniwest was not negligent in causing the accident because Amtech maintained complete and sole control of the safety and management of the worksite where the accident occurred. (Br. at 3, 10) Yet Federal omits all reference to the fact that Uniwest was cited by OSHA and sued for its own negligence in failing to enforce its own project safety manual and turning a blind eye to 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) And Federal ignores the facts regarding Uniwest's culpability for the accident in failing to enforce its own worksite safety rules. (JA 2646-47) Uniwest paid $9.5 million to settle its own negligence. (JA 2636-37, 2890-91, 2898-2900)

Federal ignores the subcontract's supremacy clause when arguing 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)

Federal also asserts that Amtech and AIU formed a "separate and valid second agreement" to indemnify Uniwest. (Br. at 10). 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) Federal also fails to acknowledge that AIU was not a party to the alleged second indemnity agreement.

In support of its estoppel arguments, Federal 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)

Federal's facts are also inaccurate because Federal asserts that: (1) AIU failed to timely reserve rights; (2) AIU agreed to defend and indemnify Uniwest; (3) AIU hired counsel (Robert Devine), who represented that he was "taking control" of the defense and "handling the most important portion" of the case; and (4) AIU "maintained exclusive control" over Uniwest's "unqualified defense." (Br. at 10, 11)

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, 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 802-803) Devine testified unequivocally that he was never lead counsel, having been hired right before the trial. (JA 866)

In short, Federal's "facts" are one-sided and fail to recognize that the evidence must be construed most favorably to AIU. Federal'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." Amtech and AIU therefore provide a complete statement of facts on the issues raised by Federal 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 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 preamble 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. (JA 1995)

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 severely 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)

Plaintiffs' liability theory in the underlying action 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) 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 reasoned correctly that the provision 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 256-75) 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, Federal's assertions of waiver and estoppel against AIU. (JA 3041-42) The court found that AIU 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. Commw.*, 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 finding made upon the evidence presented at a bench trial is 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*, 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*. 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 1)

The trial court correctly found the indemnity provision in the subcontract 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 for a party's sole negligence, and has unequivocally pronounced 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, 310, 678 S.E.2d 276, 281 (2009) (*citing Infants v. Va. 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 Federal'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."). Further, "[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 – a legal nullity that is unenforceable against Amtech.

The trial court's proper finding that the indemnity provision fell within the scope of the statute is further 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 party'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).

Given the plain meaning of "purport," it can hardly be said that the indemnity provision at issue here does not *purport* to indemnify Uniwest for its sole negligence. The subcontract's 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 Federal's assertions, a determination as to the statute's application to void the indemnity provision does not depend on any future allocation of fault. (Br. at 22) 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"). The General Assembly presumably did not intend to create an exception to the statute based on a future allocation of fault – no such exception appears in the statute's language, and "[w]e 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). The General Assembly thus intended to void contractual provisions, not by determining the relative fault of the parties, but by looking to the face of the indemnity provision itself.

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 Federal's attempt to create an exception that does not appear in the statute. Federal 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 language 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, as in *Harnois*, thus upheld the purpose of the statute by analyzing the contractual provision at issue.

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 to the indemnity provision at issue in this case, which 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 the strong public policy of

placing and keeping responsibility on those parties for maintaining a safe workplace). The trial court's application of Virginia Code § 11-4.1, which places the risk on the culpable parties, 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 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 caused the indemnitee to be less careful and thereby increased 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 common practice was to enact anti-indemnity statues.

Despite the legislative goal behind such anti-indemnity statutes, Federal 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. (Br. at 25) The inevitable result, however, will be to encourage what happened in this case – general contractors shielded by indemnity agreements they have foisted upon their subcontractors will have little or no incentive to enforce safety procedures, thereby defeating the legislative purpose behind anti-indemnity statutes.

Federal also asserts that the common sense approach is to excise the portion of an indemnity provision pertaining to the sole negligence of the indemnitee and to permit indemnification in cases of "concurrent negligence." (Br. at 20) But this approach contravenes the clear legislative intent expressed in the statute, and also creates a disincentive for litigants to settle. Rather than settle, an indemnitee will 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 settles, courts still would be required to conduct a trial of the settled case before the court applies the provision. Either scenario incentivizes litigation and discourages settlements.

This Court should also reject Federal's further argument that § 11-4.1 is not applicable to this case because the indemnity agreement is insurable. (Br. at 24-25) First and foremost, this argument is waived by failing to present it to the trial court below. Sup. Ct. R. 5:18. Waiver aside, this argument ignores the fact that the legislature has narrowed the parameters of indemnity law by carving out an exception to the general rule in the context of construction contracts in a way that the parameters of insurance law have not. Nothing in section 11-4.1 provides that it is inapplicable simply because the indemnitor is insured.

Miller Brewing Co. *v. Morgan Mechanical Contractors, Inc*., 368 S.E.2d 438, 442 (N.C. Ct. App. 1988) illustrates this point. In *Miller*, the court held that the indemnity clause at issue which purported to indemnify *Miller* for its own negligence was void pursuant to the North Carolina anti-indemnification statute G.S. 22B-1 pertaining to construction contracts. *Id*. at 442. The North Carolina statute, like § 11-4.1, contained an exception for insurance contracts. *Miller* argued that the anti-indemnification statute was not applicable because the terms of the purchase order that required defendant to provide insurance placed the agreement within the exception created by the statute for insurance. *Id*. In rejecting this argument, the *Miller* court ruled that the statutory exception does not validate an

indemnity provision rendered void by the anti-indemnity statue simply because the contractor obtained insurance covering the owner's indemnification:

> To accept the interpretation urged by plaintiff in this case – that a clause requiring a contractor to obtain insurance covering the owner's indemnification renders valid an indemnity provision that is otherwise void under G.S.22B-1 because it is an "insurance contract" or an "agreement issued by an insurer" – would in practical application render G.S. 22B-1 meaningless.

Id. The rationale of *Miller* is applicable to this case. The fact that Amtech is insured does not save the void indemnity clause. As in *Miller*, to hold otherwise would render § 11-4.1 meaningless. *See also Crosby v. Gen. Tire & Rubber Co*, 543 F.2d 1128, 1131 (5th Cir. 1976) (insurance exemption (b) in Mississippi anti-indemnification statute applies to insurance contracts, not insured indemnity contracts).

Federal additionally contends that § 11-4.1 is inapplicable since fault is shared among both Uniwest and Amtech. (Br. at 22) Federal'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. Uniwest was sued in the underlying

case for its own negligence and for punitive damages. Uniwest was not sued under a theory of vicarious liability for Amtech's conduct. In fact, Federal paid $9.5 million to Bruce and Stinson to settle Uniwest's liability for its own negligence.

In settling the underlying action, Federal paid for Uniwest's own negligence, a liability it now seeks to shift to Amtech in violation of § 11-4.1. *Crosby*, 543 F.2d at 1131 (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, Federal'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. Federal relies on inapplicable cases, none of which involve construction contracts or the anti-indemnity statute. (Br. at 17-18) 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.

Federal, 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 Federal'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 on this point. (JA 3155).

The trial court properly found that Federal's reliance on *Utica* was misplaced. *Utica* found that § 11-4.1 did not apply to the facts there because the party seeking indemnity (the subcontractor) was the party that performed the work. *Id*. at *3. In fact, the only portion of *Utica* supporting

Federal's arguments is *dictum. Bethlehem Steel Corp. v. G.C. Zarnas & Co*., 498 A.2d 605 (1985), cited by Federal, actually supports the trial court's holding here since it voids an indemnity provision similar to the one at issue here.

In *Bethlehem* the contractor agreed to indemnify the owner (Bethlehem) for, among other things, its own negligence: "contractor shall indemnify … the Bethlehem Companies from and against … all loss or liability … by reason of any act or omission … on the part of any of the Bethlehem Companies …" *Id*. at 606. Bethlehem argued this provision was valid under the allegedly controlling Pennsylvania law despite the fact that the case was being decided by a Maryland court. *Id*. at 607-608. The Maryland Court of Appeals disagreed. *Id*. at 610. It found the indemnity provision violated Maryland public policy because it operated to indemnify Bethlehem for its "sole negligence" in violation of Maryland's anti-indemnity statute, thus precluding application of Pennsylvania law:

> Under these circumstances Maryland conflict of law principles require the application of [the anti-indemnity statute] insofar as the indemnity clause provided that Bethlehem would be indemnified for damages resulting from its sole negligence.

Id.

The *Bethlehem* court did not, as Federal claims, uphold that portion of the indemnity agreement concerning concurrent negligence if the

promise established that the promisor was either concurrently or solely negligent. (Br. at 22, n.4) The court never reached the issue whether the agreement to indemnify a party for concurrent negligence was enforceable because that issue was not raised on appeal:

> On appeal, [the indemnitor] does not challenge the … holding that an agreement to indemnify a party for damages resulting from its concurrent negligence is not violative of [the anti-indemnity statute] or Maryland public policy.… Therefore we need not, and do not, express any opinion on these issues.

Id.

This Court should disregard Federal'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 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 Federal. Federal, as Uniwest's subrogee, must then prove that the liability Uniwest settled did not arise out of Uniwest's sole negligence. *See Hays v. Centennial Floors, Inc.*, 893 P.2d 564, 568 (Or. Ct. App. 1995) (indemnitee had the burden of proving the extent to which the settlement payments for which it sought indemnity pertained to claims other those relating to sole negligence). Because the trial court found that the provision was void and thus provided no basis for contractual indemnity, this issue 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 as the party that drafted the contract, there was no incorporation of the of the indemnity clause of the prime contract. Any 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 preamble of 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 in the first place.

Federal's cited cases deal with incorporation. (Br. at 30-31) 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.[1]

Moreover, even if the prime contract's indemnity clause is incorporated into the subcontract as claimed by Federal, the court correctly determined that it was only Uniwest's obligations toward the Owner that

[1] Federal's assertion that § 11-4.1 has no effect on this "flow down" indemnity provision, in that it does not provide for indemnification for the indemnitee's sole negligence, is sophistry. (Br. at 29, n. 8) As explained above, the prime contract's indemnity agreement was not incorporated into the subcontract. Even if it was, it is only Uniwest's obligations toward the Owner that Amtech could ever be deemed to have assumed.

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, Federal 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 and Federal'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 and Federal 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 IS AMPLY SUPPORTED BY THE TRIAL EVIDENCE. (RESPONSE TO ASSIGNMENT OF ERROR NO. 3)

Federal contends the trial court erred in finding that "[t]he parties were not contemplating replacing the subcontract indemnity provision with a new indemnity provision." (Br. at 32) Federal's argument on this point is

nothing more than a request to overturn the trial court's factual determination in favor of one Federal itself perceives "the testimony and evidence presented at trial established." (Br. at 32). Moreover, the record supports the trial court's factual finding. The correspondence between Amtech and Uniwest's counsel establishes that the parties merely were 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. Nor did the parties reach an accord on this issue.

Federal's contention that Uniwest purportedly waived its third-party claim in January 2004 as separate consideration for the alleged "second" indemnity agreement is patently false. (Br. at 33) Thus, there was no waiver. Uniwest simply deferred suit until now, as the instant litigation by Uniwest against Amtech makes clear.

Federal'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 V. (Br. at 35) 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, Federal cannot demonstrate Uniwest's 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).

As explained above, Uniwest did not forego its right to seek indemnity from Amtech. 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.

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

The trial court found that Uniwest is not an additional insured under the AIU policy because, among other reasons, the subcontract containing

the void indemnity agreement did not meet the policy's definition of "insured contract." (JA 3040-41) There was also no "second" indemnity agreement, as explained in Section IV. The court's finding is correct for the reasons stated above. Additionally, as explained in Section III, the prime contract's indemnity provision is not incorporated in the subcontract and does not require Amtech to indemnify Uniwest. Accordingly, Federal's assignment of error fails.

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

Estoppel cannot create coverage that never existed in the first instance. *Aetna Cas. & Sur. Co. v. Richmond*, 76 Cal. App. 3d 645, 652-53, 143 Cal. Rptr. 75 (Cal. Ct. App. 1977).[2] 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 (Cal. Ct. App. 1994). If an insurer does not have a duty to defend, it likewise has no duty to disclaim

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

coverage or reserve its rights. *Id.* at 1627. Without such a duty, the insurer cannot be estopped if it fails to disclaim coverage. *Id*.

Federal ignores the fact that AIU is an excess insurer with no obligation to defend or disclaim coverage until the primary limits – here, CNA's policy – were exhausted. Federal also ignores the fact that CNA's limits were not exhausted when all of the conduct that it claims supports estoppel occurred. Federal's assertion that AIU should be estopped from raising coverage defenses amounts to a disagreement over the trial court's fact findings. (Br. at 40-48) Finally, Federal fails to acknowledge that this Court views the evidence, and all reasonable inferences therefrom, most favorably to AIU on this point. As the fact finder, the trial court's assessments of the witnesses' credibility outweigh Federal's.

During the bench trial, the court heard testimony from Devine, Lynn and Clark regarding whether: (1) AIU timely reserved its rights; (2) if AIU agreed to defend and indemnify Uniwest; and (3) if AIU hired counsel who controlled the defense, as Federal claimed. After this testimony, the court found that AIU never acquiesced or agreed to defend and indemnify Uniwest. (JA 3041-42) In so ruling, the court found that AIU hired Devine to monitor and assist with certain aspects of the underlying action, and his actions did not amount to controlling the defense. (JA 3041-42) The court

concluded Amtech's attorney, Lynn, was lead counsel and CNA, Amtech's primary carrier, was controlling the defense. (JA 3041-42) The court also found that AIU had expressly conveyed to Amtech that it was asserting a "full and complete reservation of rights," and never committed to provide coverage. (JA 3042) The court further found that Uniwest never contacted AIU to determine or challenge AIU's coverage position. (JA 3042)

These findings defeat Federal's estoppel claim, particularly because Federal does not dispute that CNA still had a defense obligation under its policy when Federal claims AIU allegedly failed to timely deny coverage. As an excess insurer, AIU had no duty to defend Amtech or communicate any coverage position until the CNA policy was exhausted.

Federal cites California and Virginia cases allegedly supporting its estoppel argument, but fails to point out that none involved an excess policy. All state a standard applicable to only a primary carrier and require detrimental reliance – a standard Federal does not attempt to meet here. *See, e.g., Garamaldi v. Golden Eagle Ins. Co.*, 116 Cal. App. 4th 694, 722-23, 10 Cal. Rptr. 3d 724, 750 (Cal. Ct. App. 2004); *Norman v. Ins. Co. of N. Am.*, 218 Va. 718, 729, 239 S.E.2d 902, 908 (1978). (Br. at 42-43)

The record shows the trial court properly found that AIU never agreed to defend Uniwest; that it timely reserved rights; and that AIU-hired

counsel, Devine, never controlled Uniwest's defense. AIU only hired Devine because there was not yet a legal ruling as to the validity of the subcontract's indemnity provision. (JA 891) AIU verbally reserved its rights, and then when it concluded in December 2005 that the subcontract's indemnity provision was indeed void under Virginia law, AIU reserved its rights again in writing. (JA 884-85, 908, 918, 923, 2362, 2404) In fact, Uniwest informed AIU that it considered itself an additional insured under Amtech's policy for the first time in early 2006. (JA 2472) AIU promptly denied Uniwest's additional insured status. (JA 2500)

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 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, who had handled the case for many years, was solely responsible for client communications and settlement negotiations. (JA 825) Devine testified unequivocally he was never lead counsel and did not replace Lynn, who controlled the defense of the case. (JA 866)

In sum, Federal's "facts" are one-sided and fail to recognize that all reasonable inferences must be made in the light most favorable to AIU. Accordingly, Federal's request to reverse the trial court's well-supported

fact findings and credibility determinations should be denied. The trial court's decision on this point must be affirmed.

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 for further proceedings.

Respectfully submitted,

s/John D. McGavin

John D. McGavin (21794)
TRICHILO, BANCROFT, MCGAVIN, HORVATH & JUDKINS, P.C.
3920 University Drive
Fairfax, Virginia 22030
(703) 385-1000 (telephone)
(703) 385-1555 (facsimile)
jmcgavin@tbmhjlaw.com

Attorneys for plaintiffs-appellees, Amtech Elevator Services, Inc., n/k/a ABM Amtech, Inc., ABM Industries, Inc. and AIU Insurance Company

302159 / 3652

CERTIFICATE OF SERVICE

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

UNIWEST CONSTR., INC. AND U.S. FIRE INS. CO.

EDWARD W. CAMERON, VSB# 29448
CAMERON/MCEVOY, PLLC
11325 Random Hills Road
Suite 200
Fairfax, Virginia 22030
T: (703) 273-8898
F: (703) 273-8897
ecameron@cameronmcevoy.com

MATTHEW J. LODGE, *Pro Hac Vice*
CHRISTOPHER R. CARROLL, *Pro Hac Vice*
CARROLL, MCNULTY & KULL, P.C.
120 Mountain View Boulevard
Basking Ridge, New Jersey 07920
T: (908) 848.6300
F: (908) 848.6310
ccarroll@cmk.com
mlodge@cmk.com

ANDREW J. GUSTUS, *Pro Hac Vice*
CARROLL, MCNULTY & KULL, P.C.
570 Lexington Avenue
New York, NY 10022
agustus@cmk.com

PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE CO.

GEOFFREY S. GAVETT, VSB# 33393
GAVETT & DATT, P.C.
15850 Crabbs Branch Way, Suite 180
Rockville, Maryland 20855
T: (301) 948-1177
F: (301) 948-4334
ggavett@gavettdatt.com

AMTECH ELEVATOR SERVICES N/K/A ABM AMTECH, INC., ABM INDUSTRIES, INC. AND AIU INSURANCE COMPANY

JOHN D. MCGAVIN, VSB# 21794
TRICHILO, BANCROFT, MCGAVIN,
HORVATH & JUDKINS, P.C.
3920 University Drive
Fairfax, Virginia 22030
T: (703) 385-1000
F: (703) 385-1555
jmcgavin@tbmhjlaw.com

BARBARA I. MICHAELIDES, *Pro Hac Vice*
AGELO L. REPPAS, *Pro Hac Vice*
BATES & CAREY LLP
191 North Wacker Drive, Suite 2400
Chicago, Illinois 60606
T: (312) 762-3100
F: (312) 762-3200
bmichaelides@batescarey.com
areppas@batescarey.com

JOHN C. BONNIE, *Pro Hac Vice*
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
950 East Paces Ferry Road, NE, Suite 3000
Atlanta, Georgia 30326
T: (404) 876-2700
F: (404) 875-9433
jbonnie@wwhgd.com

HOWARD J. RUSSELL, *Pro Hac Vice*
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
3773 Howard Hughes Parkway, Suite 390N
Las Vegas, Nevada 89169
T: (702) 938-3810
F: (702) 938-3864
hrussell@wwhgd.com

FEDERAL INSURANCE COMPANY

JEFFREY R. SCHMIELER, VSB# 32175
ALAN B. NEURICK, *Pro Hac Vice*
LISA N. WALTERS, VSB# 72291
SAUNDERS & SCHMIELER, P.C.
8737 Colesville Road, Suite L-201
Silver Spring, Maryland 20910
T: (301) 588-7717
F: (301) 588-5073
schmielerj@sslawfirm.com
neuricka@sslawfirm.com
waltersl@sslawfirm.com

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.

/s/ Catherine B. Simpson
Counsel Press LLC
1011 East Main Street
Suite LL-50
Richmond, Virginia 23219
(804)648-3664

Filing and service were performed by direction of counsel