IN THE MISSOURI SUPREME COURT EN BANC

No. 86363

UTILITY SERVICE AND MAINTENANCE, INC.
and
TIG INSURANCE COMPANY

Plaintiffs/Respondents

vs.

NORANDA ALUMINUM, INC. and
ZURICH INSURANCE COMPANY

Defendants/Appellants

Appeal from the Circuit Court of St. Louis County, Missouri
Honorable Carolyn C. Whittington, Judge
Cause No. 98CC-004068

RESPONDENTS' SUBSTITUTE BRIEF

Rynearson Suess Schnurbusch &Champion L.L.C.

Debbie S. Champion #38637
Amy R. Brown #53136
#1 South Memorial Drive, 18th Floor
St. Louis MO 63102
Phone: 314-421-4430
Fax: 314-421-4431

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page

Statutes and Other Authority — Page

STATEMENT OF FACTS

Neither the Substitute Brief of Appellant Noranda nor the Substitute Brief of Appellant Zurich contains a fair and complete statement of the facts. Because a complete statement of the facts is vital to the understanding of all issues in this case, Respondents will present their own statement of facts.

Plaintiff Utility Service and Maintenance, Inc. (herein "Utility"), a Missouri corporation with its principal place of business in St. Louis County, Missouri (LF 63, ¶1), is a painting contractor which specializes in painting electrical high voltage structures (T 9). Plaintiff TIG Insurance Company (herein "TIG"), successor in interest to Transamerica Insurance Company, is a California corporation with its principal place of business in Irving, Texas. TIG is duly qualified and authorized to transact insurance business in the State of Missouri (LF 63, ¶2).

Noranda Aluminum, Inc. (herein "Noranda") is a Delaware corporation which is duly authorized to transact business in the State of Missouri. (LF 63, ¶3). Defendant Noranda owns, operates and maintains a plant and office for the usual and customary transaction of business as an aluminum manufacturer in the City of New Madrid, Missouri (herein "New Madrid Plant"). (LF 64, ¶6).

Defendant Zurich Insurance Company (herein "Zurich") is a foreign corporation which is duly qualified and authorized to transact insurance business in the State of Missouri. (LF 63, ¶4) Zurich issued a CGL insurance policy and an excess insurance

policy insuring Noranda's liability. (LF 11, ¶ 4; LF 49, ¶ 1; LF 63, ¶5; Exhibit 38, Exhibit 39; T6: 11-16).

FORMATION OF THE SUBSTATION PAINTING CONTRACT

Dennis C. Dunaway (hereinafter "Dunaway"), President of Utility (T 9) initiated contact with William Kaiser (hereinafter "Kaiser"), an engineer in Noranda's electrical engineering department, and learned that Noranda wanted to do painting maintenance to its rectifier yard substation structures. (T 11, 12). Dunaway visited Noranda's New Madrid Plant, surveyed all of the structural steel Noranda wanted painted, measured it, and determined its condition, including how much rust was involved. (T 24).

Dunaway then sent a letter dated June 30, 1992, to Kaiser offering to paint the substation structure for $55,240. (T 12; Plaintiffs' Exhibit 40). Dunaway then followed with a letter to Kaiser, dated July 17, 1992 (Exhibit 41), enclosing an engineering specification (Exhibit 43) he had prepared for painting the substation structure. (T 13, 14).

Utility received in the mail a Request for Quotation consisting of a package of documents (herein "bid package") (Exhibit 45, T 17; A1), wherein Noranda requested a bid from Utility to "supply all labor, supervision, materials, tools, equipment and taxes necessary to prepare and paint the Phase I - II Rectifier Yard Substation Structures in accordance with Noranda's Engineering Specification No. 50140." (LF 11, ¶ 7, LF 42, ¶ 1; T 15, 17). The Request for Quotation contained the following documents: Table of Contents for Specification No. 50140 (T 17; A3); Notice to Bidders dated July 29, 1992

(T18; A4-5); the form of a Proposal (T 18; A6-8); Access to Plant (T 18; A9); Additional Information to be Submitted with Proposal (T 19; A10); Exhibit A, Noranda's Specification No. 50140 (18 pages) (T 20; A11-29); and Exhibit B, Noranda Furnished Services and Materials. (T 20; A30).

Noranda's Specification No. 50140, which was attached to the Request For Quotation, listed in its table of contents, "Exhibit 'C' - General Conditions." (T 20; A3). Exhibit C - General Conditions was not attached to Specification No. 50140 nor was Exhibit C included in the bid package received by Utility from Noranda. (T 20, 22, 26, 42). Noranda offered no evidence that Exhibit C - General Conditions of Contract was included in documents sent with the bid package, other than evidence indicating what Noranda's normal practice was in sending out bid packages. (T 273). Lape, Noranda's Purchasing Manager (T 253) stated he had no personal recollection as to what was in this particular bid package. (T 273).

The form of the "Proposal" had blanks for a prospective bidder to complete. (T 18; A6-8). Utility completed and mailed to Noranda the PROPOSAL wherein Utility offered to furnish "all labor, supervision, material, tools, equipment, shipping, receiving, unloading, storage, taxes and insurance necessary to perform the work described in Specification No. 50140" for a total lump sum price of $55,240.00. (Plaintiffs' Exhibit 44, T 22; A32-4). The Proposal indicated that the bidder proposed performing the work described in, and in strict accordance with, contract documents, but no contract documents were supplied with or attached to Utility's Proposal. (Exhibit 44, T 22, 26).

On August 31, 1992, Noranda faxed to Utility a PURCHASE ORDER, No. 229074 requesting that Utility supply all "labor, supervision, materials, tools, equipment and tax as necessary to prepare and paint the Phase I and II Rectifier Yard Substation structures in accordance with Noranda's Engineering Specification No. 50140" (hereinafter "The Work") for a total price of $55,240.00. (Exhibit 46, T 25; A46). Noranda's Purchase Order stated: "Acceptance of this Purchase Order confirms your acknowledgment of our standard terms and conditions. For explanation of tax codes and standard purchasing terms, please contact the above purchasing office." (Exhibit 46, T 25). However, the "terms and conditions" were not attached to the purchase order faxed to Utility. (T 25).

Thereafter, on or about September 10, 1992, Utility received a letter from Noranda, dated September 3, 1992, which stated that the Terms and Conditions which would apply to the Purchase Order were attached. (Exhibit 47, T 26; A47). Paragraph 19 of the Terms and Conditions of Purchase attached to Noranda's September 3, 1992 letter stated as follows:

> 19. Seller shall indemnify and save purchaser free and harmless from and against any and all claims, damages, liabilities or obligations of whatsoever kind, including, but not limited to, damage or destruction of property and injury or death of persons resulting from or connected with seller's performance hereunder or any default by seller or breach of its obligations hereunder.

(Exhibit 47, p.2; A48).

The Terms and Conditions of Purchase also contained the following provisions:

1. This Purchase Order constitutes an offer to purchase, and not an acceptance of any offer to sell, the goods and any services described herein which may be accepted only in accordance with its terms and without modification, addition, deletion or alteration.

2. In the event Seller's quotation, acknowledgment, confirmation, invoice or other form states terms additional to or different from those set forth herein, this Purchase Order shall be deemed a notification of objection to such additional and/or different terms and a rejection thereof.

3. In the absence of written acceptance or other written confirmation hereof by Seller, the commencement of any work by Seller in pursuance of this Order or the making of any deliveries by Seller of the goods and services described herein shall be deemed an acceptance hereof and a contract shall be formed only upon the terms and conditions set forth herein.

* * *

22. This Purchase Order together with any written documents which may be incorporated by specific reference, constitutes the entire agreement between the parties and supersedes all previous

> communications between them, either oral or written. All such previous communications are hereby abrogated and withdrawn, and no stipulations, representations or agreements by Purchaser or any of its officers, agents or employees shall be binding on the Purchaser unless contained in this Purchase Order or incorporated herein by reference as above provided, and no local, general or trade custom or previous course of dealing or performance shall alter or vary the terms hereof.

(Exhibit 47, p.2). (Emphasis added)

Gary Rauls (hereinafter "Rauls"), the Engineering Manager for Noranda (Rauls Deposition, p.4) reviewed the bid package. (Rauls' Depo, 20). Kaiser, Noranda's Mechanical Engineer (Rauls' Depo, 8-9), developed a detailed scope of the project. (Rauls' Depo, 18, 19), which is the engineering specification labeled as Exhibit A in the bid package. (Rauls' Depo, 13; T 272, 279-80). The terms "scope" and "specification" are used interchangeably. Rauls did not have a specific recollection of the rectifier plant bid package. (Rauls' Depo, 24). Rather, he assumed that when the bid package came across his desk, he handled it as he always handled bid packages. (Rauls' Depo, 24).

After receiving the Terms and Conditions, Utility then proceeded to perform the work. (T 28).

The parties stipulated that the gross sales of Noranda's New Madrid Plant were in excess of $350 million in 1991. The New Madrid Plant's total assets in 1991 were

valued at more than $275 million. (LF 64, ¶7). For 1992, the year the Painting Contract was entered into, the gross sales of the New Madrid Plant were in excess of $300 million. Assets for that year were valued at more than $250 million.(LF 64, ¶8). The parties further stipulated that for 1993, the gross sales of the New Madrid Plant were in excess of $275 million. The assets for 1993 were valued at more than $250 million. (LF 64, ¶9).

In addition, the parties stipulated that, in 1991, Utility's gross sales were approximately $2.5 million. Its total assets in 1991 were valued at approximately $850,000. In 1992 and 1993, Utility's gross sales and total assets were approximately the same as in 1991. (LF 64, ¶¶ 10, 11).

Based on the stipulations of the parties, Noranda is a large manufacturing concern whose financial resources far exceed those of Utility, who in comparison is a small painting contractor. (LF 64, ¶¶ 7-11). Noranda and Utility were of unequal bargaining position during the bid process. Utility could not have negotiated additional or different contract terms from those required by Noranda. (T 23).

The alleged risk Utility assumed under the purported indemnity agreement is over $5million, compared to $55,240.00 paid to Utility for the work it performed under the contract. (Exhibit 46).

MURPHY'S LAWSUIT

On October 6, 1992, Gary Murphy, an employee of Utility, was injured when an explosion allegedly occurred at the electric conductors and electric transformers in the area where Murphy was performing The Work (T 29; LF 13, ¶19; LF 42, ¶1; LF 49, ¶1).

As a result of his injuries, Murphy filed a lawsuit against Noranda and Troy L. Long in the Circuit Court of the City of St. Louis, State of Missouri, Cause No. 952-01986, seeking damages because of bodily injury. Murphy's First Amended Petition alleged that he was caused to suffer serious and permanent injuries, all due as a direct and proximate result of the carelessness and negligence of Defendant Noranda and Defendant Troy L. Long. (LF 14, ¶21; LF 42, ¶1; LF 49, ¶1; Exhibit 4; LF. 27-9 ¶¶, 1a, b, c, d; T 77).

TIG'S INSURANCE COVERAGE FOR UTILITY

On June 30, 1995, Noranda, by and through its attorney Lawrence H. Rost (hereinafter "Rost"), forwarded a copy of the summons and petition in Murphy's case to Dunaway, President of Utility. Noranda demanded that Utility provide a defense for the lawsuit "pursuant to paragraph 13, Exhibit C - General Conditions for Contract of the Substation Painting Proposal." (T 31, Exhibit 50; T 291, 330-334; A49).

Rost was the attorney employed by Noranda to represent it on claims arising out of the insurance coverage issues incident to the lawsuit brought by Murphy against Noranda. (T 290).

Thereafter, Utility forwarded Rost's letter, the summons, and the petition to its insurance broker, who forwarded the same to TIG, requesting that TIG defend Noranda under the contractual liability portions of the insurance policy issued by TIG to Utility. (T 146, Exhibit 62).

TIG insured Utility under a Commercial General Liability Policy (herein "CGL policy") No. 3018 22 74 for the policy period November 30, 1991, to November 30, 1992. Said policy contained limits of liability of $1,000,000 per occurrence. (T 140; Exhibit 36). TIG also insured Utility under a Coverage Plus Excess Liability Policy (herein "Excess Liability Policy") Policy No. XLB 2785907 for the policy period November 30, 1991, to November 30, 1992. This policy contained limits of liability of $4,000,000 in excess of the $1,000,000 limits of the primary CGL policy. (T 140, Exhibit 37).

Under the CGL Policy and the Excess Liability Policy, TIG was only obligated to defend and indemnify Noranda if Utility was legally obligated to defend and indemnify Noranda. Said policy provides in pertinent part:

SECTION I - COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY.

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that may result.

* * *

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS COVERAGES A AND B. (Exhibit 36; CGL Coverage Form, p.1).

Policy Exclusion (b) in TIG's CGL Policy excluded from coverage any liability Utility assumed under the Substation Painting Contract, unless, in that contract, Utility assumed Noranda's tort liability to Murphy. The TIG CGL Policy provides in pertinent part:

2. Exclusions This insurance does not apply to:

b. "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) Assumed in a contract or agreement that is an "insured contract," provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or

(2) That the insured would have in the absence of the contract or agreement. (Exhibit 36; CGL Coverage Form, p.1).

TIG's CGL Policy, under **SECTION V – DEFINITIONS,** provides as follows:

6. "Insured contract" means:

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" 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. (Exhibit 36; CGL Coverage Form, p. 9).

TIG's Excess Liability Policy (Exhibit 37) provides that TIG is obligated to indemnify Noranda if Utility is legally liable to Noranda. Said policy provides in pertinent part:

SECTION I

INSURING AGREEMENTS

A. COVERAGE

WE will pay on YOUR behalf the sums that YOU shall become legally obligated to pay as damages because of PERSONAL INJURY, PROPERTY DAMAGE, or ADVERTISING INJURY, caused by an OCCURRENCE to which this policy applies during

this POLICY PERIOD. The OCCURRENCE must take place in the COVERAGE TERRITORY. (Exhibit 37; p.1)

Exclusion b. under the Contractors Limitation Endorsement to TIG's Excess Liability Policy excludes coverage for any liability assumed by Utility under any contract or agreement unless such coverage is provided under TIG's CGL Policy. Exclusion b. provides:

> This insurance does not apply to:
>
> b. Bodily injury, personal injury or property damage assumed by you under any contract or agreement;
>
> Unless such liability is covered by valid and collectible underlying insurance as listed in the schedule of underlying insurance for the full limits shown therein, and then only for such liability for which coverage is afforded under said underlying insurance. (Exhibit 37).

TIG's Excess Liability Policy defines Personal Injury and Underlying Insurance as follows:

> **SECTION III**
>
> **DEFINITIONS**
>
> N. PERSONAL INJURY means:

1. Bodily injury, sickness or disease sustained by a person including death resulting from any of these at any time;

V. UNDERLYING INSURANCE means the policy or policies of insurance as described in the Schedule of Underlying insurance forming a part of this policy.

(Exhibit 37; Coverage Plus Umbrella Liability Policy, pp. 6-7).

Under the Schedule of Underlying Insurance in TIG's Excess Liability Policy, Transamerica Insurance Companies (TIG) is listed as the underlying insurer with limits of $1,000,000.00 each occurrence, $2,000,000.00 general aggregate. (Exhibit 37).

TIG'S ACCEPTANCE OF NORANDA'S TENDER OF DEFENSE AND TIG'S RETENDER OF DEFENSE TO NORANDA

In July, 1995, in response to Rost's June 30, 1995 letter, Charles Buttner (hereinafter "Buttner"), TIG's Adjuster, (Exhibit 50), employed Russell Watters and Joseph Swift, who were members of the law firm of Brown & James, P.C., to defend Noranda. (T 147). Watters, by letter dated July 12, 1995, (Exhibit 65) informed Rost that he had been retained by TIG to review the matter raised in Rost's letter on behalf of Noranda, which included Noranda's request that Utility take over its defense of the Murphy lawsuit. Watters indicated that, pursuant to his agreement with Rost, Brown & James had entered its appearance to protect the answer date and to give TIG an opportunity to review and obtain its investigative file to determine whether TIG or Utility

did in fact owe a defense to Noranda. Watters warned Rost that if TIG determined that no such defense was owing to Noranda, then Watters would notify Rost immediately upon that determination. Watters further stated, "At that point, we will then withdraw our appearance on behalf of Noranda and either you, or someone else who is selected by Noranda, will enter their appearance to further defend it in the pending litigation." (Exhibit 65; T 212, 292, 342-3).

Buttner asked Swift to obtain from Rost a copy of Exhibit C - General Conditions for Contract, which was referred to in Rost's June 30, 1995, letter. (T 103, 151-2). By letter dated September 6, 1995, Swift confirmed to Buttner that he had asked Rost to supply Exhibit C, paragraph 13, General Conditions for Contract. (T 109, 110, 152, 162, Exhibit 53).

Simultaneously, Swift, in a letter to Rost dated September 6, 1995, enclosed the Terms and Conditions of Purchase (Exhibit 47), which he had acquired from Dunaway's file. Swift wrote that Rost's letter of June 30, 1995, indicated that paragraph 13 of Exhibit C applied. Swift requested Rost to "send me the contract to which you are referring. Perhaps it will speed up the decision from the insurer." (T 294-5, 345). Rost admitted that he received Swift's request for Exhibit C (T 294 -5), but he did not send that document to Swift. (T 109-10, 152, 345).

At the time TIG assumed Noranda's defense in the Murphy lawsuit, Lape's September 3, 1992 letter, and the attached Terms and Conditions of Purchase were the only purported contract documents Buttner had in TIG's file. (T 162). Buttner compared

the language of TIG's CGL Policy, which provided that TIG would pay all sums that Utility became legally obligated to pay as damages for bodily injury, with the language of Paragraph 19 of the Terms and Conditions of Purchase and with the allegations of Murphy's Petition. Based upon this comparison, and upon Noranda's request for defense, Buttner determined that TIG had a duty to defend, a duty to defend Noranda in Murphy's lawsuit, because Noranda's demand, the purported contract documents and Murphy's petition asserted facts that potentially were within the coverage afforded Utility under TIG's CGL insurance policy. (T 192, 207).

Buttner knew that he could withdraw the defense of Noranda if evidence later showed that Utility owed no duty to defend Noranda under the Contract. He understood that TIG's obligations were to defend Noranda only if their insured, Utility, had an obligation to do so. (T 155, 165-7).

Later, by letter dated March 4, 1997, addressed to Rost (Exhibit 6; A50), Attorney Sam Rynearson, acting on behalf of TIG, indicated that, TIG's defense of Noranda in the Murphy lawsuit was based upon the representations contained in Rost's letter of June 30, 1995, wherein Rost indicated that Utility was obligated to assume responsibility for the defense of the lawsuit pursuant to paragraph 13, Exhibit "C" General Conditions for Contract. Rynearson indicated that TIG did not have a copy of Exhibit C General Conditions for Contract and requested that Rost supply to him a copy of the complete contract documents, including Exhibit C and paragraph 13. (Exhibit 6; T 310-11, 351, 353).

In his letter to Rynearson dated March 6, 1997, Rost responded that he would forward a copy of the requested painting contract together with exhibits, schedules, etc. under separate cover. He demanded that TIG supply to Noranda copies of TIG's insurance policies, including certificates of insurance. In addition, he enclosed a copy of his December [sic November] 19, 1992, correspondence to Brown & James wherein he requested TIG's insurance policies. (Exhibit 5; T 351; Exhibit 7; T 311-2, 354; A52-3).

Rost did not forward a copy of Exhibit C at that time, nor did he do so until after Rynearson provided him with the insurance documents. (T 354-5). Rost admits that although he had a copy of Exhibit C in June 1995, (T 334) he refused to provide Exhibit C to Utility or TIG or their attorneys despite previous requests to do so. (T 317, 318, 344, 345, 347, 354, 355).

By May 14, 1997, Rynearson had not received a copy of Exhibit C - General Conditions from Rost, and Rynearson reminded Rost in a letter on that same date that Rost had promised to send the contract material. Rynearson also enclosed TIG's insurance policies. Rynearson indicated that Dunaway, President of Utility, had stated that he doubted he ever received Exhibit C - General Conditions. Rynearson explained that TIG was providing a defense based upon Noranda's representation in Rost's letter of June 30, 1995, that paragraph 13 of Exhibit C contained an enforceable indemnity agreement between Noranda and Utility. Rynearson reminded Rost that on or about September 6, 1995, Swift had requested that Rost supply Exhibit C. Rynearson suggested that because of Rost's long delay, TIG had reason to believe that Exhibit C was not a part

of the contract. Rynearson further suggested that, if the Substation Painting Proposal did not contain an enforceable indemnity provision, Noranda should take over defense of Murphy's lawsuit and reimburse TIG for the defense cost it had incurred because of Noranda's representations. (Exhibit 8; T 314-6, 355; A54-5).

Later, in a letter dated May 16, 1997, Rost mailed a copy of what he asserted to be the complete Substation Painting Contract, including Exhibit C and paragraph 13. Rost therein claimed that under the contract documents, Utility agreed to indemnify Noranda "by dint of Paragraph 19 of the Terms and Conditions of Purchase and paragraph 13, Exhibit C - General Conditions of Contract." In his letter, Rost suggested that Dunaway had signed the proposal which specified Exhibits A, B, C and D as a part of the contract documents. (Exhibit 9; T 317-8; A56). At that time, Noranda did not take over the defense because it believed that there was an enforceable indemnity provision. (T 356)

However, Rost's assertion that Paragraph 13 of Exhibit C was a part of the Substation Painting Contract is not supported by his actions. On July 17, 1997, when Noranda filed the Substation Painting Contract attached to its Motion for Summary Judgment in the Murphy lawsuit (Exhibit 27), it did not include Exhibit C - General Conditions for Contract as a part of the Contract. (T 89-91, 346-9) The Motion for Summary Judgment represented to the court that the documents attached in Exhibit A, Purchase Order, i.e. the September 3, 1992 Lape letter, the Terms and Conditions of Purchase and the Engineering Specification No. 50140, constituted the Substation

Painting Contract. (Exhibit 27, Noranda's Motion for Summary Judgment, Facts Not in Dispute, ¶2, Exhibit A attached thereto; T 89).

Rost received a copy of the Motion for Summary Judgment from Swift but he did not provide Swift with a copy of Exhibit C. (T 346). He did not tell Swift that the documents attached as Exhibit A to the Motion for Summary Judgment did not contain all of the terms of the contract (T 349-50), even though Rost believed and was claiming that Exhibit C, General Conditions of Contract and the Terms and Conditions of Purchase were all part of the Contract. (T 336-8).

Noranda's Renewed Motion for Summary Judgment, filed September 1, 1998, attached the same Contract documents as were attached to Noranda's original motion. (T 88, Exhibit 30).

Since Rost was contending that both the Terms and Conditions of Purchase and Exhibit C - General Conditions of Contract applied, and because facts were in dispute as to the resolution of that question, TIG continued to defend Noranda in the Murphy litigation. (Exhibit 11; T 359).

NORANDA'S PARTICIPATION IN DEFENSE OF MURPHY'S LAWSUIT

Noranda's attorney, Rost, was involved in Noranda's defense. (T 91, 109, 302, 303). He supplied factual information to Swift, including documents (T 345). He reviewed and prepared responses to discovery (T 91, 345). He attended Murphy's deposition (T 79, 345). He reviewed the Motion for Summary Judgment (T 88-9, 347) and the Renewed Motion for Summary Judgment, and he was designated co-counsel for

Noranda on each of these pleadings (Exhibit 27, 30; T 297). Rost received the Motion for Summary Judgment and the Contract documents attached thereto (T 346) and did not tell Swift that it did not contain Exhibit C - General Conditions (T349-50). Rost urged Swift to explore settlement of the case. (Exhibit 5, T 353; Plaintiffs' Exhibit 10; T 357).

By letter dated August 24, 1998, Murphy's attorney, Phillip A. Cervantes, demanded $30 million to settle the Murphy lawsuit. (Exhibit 19, T 98).

In response to Murphy's $30 million demand, Rost, by letter dated August 31, 1998, demanded on behalf of Noranda that TIG settle the Murphy lawsuit within TIG's available limits. Rost also demanded that mediation be scheduled as soon as possible. (Exhibit 10; T 320-1, 357; A10-1).

On September 10, 1998, Rynearson responded to Rost's letter of August 31, 1998, indicating that there was a dispute concerning whether Exhibit C and paragraph 13 ever became a part of the Substation Painting Contract, and that, because of this dispute, TIG had continued to defend Noranda. However, Noranda's right to defense and indemnity depended upon the validity and presence of an enforceable indemnity agreement between Noranda and Utility. Rynearson indicated that TIG would continue to defend and indemnify Noranda based upon Noranda's representation that the indemnity agreement was in fact a part of the Substation Painting Contract. Rynearson further indicated that TIG would seek reimbursement of the cost of defense and indemnity from Noranda if a determination was made that the indemnity agreement was not part of the contract. (Exhibit 11; T 358-360; A11-2).

Rynearson also responded to Noranda's demand that TIG settle the case within TIG's policy limits by indicating that TIG would expend every effort to defend, settle and/or successfully litigate the Murphy lawsuit. He further indicated that since TIG's liability under the policies was limited to $5 million, any judgment which might exceed that amount would be Noranda's obligation. Noranda was advised of its right to have its own counsel associate with counsel employed by TIG in defense of the lawsuit. (Exhibit 11; T 361-2).

After receiving Rynearson's letter of September 11, 1998 (Exhibit 11), Noranda did not take over the defense of the Murphy lawsuit (T 368) or file a declaratory judgment action (T 368). When TIG's letter indicated that TIG would seek reimbursement if a determination was made that the indemnity agreement was not part of the Contract, Rost did not do anything because he believed TIG had waited too long (T 362-3). Rost attempted to explain his inaction by contending that he was relying on Watters' July 12, 1995, letter (Exhibit 65) which stated, if a determination was made by TIG that no defense was owed, TIG would notify Noranda and Watters would withdraw his appearance. (T 364, 368).

Rost attended the mediation (T 100).

ZURICH'S INSURANCE COVERAGE

Zurich issued a Comprehensive General Liability insurance policy (herein "CGL policy") and an Umbrella and Follow Form Excess Liability Insurance Policy insuring

Noranda's liability to Murphy. (LF 63, ¶ 5; Exhibit 38, T 140; Exhibit 39, T 140; A61). The insuring agreement in Zurich's CGL Policy stated as follows:

> The insurer agrees to pay on behalf of the insured all sums which the insured shall become obligated to pay as damages:
>
> 1. PERSONAL INJURY LIABILITY
>
> Because of personal injury sustained by any person or persons during the policy period. . . .
>
> 3. ADDITIONAL INSURING AGREEMENTS
>
> With respect to such insurance as is afforded by this Policy, the Insurer shall:
>
> a. If claim is made or suit is brought within . . . the United States of America . . . defend any such claim or suit against the insured, even if such claim or suit is groundless, false or fraudulent. The insurer shall make such investigation, negotiation and settlement of any claim or suit as it deems expedient;

(Exhibit 38, p.2; A62)

The term Personal Injury is defined as follows:

> 4. PERSONAL INJURY
>
> The term "Personal Injury" wherever used in this Policy shall mean:
>
> a. Bodily injury, mental anguish, shock, sickness or disease, including death at any time resulting there from.

(Exhibit 38, p.8; A68)

Zurich's policy provided coverage to Noranda for the period May 1, 1992, to May 1, 1993. Zurich's limit of liability for its CGL policy was $2,000,000 inclusive, each occurrence, and $4,000,000 in the aggregate. (Exhibit 38, p.1; A61).

Zurich's Umbrella Policy and Follow Form Excess Liability Insurance agreements provided:

> . . .[T]he insurer hereby agrees:
>
> Coverage:
>
> To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay for damages, as more fully defined by the term "ultimate net loss," on account of:
>
> (i) Personal injury;
>
> caused by an Occurrence which takes place during the policy period anywhere in the world.

(Exhibit 39, p. I-1; A78)

> The policy provided under paragraph 3, Limit of Liability as follows:
>
> The Insurer shall be liable only for the Ultimate Net Loss in excess of either:
>
> (a) the limits of the Underlying Insurance as set out elsewhere herein and the amount recoverable under any other underlying insurances

collectible by the Insured in respect of each Occurrence covered by said underlying insurances.

(Exhibit 39, p. I-2; A79).

The policy defines the following terms:

2. Bodily Injury

The term "Bodily Injury" means bodily injury, . . .

(Exhibit 39, p. I-8; A85)

3. Personal Injury

Except when it arises out of Advertising Liability, the term "Personal Injury" means Bodily Injury . . .

(Exhibit 39, p. I-8; A86)

* * *

7. Ultimate Net Loss

The term "Ultimate Net Loss" means the sum actually paid or payable in the settlement or satisfaction of losses for which the Insured is liable either by adjudication or compromise with the written consent of the Insurer, after making proper deduction for all recoveries and salvages collectible, but excludes all loss expenses and legal expenses (including attorneys' fees, court costs and interest on any judgement or award) and all salaries of employees and office

expenses of the Insured, the Insurer or any underlying Insurer so incurred.

(Exhibit 39, p. I-9; A86)

Under Section I, SCHEDULE OF UNDERLYING INSURANCE, the policy provides that the underlying coverage applicable to all insureds for CGL is $2,000,000 each occurrence, $2,000,000 annual aggregate (Exhibit 39, Section I).

Zurich's limit of liability was $5,000,000 each occurrence, and $5,000,000 aggregate (Exhibit 39, D1)

SETTLEMENT OF MURPHY'S LAWSUIT WAS REASONABLE

On or about November 9, 1998, during a mediation conducted in the Murphy lawsuit, TIG agreed to pay $4,300,000 in settlement of Murphy's and Liberty Mutual's claim against Noranda. (Exhibit 26; T 99-101).

Zurich had notice of Murphy's lawsuit. Both Zurich's representative and Noranda's representative attended the mediation and refused to pay the negotiated settlement amount. (T 100-101).

Swift testified as plaintiff's expert witness with respect to the reasonableness of the settlement in the Murphy lawsuit. Swift had worked as a trial attorney handling defense of personal injury litigation for fifteen years. (T 68). He had evaluated approximately 1,000 to 1,500 cases. His evaluation of personal injury suits included a consideration of where the case was filed and the possible make-up of the jury pool. He evaluated whether the plaintiff was a likeable person and whether the plaintiff was

believable. (T 60). Swift also evaluated the extent and permanency of the injury, he determined whether plaintiff was partially or wholly at fault, and he evaluated the potential legal defenses. All of those considerations went into calculating a bottom line amount, usually consisting of a range of numbers. (T 70). Swift indicated that, in his opinion, $4,300,000 was a reasonable settlement of Murphy's and Liberty Mutual's lawsuit in view of Noranda's potential liability and the severe bodily injury and disfigurement suffered by Murphy from burns to his head, face and upper body. (T 109, 128).

Murphy's injuries were apparent. He was deformed with second and third degree burns over most of his body, causing severe scarring. (T 78-9, 82). He was disabled and unable to work, and he claimed lost wages and a psychiatric injury. (T 82). His ear lobes were gone, he was missing fingers, and he could not grow hair on top of his head, causing him to wear a wig or toupee. (T 79).

In his claim, Murphy asserted that these injuries resulted from Noranda's negligence in supervising and/or operating its plant by allowing Murphy to get up in the grid when Murphy was unaware that the top line remained electrically charged. (Exhibit 4; T 78). There was no allegation in the Murphy Petition that Utility was negligent. (Exhibit 4, T 78).

Noranda had two defenses to Murphy's claims: either Murphy was Noranda's borrowed servant and subject to the workers compensation bar, or Murphy was an independent contractor who had received workers compensation benefits and had no

claim against Noranda. Noranda filed a Motion for Summary Judgment on the legal issue of borrowed servant and independent contractor. (T 83, Plaintiffs' Exhibit 27).

Noranda's Motion for Summary Judgment was argued and submitted. By Order dated January 27, 1998, the Honorable Robert Dierker denied Noranda's Motion for Summary Judgment because of the unresolved question of fact regarding the issue of Noranda's control over Murphy's work. (Exhibit 29; T84).

In a letter dated July 16, 1998, TIG was informed by Swift that a jury could potentially find a verdict in the range of $8 to $10 million. (Exhibit 16, p.7; T 98). The liability picture was overshadowed by the injury to plaintiff because, in Swift's opinion, juries tend to be sympathetic to catastrophically injured plaintiffs. (Exhibit 16, p.7). Swift believed there was a poor chance of convincing a jury that Noranda was not liable. Further, venue of the lawsuit was in the City of St. Louis, where jury awards to plaintiffs are very liberal. (Exhibit 16, p.7).

By letter dated August 13, 1998, Swift informed TIG that Murphy's demand could be in the range of $15 to $20 million and that a reasonable settlement would be in the range of $6 to $8 million. (Exhibit 17, p.6). Rost was sent a copy of that letter.

In a letter dated August 19, 1998, addressed to Gary Widmer, Claims Representative at TIG, Swift informed TIG that the probability of winning the Renewed Motion for Summary Judgment was 20 to 25 percent; the probability for winning on appeal was 50 to 60 percent; and the probability of obtaining a jury verdict in favor of Noranda was 10 percent. Swift believed there was a 20 to 30 percent chance of a verdict

in the $8 to $10 million range and a 50 percent chance of a verdict in the $2 to $3 million range. A copy of that letter was sent to Rost. (Exhibit 18, p.3; T 98).

At no time did Rost or anyone at Noranda indicate that they disagreed with Swift's evaluation of the Murphy lawsuit. (T 108).

The parties stipulated that TIG paid the Brown & James firm $73,808.50 in attorney's fees in defense of the Murphy lawsuit, and that TIG paid $8,368.66 in expenses in defending the Murphy lawsuit. (LF 66, paragraph 1, 2; T 4). The amount paid for attorney services and expenses was necessary and the amount charged for attorney services was reasonable. (LF 66, paragraph 1, 2; T 4).

PROCEEDINGS BELOW

The Trial Court conducted a two-day bench trial on January 15-16, 2002. Subsequently, the Trial Court entered its order in favor of Plaintiffs TIG and Utility and against Defendants Noranda and Zurich. (LF 150) Defendants appealed to the Eastern District Court of Appeals, and after briefing and oral argument, the Court issued its order affirming the Trial Court's order as it related to Judgment in favor of Respondent/Plaintiffs and against Noranda, and reversed the Trial Court's order as it related to Judgment against Zurich. (Respondent Appendix, A 77). This Court subsequently granted Appellant Noranda's Motion to Transfer.

POINTS RELIED UPON

I. **Response to Points I & II, Noranda's Substitute Brief.** THE TRIAL COURT CORRECTLY FOUND THAT TIG WAS NOT ESTOPPED FROM ASSERTING NON-LIABILITY AND CLAIMING REIMBURSEMENT BECAUSE TIG'S CONTINUED DEFENSE OF NORANDA WAS NOT INCONSISTENT WITH TIG'S LATER ASSERTED CLAIM FOR REIMBURSEMENT, IN THAT THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT TIG PROVIDED NOTICE THAT ITS DEFENSE WAS NO LONGER UNCONDITIONAL AND THAT IF THERE WAS NO ENFORCEABLE INDEMNITY PROVISION, NORANDA SHOULD TAKE OVER THE DEFENSE AND REIMBURSE TIG FOR ITS DEFENSE COSTS.

A. Noranda was not an insured under the contract and thus, TIG did not have any obligation to Noranda to reserve its rights to deny liability or coverage.

III. Response to Point IV, Noranda's Substitute Brief. THE TRIAL COURT CORRECTLY FOUND THAT THE SUBSTATION PAINTING CONTRACT DID NOT CONTAIN A PROVISION REQUIRING UTILITY TO INDEMNIFY NORANDA FOR NORANDA'S OWN NEGLIGENCE BECAUSE PARAGRAPH 19, THE INDEMNITY PROVISION IN THE TERMS AND CONDITIONS OF PURCHASE, WAS NOT PART OF THE NEGOTIATED CONTRACT AND BECAUSE PARAGRAPH 19 DOES NOT CLEARLY, CONSPICUOUSLY AND UNEQUIVOCALLY EXPRESS THE PARTYS' INTENTION TO INDEMNIFY NORANDA FOR NORANDA'S OWN NEGLIGENCE.

A. The indemnity agreement contained in Paragraph 19 of the Terms and Conditions of Purchase does not conspicuously or specifically require Utility to indemnity Noranda for Noranda's own negligence.

B. Paragraph 19 did not satisfy this Court's requirement that indemnity provisions be conspicuous, in that such provision was hidden on the back of a

V. Response to Point III, Zurich's Substitute Brief. THE TRIAL COURT CORRECTLY FOUND THAT TIG HAD A RIGHT TO SEEK INDEMNIFICATION AND REIMBURSEMENT FROM NORANDA AND DID NOT WAIVE THAT RIGHT IN THAT TIG DID NOT POSSESS KNOWLEDGE OF ALL THE MATERIAL FACTS BECAUSE, DESPITE ITS CLAIMS THAT EXHIBIT C WAS PART OF THE CONTRACT BETWEEN NORANDA AND UTILITY, NORANDA HAD REFUSED TO PROVIDE THAT EXHIBIT TO TIG.

ARGUMENT

I. **Response to Points I & II, Noranda's Substitute Brief. Response to Points I & II, Noranda's Substitute Brief.** THE TRIAL COURT CORRECTLY FOUND THAT TIG WAS NOT ESTOPPED FROM ASSERTING NON-LIABILITY AND CLAIMING REIMBURSEMENT BECAUSE TIG'S CONTINUED DEFENSE OF NORANDA WAS NOT INCONSISTENT WITH TIG'S LATER ASSERTED CLAIM FOR REIMBURSEMENT, IN THAT THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT TIG PROVIDED NOTICE THAT ITS DEFENSE WAS NO LONGER UNCONDITIONAL AND THAT IF THERE WAS NO ENFORCEABLE INDEMNITY PROVISION, NORANDA SHOULD TAKE OVER THE DEFENSE AND REIMBURSE TIG FOR ITS DEFENSE COSTS. [1]

STANDARD OF REVIEW

Rule 73.01 mandates that, in a court tried case, the standard of review "requires that the decision of the Trial Court be affirmed unless there is no substantial evidence to

[1] Noranda fails to assert any claim or point on appeal against Respondent Utillity. Because Noranda failed to identify any point of appeal or error of the Trial Court or the Court of Appeals as it relates to Utility, they have waived any claim on appeal regarding the entry of the Trial Court's judgment in favor of Utility. As such, Respondents have addressed only the Points on Appeal regarding TIG. Supreme Court Rule 84.04(d); Zakibe v. Ahrens & McCarron, Inc., 28 S.W.3d 373 (Mo.App. E.D. 2000).

support it, it is against the weight of the evidence, or it erroneously declares or applies the law." Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976); Spradling v. City of Fulton, 982 S.W.2d 255, 263 (Mo. banc 1998). When considering the evidence, the appellate court must give due regard to the Trial Court's opportunity to judge the credibility of the witnesses. Rule 84.13(d)(2). Pruitt v. Hunter, 105 S.W.3d 874 (Mo.App. E.D. 2003). The Trial Court is free to believe all, part, or none of the testimony of any witness. Harris v. Desisto**,** 932 S.W.2d 435, 443 (Mo.App. W.D. 1996). The appellate court must consider any fact issue upon which no specific finding was made as having been determined in accordance with the result reached. Rule 73.01; Clouse v. Myers, 753 S.W.2d 316 (Mo.App. S.D. 1988); Gillis v. Pagano, 672 S.W.2d 387, 388 (Mo.App. E.D. 1984). In determining the sufficiency of the evidence, an appellate court will accept as true all evidence and permissible inferences favorable to the prevailing parties and will disregard any contrary evidence. Harris v. Desisto**,** 932 S.W.2d at 443. A reviewing court will set aside a decree as against the weight of the evidence only with a firm belief that the decree is wrong. Centennial Insurance Co. v. International Motorcar Co., 581 S.W.2d 883, 885 (Mo.App. E.D. 1979).

Points I and II of Noranda's Substitute Brief essentially assert that TIG is estopped from asserting its nonliability to Noranda because TIG failed to issue a reservation of rights letter outlining any limiting conditions prior to assigning defense counsel to represent Noranda in the Murphy lawsuit. Specifically, Point II of Noranda's Substitute Brief argues that TIG is estopped from asserting its nonliability because TIG did not

overtly question the validity of Paragraph 19 of the Terms and Conditions of the Contract prior to settling the Murphy case. Because Point II falls within the Argument of Point I, Respondent has addressed those issues under one Point.

A. Noranda was not an insured under the contract and thus, TIG did not have any obligation to Noranda to reserve its rights to deny liability or coverage.

Noranda claims that TIG is estopped because it never properly reserved its rights to later deny coverage and remained in exclusive control of the defense, citing Atlanta Casualty Co. v. Stephens**,** 825 S.W.2d 330, 333 (Mo.App. 1992). (Noranda's Substitute Brief, pp. 18-22). Noranda incorrectly claims that, by defending Noranda in the Murphy lawsuit, TIG is estopped and/or has waived any right to contend whether or not Noranda was entitled to coverage under the policies of insurance issued by TIG to Utility.

The doctrine of estoppel cannot be used to extend the coverage of an insurance policy or to create coverage where none exists. Whitney v. Aetna Casualty & Surety Co., 16 S.W.3d 729, 733-4 (Mo.App. E.D. 2000); Magruder v. Shelter Ins. Co., 985 S.W.2d 869, 873 (Mo.App. W.D. 1999); Shelter General v. Siegler, 945 S.W.2d 24, 27 (Mo.App. E.D. 1997); Great West Casualty Co. v. Wenger, 748 S.W.2d 926, 928 (Mo.App. W.D. 1988); Young v. Ray America, Inc., 673 S.W.2d 74, 80 (Mo.App. 1984). Estoppel operates to preserve only rights already acquired, not to create new ones which are not part of an original contract. McKee v. Travelers Insurance, 315 S.W.2d 852, 858 (Mo.App. 1958). Estoppel cannot operate to change the terms of the policy so as to cover additional subject matter. Martinelli v. Security Insurance Co. of New Haven, 490

S.W.2d 427, 434 (Mo.App. 1973). While Noranda argued waiver and estoppel during trial and in the Court of Appeals, it appears that they are no longer asserting a claim of waiver in this Court.

In Points I and II of its Substitute Brief, Noranda does not argue that there was coverage or that there should have been coverage under the policy. It does not contest that the claimed actions in Murphy's law suit were for Noranda's own negligence. They argue that, simply because TIG hired counsel for defendant Noranda, at the *demand* of Noranda, TIG was wrong and should thus cover Noranda's liability. Noranda further argues that because TIG failed to contest Paragraph 19 of the Terms and Conditions, upon which Noranda demanded indemnity and defense, TIG was forever barred from so contesting.

Coverage which is excluded, or not included within the insurance agreement, may not be included upon the basis of estoppel for failure to timely assert a defense. Great West Casualty v. Wenger, 748 S.W.2d at 929; Hussman v. Government Employees Insurance Co., 768 S.W.2d 585, 587 (Mo.App. 1989); State Farm Mutual Automobile Insurance Co. v. Hartford Accident & Indemnity Co., 646 S.W.2d 379, 381 (Mo.App. 1983); Young v. Ray America, Inc., 673 S.W.2d at 80; State Farm Mutual Automobile Insurance Company v. Zumwalt, 825 S.W.2d 906, 910 (Mo.App. S.D. 1992); Whitney v. Aetna Casualty & Surety Co., 16 S.W.3d at 733-4.

Noranda, who was not a party to the insurance contract, and who under its terms was not entitled to its protection, may not create a new contract of liability with TIG

through waiver or estoppel. Linenschmidt v. Continental Casualty Co., 356 Mo. 914, 204 S.W.2d 295, 302 (Mo. 1947). Also see Magruder v. Shelter Insurance Co., 985 S.W.2d at 873.

TIG's CGL Policy insured only Utility. (Ex. 36; T140) The insuring agreement provided that TIG would defend Utility and pay those sums that Utility became "legally obligated to pay as damages because of bodily injury." As the Trial Court found, the purported indemnity agreement between Utility and Noranda was not enforceable. Because the indemnity agreement was not enforceable, Utility was not legally obligated to pay damages for Noranda because of Murphy's bodily injury. Accordingly, TIG had no duty to defend or indemnify Noranda.

Further, policy exclusion (b) in TIG's CGL Policy excluded from coverage liability Utility assumed under the Substation Painting Contract, unless, in that contract, Utility assumed Noranda's tort liability to Murphy. Exclusion (b) provides:

> **2. Exclusions**
>
> This insurance does not apply to:
>
> **b.** "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> **(1)** Assumed in a contract or agreement that is an "insured contract," provided the "bodily injury"

or "property damage" occurs subsequent to the execution of the contract or agreement; or

(2) That the insured would have in the absence of the contract or agreement.

(Exhibit 36, Comprehensive General Liability Coverage Form, p.1).

Thus, unless exception (1) or (2) to the exclusion applies, there would be no coverage for Utility for any liability which it allegedly accepted in the Substation Painting Contract. Exception (1) is for an "insured contract" which is defined as a "contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for bodily injury or property damage to a third person or organization." Paragraph 19, Terms and Conditions of Purchase is not an enforceable indemnity agreement because it does not specifically provide that Utility will indemnify Noranda for Noranda's own negligence. Thus, the indemnity provision in Paragraph 19 is not an "insured contract," and consequently, Exception (1) does not apply.

Exception (2) to Exclusion (b) applies if the insured would have been liable in the absence of a contract or agreement. As indicated in part IB, under Section 287.120 of the Worker's Compensation Act, Utility would have been immune to any liability to Noranda. Thus, Utility would have had no liability to Noranda in the absence of an express contract of indemnity. Parks v. Union Carbide, 602 S.W.2d 188, 190 (Mo. banc 1980). Consequently, Exception (2) also does not apply. Accordingly, Exclusion (b)

precludes coverage. See, West v. Jacobs, 790 S.W.2d 475 (Mo.App. 1990); Great American Insurance Co. v. Pearl Paint Co., 703 S.W.2d 601 (Mo.App. 1986).

TIG's Excess Liability Policy provided that TIG is obligated to indemnify Noranda if Utility is legally liable to Noranda. (Exhibit 37; T140). Exclusion (b) under the Contractor Limitation Endorsement excludes coverage for liability assumed by Utility unless liability is covered by TIG's CGL Policy. (Exhibit 37, Contractors Limitation Endorsement). As previously explained, TIG's CGL Policy did not provide coverage for liability assumed by Utility under the contract, and thus, coverage is also precluded under the Excess Liability Policy.

Since Utility was not legally obligated to indemnify Noranda, there is no coverage under TIG's policies and Noranda cannot create coverage by way of waiver or estoppel. Whitney v. Aetna; Shelter General v. Siegler; Great West Casualty Co. v. Wenger.

In Parks, this Court implied that estoppel and/or waiver cannot be used to create a contract of indemnity which would permit a third party, such as Noranda, to shift Noranda's liability for Utility's employee, Murphy, back to Utility. Only a specific agreement providing that Utility would indemnify Noranda's own negligence is sufficient to shift that liability. In this case, to shift that liability to Utility's insurer, TIG, would in effect also nullify Parks. Because Utility was not legally obligated to defend and indemnify Noranda, TIG was not obligated under the terms of its insurance policy to defend and indemnify Noranda.

B. TIG's actions of hiring defense counsel for Noranda did not impose an irrefutable obligation to continue such defense and to indemnify Noranda for its liability, especially because TIG's actions were not inconsistent with its claims of nonliability because those actions had been based on Noranda's repeated, albeit incorrect, affirmation that there was a valid and enforceable indemnity agreement between Noranda and TIG's insured, Utility.

Noranda claims that TIG's provision of a defense prohibited TIG from later determining that it would not defend and/or indemnify Noranda under the Utility policies. Likewise, Zurich also argues that TIG was unable to deny Noranda indemnity and defense because TIG did not issue a conditional reservation of rights when they hired counsel to defend Noranda. (Zurich's Substitute Brief, Point III). Both parties wholly ignore the Trial Court's findings of fact regarding this matter.

The Trial Court found that by letter dated May 14, 1997 (Ex. 8), TIG informed Noranda that its defense was no longer unconditional. TIG informed Noranda it was providing a defense based upon Noranda's representation that Exhibit C was part of the Contract, and that if there was no provision in the contract which contained an enforceable indemnity provision, Noranda should take over defense of the lawsuit. (LF 150 ¶24, 25; Ex. 6; T310-1, 351; Ex. 8, T314-6). The Trial Court's finding that TIG withdrew its unconditional defense was supported by substantial evidence and permissible inferences drawn from said evidence. Harris v. Desisto, 932 S.W.2d 435, 443 (Mo.App. W.D. 1996).

Both Noranda and Zurich argue that TIG is prohibited under Missouri law from withdrawing its defense of Noranda because it did not send out a reservation of rights before it hired counsel for Noranda.

TIG provided sufficient notice to Noranda that its continued defense should not be considered a waiver of policy rights to deny coverage, and TIG should not be estopped from denying defense and indemnity under the Contract. Atlanta Casualty, 825 S.W.2d at 333. Noranda's failure to object to TIG's continued defense defeats Noranda's claim that TIG waived its right to seek reimbursement from Noranda or that TIG is estopped from seeking restitution. Boomer and Associates Construction v. Western Casualty & Surety**,** 760 S.W.2d 445, 447-8 (Mo.App. W.D. 1988).

When Noranda received TIG's May 1997 reservation (Exhibit 8) and the September 10, 1998 reservation (Exhibit 11), Noranda could have rejected TIG's defense, and taken control of the lawsuit itself, and entered into a Section 537.065 agreement with Murphy. Safeco Insurance Co. v. Rogers, 968 S.W.2d 256, 258 (Mo.App. W.D. 1998); Boomer & Associates v. Western Casualty & Surety, 760 S.W.2d 445, 447 (Mo.App. W.D. 1988). Instead, Noranda demanded that TIG settle the lawsuit within TIG's available limits and demanded that mediation be scheduled. (LF 151, ¶30; Exhibit 10; T 320-1). Such response showed Noranda's acquiescence to TIG's continued defense and settlement of the Murphy lawsuit under the conditions set forth in the May 1997 and September 1998 letters.

C. TIG's action of settling the Murphy case was not inconsistent with TIG's claims of nonliability because those actions were done after TIG informed Noranda that it was defending Noranda based upon Noranda's representation that Exhibit C was part of the Contract and that, if there was no enforceable indemnity provision, TIG would seek reimbursement, and Noranda did not inform TIG that this conditional defense was unacceptable and did not take over the defense of the lawsuit, but instead demanded that TIG settle the Murphy lawsuit.

One element of estoppel is an act inconsistent with the claim later asserted. Brown v. State Farm, 776 S.W.2d 385, 388 (Mo. banc 1989). Noranda rejected tender of defense and demanded that TIG settle the lawsuit within its policy limits, and Noranda was then notified that TIG would settle but would later seek reimbursement if there was no enforceable indemnity provision in the Substation Painting Contract. Noranda failed to show that TIG's settlement of the lawsuit was inconsistent with its later demand for reimbursement.

After the demand to settle, TIG again informed Noranda there was a dispute about whether Exhibit C ever became a part of the contract and that Noranda's right to defense and indemnity depended upon the presence of an enforceable indemnity agreement in the Substation Painting Contract. TIG informed Noranda that reimbursement of the cost of defense and indemnity would be sought if a determination was made that the indemnity agreement was not a part of the contract. (LF 151, ¶31; Exhibit 11; T 358-60).

After receiving Rynearson's letter of September 11, 1998 (Exhibit 11), Noranda took no action. It did not take over the defense of the Murphy lawsuit (T 368) or file a declaratory judgment action (T 368). Even though Rynearson's letter indicated that TIG would seek reimbursement if it later determined that the indemnity agreement was not part of the contract, Noranda did nothing, other than send Rost to participate in the mediation and fail to object to the settlement actions of TIG. (T 362-4). Noranda acquiesced in TIG's continued defense and settlement of the Murphy lawsuit under the conditions set forth in the May 1997 and September 1998 letters.

After May 16, 1997, TIG's continued defense and control of the Murphy lawsuit cannot be considered conduct inconsistent with its later claim for reimbursement, and therefore, there are no grounds for asserting estoppel. Estoppel requires an act inconsistent with a claim later asserted. Brown v. State Farm, 776 S.W.2d 385, 388 (Mo. banc 1989). TIG's actions were not inconsistent with its claim asserted in the Trial Court. Indeed, the claim asserted was exactly what TIG had informed Noranda and Zurich it would assert if there was no indemnity agreement.

Pursuant to Noranda's demand, the Murphy case was mediated and settled for $4.3 million (Exhibit 26; T 99-101). Clearly, this was a good faith settlement of a bonafide dispute of more than colorable merit between Murphy and Noranda. As such, TIG's conduct in settling was consistent with its claim for reimbursement. Noranda's claim that TIG was estopped from seeking reimbursement is unfounded in fact and in law. Stephenson v. First Missouri Corp., 861 S.W.2d 651 (Mo.App. W.D. 1993).

Since the Substation Painting Contract did not contain an enforceable indemnity agreement (LF 150, ¶ 11, LF 151, ¶ 35), TIG is entitled to restitution for the amounts which it paid on behalf of Noranda and Zurich in the settlement and defense of the Murphy lawsuit.

D. Noranda did not detrimentally rely on TIG's defense and was not prejudiced by any action of TIG because Noranda actively participated in the defense of the Murphy suit and demanded that TIG settle that suit.

Noranda asserts that it detrimentally relied on the defense provided by TIG, but there was no evidence adduced at trial regarding such reliance. To the contrary, Noranda hired their own counsel who was kept informed at all times during the pendency of the Murphy case. Noranda also asserts that it was prejudiced by TIG's defense of the lawsuit. (Noranda's Substitute Brief p.19-20). Noranda claims that TIG is estopped from asserting non-liabilty because of its reliance and the prejudice to Noranda's rights.

Estoppel requires (1) an admission, statement or act inconsistent with the claim later asserted and sued upon; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party, resulting from allowing the first party to contradict or repudiate the admission, statement or act. Brown v. State Farm, 776 S.W.2d 385, 388 (Mo. banc 1989). Noranda is unable to show all the necessary elements of estoppel. The party asserting estoppel bears the burden of proving every fact by clear and satisfactory evidence. Van Kampen v. Kauffman, 685 S.W.2d 619, 625 (Mo.App.

1985); Missouri Property & Casualty Insurance Guaranty Association v. Wal-Mart Stores, Inc., 811 S.W.2d 28, 34 (Mo.App. E.D. 1991).

For estoppel to apply in the context of insurance, the insurer's action must induce the insured to rely upon the statement or action. In addition, the insured must show that he was prejudiced by the insurer's action before estoppel may be invoked. DePriest v. State Farm, 779 S.W.2d 347, 350 (Mo.App. 1989).

Where the insured is represented by its own attorney in a personal injury lawsuit, the insured is not prejudiced by the insurer's defense of the lawsuit. Shahan v. Shahan, 988 S.W.2d 529, 534, f.n.1 (Mo. banc 1999) (Insurer's withdrawal of its defense attorney just prior to trial did not prejudice insured where insured's own attorney acted as co-counsel and could take over defense). After Shahan, the holdings in cases cited by Noranda, which state that the insured is presumed to have been prejudiced, are no longer viable law. See, Fairbanks Canning Co. v. London Guaranty and Accident Co., 133 S.W. 664 (Mo.App. 1911), Royle Mining Co. v. Fidelity and Casualty Co., 103 S.W. 1098 (Mo.App. 1907); National Battery Co. v. Standard Accident Insurance Co., 41 S.W.2d 599 (Mo.App. 1931); Reiger v. London Guarantee and Accident Co., 215 S.W. 920 (Mo.App. 1919); Compton Heights Laundry v. General Accident, Fire and Life Assurance Corp., 190 S.W. 382, (Mo.App. 1916).

In addition to Swift and the law firm of Brown & James, the counsel supplied by TIG to defend Noranda, Rost, Noranda's own counsel, acted as co-counsel in the defense of Murphy's lawsuit throughout discovery and prior to settlement (T91, 297, 345, Ex. 27,

30). Rost took a supervisory role (Noranda's Substitute Brief p.48); attended Murphy's deposition (T79, 345); reviewed and prepared responses to discovery (T91, 345); and supplied factual information (T 345). Noranda presented no evidence that it was prejudiced by TIG's defense from the time TIG assumed the defense in January, 1996 until May, 1997, when TIG notified Noranda that its defense was no longer unconditional. When presented with the evidence adduced, this Court must conclude that Noranda's statement that it relinquished all control over the defense and settlement of the case (Noranda's Substitute Brief, page 20) is clearly improper.

One cannot claim another's act or conduct as the grounds of an estoppel unless the one claiming it was actually misled or deceived by such act or conduct, nor can one claim estoppel where he knew or had the same means of knowledge as the other as to the truth. Van Kampen, 685 S.W.2d at 625; Missouri Property & Casualty, 811 S.W.2d at 34. Estoppel will not be applied where both parties are equally in possession of all the facts and the issue involves solely a question of law. See e.g. St. Paul Fire & Marine Insurance Company v. Best Transportation Co., 500 F.Supp. 1365, 1379-1380 (N.D. Miss. 1980); 28 Am.Jur.2d Estoppel and Waiver, Section 52. Here, Noranda, as a party which drafted all the terms of the Substation Painting Contract, was in possession of all the facts pertaining to contract formation. On the other hand, TIG was at a disadvantage in that it had to rely upon the facts given to it by Noranda and by Utility. Noranda knew that the Purchase Order and the Terms and Conditions of Purchase was a counteroffer which rejected all previous terms and conditions, including Exhibit C - General Conditions.

Further, it knew that Paragraph 19 of the Terms and Conditions of Purchase was not enforceable since it did not specifically require Utility to indemnify Noranda for Noranda's own negligence.

Noranda argues in page 21 of its Substitute Brief that it lost an opportunity to settle the Murphy case. To the contrary, Noranda could have submitted this claim to its own insurance carrier, could have taken back the tendered defense, could have objected to the settlement at the mediation, or could have discussed the issues with TIG. Instead, Noranda placed TIG under a demand to settle within TIG's policy limits, leaving TIG will no choice other than to attempt to get a reasonable settlement. Noranda did not lose any opportunity to defend or settle this matter. To the contrary, Noranda refused to exercise any opportunity to do so and, as a result, now improperly seeks to continue that benefit in this Court.

A person who has been unjustly enriched at the expense of another is required to make restitution to the other. Petrie v. Levan, 799 S.W.2d 632, 634 (Mo.App. W.D. 1990). The right to restitution occurs (1) when the defendant was enriched by the receipt of a benefit; (2) when the enrichment was at the expense of the plaintiff; and (3) when it would be unjust to allow the defendant to retain the benefit. 799 S.W.2d at 635.

Because there was no enforceable indemnity provision in the contract between Utility and Noranda, Noranda and its insurer, Zurich, received a benefit through TIG's settlement of the Murphy lawsuit. Noranda and Zurich were enriched at TIG's expense in that the Murphy lawsuit was settled without any payment by them. It would be unjust

to allow Noranda and Zurich to retain the benefit when TIG put them on notice that it would seek reimbursement if there was no enforceable indemnity provision. Despite that notice, Noranda acquiesced in TIG's continued defense, attended the mediation, did not withdraw its demand that TIG settle within its policy limits, and did not take over the defense and settlement negotiations. Because there was no enforceable indemnity agreement, Noranda and Zurich should have made the settlement payment and should be compelled to make restitution to TIG.

Estoppel is an equitable doctrine devised to prevent a wrong being done to an innocent party. Farley v. St. Charles Insurance Agency, 807 S.W.2d 168, 171 (Mo.App. E.D. 1991); Block v. Block, 593 S.W.2d 584, 590 (Mo.App. 1979). For the period from September, 1995, through May, 1997, Noranda failed to provide TIG with Exhibit C - General Conditions for Contract while continuously asserting that Exhibit C was part of the Substation Painting Contract. (T109-10, 152, 162, Ex. 53; T294-5; Ex. 50, Ex. 9). Noranda also stood by and ignored TIG's request for further information about the indemnity agreement. Noranda failed to respond to TIG's retender offers, which asked Noranda to provide evidence of an enforceable indemnity agreement or face a claim for reimbursement. Noranda's only response was to demand that TIG settle Murphy's claim. As a result of its inaction, Noranda cannot claim that it is an innocent party and rely on estoppel in an attempt to create coverage where there is none.

In order to prove estoppel, Noranda must show that TIG engaged in an act inconsistent with the claim later asserted. See, Brown v State Farm, 776 S.W.2d 385,

388 (Mo. Banc 1989). TIG settled the Murphy lawsuit in accordance with Noranda's demand to do so. TIG also gave notice to Noranda that it would settle Murphy's case but would later seek reimbursement if there was no enforceable indemnity provision in the Substation Painting Contract. Noranda failed to show that TIG's settlement of the Murphy lawsuit was inconsistent with its later demand for reimbursement. On the contrary, TIG was consistent in its position that it may later seek reimbursement throughout the Murphy case.

In the present case, the evidence showed that TIG did not have knowledge of the facts upon which to base a denial of coverage, and that furthermore, Noranda withheld information regarding facts that impacted coverage under the TIG policy. Thus, TIG is not precluded by waiver or estoppel from denying coverage even though it defended the action brought against Noranda. Mistele v. Ogle, 293 S.W.2d 330,334 (Mo. 1956).

E. TIG repeatedly contested the validity of any indemnity agreement in the Substructure Painting Contract.

In Point II of Noranda's Substitute Brief, Noranda argues for the first time that TIG's initial failure to contest the validy of Paragraph 19 of the Terms and Conditions of Contract prevented TIG from later claiming that such language was not an enforceable indemnity agreement. Noranda did not assert this argument at trial, or in front of the Court of Appeals. As such, it is now too late to make such an argument, as it was waived in the courts below and not properly preserved for appeal.

Even if this Court analyzes the merits of Noranda's claim, it must look no further than the trial transcript to find that Utility and TIG repeatedly contested the validity of Paragraph 19 during the trial. (T 58-59; 389-391) In addition, the Trial Court explicitly found that TIG relied on Noranda's assertions that Exhibit C contained a valid indemnity agreement. (Noranda Appendix, A 4-5).

Noranda's original request for defense occurred when Rost, on behalf of Noranda, demanded that Utility provide a defense of the Murphy lawsuit pursuant to Paragraph 13, Exhibit C - General Conditions for Contract. (Exhibit 50, T31, 291, 330-34, A49). At the time that TIG assumed the defense of the Murphy lawsuit, its adjuster, Charles Buttner, had a copy of Rost's letter indicating that Paragraph 13, Exhibit C - General Conditions for Contract required Utility to defend Noranda (T162). Buttner asked Swift to obtain a copy of Exhibit C - General Conditions for Contract from Rost. (T103, 151-2). In a letter dated September 6, 1995, Swift sent Rost the Terms and Conditions of Purchase (Exhibit 47) which he said he had found in Dunaway's file. Because Rost's June 30, 1995 letter indicated that paragraph 13 of Exhibit C applied, Swift asked Rost to supply him with the contract to which Rost referred so they could speed up the decision for TIG regarding defense of the Murphy suit. (T294-5, 345). In a letter to Buttner dated September 6, 1995, Swift indicated that he had requested through Rost that Noranda provide a copy of Exhibit C - General Conditions for Contract. (T109-10, 152, 162, Ex. 53) Although Rost received Swift's request, he did not supply a copy of Exhibit C - General Conditions for Contract to Swift or TIG. (T109-10 317-8, 344-5, 347, 354, 355).

At the time TIG assumed Noranda's defense in the Murphy lawsuit, the only purported contract document Buttner had in TIG's file was Lape's letter of September 3, 1992, and the Terms and Conditions of Purchase attached to said letter. (T162). Buttner did not have knowledge of all the facts showing that there was no enforceable indemnity agreement because Noranda was withholding and refusing to supply all the terms of the purported contract, including Exhibit C. Clearly, if Buttner was still attempting to obtain Exhibit C, he did not believe that Paragraph 19 was an acceptable indemnity agreement, despite what his counsel may have told him. Indeed, without full knowledge of the provisions which allegedly comprised the indemnity agreement, TIG could make no determination as to whether Utility owed any duty to indemnify or defend Noranda.

By letter dated March 4, 1997 (A50) and May 14, 1997 (A54), TIG, through its attorney, again requested that Noranda provide TIG with a copy of Exhibit C - General Conditions for Contract. (T310, 11; Ex.6, T 351; Ex. 8; T314-6). Again, because TIG had Paragraph 19, TIG clearly did not believe Paragraph 19 to be an enforceable indemnity agreement because it continued to request the claimed enforceable indemnity agreement. In the May 14, 1997 letter, TIG provided notice to Noranda that its defense was no longer unconditional. TIG informed Noranda that its defense rested on Noranda's representation that Exhibit C was a part of the contract between Noranda and Utility. TIG further indicated that if there was no provision which contained an enforceable indemnity agreement, Noranda should take over the defense of the Murphy lawsuit and reimburse TIG for its defense costs. (Ex. 8; A54).

Noranda did not advise TIG that its defense of the lawsuit under those conditions was unacceptable. (T356). Noranda's only response was to provide TIG with what it considered to be the complete Substation Painting Contract and to assert that Utility agreed to indemnify Noranda "by dint of Paragraph 19 of the terms and conditions of purchase and paragraph 13, Exhibit C – General Conditions for Contract." (Ex. 9: T317-8; A56).

Thus, during the period when TIG had conflicting information from Noranda and when Noranda withheld knowledge as to the facts regarding the indemnity provisions, TIG was not precluded from denying coverage merely because it was defending the action brought against Noranda. Mistele, 293 S.W.2d at 334. Moreover, during the same period, TIG was not precluded from disputing the validity of any portion of the contract, particularly Paragraph 19 of the Terms and Conditions of the Contract, because it had continually attempted to determine exactly what documents comprised the agreement between the parties. Noranda, upon numerous requests, refused to provide TIG with all the documentation and, therefore, TIG could not make any determination as to whether there was an enforceable indemnity contract. TIG continued to defend the case only after putting Noranda on notice of its conditions for said continued defense. Because TIG required Noranda to provide Exhibit C, before it would make a decision regarding indemnity, it clearly follows that TIG did not believe Paragraph 19 was an enforceable agreement for indemnity.

Noranda's argument would require this Court to draw the conclusion that an insurance company could never deny coverage for any reason other than those contained in a specific reservation of rights letter. However, facts asserted in cases change during the discovery process. Coverage may later be withdrawn because a claimed accident may not fall within the policy period or because a claim for negligence might turn into an intentional act claim which might not be covered under the policy. It is not and has never been the law in the State of Missouri that an insurance company must cover more than its contract required. The lack of an enforceable indemnity agreement voided coverage under the policy. TIG sought an enforceable agreement during its defense of Noranda, but Noranda refused or was unable to provide one. As such, Noranda's claim for estoppel must fail.

II. Response to Point III, Noranda's Substitute Brief. THE TRIAL COURT CORRECTLY HELD THAT TIG WAS ENTITLED TO RESTITUTION OF THE AMOUNTS IT INCURRED IN THE MURPHY LAWSUIT BECAUSE TIG DEFENDED AND MADE PAYMENT WITHOUT FULL KNOWLEDGE OF THE FACTS, AND, ALTERNATIVELY, EVEN IF THE DEFENSE AND PAYMENT WERE MADE UNDER A MISTAKE OF LAW, TIG WAS ENTITLED TO RESTITUTION WHERE THE MISTAKE WAS INDUCED OR ACCOMPANIED BY NORANDA'S INEQUITABLE CONDUCT AND MISLEADING STATEMENTS THAT BOTH EXHIBIT C- GENERAL CONDITIONS FOR CONTRACT,

PARAGRAPH 13, AND THE TERMS AND CONDITIONS OF CONTRACT, PARAGRAPH 19, WERE A PART OF THE SUBSTATION PAINTING CONTRACT.

Noranda claims in Point III that TIG was not entitled to restitution because it acted as a volunteer, in that TIG made a mistake of law when it paid out $4.3 million in the Murphy settlement on behalf of Noranda. In making this argument, Noranda completely ignores the Trial Court's findings, which were supported by substantial evidence. The Trial Court found that, by letter, dated May 14, 1997, TIG provided notice to Noranda that its defense of the Murphy lawsuit was no longer unconditional.

TIG informed Noranda that its defense rested on Noranda's representation that Exhibit C was a part of the contract between Noranda and Utility and that the contract contained an enforceable indemnity provision. TIG further notified Noranda that if there was no provision which contained an enforceable indemnity agreement, Noranda should take over the defense of Murphy's lawsuit and reimburse TIG for its defense costs. (LF 151, ¶25; Exhibit 8; T 314-6). Noranda did not advise TIG that its conditional defense of the Murphy lawsuit was unacceptable. (LF 151, ¶27; T 356). Noranda's only response was to provide TIG with what it considered to the complete Substation Painting Contract and to assert that Utility agreed to indemnify Noranda "by dint of Paragraph 19 of the Terms and Conditions of Purchase and Paragraph 13, Exhibit C - General Conditions for Contract." (Exhibit 9; T 317-8).

Noranda cites American Motorist Ins. Co. v. Shrock**,** 447 S.W. 2d 809 (Mo. App. 1969) to support its argument that TIG voluntarily paid the monies in the Murphy case.

The "voluntary payor" rule provides that "a voluntary payment made under a mistake or in ignorance of the law, but with full knowledge of all the facts, and not induced by any fraud or improper conduct on the part of the payee, cannot be recovered back." Wilkins v. Bell's Estate, 261 S.W. 927 (Mo.App. 1924).

For TIG's payment to be voluntary, it must have made the payment with *full knowledge of all the facts*. Wilkins, at 928 [Emphasis added]. TIG did not have full knowledge of all the facts. The facts were in dispute. Noranda claimed that Exhibit C - General Conditions for Contract contained an indemnity clause which required Utility to defend and indemnify Noranda for Noranda's own negligence. (Exhibit 50, T 31, 291, 340-34). On the other hand, Utility claimed that it never received Exhibit C - General Conditions for Contract, and thus it could not have been a part of the contract. (T 20, 22, 26, 42). Although TIG requested that Noranda supply a copy of Exhibit C prior to the time it assumed Noranda's defense (T 294-5, 345), Noranda failed to provide a copy to Swift, to Utility or to TIG until on or about May 16, 1997, long after TIG had assumed the defense of Noranda on behalf of Utility. (Exhibit 9; T 317-8). The facts were disputed between the parties, indeed the facts were not resolved until the Trial Court found that Exhibit C was never a part of the Substation Painting Contract. Thus, Noranda's claim that TIG was estopped to seek reimbursement because it purportedly acted as a volunteer when it settled the Murphy lawsuit is unfounded in fact and in law. Stephenson v. First Missouri Corp., 861 S.W.2d.

In addition, Noranda was claiming that Paragraph 19 of the Terms and Conditions of Purchase was part of the Substation Painting Contract and required Utility to indemnify Noranda (Exhibit 9; T 317-9). The law at that time was clear that Paragraph 19 of the Terms and Conditions of Purchase was not sufficiently specific to require Utility to indemnify Noranda (Exhibit 9). Pilla v. Tom Boy, Inc., 756 S.W.2d 638, 641 (Mo.App. 1988); Bonenberger v. Associated Dry Goods Co., 738 S.W.2d 598, 600 (Mo.App. 1987). At the time of the settlement, the Court of Appeals had decided the case of Monsanto Company v. Gould Electronics, Inc., 965 S.W.2d 314 (Mo.App. E.D. 1998), holding that a general contract of indemnity was sufficient where the bargaining position of the parties were equal. At that time, there was an issue of fact as to whether or not Noranda and Utility were of equal bargaining position and whether the indemnity provision was in fact bargained for. Monsanto, 965 S.W.2d at 316. Monsanto may also have been inapplicable because, there, indemnity was the purpose of the contract and, here, the purpose was to paint the substation. Thus, because the case of Economy Forms v. J. S. Alberici, 53 S.W. 3d 552 (Mo. App. 2001) had not yet been decided, the law in the area of indemnity was unsettled, and the facts in the present case were disputed.

Once TIG requested that Noranda assume its own defense, (LF 151,¶ 25; Exhibit 8: T314-6) and Noranda subsequently refused but demanded that TIG settle the lawsuit (LF 151, ¶ 30; Exhibit 10: t 320-1), TIG was free to make a good faith settlement without having to demonstrate liability. TIG was not a volunteer in settling the lawsuit. Noranda was in no position to insist upon a showing of absolute legal liability. Pilla v.

Tom-Boy, 756 S.W.2d 638, 640 (Mo.App. E.D. 1988); Missouri Pacific Railroad Company v. Rental Storage and Transit Company, 524 S.W.2d 898, 902 (Mo.App. 1975); Stephenson v. First Missouri Corp., 861 S.W.2d 651, 657 (Mo.App. W.D. 1993). Since compromise settlements are favored, appellate courts are reluctant to look behind such disposition of litigated matters. When the court reviews the settlement, it "look[s] only so far as to detect a bonafide dispute of even colorable merit in order to uphold the resolution of differences reached by the parties themselves." Id. Here, the record and exhibits show that Noranda presented the borrowed servant defense and independent contractor defense to the Trial Court in the Murphy litigation. (T 83; Exhibit 27). Judge Dierker denied Noranda's Motion for Summary Judgment because of questions of fact regarding the issue of control by Noranda over Murphy. (T 84; Exhibit 29).

TIG was informed by Swift that a jury could potentially find a verdict in the range of $8 to 10 million, (T 98; Exhibit 16, p.7) or $6 to 8 million. (T 98; Exhibit 18, p.3). Noranda admits that the $4.3 million settlement is not unreasonable concerning the extent of Murphy's injuries. (T 81). Swift opined that $4.3 million is a reasonable settlement in view of Noranda's potential liability and the extent of Murphy's injury. (T 109, 128). Accordingly, the Trial Court's finding that the sum paid in settlement of the Murphy lawsuit was fair and reasonable (LF 152, ¶37), was supported by substantial evidence. As a result, TIG cannot now argue, without having presented such argument at trial, that it was prejudiced by such settlement. Not only has Noranda waived this issue by

previously failing to assert it, but also the argument must fail because the finding of facts made by the Trial Court contradict the factual assertions and argument by Noranda.

The Trial Court further found that when Murphy's attorney demanded $30 million to settle the lawsuit (LF 151 ¶29; Exhibit 19), Noranda demanded that TIG settle the lawsuit within TIG's available limits and further demanded that mediation be scheduled. (LF 151 ¶30; Exhibit 10; T320-1; A58-9). TIG responded and informed Noranda that there was a dispute about whether Exhibit C ever became a part of the contract and that Noranda's right to defense and indemnity depended upon the validity and presence of an enforceable indemnity agreement between Noranda and Utility. TIG informed Noranda that reimbursement of the cost of defense and indemnity would be sought if the determination was made that the indemnity agreement was not a part of the contract. (LF 151 ¶31; Exhibit 11; T 358-360; A59).

As a result of these factual determinations, the Trial Court found that Utility was not obligated under the Substation Painting Contract to defend and indemnify Noranda (LF 150, ¶ 11; LF 151, ¶ 35), and that Noranda, through its conduct and incorrect statements, aided and procured TIG's defense and payment to Murphy (LF 150, ¶ 14; LF 151, ¶ 26; LF 151, ¶ 30). Accordingly, the Trial Court's findings that TIG paid an amount which Noranda and its insurer, Zurich, should have paid and that TIG is entitled to complete restitution that amount plus the amount of its attorney's fees and expenses from the Murphy lawsuit, were supported in fact and in law.

The Court of Appeals agreed and held that TIG should be allowed to recover for payments it made where it had reason to believe it would be reimbursed (Respondent Appendix, A 86), Ticor Title Ins. Co. v Mundelius, 887 S.W.2d, 726, 728 (Mo. App.). As the Court of Appeals explained, TIG made a payment in this case conditioned on Exhibit C being part of the underlying contract, but when that fact was found to be untrue, TIG rightfully expected recovery of its payment.

Noranda's quotation from American Motorist Ins. Co. v. Shrock**,** 447 S.W. 2d 809 (Mo. App. 1969), underscores its untenable position in this case. On page 28 of its Substitute Brief, Noranda quotes Shrock, "(I)f a person would resist an unjust demand he must do so at the threshold of the matter…" (Noranda's Substitute Brief, page 28). The problem in this case is one of Noranda's own making. During the years the Murphy case proceeded, Noranda repeated and continuously claimed that there was an enforceable indemnity agreement in both or either of Exhibit C or Paragraph 19. However, Noranda steadfastly refused to provide TIG or Utility with the claimed contractual language. Noranda was put on notice that if no such enforceable agreement existed, TIG and Utility would seek reimbursement. Rather than provide TIG with the facts to allow it to make a correct analysis of the law as it applied to the claimed contract for indemnity, Noranda attempted to hide the information and now seeks to benefit from its subterfuge.

TIG's misconception of the facts and the law, if any, was a result of incorrect or misleading statements or acts by Noranda. Noranda insisted throughout the Murphy case that Exhibit C - General Conditions for Contract, paragraph 13, and the Terms and

Conditions of Purchase, Paragraph 19, were a part of the Substation Painting Contract and that those provisions required TIG to indemnify and defend Noranda. Despite its claims to TIG regarding the contents of the contract, Noranda apparently did not believe that Exhibit C, paragraph 13, was a part of the Substation Painting Contract. When it filed the Substation Painting Contract attached as Exhibit A to its Motion for Summary Judgment in the Murphy lawsuit, it did not include Exhibit C - General Conditions as a part of the Contract. (Exhibit 27; T 89-91, 346-9). Noranda represented to the court in the Murphy lawsuit that the Contract attached to its Motion for Summary Judgment was the true and accurate Contract. (Exhibit 27 with Exhibit A attached). However, Noranda continually took contrary positions with Utility and TIG regarding the presence of Exhibit C as part of the Substation Painting Contract. As a result, TIG could not have had "full knowledge" of the facts or of its responsibilities until the Trial Court made its determination in this matter.

Further, the general rule relied upon by Noranda (that equity will not relieve against a mistake of law) does not enjoy the high favor that courts accord the doctrine of restitution and is subject to numerous exceptions. The modern trend of judicial opinion is toward liberizing the general rule denying relief from mistake of law. Previously, relief had been granted in order to prevent unconscionable advantage. Handly v. Lyons, 475 S.W.2d 451, 462-3 (Mo.App. 1972); Western Casualty and Surety Company v. Kohm, 638 S.W.2d 798, 800 (Mo.App. E.D. 1982).

Equity always relieves against a mistake of law when the surrounding facts raise an independent in equity, as where the mistake is induced or is accompanied by inequitable conduct of the other party. Hartford Accident & Indemnity Co. v. M.J. Smith Sawmill, Inc., 883 S.W.2d 91, 94 (Mo.App. S.D. 1994); Western Casualty v. Kohm, 638 S.W.2d at 800; Handly v. Lyons, 475 S.W.2d at 463; Columbia Building and Loan Association v. Gill, 285 S.W. 181 (Mo.App.); Glover v. Metropolitan Life Ins. Co., 664 F.2d 1101, 1104 (8th Cir. 1981). It is not necessary that the conduct be intentionally misleading much less that it should be actual fraud. Handly v. Lyons, 475 S.W.2d 451, 462-3 (Mo.App. 1972).

In Handly, the court quoted Pomeroy's Equity Jurisprudence, 5th Ed., Section 847, p.304, with approval:

> Whatever be the effect of a mistake pure and simple, there is no doubt that equitable relief, affirmative or defensive, will be granted when the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, is induced, procured, aided, or accompanied by inequitable conduct of the other parties. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud; it is enough that the misconception of the law was the result of, or even aided or accompanied by, incorrect or misleading statements, or acts of the other party. When the mistake of law is pure and

> simple, the balance held by justice hangs even; but when the error is accompanied by an inequitable conduct of the other party, it inclines in favor of the one who is mistaken.

Handly v. Lyons, 475 S.W.2d at 463.

Noranda claims that TIG cannot recover because TIG was negligent in paying any amount to settle the Murphy lawsuit. In the case of mistaken payment, the payor's lack of care will not diminish his right to recover or somehow justify retention of a windfall. Western Casualty and Surety v. Kohm, 638 S.W.2d at 801; Blue Cross Health Services, Inc. v. Sauer, 800 S.W.2d 72, 75 (Mo.App. E.D. 1990). Noranda argues that there is no evidence that Noranda behaved inequitably or induced any mistake. However, the trier of fact found that Noranda's Exhibit C was not a part of the contract at issue. Noranda steadfastly argued (until this appearance), that Exhibit C was part of the Substation Painting Contract. Such argument incorrectly induced payment by TIG and as such, TIG should be allowed to recover their payment

III. Response to Point IV, Noranda's Substitute Brief. THE TRIAL COURT CORRECTLY FOUND THAT THE SUBSTATION PAINTING CONTRACT DID NOT CONTAIN A PROVISION REQUIRING UTILITY TO INDEMNIFY NORANDA FOR NORANDA'S OWN NEGLIGENCE BECAUSE PARAGRAPH 19, THE INDEMNITY PROVISION IN THE TERMS AND CONDITIONS OF PURCHASE, WAS NOT PART OF THE NEGOTIATED CONTRACT AND BECAUSE PARAGRAPH 19 DOES NOT CLEARLY, CONSPICUOUSLY AND

UNEQUIVOCALLY EXPRESS THE PARTYS' INTENTION TO INDEMNIFY NORANDA FOR NORANDA'S OWN NEGLIGENCE.

ARGUMENT

Utility did not agree in Paragraph 19 of Terms and Conditions of Purchase, to indemnify Noranda for Noranda's own negligence, and the indemnity provision in paragraph 13 of Exhibit C - General Conditions of Contract never became a part of the Substation Painting Contract. Accordingly, Utility was not legally obligated to defend and indemnify Noranda from Murphy's bodily injury claim.

Until the current brief filed before this Court, Noranda has always claimed that there were two indemnity provisions in the Substation Painting Contract, each of which required Utility to defend and indemnify Noranda for Murphy's claims. (Noranda's (Court of Appeals) Brief, Points VII and VIII: T337-9; Exhibit 9). Appellants waived part of their claim of error in Point IV by failing to address that issue in the Trial Court or the Court of Appeals.

The Trial Court correctly found that there was no enforceable indemnity agreement in the contract between Noranda and Utility. The Court found that Exhibit C was not a part of the contract (LF 150, ¶11) and that, although Paragraph 19 of the Terms and Conditions of Purchase was part of the Contract (LF 149-50, ¶9), Paragraph 19 as a matter of law was unenforceable because it did not require Utility to indemnify Noranda for Noranda's own negligence. (LF 151, ¶9). The Court found that, accordingly, TIG was not obligated under its insurance policy with Utility to defend and indemnify

Noranda. (LF. 152, ¶35). The Trial Court's ruling was correct as based on the facts before it; and was consistent with Missouri law.

STANDARD OF REVIEW

Whether parties to a contract are of equal footing is a question of fact which was resolved by the Trial Court. When considering the evidence, the appellate court must give due regard to the Trial Court's opportunity to judge the credibility of the witnesses. Rule 84.13(d)(2). Pruitt v. Hunter, 105 S.W.3d 874 (Mo.App. E.D. 2003). The Trial Court is free to believe all, part, or none of the testimony of any witness. Harris v. Desisto**,** 932 S.W.2d 435, 443 (Mo.App. W.D. 1996). The appellate court must consider any fact issue upon which no specific finding was made as having been determined in accordance with the result reached. Rule 73.01; Clouse v. Myers, 753 S.W.2d 316 (Mo.App. S.D. 1988); Gillis v. Pagano, 672 S.W.2d 387, 388 (Mo.App. E.D. 1984). In determining the sufficiency of the evidence, an appellate court will accept as true all evidence and permissible inferences favorable to the prevailing parties and will disregard any contrary evidence. Harris v. Desisto**,** 932 S.W.2d at 443. A reviewing court will set aside a decree as against the weight of the evidence only with a firm belief that the decree is wrong. Centennial Insurance Co. v. International Motorcar Co., 581 S.W.2d 883, 885 (Mo.App. E.D. 1979).

In the present case, the Trial Court determined that the parties did not negotiate the terms of Paragraph 19 as similar commercial entities. (See, LF 150, paragraph 7-10).

Whether Missouri courts will construe a contract of indemnity against an indemnitor for the indemnitee's own negligence depends on the intention of the parties, which is determined by the trier of fact. See, Parks v. Union Carbide Corp., 602 S.W.2d 188, 190 (Mo. banc 1980).

A. The indemnity agreement contained in Paragraph 19 of the Terms and Conditions of Purchase does not conspicuously or specifically require Utility to indemnity Noranda for Noranda's own negligence.

Paragraph 19 of Noranda's Terms and Condition of purchase provides:

> 19. Seller shall indemnify and save purchaser free and harmless from and against any and all claims, damages, liabilities or obligations of whatsoever kind, including, but not limited to, damage or destruction of property and injury or death of persons resulting from or connected with seller's performance hereunder or any default by seller or breach of its obligations hereunder.

(Exhibit 47, p.2).

The general, broad and all inclusive language found in Paragraph 19 is not sufficient to impose liability on Utility for Noranda's own negligence. Economy Forms v. J.S. Alberici Construction Co., 53 S.W.3d 552, 554-5 (Mo.App. E.D. 2001); Pilla v. Tom-Boy, Inc., 756 S.W.2d 638, 641 (Mo.App. E.D. 1988); Kansas City Power and Light Co. v. Federal Construction Co., 351 S.W.2d 741, 745 (Mo. 1961). A contract of indemnity will not be construed so as to indemnify one against loss or damage resulting from his

own negligence unless such intention is expressed in clear and unequivocal terms. Kansas City, 351 S.W.2d at 745; Parks v. Union Carbide Corp., 602 S.W.2d 188, 190 (Mo. banc 1980); Bonenberger v. Associated Dry Goods Co., 738 S.W.2d 598, 600 (Mo.App. 1987).

In Pilla, the Missouri Court of Appeals held the following indemnification provision insufficient to indemnify a lessor for its own negligence:

> Lessee…agrees to save the Lessor…and Lessor's real estate agent, harmless from any and all damages and damage suits in connection with the liability for any and all injuries and damages suffered by any employee of said Lessee, or Lessee's agent, customers, guests or other persons whomsoever, caused to them or their persons or property in, on, or about or adjacent to said premises.

756 S.W.2d at 639. See *also* K.C. Landsmen v. Lowe - Guido, 35 S.W.3d 917, 921-2 (Mo.App. W.D. 2001).

The Trial Court found that in his lawsuit against Noranda, Murphy sought damages for Noranda's own negligence, not for any claimed negligence of Utility. (LF 150, ¶13; LF 27-29; Exhibit 4, paragraph 11, pp.3-4; LF 14, ¶21; LF 42, ¶1; LF 49 ¶1). Accordingly, the Trial Court correctly found that as a matter of law, the indemnity provision in Paragraph 19 of the Terms and Conditions of Purchase was unenforceable because it did not clearly and unequivocally provide for indemnification of Noranda's own negligence. (LF 151-2, ¶35). In rendering its decision, the Trial Court necessarily

found that the parties did not unequivocally intend for Utility to indemnify Noranda for its own negligence. See, Parks v. Union Carbide Corp., 602 S.W.2d 188, 190 (Mo. banc 1980). As such, the Trial Court's finding of such fact should not be disturbed on appeal before this Court.

B. Paragraph 19 did not satisfy this Court's requirement that indemnity provisions be conspicuous, in that such provision was hidden on the back of a form which was sent to Utility as a supplement to the contract after Utility had been awarded the contract.

Further, Paragraph 19 does not satisfy the requirement that an indemnity provision be conspicuous. See Economy Forms, 53 S.W.3d at 556; Burcham v. Proctor & Gamble Manufacturing Co., 812 F.Supp. 947, 948 (E.D. Mo. 1993). Lape, in his September 3, 1992 letter, did not alert Utility that an indemnity provision was part of the agreement. (Ex. 47, p. 1) Paragraph 19 is one of 23 provisions, the print is minuscule, and there is no emphasis on its placement or language. (Exhibit 47, p.2). Accordingly, Paragraph 19 does not satisfy the requirement that the indemnity provision be conspicuous.

Noranda relies upon the case of Monsanto Company v. Gould Electronics, Inc., 965 S.W.2d 316 (Mo.App. 1998), claiming that here, as in Monsanto, the parties are sophisticated commercial entities and that general and broad indemnity language is sufficient. (Noranda's Substitute Brief, pp.31,33). The court in Economy Forms v. J.S. Alberici distinguished Monsanto, finding that Monsanto contract was a specific undertaking for contractual indemnity. The contract in that case recognized the

potentially dangerous nature of the PCBs sold by Monsanto to Gould and discussed defense and indemnity for "contamination of adverse effects on humans, marine and wildlife, animal feed or the environment and the use of PCBs alone or in combination with other substances." Economy Forms, 53 S.W.3d at 556. The intention was that Gould would indemnify Monsanto from its own negligence was clear from the contract even though the contract did not specifically so state. The purpose of the contract was indemnification. In the present case, the purpose of the contract was painting the substation structures. Certainly the issue of indemnity was not discussed between the parties or contemplated by Utility.

Noranda also relies upon the case of Purcell Tire & Rubber Co. v. Executive Beechcraft, Inc., 59 S.W.3d 505 (Mo. Banc 2001) to argue that the parties in the present case were sophisticated entities which could contract for indemnity without explicit language requiring one to indemnify another for the first's own negligence (Noranda's Substitute Brief, page 32-33). In Purcell**,** this Court indicated that the parties were "sophisticated businesses" that had "negotiated at arm's length." Id. at 509. However, in the present case, the two parties did not negotiate at all on the indemnity agreement. First, Exhibit C was omitted from the bid package, and Utility was not even given the chance to review any indemnity language when they bid the project. (LF 150, paragraph 7). Second, Noranda's Terms and Conditions, which contained Paragraph 19, were not part of the bid package. Indeed, Utility received the Terms and Conditions long after the bid had been submitted and after the bid had been accepted by Noranda. (LF 150,

paragraph 9). There was no discussion or negotiation regarding any indemnity and Noranda provided no notice to Utility that it would expect Utility to be responsible for anything other than what Utility's own acts might occasion. As a result, this Court's analysis of the parties in Purcell does not apply to the parties in the present case.

Indeed, the Court of Appeals in this matter declined to follow the Monsanto/Purcell reasoning based on the fact that the terms of Paragraph 19 were ambiguous as a matter of law. The Appellate Court agreed with the Trial Court that Paragraph 19 was not an enforceable indemnity agreement because there was no clear expression of the parties' intent that Utility would indemnify Noranda for Noranda's own negligence. (Respondent Appendix, A 83-84). For these reasons, Respondent respectfully requests this Court to affirm the findings of the Trial Court and the Court of Appeals.

C. The public policy behind Section 287.120 of the Worker's Compensation Act would be violated if Paragraph 19 were extended to require Utility, Murphy's employer, to indemnify Noranda for its own negligence.

In addition, in Monsanto v. Gould, Monsanto was not seeking indemnity for liability for injury caused to Gould's employee. Here, Murphy was Utility's employee and Section 287.120 of the workers compensation statute grants the employer immunity against any other liability for its employees' injuries. Section 287.120 of the Workers Compensation Act provides, in relevant part:

> Every employer . . . shall be liable, irrespective of negligence, to furnish compensation under the provisions of this Chapter for personal injury or

> death of the employee by accident arising out of and in the course of employment and shall be released from all other liability therefor whatsoever whether to the employee or any other person. (emphasis added).

The statute bars a third party from attempting, by any means, to pass back to the employer the third-party's tort liability to an employee for a job-related injury. In the present case, this means that Noranda may not enforce indemnity against the employer, Utility, with respect to claims made against Noranda by Utility's employee, Murphy, for injuries sustained in the course of employment.

In McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co., 323 S.W.2d 788 (Mo. 1959), the Court recognized that Missouri law would permit an employer to waive by contract the employer's immunity under Section 287.120. However, the subsequent decision of the Supreme Court in Parks v. Union Carbide Corp., 602 S.W.2d at 190, and its progeny, have made it clear that the scope of McDonnell's exception is very narrow, and that an employer's contract must be exceptionally definite and explicit before it will be construed to waive the protection afforded by the Worker's Compensation Act.

The decision in Monsanto v. Gould does not attempt to change or overrule the principles laid down by the Missouri Supreme Court in Parks and its progeny. Monsanto does not deal with or apply to the present factual situation. Based upon these considerations, the Trial Court's holding that Utility did not agree to indemnify Noranda for Noranda's own negligence does not conflict with Monsanto.

Accordingly, the Monsanto exception to the general rule does not apply to the present case, and the Trial Court correctly found as a matter of law that Paragraph 19 of was not an enforceable indemnity provision because it did not specifically provide that Utility would indemnify Noranda's own negligence. Parks v. Union Carbide Corp., 602 S.W.2d 188 (Mo. banc 1980), Economy Forms v. J.S. Alberici Construction Co., 53 S.W.3d 552 (Mo.App. E.D. 2001), Pilla v. Tom-Boy, 756 S.W.2d 638 (Mo.App. E.D. 1988, and Bonenberger v. Associated Dry Goods Co., 738 S.W.2d 598 (Mo.App. 1987).

IV. Response to Points I and II, Zurich's Substitute Brief. THE TRIAL COURT CORRECTLY EXERCISED SUBJECT MATTER JURISDICTION OVER ZURICH IN THE DETERMINTATION OF CONTRACTUAL OBLIGATIONS BETWEEN UTILITY AND NORANDA IN THAT ZURICH HAD TAKEN AN ACTIVE ROLE IN INDUCING TIG TO DEFEND NORANDA AND SETTLE THE MURPHY CASE AND ZURICH HAD A FINANCIAL INTEREST IN THE COURT'S DETERMINATION OF LIABILITY BETWEEN NORANDA AND UTILITY .

Zurich is misplaced in its assertion that the trial court lacked subject matter jurisdiction to adjudicate TIG and Utility's claims against it because such adjudication necessarily involved a declaration of Noranda's rights against Zurich. TIG and Utility's First Amended Petition alleged two counts against Zurich: one count requesting declaratory judgment that TIG and Utility did not owe a duty to defend Noranda under the contract at issue, and one count requesting that Zurich and Noranda indemnify TIG.

Zurich's reliance on St. Paul Fire & Marine Ins. Co. v. Medical Protective Co., 675 S.W.2d 665 (Mo. App. 1984) is without merit. In St. Paul, one insurance company brought suit against another, seeking a declaration that the St. Paul policy was excess over Medical Protective's policy. Id. at 667. The insured was not a party to that suit. Id. The Court ruled that insurance companies could not sue each other as strangers to the policies in an attempt to enforce those policies. Id. The Court specifically noted that, in the absence of an insured, the Declaratory Judgment Act cannot be used to interpret an insurance policy. Id.

Unlike St. Paul, in this case, Noranda, the insured, was named as a party to the suit and was represented by the same attorney as Zurich. In addition, TIG and Utility did not ask the trial court to interpret the insurance policy issued by Zurich to Noranda. In fact, Zurich admitted or stipulated to coverage for any liability Noranda may have. Moreover, instead of interpreting the insurance policy, the trial court interpreted the Substation Painting Contract entered into between Utility and Noranda. No party to this suit was a stranger to that contract. In issuing its ruling, the Trial Court determined the obligations of the parties under the Substation Painting Contract and the claim for indemnification, and the Trial Court's exercise of subject matter jurisdiction was proper.

Zurich's reliance on State ex rel. Anderson v. Dinwiddie, 224 S.W.2d 985 (Mo. banc 1949) is also misplaced. Zurich argues that, before TIG and Utility can proceed against it, they must first obtain a judgment against Noranda. Only after said judgment becomes final can TIG and Utility proceed in equity to satisfy the judgment. While

Anderson, does hold that a claim may not be made directly against an insurer, it does not prohibit claims for indemnity against an insurance company which solicited and demanded payment on behalf of its insured, as Zurich did in the instant case.

Zurich was brought into this suit for two reasons. First, Zurich had a financial interest in how the Substation Painting Contract was interpreted. Second, Zurich took an active role in requesting and requiring that TIG settle the Murphy case. For example, Zurich actively participated in the mediation of the Murphy case and represented certain matters to TIG which were later discovered to be untrue. Because of Zurich's direct and distinct involvement in the Murphy case, it is a proper party in the present case.

The Trial Court had subject matter jurisdiction over the claims asserted against Zurich. The Declaratory Judgment Act authorizes any party with a present interest in a written contract to seek a determination regarding any question of construction or validity of the contract. Section 527.020, R.S.Mo. (2000). The statute further requires that all persons who have or claim to have any interest which would be affected by the declaration be added as parties the declaration action. Id. The Petition in this matter included a claim for a declaratory judgment against Zurich.

All parties to the present case had an interest in the construction of the Substation Painting Contract, and Zurich has never denied that it had such an interest. In fact, Zurich had a substantial financial interest in the interpretation of the contract, as it had stipulated to coverage of any liability incurred by Noranda. Thus, under § 527.020, Zurich was a required party. While TIG and Utility may not properly be awarded

judgment for the collection of monies in the case below against Zurich, the Trial Court certainly had subject matter jurisdiction over Zurich under the declaratory judgment claim and had the proper authority to analyze the legal requirements of the policies and the contracts between the parties. Because all parties to the present action had a financial interest in the interpretation of the Substation Painting Contract, the trial court had subject matter jurisdiction over all claims.

V. Response to Point III, Zurich's Substitute Brief. THE TRIAL COURT CORRECTLY FOUND THAT TIG HAD A RIGHT TO SEEK INDEMNIFICATION AND REIMBURSEMENT FROM NORANDA AND DID NOT WAIVE THAT RIGHT IN THAT TIG DID NOT POSSESS KNOWLEDGE OF ALL THE MATERIAL FACTS BECAUSE, DESPITE ITS CLAIMS THAT EXHIBIT C WAS PART OF THE CONTRACT BETWEEN NORANDA AND UTILITY, NORANDA HAD REFUSED TO PROVIDE THAT EXHIBIT TO TIG.

In Point III of its Substitute Brief, Zurich argues that TIG had no right to indemnification from Noranda and Zurich for payments made in the Murphy case because TIG possessed full knowledge of the material facts bearing upon its obligation to pay, or remained uncertain as to whether it was obligated to pay and nonetheless paid the monies. Insofar as Zurich argues that the payment was voluntarily made, the Trial Court correctly found that TIG was not estopped from recovering the amounts paid and that TIG was not a volunteer as further discussed in Point II, supra.

Zurich notes that the material or pertinent facts are not in dispute in this matter (Zurich's Substitute Brief, page 29). However, Zurich's argument disputes factual findings made by the Trial Court, specifically, whether TIG was aware of the details of Exhibit C and whether it was part of the Substation Painting Contract (LF 150, paragraph 7 & 8). Despite such finding by the Trial Court, Zurich argues that TIG's recovery is barred.

Zurich relies on the case of Commercial Union Ins. Co., v. Famers Mut. Fire Ins. Co., 457 S.W.2d 224 (Mo. Ct. App. 1970) which states that "a volunteer who pays money in the absence of fraud or duress, is not entitled to the return of his money". Id. at 226. However, the Commercial Union court went on to hold that in order for such rule to apply, "one much have full knowledge of all the facts in the case." Id. at 226. The only party involved in the present case with full knowledge of the facts was Noranda. As the Trial Court stated, there was no indication as to what portions of the contract were being negotiated at any given time. (LF 150-152). Utility received the Terms and Conditions of the Contract after it was informed that its bid had been accepted, and the evidence showed that there were no additional discussions regarding any indemnity agreement or Paragraph 19 at that time. (Noranda Appendix, A-3).

Utility began work on the contract and was not aware of any indemnity requirements until it received the demand for defense and indemnity after Noranda was served with process in the Murphy case. Despite its lack of full knowledge, TIG relied on Noranda's assertion that there was a valid indemnity agreement and asked Noranda to

provide that agreement. As the Trial Court found, TIG informed Noranda of its questions and concerns regarding whether there was an enforceable indemnity agreement and ultimately re-tendered the defense to Noranda. (LF 150-152, paragraphs 21, 24, 25). Noranda responded by demanding that TIG settle the case.

As the Court of Appeals held, the reaction and response of Noranda to the repeated requests of TIG amounted to no less than duress. At that point, TIG was faced with either incurring additional costs and judgments or settling the case and subsequently attempting to recover from Noranda or Zurich if Noranda's allegations regarding the presence of an enforceable indemnity agreement were false.

The remaining cases cited by Zurich do not apply to the present case, in that the finder of fact in those cases had determined that there was full knowledge of the facts by the payor before the payment was made. That vital requirement is absent in the present case. Because TIG did not have full knowledge of the terms of the Substation Painting Contract until the Trial Court's order of October 8, 2002, it cannot be held to a contractual requirement which did not otherwise exist.

Further, in Section B of its Point III, Zurich appears to claim that because TIG continued to defend Noranda in lieu of filing a motion for declaratory judgment, TIG has waived its right to file for reimbursement of its costs paid. This argument appears to be based on the idea that TIG *waived* any right to contest Noranda's request for defense and indemnity. In essence, Zurich argues that TIG would be liable to Noranda notwithstanding any misrepresentation of Noranda to TIG regarding the contract.

Waiver is the intentional relinquishment or abandonment of a known right. DePriest v. State Farm, 778 S.W.2d 347, 350 (Mo.App. 1989); Cameron v. Norfolk & Western Railway, 891 S.W.2d 495, 500 (Mo.App. 1994); Greenberg v. Koslow, 475 S.W.2d 434, 438 (Mo.App. 1971). In order to show waiver, Noranda must show that TIG knew that there was *no enforceable indemnity agreement* and then intentionally waived that requirement. For waiver to arise, the insurer must have knowledge of the facts upon which it could base a denial of coverage, but, not withstanding such knowledge, the insurer fails to deny coverage, and proceeds to investigate and defend the claim, without making a non-waiver agreement. Mistele v. Ogle, 293 S.W.2d 330, 334 (Mo. 1956).

In the present case, Noranda and Zurich are still arguing that there is indeed an enforceable indemnity agreement. Thus, waiver cannot apply. Noranda's argument in Point IV of its Substitute Brief is inconsistent with Zurich's Point III. Even with the inconsistency, neither point weighs in favor of Appellants.

Where the insured withholds information from the insurer, the insurer's assumption of the insured's defense does not give rise to waiver. The treatise on Contracts indicates that a waiver of a material part of an agreed contract is ineffective. The author states:

> So also if A for a consideration promises to pay $1,000 if B's house burns and then promises to pay even if B's house does not burn, there is an attempted waiver of a condition which is material to the risk, that is to say a material part of the agreed exchange and thus the waiver is ineffective.

Calamari & Perillo, Contracts, Section 11-31, p.493 (3d Ed. 1987). Any other result would completely subvert the policy underlying the doctrine of consideration. Id.

Thus, during the period in which the insurance company had conflicting information from the insured and the insured withheld knowledge as to facts regarding coverage under the policy, the insurance company is not precluded by waiver or estoppel from denying coverage merely because it defended the action brought against the insured. During the interval when the insured withheld facts, the insurance company had no alternative other than to defend the action. See, Mistele v. Ogle, 293 S.W.2d 330 (Mo. 1956).

As previously discussed, the evidence shows that TIG did not have knowledge of the facts upon which to base a denial of coverage, and, furthermore Noranda withheld knowledge as to facts concerning coverage under the TIG policy. The facts were not resolved in this matter until the Trial Court issued its order. Thus, TIG is not precluded by waiver or estoppel from denying coverage merely because it defended the action brought against Noranda. Mistele v. Ogle, 293 S.W.2d 330 (Mo. 1956).

Until Noranda finally provided Exhibit C to TIG, TIG could not even begin to determine the terms of any indemnity contract. Thereafter, a material factual dispute continued regarding whether Exhibit C was part of the contract. Further, TIG had placed Noranda on notice that its defense of the lawsuit was conditioned on the presence of an enforceable indemnity agreement.

As discussed, infra, the doctrine of waiver cannot be used to extend the coverage of an insurance policy or to create coverage where none exists. Whitney v. Aetna Casualty & Surety Co., 16 S.W.3d 729, 733-4 (Mo.App. E.D. 2000); Magruder v. Shelter Ins. Co., 985 S.W.2d 869, 873 (Mo.App. W.D. 1999); Shelter General v. Siegler, 945 S.W.2d 24, 27 (Mo.App. E.D. 1997); Great West Casualty Co. v. Wenger, 748 S.W.2d 926, 928 (Mo.App. W.D. 1988); Young v. Ray America, Inc., 673 S.W.2d 74, 80 (Mo.App. 1984). A claim of waiver, particularly in circumstances such as those existing between the parties in this case, *cannot* operate to change the terms of the policy so as to cover additional subject matter. Martinelli v. Security Insurance Co. of New Haven, 490 S.W.2d 427, 434 (Mo.App. 1973) (emphasis added).

As further argued, infra, coverage which is excluded or not included within the insurance agreement may not be found based on waiver or estoppel due to failure to timely assert the defense. Great West Casualty v. Wenger, 748 S.W.2d at 929; Hussman v. Government Employees Insurance Co., 768 S.W.2d 585, 587 (Mo.App. 1989); State Farm Mutual Automobile Insurance Co. v. Hartford Accident & Indemnity Co., 646 S.W.2d 379, 381 (Mo.App. 1983); Young v. Ray America, Inc., 673 S.W.2d at 80; State Farm Mutual Automobile Insurance Company v. Zumwalt, 825 S.W.2d 906, 910 (Mo.App. S.D. 1992); Whitney v. Aetna Casualty & Surety Co., 16 S.W.3d at 733-4. Zurich, who was not a party to the insurance contract and who, under its terms, was not entitled to its protection, may not through waiver or estoppel create a new contract of

liability with TIG, nor may Zurich attempt to do so as a third-party with a financial interest on behalf of its insured.

Since the indemnity agreement was not enforceable, Utility was not legally obligated to pay damages for Noranda because of Murphy's bodily injury. Accordingly, there is no coverage under TIG's policies with Utility and TIG had no duty to defend or indemnify Noranda. Neither Noranda nor Zurich can create coverage by way of waiver or estoppel. Whitney v. Aetna Casualty & Surety Co., 16 S.W.3d 729 (Mo.App. E.D. 2000), Shelter General v. Siegler, 945 S.W.2d 24 (Mo.App. E.D. 1997); Great West Casualty Co. v. Wenger, 748 S.W.2d 926 (Mo.App. W.D. 1988). As such, Respondent respectfully request this Court to affirm the decision of the Trial Court.

CONCLUSION

For the foregoing reasons, Respondents respectfully request the Court affirm the Judgment of the Trial Court and award Respondents their costs herein and past judgment interest.

Respectfully submitted,

RYNEARSON, SUESS, SCHNURBUSCH & CHAMPION, L.L.C.

Debbie S. Champion #38637
Amy R. Brown #53136
#1 South Memorial Drive, 18th Floor
St. Louis, MO 63102
Phone: 314/421-4430
FAX: 314/421-4431

CERTIFICATE OF SERVICE

I, Debbie S. Champion, hereby certify that two (2) true and accurate hard copies of the foregoing Brief and Respondents' separate appendix and one (1) copy of the Brief on disk were delivered, on this 4th day of February, 2005, by U.S. Mail postage prepaid to:

Bradley J. Baumgart, Esq.
Kutak Rock LLP
200 Valencia Place
444 W. 47th Street
Kansas City, MO 64112

John M. McFarland, Esq.
2345 Grand Boulevard, Suite 2500
Kansas City, MO 64108

HUSCH & EPPENBERGER LLC
Mark G. Arnold
190 Carondelet Plaza
St. Louis MO 63105

AMELUNG, WULFF & WILLENBROCK, P.C.
Ronald C. Willenbrock,
Mark F. Mueller,
705 Olive St., 11th Floor
St. Louis MO 63101

_____
Debbie S. Champion

CERTIFICATE OF COMPLIANCE

Debbie S. Champion, the undersigned attorney for Plaintiffs/Respondents, hereby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this Respondents' Substitute Brief:

1. Complies with Missouri Supreme Court Rule 55.03,

2. Complies with the limitations contained in Missouri Supreme Court Rule 84.06(b),

3. Contains 21,030 words, including the cover page, signature blocks, Certificate of Service, the Certificate of Compliance, the Table of Contents and the Table of Authorities according to the word count toll contained in Microsoft Word, the software with which it was prepared, using Times New Roman typeface in font size 13.

4. The disk accompanying Respondents' Substitute Brief has been scanned for viruses and to the best knowledge, information and belief of the undersigned, it is virus-free.

RYNEARSON, SUESS, SCHNURBUSCH & CHAMPION, L.L.C.

BY_____
Debbie S. Champion #38637