IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DELMARVA POWER & LIGHT COMPANY,	)	
Plaintiff,	)	C.A. No.00C-02-175 WCC
v.	)	
ABB POWER T & D COMPANY INC., and ASEA BROWN BOVERI, INC.,	)	
Defendants.	)	

Submitted: October 19, 2001
Decided: April 30, 2002

O P I N I O N

On Defendants' Motion for Summary Judgment. Granted.

John D. Balaguer, Esquire, White & Williams, 824 Market Street, Wilmington, Delaware, 19801, Attorney for Defendant.

Gregory A. Inskip, Esquire; Potter, Anderson & Corroon, Hercules Plaza, 6th Floor, Wilmington, DE 19899, and William N. Clark Jr., Esquire; Cozen & O'Conner, The Atrium, 1900 Market Street, Philadelphia, Pennsylvania, 19103. Attorneys for Plaintiff.

CARPENTER, J.

This is a property damage subrogation matter filed by Delmarva Power and Light Company ("Delmarva"). Delmarva seeks reimbursement for damages to a steam turbine generator located at its Indian River power plant near Millsboro, Delaware. Delmarva claims that the generator damage was caused by the actions of Asea Brown Boveri, Inc., a Canadian corporation and ABB Power T & D Company, Inc., its U.S. subsidiary (collectively referred to as "ABB") during its attempt to repair deficiencies in a static excitation system manufactured and supplied by ABB. Delmarva also seeks damages for the replacement power costs incurred while the generator was being repaired. The static excitation system was manufactured and sold to Delmarva by ABB.

A static excitation system (collectively referred to as an "exciter") is a piece of equipment that provides electrical currents to the main fuel coils on the rotor of the electrical power generator. In October of 1996, Delmarva sought to purchase three static exciters for three generators located at its Indian River power plant. Accordingly, on October 3, 1996, Delmarva issued a request for quotations to several manufacturers of exciters including ABB. Delmarva's request sought a proposal for static exciters in accordance with Delmarva's specification number IR-97-EX001 dated October 1, 1996. On October 17, 1996, ABB issued its quotation offering to supply the three excitation systems to Delmarva for a total price of $418,000.00.

ABB's quote further specificized that the terms of its offer were to be "per Delmarva Power and Light Company purchase order general terms and conditions as amended for ABB Power T & D Company dated August 6, 1993."

Although Delmarva's solicitation contained its own general conditions of contract and special conditions of contract, it also included a page to allow a prospective bidder to list exceptions, clarifications and assumptions. On this page ABB indicated that the "terms and conditions are based on Delmarva Power & Light Company purchase order general terms and conditions as amended for ABB Power T&D Company dated August 6, 1993."

The August 6, 1993 terms and conditions that are at issue here appear to have been previously negotiated between Delmarva and ABB in connection with other equipment purchased by Delmarva. These terms and conditions as amended by Delmarva, specifically for ABB, appear in paragraph 18 under the heading "limitations of liability" and state the following

> "Seller, its contractors and suppliers of any tier, shall not be liable in contract, in tort (including negligence or strict liability) or otherwise for damage or loss of other property or equipment, loss of profits or revenue, loss of use of equipment or power system, cost of capital, cost of purchased or replacement power or temporary equipment. . . . claims of customers of the Buyer, or for any special indirect, incidental or consequential damages whatsoever."[1]

[1] Delmarva's Purchase Order General Terms and Conditions as Amended for ABB Power T&D Company August 6, 1993 at 3.

> The remedies of the buyer set forth herein are exclusive and the total cumulative liability of seller with respect to this contract or anything done in connection therewith such as the performance or breach thereof, or for the manufacture, sale, delivery, resale or use of any product covered by or furnished under the Contract, whether in contract, in tort (including negligence or strict liability) or otherwise, shall not exceed the price of the product or part on which such liability is based. No action regardless of form, arising out of the transactions under this contract may be brought by the buyer more than one (1) year after the cause of action has occurred.[2]

After receiving ABB's proposal, Delmarva issued its purchase order, number 043422, to ABB accepting its offer to supply three excitations systems. However, on November 21, 1996, Delmarva canceled the purchase order. ABB acknowledged the cancellation but agreed to keep its original offer open for one additional year. Approximately one year later, on September 9, 1997, Delmarva issued another purchase order number 2005590 to ABB for one exciter for its generator unit number 3 at the Indian River plant for a purchase price of $169,965.00. This purchase order again requested that ABB furnish the exciter in accordance with Delmarva's purchase orders general terms and conditions but also referenced both Delmarva's original specifications as well as ABB's modification dated August 6, 1993.

ABB proceeded to manufacture and deliver the exciter. After delivery, Delmarva personnel installed the exciter at the Indian River facility. Once installed,

[2] Delmarva's Purchase Order as Amended for ABB dated August 6, 1993 at 18A.

ABB was responsible for commissioning the exciter, the process whereby ABB examined, powered up and tested the exciter to insure it was working properly within design parameters so that it then could be released to Delmarva for operation. George Vangelatos, an ABB technician, was dispatched to Delmarva's power plant on April 6, 1999 to begin the commissioning process which lasted until approximately May 7, 1999. During this stage, Mr. Vangelatos discovered that three control panels of the exciter were faulty and they were replaced by ABB.

Almost immediately after commissioning on May 7, 1999, the exciter began to malfunction requiring numerous service visits by ABB technicians. Between May 12, 1999 and May 14, 1999, Mr. Vangelatos spent 14.5 hours troubleshooting the system as the exciter was apparently causing the generator to suffer over-voltage trips and go out of service. Mr. Vangelatos continued his diagnostic and repair work until May 18, 1999, but was apparently unsuccessful. On that date Mr. Vangelatos changed a crowbar CT, the crowbar firing board, and reset the exciter.[3] Between May 12 and May 18, 1999, ABB spent approximately 32 hours attempting to repair the new exciter. On May 19, 1999, another ABB technician, Francis Russo[4], was sent to

[3] "CT" is an abbreviation for current transformer. The crowbar is part of the exciter that protects the generator from over voltage surges. The "crowbar CT" is a current transformer in the crowbar that senses over-voltage. *See* Delmarva's Answering Brief at 5.

[4] Mr. Russo is the Manager for Engineering Group, External Markets, ABB Switzerland. (Russo Dep. at 5.)

examine the exciter, as Mr. Vangelatos was unable to successfully correct the problems Delmarva was experiencing. Mr. Russo was also unsuccessful as he returned to the Indian River cite on June 4, 1999 to attempt to troubleshoot additional defects with the exciter.

On June 9, 1999, ABB sent Mr. Russo replacement parts, and he installed new cables in the exciter. The new cables continued to cause the generator to "trip," so Mr. Russo continued with his diagnostic work, as the cable replacement did not remedy the situation. ABB in Switzerland was contacted, and informed Mr. Russo that the computer software was causing the problems. He was sent updated computer software, and it was installed on June 10, 1999. Once installed, Mr. Russo again attempted to engage the exciter, but the generator showed signs of rotor damage which lead to the taking of the generator off line and which now forms the basis of this litigation.

ABB asserts that (1) there was a contract between ABB and Delmarva, which included an exclusive remedy provision that limited Delmarva's remedies in the event of a breach to repair and replacements costs; (2) Delmarva is precluded from seeking consequential damages from ABB because of this exclusive remedy clause; (3) that the limitation of liability clause restricting Delmarva's remedies to the repair and replacement costs, has not failed in its essential purpose; and (4) the

language disclaiming liability for any of ABB's negligence is valid.

Delmarva claims that during the diagnosis and repair work engaged in by ABB technicians, the generator was left in "turning gear," which damaged the rotor. Because of this damage, Delmarva was forced to repair the rotor, and during the period of time needed to repair the damage, Delmarva was forced to purchase power from other sources. Delmarva concedes that it entered into a contract with ABB that excluded consequential damages, but asserts that the clause is invalid, because ABB's exclusive remedy failed its essential purpose. Delmarva also asserts that ABB cannot escape the damages allegedly caused by its personnel, as ABB did not properly include the required language to effectively disclaim any negligence. In essence, Delmarva claims that the limited liability provision, which includes the exclusion of consequential damages clause, and the tort liability disclaimer, does not contain the judicially required language "stating explicitly that the defendants are disclaiming liability for their own negligence." Lastly, Delmarva asserts that the limitation of remedies clause is unenforceable under 6 *Del.C.* § 2704(a), as the contract concerns the construction, alteration, repair, and maintenance of an "appliance." The rotor was repaired at a cost of $4,266,433.62. During the period of time needed to repair the damage to the generator rotor, Delmarva was forced to purchase power from other sources at a cost of $13,000,000.00 in order to supply electricity to its consumers.

STANDARD OF REVIEW

A summary judgment may only be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[5] If a material fact is in dispute or it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law, summary judgment is inappropriate.[6] The motion for summary judgment will be denied if the Court finds any genuine issues of material fact.[7] However, if a motion for summary judgment is properly supported, the burden shifts to the non-moving party to demonstrate that there are material issues of fact.[8] Lastly, the Court must view all factual inferences in a light most favorable to the non-moving party.[9]

DISCUSSION

I. The Exclusive Remedy of Repair and Replace

The core of this controversy centers on whether or not ABB's exclusive remedy failed its essential purpose, which then permits Delmarva to avoid the contract

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[5] *Wilmington Trust Co. v. Aetna Cas. & Sur. Co.*, 690 A.2d 914, 916 (Del. 1996).

[6] *Kysor Industrial Corp. v. Margaux,* 674 A.2d 889, 894 (Del. Super. 1996).

[7] *Pullman, Inc. v. Phoenix Steel Corp.*, 304 A.2d 334 (Del. Super. 1973); *Hoechst Celanese Corp. v. Certain Underwriters of Lloyd's of London*, 673 A.2d 164, 170 (Del. Super. 1996).

[8] *Phillips v. Delaware Power & Light Co.*, 216 A.2d 281, 285 (Del. 1996).

[9] *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. Super.1990).

provision excluding consequential damages, and move forward to seek the remedies provided for under Delaware's commercial code law. In essence, this would permit Delmarva to recover the cost from ABB, which it expended for substitute power while one generator was shut down. At the outset, subject to the findings set forth in this opinion, the Court finds (1) that there was a valid and enforceable contract between ABB and Delmarva, which contained a valid and enforceable limited remedy provision to which Delmarva is bound;[10] and (2) that the language which purports to effectively disclaim any of ABB's potential negligence, is valid and binding as well.

Since the contractual provision excluding consequential damages is enforceable, the Court now must consider whether the limitation of remedies provision, has failed of its essential purpose. The applicable statute, 6 *Del. C.* § 2-719 provides that

> (1) Subject to the provisions of subsection (2) and (3) of this section and of the preceding section on liquidation and limitation of damages, (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by *limiting the buyer's remedies* to return of the goods and repayment of the price or *to repair and replacement of non-conforming goods or parts;* and (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to

[10] Delmarva specifically stated in its Answering Brief that ". . . Delmarva agreed to limit its contractual damages to the cost of repairs." Plaintiff's Answering Brief at 12 - 13.

> be exclusive, in which case *it is the sole remedy.*
> (2) Where circumstances cause an exclusive or limited remedy to *fail of its essential purpose,* remedy may be had as provided in this title.
> (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not. "[11]

Thus, under Delaware law, a party may limit the remedies available to the other party, provided the remedy excluding consequential damages, does not fail of its essential purpose, and is not unconscionable. If it can be shown that the exclusive remedy failed in its essential purpose, then the buyer may disregard the exclusive remedy provision, and pursue other remedies, such as consequential damages. As noted in *Beal v. General Motors Corp.*,[12]

> "[t]he purpose of an exclusive remedy of replacement or repair of defective parts . . . is to give the seller an opportunity to make the goods conforming while limiting the risks to which he is subject by excluding the direct and consequential damages that might otherwise arise."[13]

From the buyer's point of view, the exclusive remedy's purpose is to give the buyer conforming goods within a reasonable period of time after a defective part is

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[11] 6 *Del. C.* § 2-719. (Emphasis added).

[12] 54 F.Supp. 423 (D. Del. 1973).

[13] 54 F.Supp. at 425.

discovered.[14]

[14] *Id.*; *See also Myrtle Beach Pipeline Corporation v. Emerson Electric Co.,* 843 F. Supp. 1027, 1042 (D.S.C. 1993)(stating that the Court should examine the success or failure of the limited remedy of repair or replacement against these mentioned purposes)).

Although the Code has not specifically identified what precise circumstances would justify a finding of failure of essential purpose,[15] this Court has held in *J.A. Jones Construction Co. v. City of Dover*,[16] that in

> [d]etermining whether the contract limitation fails of its essential purpose, the facts and circumstances surrounding the contract, the nature of the basic obligations of the party, the nature of the goods involved, the uniqueness or experimental nature of the items, the general availability of the items, and the good faith and reasonableness of the provision are factors which should be considered.[17]

The *J.A. Jones* court further noted that an underlying premise of contractual terms that limit liability is the presumption that the contracting parties have negotiated those terms in good faith and have made reasonable efforts involving kind, quantity, quality, and time in the performance of the contract.[18] In *Norman Gershman's Things to Wear v. Mercedes Benz,*[19] the Supreme Court of Delaware noted that

> [a]n exclusive remedy of repair or replacement of defective parts will be held to have failed of its essential purpose where the warrantor refuses to repair the [good], the [good] is not repaired within a reasonable time, or the [good] is not repaired in a reasonable number of attempts.[20]

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[15] *Riegel Power Corporation v. Voith Hydro*, 888 F.2d 1043, 1045 (4th Cir.1989).

[16] 372 A.2d 540 (Del. Super. 1977).

[17] 372 A.2d at 549-550(noting that "the language of § 2-719(2) shows that the [UCC] draftsmen . . .intended to provide flexibility in molding contractual liability according to the actual nature of the transaction," but "[a]t the same time, the protective feature must not render performance rights under the contract illusory.").

[18] 372 A.2d at 550-551.

[19] 558 A.2d 1066, 1070 (Del. Super. 1989).

[20] 558 A.2d at 1070.

It is with these factors in mind that the Court will review the ABB - Delmarva contract, to determine whether or not the exclusive remedy has failed its essential purpose.

The circumstances surrounding this contract evidence two experienced, sophisticated, commercial business parties, who negotiated these types of contracts as a routine performance of their businesses. Delmarva entered into a contract with ABB on at least two previous occasions and on each occasion the remedies, in the event of breach, were limited to repair and replacement costs. The contract term, which ABB inserted into its previous contract, and reiterated in this second contract, stated in pertinent part that

> [s]eller. . . shall not be liable in contract, in tort (including negligence or strict liability) or otherwise for damage or loss of other property or equipment, loss of profits or revenue, loss of use of equipment or power system, cost of capital, cost of purchased or replacement power or temporary equipment . . . or for any special indirect, incidental or consequential damages whatsoever.[21]

These terms were located under the heading "Limitation of Liability" and were not misleading, abstract, or ambiguous in any way. The limitation on liability provision is precise and comprehensive, and it appears that both ABB and Delmarva used good faith efforts in their negotiation and performance of this contract.

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[21] Delmarva's August 6, 1993 Purchase Order at paragraph 18.

When considering the nature of the goods involved, or the uniqueness or experimental nature of the items, and the items general availability, the Court finds that a static excitation system clearly is not a readily available, simple piece of equipment.[22] This is evidenced by the fact that an exciter works with a rotor, inside of a generator, which then supplies power to thousands of people. A system of this magnitude, which produces electricity for a power plant is not a simple consumer product that should be expected to work immediately or without some reasonable repair and modification.

Lastly, in considering the good faith and reasonableness of the exclusive remedy provision, the Court finds that ABB made numerous, good-faith attempts to fix the problems not only with the exciter, but the other problems occasioned with Delmarva's generator and the entire excitation system. ABB's technician, Mr. Vangelatos, started the pre-commissioning work on April 6, 1999, and from that date, he spent days, and nights, attempting to fix the problems occasioned by the excitation system. When Mr. Vangelatos' efforts proved unsuccessful, other technicians were sent to address the problems. Not only was there a local effort to correct the problem but also efforts in the home office in Switzerland to resolve Delmarva's issues. While

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[22] *See White and Summers* 4th ed. 661, § 12-10(stating that a buyer may not succeed in establishing 'failure of essential purpose' because "[t]he reasonableness of the opportunity to repair varies with the type of goods involved, and some may require a lengthy repair period."

perhaps the problems were not immediately solved, there was a good faith and diligent effort to address them until the generator was taken off line. Simply put, ABB was notoriously diligent in attempting to correct the problems associated with the exciter when Delmarva notified ABB of these problems.[23] ABB repeatedly dispatched technicians and engineers to the Indian River cite from the first day of pre-commissioning, through June 9, 1999, and then continued to send ABB technicians until February, 2000, when the generators and excitation system were again fully operational. While the Court can appreciate Delmarva's frustration in not having its generators in full operation during the hot summer months, the Court cannot find that a two month period to address these concerns constitutes an unreasonable amount of time to repair or replace a system of this magnitude or complexity. While several additional months passed before the generator was put back on line, the Court finds it would be inappropriate to include that time in its analysis since the generator was down due to the damaged rotor, not ABB's failure to repair the exciter.

Both Delmarva and ABB kept copious records, which note the numerous visits made by ABB technicians Russo and Vangelatos to repair the exciter. Although the

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[23] *c.f. Stutts v. Green Ford, Inc.* 267 S.E. 2d 919 (1980)(holding that although limited warranties are valid, compliance with their covenants to repair and to replace defective parts requires that the warrantor do more than make good-faith attempts to repair defects when requested to do so.).

record reflects that ABB technicians visited the power plant on numerous occasions, and were not successful in repairing the excitation system, this static excitation system appears to be a sophisticated and complex piece of equipment, which was difficult to commission.[24] What is a reasonable period of time to correct defects will vary according to the type of product involved and complex machinery such as that involved in this litigation reach toward the extreme of that spectrum. *In Riegel Power Corporation v. Voith Hydro*,[25] the Fourth Circuit, interpreting Delaware law, found that a limited repair or replacement remedy did not fail of its essential purpose, despite the occurrence of numerous problems during a generator's break-in period. *Riegel Power* involved an electrical turbine generator with a history of intermittent problems, similar to the ones experienced by Delmarva.

Similar to *Riegel Power*, the Court finds that reasonable, timely efforts were made to repair the exciter, which were consistent with the terms of the contract. Thus, the exclusive remedy provided in Delmarva and ABB's contract did not fail its essential purpose, and therefore remains binding.

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[24] *See Riegel Power Corp.* 888 F.2d at 1045 (stating that '[o]ne of the most relevant of the enunciated factors was inquiry into the type of product sold" and that the "inquiry bears not only on the product sold, but also on the context of the transaction -*i.e.*- whether the sale was a commercial or consumer transaction.).

[25] 888 F.2d 1043 (4th Cir.1989).

II. Waiver of Negligence

Delmarva next argues that ABB failed to set forth a precise, clear, and unequivocal negligence disclaimer in the contract's limitation of liability clause. As such, Delmarva argues that the limitation of liability clause does not prevent its tort claims from proceeding as asserted in the complaint. It is true that under Delaware law a contractual provision that purports to relieve a party from liability for damages resulting from his own negligence is disfavored.[26] In order for a contractual provision to relieve a party from the results of its own negligence it must expressly show this intent.[27] Contractual language "will not suffice to relieve a contracting party from its failure to satisfy legal obligations unless the contract language makes it crystal clear and unequivocal that the party specifically contemplated that the contracting parties would be relieved of its own defaults."[28] A general reference to the term 'negligence' is insufficient.[29]

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[26] *J.A. Jones Construction*, 372 A.2d at 552.

[27] *J.A. Jones Construction,* 372A.2d at 552("The Delaware cases which have found contractual language sufficient to protect a party against a claim based on its own negligence have all specifically referred to negligence of the protected party.").

[28] 372 A.2d at 553.

[29] *Id.* at 553 (stating that "[i]t is not the reference to 'negligence' generally, but a reference to the negligent wrongdoing of [a] party protected by the limitation which is required.").

However, the Court agrees with ABB that a party cannot convert what is clearly a contractual dispute for which there are remedies available under the negotiated terms of the contract to a tort action simply by pleading claims of negligence. If such actions were allowed, it would permit a party to easily crack the foundation of a contractual relationship that has been negotiated in good faith and agreed to by the parties and in essence void the contract.

The subject of this litigation is a contractual dispute, and the Court will not allow one to flip flop between contract or negligence whenever it is to that parties benefit to do so. The negligence claims asserted by Delmarva are ones based upon the parties' contractual relationship. They reference manufacturing, engineering, designing, servicing, and repairing, all of which are obligations imposed upon ABB under the contract. As such, the only question remaining is whether the contractual limitation provision relating to negligent conduct sufficiently and clearly limits ABB's own conduct.

While recognizing the Court's factual determination in *J.A. Jones Construction*, the Court here finds that any reasonable reading of ABB's limitation provisions would include ABB's own negligent conduct. The Court does not believe ABB's failure to specifically state "including ABB's negligence" in the text of the limitation clause is fatal. Although the *J.A. Jones* court held that the language

disclaiming negligence must "show a clear and unequivocal intention" that the party was disclaiming its own negligence, the Court here does not find that "magical words or phrases" must be employed to effectively disclaim negligence. The clause at issue here clearly stated that the "[s]eller . . . shall not be liable in contract, in tort (including negligence or strict liability) or otherwise . . . ." ABB was clearly the seller in this instance and Delmarva was unequivocally the buyer. Unlike the situation in *Jones*, there were not several different parties and several different contracts involved. There were two parties, ABB and Delmarva, and there was in essence one contract. The Court again emphasizes that these parties are sophisticated business ventures with access to individuals with expertise in legal and contractual matters. Delmarva could have easily remedied the deficiency, which they now are claiming, by explicitly excluding ABB's own negligence from the limitation provision. This was not done because it was clear under the terms of the contract that the ABB intended and Delmarva agreed, to limit ABB's exposure to the remedies set forth in the contract. Having made this judgment, which clearly in hindsight has proven unwise, Delmarva may not now attempt to rewrite the contract to again redistribute the risk previously negotiated. ABB's motion for summary judgment on the negligence issue therefore is granted.

III. Public Policy

Finally, the Court finds that Delmarva's argument, as to the applicability of 6 *Del. C.* §2704(a), is completely without merit and the Court will not void an otherwise valid contract under that contract provision. The section states in pertinent part:

> Exculpatory clauses in certain contracts void.
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> (a) A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement (including but not limited to a contract or agreement with the State, any county, municipality or political subdivision of the State, or with any agency, commission, department, body or board of any of them, as well as any contract or agreement with a private party or entity) relative to the construction, alteration, repair or maintenance of a road, highway, driveway, street, bridge or entrance or walkway of any type constructed thereon, and building, structure, appurtenance or appliance, including without limiting the generality of the foregoing, the moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee or indemnitee or others, or their agents, servants and employees, for damages arising from liability for bodily injury or death to persons or damage to property caused partially or solely by, or resulting partially or solely from, or arising partially or solely out of the negligence of such promisee or indemnitee or others than the promisor or indemnitor, or its subcontractors, agents, servants or employees, is against public policy and is void and unenforceable, even where such covenant, promise, agreement or understanding is crystal clear and unambiguous in obligating the promisor or indemnitor to indemnify or hold harmless the promisee or indemnitee from liability resulting from such promisee's or indemnitee's own negligence. This section shall apply to all phases of the preconstruction, construction, repairs and maintenance described in this subsection, and nothing in this section shall be construed to limit its application to preconstruction

professionals such as designers, planners and architects.

First, this statute relates to contracts regarding the construction, alteration, repair or maintenance of road, highways, bridges, etc. or in other words construction matters. Second, even if the section was applicable, the Plaintiffs attempt to characterize an exciter, a sophisticated and complex piece of industrial equipment, as an appliance as set forth in the statute is simply nonsensical. The statute simply does not apply to this factual situation.

CONCLUSION

For the reasons set forth above, ABB's motion for summary judgment is granted. The contract provisions limiting Delmarva's remedies to the repair and replacement value is an enforceable provision which did not fail of its essential purpose. In addition, for the reasons set forth above, the negligence claim set forth in the complaint is dismissed, and 6 *Del. C.* § 2704(a) is not applicable to this contract. As such, ABB's motion for summary judgment is granted.

Judge William C. Carpenter, Jr.