

NO. A11-0159

State of Minnesota
In Supreme Court

Engineering and Construction Innovations, Inc.,
Respondent,

v.

L.H. Bolduc Co., Inc.,

Appellant,

The Travelers Indemnity Company of Connecticut,

Appellant.

**BRIEF AND ADDENDUM OF
THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT**

Kay Nord Hunt (#138289)
LOMMEN, ABDO, COLE, KING
& STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

William M. Hart (#150526)
Charles E. Spevacek (#126044)
Damon L. Highly (#0300044)
MEAGHER & GEER, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
(612) 338-0661

Louise A. Behrendt (#201169)
Michael S. Kreidler (#58191)
STICH, ANGELL, KREIDLER
& DODGE, P.A.
The Crossings, Suite 120
250 Second Avenue South
Minneapolis, MN 55401
(612) 333-6251

Daniel A. Haws (#193501)
Stacy E. Ertz (#267181)
John Paul J. Gatto (#387730)
MURNANE BRANDT
30 East Seventh Street, Suite 3200
St. Paul, MN 55101
(651) 227-9411

Counsel for Appellant L.H. Bolduc Co., Inc.

*Attorneys for Appellant The Travelers
Indemnity Company of Connecticut*

(Counsel continued on next page)

David D. Hammargren (#167538)
Adina R. Bergstrom (#337833)
HAMMARGREN & MEYER, P.A.
3500 American Boulevard West
Suite 450
Bloomington, MN 55431
(952) 844-9033

*Counsel for Respondent Engineering and
Construction Innovations, Inc.*

Dean B. Thomson (#0141045)
Kristine Kroenke (#0336294)
FABYANSKE, WESTRA, HART
& THOMSON, PA
800 LaSalle Avenue, Suite 1900
Minneapolis, MN 55402
(612) 359-7600

*Counsel for Amicus Curiae Associated
General Contractors of Minnesota*

Robert J. Huber (#47740)
LEONARD, STREET
AND DEINARD
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
(612) 335-1500

*Counsel for Amicus Curiae Minnesota
Utility Contractors Association*

Curtis D. Ruwe (#0313257)
Beth A. Jensen Prouty (#0389275)
ARTHUR, CHAPMAN, KETTERING,
SMETAK & PIKALA, P.A.
81 South Ninth Street, Suite 500
Minneapolis, MN 55402
(612) 339-3500

*Counsel for Amicus Curiae Property Casualty
Ins. Association of America*

Dale O. Thornsjo (#162048)
JOHNSON & CONDON, P.A.
7401 Metro Boulevard, Suite 600
Minneapolis, MN 55439
(952) 831-6544

*Counsel for Amicus Curiae
American Insurance Association*

Curtis D. Smith (#102313)
MOSS & BARNETT
4800 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4129
(612) 877-5000

*Counsel for Amicus Curiae American
Subcontractors Association of Minnesota*

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF LEGAL ISSUES	1
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	3
A. The project and the parties.	3
B. The ECI/Bolduc contract.	4
C. The liability coverage and its additional insured endorsement.....	5
F. ECI sues Bolduc, Travelers, and Western National.	9
G. A jury finds that Bolduc was not at fault and that ECI sustained no loss.	10
H. The district court orders summary judgment for Travelers and Bolduc.....	10
ARGUMENT	11
I. Standard of review.....	11
II. The district court correctly ruled that the Travelers policy provides no coverage to ECI, as an additional insured, for the cost ECI incurred to repair the underground pipe.	12
A. Given the jury’s binding verdict, ECI’s legal obligation to pay, if any, could only be grounded in its own independent acts or omissions, for which it does not qualify as an additional insured.....	12
B. The Additional Insured Endorsement unambiguously applies to make ECI an additional insured only to the extent that the named insured, Bolduc, was at fault for the damage. Because Bolduc was not at fault, ECI is not an additional insured.....	15
C. Cases from other jurisdictions, and cases construing different policy language, support the district court’s ruling.....	20
D. The jury’s finding of \$0 as ECI’s “loss resulting from damage to the pipe” precludes indemnity coverage.	23

CONCLUSION 24

Form and Length Certification

TABLE OF AUTHORITIES

Cases

<i>Bobich v. Oja</i> , 258 Minn. 287, 104 N.W.2d 19 (1960).....	1, 16
<i>Boedigheimer v. Taylor</i> , 287 Minn. 323, 178 N.W.2d 610 (1970).....	1, 13
<i>Brecht v. Schramm</i> , 266 N.W.2d 514 (Minn. 1978)	11
<i>Brookfield Trade Ctr., Inc. v. County of Ramsey</i> , 584 N.W.2d 390 (Minn. 1998).....	16
<i>Consolidation Coal Co. v. Liberty Mut. Ins. Co.</i> , 406 F.Supp. 1292 (W.D. Pa. 1976).....	21
<i>D & A Dev. Co. v. Butler</i> , 357 N.W.2d 156 (Minn. App. 1984)	15
<i>Day Masonry v. Indep. Sch. Dist. 347</i> , 781 N.W.2d 321 (Minn. 2010)	11
<i>Faber v. Roelofs</i> , 311 Minn. 428, 250 N.W.2d 817 (1977)	22
<i>Garcia v. Federal Ins. Co.</i> , 969 So.2d 288 (Fla. 2007).....	20, 21
<i>Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assoc.</i> , 418 N.W.2d 173 (Minn. 1988)	23
<i>J.A. Jones Constr. Co. v. Hartford Fire Ins. Co.</i> , 645 N.E.2d 980 (Ill. App. 1995).....	22
<i>Jarecki v. G. D. Searle & Co.</i> , 367 U.S. 303 (1961).....	18
<i>Leamington Co. v. Nonprofits' Ins. Ass'n</i> , 615 N.W.2d 349 (Minn. 2000).....	11
<i>Lott v. State Farm Fire & Cas. Co.</i> , 541 N.W.2d 304 (Minn. 1995).....	12
<i>Meadowbrook, Inc. v. Tower Ins. Co.</i> , 559 N.W.2d 411 (Minn. 1997).....	18
<i>Moundsview Indep. Sch. Dist. No. 629 v. Buetow & Assocs., Inc.</i> , 253 N.W.2d 836 (Minn. 1977)	15
<i>Nadeau v. Melin</i> , 260 Minn. 369, 110 N.W.2d 29 (1961)	14
<i>Nat'l Hydro Sys., a Div. of McNish Corp. v. M.A. Mortenson Co.</i> , 507 N.W.2d 27 (Minn. App. 1993), affirmed 529 N.W.2d 690 (Minn. 1995)	11

<i>Nor-Son, Inc. v. Western Nat'l Mut. Ins. Co.</i> 2011 WL 6149940 at 7 (Minn. Dist. Ct. Sept. 13, 2011)	21
<i>Orwick v. Belshan</i> , 304 Minn. 338, 231 N.W.2d 90 (1975)	1, 14, 23
<i>Republic Nat'l Life Ins. Co. v. Lorraine Realty Corp.</i> , 279 N.W.2d 349 (Minn. 1979).....	1, 16
<i>SCSC Corp. v. Allied Mut. Ins. Co.</i> , 536 N.W.2d 305 (Minn.1995).....	13, 15
<i>Turner v. Alpha Phi Sorority House</i> , 276 N.W.2d 63 (Minn. 1979)	11
<i>Vulcan Materials Co. v. Casualty Ins. Co.</i> , 723 F.Supp. 1263 (N.D. Ill. 1989).....	21
<i>Youngquist v. Cincinnati Ins. Co.</i> , 625 N.W.2d 178 (Minn. App. 2001).....	22

STATEMENT OF LEGAL ISSUES

1. The additional insured provision in Travelers' policy applies to make ECI an additional insured "[o]nly with respect to liability for . . . 'property damage' . . . and [i]f, and only to the extent that, the . . . damage is caused by acts or omissions of [Bolduc]." Did the district court correctly construe this provision to be inapplicable as a matter of law to cover ECI because a jury determined that Bolduc was not at fault for what occurred?

The court of appeals reversed the district court and ruled that ECI is entitled to coverage as an "additional insured." The dissent stated that "[t]he jury's verdict made it clear that Bolduc's actions did not cause the damage to the pipeline. As a result, no additional named-insured coverage is available to ECI under a plain and simple application of the language of the additional insured endorsement." (ADD.41).

Apposite authority:

Bobich v. Oja, 258 Minn. 287, 104 N.W.2d 19 (1960);
Republic Nat'l Life Ins. Co. v. Lorraine Realty Corp., 279 N.W.2d 349 (Minn. 1979);
Boedigheimer v. Taylor, 287 Minn. 323, 178 N.W.2d 610 (1970);
Orwick v. Belshan, 304 Minn. 338, 231 N.W.2d 90 (1975).

STATEMENT OF THE CASE

This is an insurance-coverage dispute arising out of damage that occurred during construction of a sanitary sewer lift station near Hugo, Minnesota. Part of the project called for installation of a "forcemain" pipe about 30 feet below grade. (T.44). The project required manhole access to this pipe. (T.46). To provide this access, Respondent Engineering & Construction Innovations, Inc. (ECI) contracted to build concrete vaults from the surface to the pipe. (T.55, 313-14; A.9). To prevent a collapse during excavation and construction of the vaults, ECI sub-contracted with Appellant L.H. Bolduc Co., Inc. to drive "sheeting cofferdams," which are sheet walls that provide lateral support until concrete can be poured. (T.55, 313-14). ECI drafted the ECI/Bolduc contract, which specified that Bolduc was to drive the sheeting cofferdams "per ECI

location.” (ADD.9-10; A.2-3). ECI provided the template and the markings to designate where ECI wanted Bolduc to drive the sheets so that they would not damage the pipe. (T.55, 127, 197-98, 316, 320-21, 323, 325).

The ECI-drafted contract also contained an indemnity-and-insurance provision, which required Bolduc to indemnify ECI for “damages to property caused or alleged to have been caused by any act or omission of [Bolduc].” (ADD.11; A.4). It also required Bolduc to obtain insurance, which it obtained from Respondent Travelers Indemnity Company in the form of an Additional Insured endorsement. (Id.). The endorsement extended coverage to ECI, as an “additional insured,” for damage “caused by acts or omissions of [Bolduc].” (ADD.19, 21; A.55, 161). It further provided that ECI “does not qualify as an additional insured with respect to the independent acts or omissions of [ECI].” (Id.).

The damage giving rise to this dispute occurred when one of Bolduc’s sheet walls struck the subsurface pipe. As it turns out, ECI’s surface markings were inaccurate for identifying the pipe’s location. (T.333). ECI voluntarily paid to have the damage repaired and then sought indemnity coverage from Travelers as an “additional insured,” contending that Bolduc had “mistakenly and negligently” damaged the pipe. (A.217, A.240). Travelers denied coverage on the ground that because Bolduc was not at fault for the damage, ECI was not entitled to coverage as an “additional insured.”

ECI commenced suit against Bolduc and Travelers in 2008. ECI alleged that Bolduc was at fault for the pipe damage. ECI alleged that Travelers had breached the insurance contract by refusing to provide liability coverage to ECI, as an additional

insured, for the pipe damage. (A.227, A.240). Travelers denied the allegations and asserted a counterclaim for declaratory judgment. (A.228-231).

In a 2010 bifurcated trial, ECI and Bolduc tried the fault and damages issues to a jury. (A.252-256). The jury found that Bolduc was not negligent. (ADD.16-17; A.257-58). Following the trial, Travelers and Bolduc moved for summary judgment. (ADD.1-3). On October 6, 2010, the Ramsey County District Court, Hon. Gregg E. Johnson, ruled that Bolduc's contractual indemnity obligation extended only to acts or omissions giving rise to its liability, and that Travelers' additional insured endorsement extended coverage to ECI only to the extent of Bolduc's fault. (ADD.1-7). Because the jury found that Bolduc was not at fault for the pipeline damage, the district court ordered summary judgment for both Travelers and Bolduc. The court of appeals reversed. (ADD.23).

STATEMENT OF THE FACTS

A. The project and the parties.

This case arose in the context of a project for the construction of a sanitary sewer lift station near Hugo, Minnesota. (T.43). Part of the project called for the laying of a "forcemain" pipe to handle potential overflow from future rain events. (T.44). The project owner was Metropolitan Council Environmental Services. The prime contractor was Frontier Pipeline LLC. The Met Council contracted with Frontier to install the sewer pipe, which was to be a 28-inch high-density polyethylene pipe (*i.e.*, 28-inch exterior circumference, 22-inch interior). (T.45, 77). The project required manhole access at points where sections of pipe intersected. (T.46). Such access is accomplished

through “Forcemain Access Structures” (FAS), which are concrete vaults constructed below the surface, with manhole access at the surface. The project called for an FAS every 2600-3600 linear feet (*i.e.*, every one-half to two-thirds of a mile). (A.9). Frontier contracted with Respondent Engineering & Construction Innovations, Inc. (ECI) to build those structures.

The building of an FAS involves excavation of a pit from the surface to the pipe, which on this project was 30 or so feet below grade. The concrete vault is built in the pit. To prevent the pit walls from collapsing during excavation and construction, contractors drive “sheeting cofferdams” in a rectangle shape to form sheet walls around the pit for lateral support. (T. 55, 313-14). The sheets are driven separately but eventually interlock with each other. (T.314). In March 2006, ECI sub-contracted with Appellant L.H. Bolduc Co., Inc. to drive the sheeting cofferdams for the project at six FAS locations along the pipe. (ADD.8-9; A.1-8, A.9-11).

B. The ECI/Bolduc contract.

ECI drafted the ECI/Bolduc contract. (ADD.10; A.3). Specific to the sheeting cofferdams, the contract states that Bolduc was to drive them “per ECI location.” (ADD.9; A.2). As described in detail below, it is undisputed that ECI provided the template and the markings to designate where ECI wanted Bolduc to drive the sheeting cofferdams. (T.55, 127, 197-98, 316, 320-21, 323, 325).

The ECI-drafted contract also contained an indemnity-and-insurance provision:

9. INDEMNITY AND INSURANCE:

Subcontractor [Bolduc] agrees to protect, indemnify, defend, and hold harmless ECI and Owner, to the fullest extent permitted by law and to the extent of the insurance requirement below, from and against (a) all claims, causes of action, liabilities, obligations, demands, costs, and expenses arising out of injury to any persons or *damages to property caused or alleged to have been caused by any act or omission of Subcontractor*, its agents, employees or invitees, and (b) all damage, judgments, expenses, and attorney's fees *caused by any act or omission of Subcontractor* or anyone who performs work or services in the prosecution of the Subcontract. Subcontractor shall defend any and all suits brought against ECI or Owner on account of any such liability or claims of liability. Subcontractor agrees to procure and carry until the completion of the Subcontract, worker's compensation and such other insurance that specifically covers the indemnity obligations under this paragraph, from an insurance carrier which ECI finds financially sound and acceptable, and to name ECI as an additional insured on said policies . . .

(ADD.11; A.4) (emphasis added). Consistent with this requirement, Bolduc had obtained a Blanket Additional Insured endorsement on its Commercial General Liability insurance policy from Respondent Travelers Indemnity Company. (ADD.19; A.55).

C. . The liability coverage and its additional insured endorsement.

Travelers issued to Bolduc successive Commercial General Liability insurance policies for the policy periods October 1, 2006-07 and October 1, 2007-08. (A.12, A.114). Both included the following provisions:

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 . . .
“property damage” to which this insurance applies. . . .

(ADD.18; A.28, A.134) (emphasis in original).

SECTION V - DEFINITIONS

17. "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property . . .

(A.39, 42; A.145, 148) (emphasis in original). The policies also contained an identical Blanket Additional Insured (Contractors) Endorsement. The endorsement provided, in relevant part, as follows:

BLANKET ADDITIONAL INSURED (CONTRACTORS)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

1. WHO IS AN INSURED — (Section II) is amended to include any person or organization that you agree in a "written contract requiring insurance" to include as an additional insured on this Coverage Part, but:
 - a) Only with respect to *liability* for "bodily injury", "property Damage" or "personal injury"; and
 - b) If, and *only to the extent that, the injury or damage is caused by acts or omissions of you or your subcontractor* in the performance of "your work" to which the "written contract requiring insurance" applies. The person or organization does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization.

(ADD.19, 21; A.55, A.161) (emphasis added).

D. Damage occurs during the driving of sheeting cofferdams.

The damage giving rise to this dispute occurred at FAS-1. Despite its designated number, FAS-1 was in fact the last of the six access structures for which Bolduc drove sheeting cofferdams. (T.119). As mentioned, the parties' contract required ECI to provide Bolduc with the information necessary to drive the sheets without damaging the below-surface pipe. (ADD,9; A.2; T.55, 316). ECI started the identification process by deciding where the cofferdam pit would be located. (T.53). In this case, the pit was to be located in the middle of a residential street. (T.52). After identifying and orienting the pit's location, ECI sub-cut the area by stripping the asphalt and digging down about four feet. (T.53, 64). It then seated a driving template (a.k.a. "waler") into the sub-cut. (Id.). The template established the shape, size, and location for the sheeting. (T.320). Bolduc was expected to drive the sheets around the template. (T.127, 320-21). In addition, ECI twice marked the template with the letter "S" to inform Bolduc where it should consider the center of the below-grade pipe to be. (T.197-98, 323, 325). ECI understood that Bolduc would rely on the "S" markings when driving the sheets. (T.198).

ECI did not follow the same procedure at FAS-1 as it had at the previous five locations. At each of the prior pit locations, ECI had used "mouchettes" to confirm the accuracy of the surveys showing the underground pipe locations. (T.321-22). Mouchettes are small cylinders whose primary use is to inject grout into spaces at depths many feet below the surface. (T.58-59). They can also be used, however, to physically confirm the location of a pipe below the surface. (T.66). Mouchettes proved

very useful at a prior FAS on this project when the Bolduc crew discovered that the pipe at FAS-6 was about five feet from where the survey had shown it to be. (T.65, 124, 317). The Bolduc crew identified the problem for ECI. (T.318). ECI personnel then located the pipe by using mouchettes. (T.319).

As mentioned, ECI used mouchettes to confirm the pipe location at each of the five prior FAS sites on this project. (T.321-22). When the Bolduc crew foreman discovered that ECI had not used mouchettes at FAS-1, he objected. (T.325). Bolduc believed that use of mouchettes was the only way to confidently locate the pipe. (T.331). In fact, in response to the question whether mouchettes are “the most accurate way to accomplish” the location of an underground pipe, ECI’s own crew supervisor testified “I don’t know how else to, you know, I would do it, I guess.” (T.303). And accuracy was important because everyone knew there was a small margin of error in this location. (T.59-60, 62, 110). Nevertheless, when Bolduc objected, ECI responded that “they were confident that the surveyor’s marks were accurate and that was all the location we were going to get and we should proceed.” (Id.).

Bolduc proceeded as instructed. All parties agree that one of Bolduc’s sheets struck the pipe, causing damage. The Bolduc crew foreman testified that the “S” markings on the waler at FAS-1 turned out to be inaccurate by more than a foot. (T.333).

E. ECI fixes the damaged pipe.

Frontier demanded that ECI repair the pipe at peril of a contractual liquidated-damage clause. (T.50). ECI did so at a claimed cost of about \$235,000. (A.217).

ECI's insurer, Western National, denied coverage for ECI's pipeline repair costs. (A.236-37). ECI also sought coverage from Travelers, contending that Bolduc "mistakenly and negligently drove its sheeting into and damaged [the pipeline] . . . at FAS-1." (A.217, 240). Travelers denied coverage to ECI on the ground that because Bolduc was not at fault for the damage, ECI was not entitled to coverage as an "additional insured." (A.227, 230).

F. ECI sues Bolduc, Travelers, and Western National.

ECI commenced suit against Bolduc and Travelers in 2008. ECI alleged that the pipe damage occurred as a result of Bolduc's fault. (A.217-18). ECI further alleged that Bolduc breached the parties' contract by failing to indemnify ECI for the cost of repair. (Id.). Bolduc counterclaimed for the unpaid monies ECI had failed to pay for Bolduc's services. (A.245).

ECI alleged that Travelers had breached the insurance contract by refusing to provide liability coverage to ECI, as an additional insured, for the pipe damage. (A.218-19). Travelers denied the allegations and asserted a counterclaim for declaratory judgment. (A.228-231).

ECI separately sued Western National seeking to recover the pipeline repair costs. (Ramsey Cty. Case # 62-CV-09-10134). ECI and Western National settled that case in July 2010. (A.259-261).

G. A jury finds that Bolduc was not at fault and that ECI sustained no loss.

The district court bifurcated ECI's claims because judicial economy would be best served by first resolving "the factual issue of who is responsible for causing the damage to the pipeline." (A.252). In March 2010, ECI and Bolduc tried the fault and damages issues to a jury. (A.253-256). Based upon the parties' agreed-upon verdict form, the jury's special verdict resolved the issues as follows: "Was [Bolduc] negligent? Answer: No."¹ "What sum of money will fairly compensate [ECI] for its loss resulting from damage to the pipe? Answer: \$0." (ADD.16-17; A.257-58). ECI has never challenged the jury's findings, and they remain the legally established and binding facts.

H. The district court orders summary judgment for Travelers and Bolduc.

Following the trial, Travelers and Bolduc made motions for summary judgment. (ADD.1-3). The district court ruled that Bolduc's contractual indemnity obligation extended only to acts or omissions giving rise to its liability, and that Travelers' additional insured endorsement extended coverage to ECI only to the extent of Bolduc's fault. (ADD.1-7). Because the jury rejected ECI's claim that Bolduc was at fault for the pipeline damage, the district court ordered summary judgment for both Travelers and Bolduc. (ADD.7). The court of appeals reversed. (A.262).

¹ Given this "no" answer, the verdict instructed the jury to skip ahead to the damages question. (ADD.16-17; A.257-58). Therefore, the jury did not answer the specific question directed at ECI's fault. (ADD.16; A.257).

ARGUMENT

I. Standard of review.

A de novo standard of review applies to a district court's order granting summary judgment. *Day Masonry v. Indep. Sch. Dist.* 347, 781 N.W.2d 321, 325 (Minn. 2010).

This court will affirm summary judgment "if no genuine issues of material fact exist and if the court below properly applied the law." *Id.* at 325-26. This court must affirm a district court's order granting summary judgment if it can be sustained on any grounds.

See Brecht v. Schramm, 266 N.W.2d 514, 520 (Minn. 1978) ("If the trial court arrives at a correct decision, that decision should not be overturned regardless of the theory upon which it is based.").

In addition, this court's review of the lower courts' legal conclusions and insurance policy interpretation are questions of law subject to de novo review. *Leamington Co. v. Nonprofits' Ins. Ass'n*, 615 N.W.2d 349, 353 (Minn. 2000). The construction of a contract, including an indemnification provision, is generally a question of law. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979); *see Nat'l Hydro Sys., a Div. of McNish Corp. v. M.A. Mortenson Co.*, 507 N.W.2d 27, 28 (Minn. App. 1993) ("The construction and effect of a contract, including the meaning of an indemnification clause, are generally questions of law.") (citing *Turner*, 276 N.W.2d at 66), *affirmed* 529 N.W.2d 690 (Minn. 1995).

II. The district court correctly ruled that the Travelers policy provides no coverage to ECI, as an additional insured, for the cost ECI incurred to repair the underground pipe.

A. Given the jury's binding verdict, ECI's legal obligation to pay, if any, could only be grounded in its own independent acts or omissions, for which it does not qualify as an additional insured.

The foundation for all liability-insurance indemnity agreements is the requirement that the insured be legally obligated to pay covered damages. One who is not an "insured" is not entitled to coverage. *See, e.g., Lott v. State Farm Fire & Cas. Co.*, 541 N.W.2d 304, 308 (Minn. 1995) (holding that person claiming coverage was not an "insured," and that coverage was therefore inapplicable as matter of law). Nor must an insurer provide indemnity for damages the insured is not legally obligated to pay. *See, e.g., Hi-Port, Inc. v. Am. Intern. Specialty Lines Ins. Co.*, 22 F. Supp.2d 596, 601-02 (S.D. Tex. 1997), *aff'd*, 162 F.3d 93 (5th Cir. 1998) (holding that CGL insurer owed no duty to indemnify insured for a voluntary payment it made). The very first provision in Travelers' Insuring Agreement reflects these foundational concepts: "We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies. . . ." (ADD.18; A.28, A.134).

In this case, Bolduc is the "named insured," but the jury's verdict means that it has no legal obligation to pay for the damaged pipe. (ADD.16-21; A.28, 55, 134, 161; A.257-58). Bolduc did, however, agree in its construction contract to have ECI added as an additional insured to Bolduc's liability policy with Travelers. (ADD.11; A.4). Bolduc met that requirement. Travelers' Additional Insured Endorsement, in turn, provides that the "Who Is An Insured" provision is amended to include any

organization that Bolduc agreed by written contract to include as an additional insured. (ADD.19, 21; A.55, 161). But Travelers did not agree that ECI's status as an additional insured would be unconditional. First, the endorsement provides that ECI is an additional insured only "with respect to liability for . . . 'property damage'" (*i.e.*, only with respect to liability for covered damages). (*Id.*). Second, it provides that ECI is an additional insured "if, and only to the extent that, the injury or damage is caused by the acts or omissions of [Bolduc]." (*Id.*). Third, it provides that ECI is not an additional insured "with respect to the independent acts or omissions of [ECI]." (*Id.*).

Applying these provisions starts with the fact that ECI incurred the disputed costs voluntarily, at the behest of Frontier, without establishing anyone's legal obligation to pay. ECI had its business reasons for incurring those costs in that manner, but that fact neither expands Travelers' coverage nor lessens ECI's burden, as a putative insured, to establish a right to coverage. *See SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 313 (Minn.1995) (recognizing that insured has the burden to establish a prima facie case that the claim is within the terms of coverage); *Boedigheimer v. Taylor*, 287 Minn. 323, 329, 178 N.W.2d 610, 614 (1970) ("It is axiomatic that the burden of proof rests upon the party claiming coverage under an insurance policy."). Regardless of the order in which it chose to proceed, ECI can seek to be an "insured" only with respect to its own legal obligation to pay. (ADD.18; A.28, A.134) (providing that "[w]e will pay those sums that the *insured* becomes legally obligated to pay as damages because of . . . 'property damage'") (emphasis added). And liability does not exist in the abstract. Liability arises directly, by one's own actions constituting fault, or

it is imputed by the actions of others constituting fault. *See* Minn. Stat. § 604.02 (establishing the parameters of joint liability when two or more persons are liable for the same damage); *Nadeau v. Melin*, 260 Minn. 369, 376-77, 110 N.W.2d 29, 34-35 (1961) (discussing imputed liability that is “based on a relationship between the parties”). In this case, it is now established that ECI was not liable for Bolduc’s actions under any theory of Minnesota law, because a jury concluded that Bolduc was not at fault for the damage.² ECI has never challenged the jury’s findings, and they are binding as the established and undisputed facts. *See Orwick v. Belshan*, 304 Minn. 338, 343, 231 N.W.2d 90, 94 (1975) (“We have held that the findings of a jury under a special verdict are binding on the court.”). Under those established facts, ECI can never establish that even one percent of its liability for the damaged pipe was caused by Bolduc’s acts or omissions. Therefore, to the extent ECI was legally obligated to pay at all, it was on the basis of its own independent actions in failing to use mouchettes and in failing to accurately mark the pipe location on the waler. And the Travelers’ policy could not more clearly state that ECI “does not qualify as an additional insured with respect to the independent acts or omissions of [ECI].” (ADD.19, 21; A.55, A.161).

² Had the jury found *both* ECI and Bolduc at fault — and assigned percentages of fault to each — then the additional insured endorsement would have provided *indemnity* coverage to ECI, “but only to the extent that [] the damage [was] caused by acts or omissions of [the named insured, Bolduc],” that is, only to the extent that the jury had assigned a percentage of fault to Bolduc. Because that percentage is necessarily zero in this case, there is no coverage. As for any potential defense obligation, see note 4, *supra*.

Perhaps a ruling in this case would be less complicated had Bolduc and ECI obtained a specific finding of ECI's fault, but ECI bore the burden of establishing coverage by showing its legal obligation to pay on a basis that qualified it to be an additional insured. *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d at 313.³ The jury's verdict foreclosed that possibility because it left only ECI's independent acts or omissions as a basis for its potential liability. Under the unambiguous terms of Traveler's additional insured endorsement, ECI is not an insured for such liability. As a matter of law, therefore, Travelers has no duty to indemnify ECI for the costs it incurred in repairing the damaged pipeline. The court of appeals' contrary ruling must be reversed and the district court's order and judgment reinstated.

B. The Additional Insured Endorsement unambiguously applies to make ECI an additional insured only to the extent that the named insured, Bolduc, was at fault for the damage. Because Bolduc was not at fault, ECI is not an additional insured.

ECI qualifies as an additional insured “[i]f, and only to the extent that, the injury or damage is caused by acts or omissions of [Bolduc].” (ADD.19, 21; A.55, A.161). The court of appeals ruled that the limitation “caused by acts or omissions of [Bolduc]”

³ ECI argued below that a second trial is needed to determine whether Bolduc breached its contract by failing to drive the sheets “in a workmanlike manner.” (T.21). But Bolduc had only a single source of duty – the contract. *See D & A Dev. Co. v. Butler*, 357 N.W.2d 156, 158 (Minn. App. 1984) (“[T]he duties between the parties here arose out of the contract. WBC had a contractual duty to complete the architectural plans by the date agreed upon; that duty was created by its promise, not by law or by public policy. Apart from the contract, WBC had no duty to complete the plans at all.”). Under Minnesota law, the *contract* defines the extent of the duty to use reasonable care. *Moundsview Indep. Sch. Dist. No. 629 v. Buetow & Assocs., Inc.*, 253 N.W.2d 836, 839 (Minn. 1977). ECI is not entitled to a second trial at which it would use different terminology to argue that Bolduc breached its duty to drive the sheets in accordance with industry standards, the precise duty adjudicated in a trial that absolved Bolduc of fault.

requires no element of Bolduc's fault. (ADD.35) (stating that jury's verdict finding Bolduc not at fault "does not equate to a finding that Bolduc did not cause the damage to the pipeline"). The court's construction of this provision cannot be sustained under Minnesota law.

The court of appeals construed the disputed provision as though it were not part of a *liability* policy. Under Minnesota law, however, contract provisions "are not to be viewed in isolation." *Republic Nat'l Life Ins. Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349, 354 (Minn. 1979). *See also, Bobich v. Oja*, 258 Minn. 287, 294, 104 N.W.2d 19, 24 (1960) (stating that "[a] policy of insurance is within the application of general principles of the law of contracts"). Instead, a court must pursue the primary goal of all contract interpretation – ascertaining the intent of the parties – "not by a process of dissection in which words and phrases are isolated from their context, but rather from a process of synthesis in which the words and phrases are given meaning in accordance with the obvious purpose of the contract . . . as a whole." *Id.* (citations omitted). The purpose of a liability policy is to provide indemnity for the insured's legal obligation to pay covered damages. In that context, as applied to this case, the clause "damage . . . caused by acts or omissions of [Bolduc]" cannot reasonably be divorced from Bolduc's fault.

Only by dissecting the phrase "acts or omissions" and construing it in isolation could the appellate court apply the contextually absurd construction that the endorsement refers to any act or omission, regardless of fault. *See Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998) (stating that this court

“will not construe [contract] terms so as to lead to a harsh and absurd result”). The court reasoned that it could not construe the phrase differently because the endorsement does not include the term “*negligent acts or omissions.*” (ADD.35). But the law does not require the addition of superfluous words when the meaning is clear from both the words in the provision as it exists and from the overall context in which it appears. By the court of appeals’ reasoning, the endorsement would also have to state that it applies only to “acts or omissions of [Bolduc] *for which it owes a duty.*” But as with the addition of the term “negligent,” the addition of a term specifying the requirement of a duty would be superfluous. This is so because no one could reasonably conclude, for example, that the parties intended the endorsement to apply to any omission, regardless of whether Bolduc had any duty to act. Absurdly, then ECI could become an additional insured on the ground that Bolduc “omitted” to locate the pipe through the use of “mouchettes,” even though ECI itself undisputedly owed that duty. Or ECI could become an additional insured on the ground that Bolduc “omitted” to perform an independent survey to locate the pipe, even though a surveyor was under contract for that duty. When used in a liability-insurance policy, the phrase “damage . . . caused by acts or omissions” cannot be divorced from the duty to act or from the standard by which the duty to act is either discharged or breached (*i.e.*, by meeting the standard of care, or conversely, by committing negligence).

For purposes of Travelers’ *indemnity* obligation to a putative additional insured, the phrase “damage . . . caused by acts or omissions [of the named insured]” includes

only action or inaction that constitutes the named insured's fault.⁴ The court of appeals misapplied Minnesota law in construing the clause to the contrary. As a matter of law, when the jury found Bolduc not at fault, it found that the pipeline damage was not "caused by the acts or omissions of [Bolduc]." The jury plainly understood this when it answered "\$0" as the amount of ECI's resulting loss. (ADD.17; A.258). As a matter of law, the jury's verdict foreclosed ECI from satisfying the requirements for coverage as an additional insured.

The endorsement's companion clause only reinforces this conclusion. The companion clause states that ECI "does not qualify as an additional insured with respect to the independent acts or omissions of [ECI]." (ADD.19, 21; A.55, A.161). As seen, this clause also uses the phrase "acts or omissions." *See, e.g., Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("The maxim noscitur a sociis, [is] that a word is known by the company it keeps * * * ."). Just as in the immediately preceding clause, the term "negligent" is unnecessary to unambiguously convey that the term "acts or omissions" means actions or inactions constituting fault. As with its construction in the companion clause, construing the phrase "acts or omissions" as literally anything engaged in – or refrained from – would be unreasonable, absurd, and impermissible under Minnesota

⁴ An insurer's duty to defend is not at issue here. ECI voluntarily paid for the pipeline repair and then sued Bolduc and Travelers seeking to recoup its payment. Had both ECI and Bolduc been sued and *alleged* to be at fault, Travelers would have accepted a request to defend ECI. *See, e.g., Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 415 (Minn. 1997) (stating that duty to defend is broader than duty to indemnify). But had Bolduc later been adjudicated not at fault (as it was here), the result of Travelers' *indemnity* obligation would be the same – ECI would not be entitled to indemnity as an additional insured because the damage would not be "caused by the acts or omissions of [Bolduc]."

law. For purposes of Travelers' indemnity obligation to a putative additional insured, the term "acts or omissions," as it is used in both adjacent clauses, means action or inaction that constitutes fault. Any other construction is unreasonable.

Under Minnesota law, the court of appeals was supposed to examine the meaning, context, purpose, and intent of the disputed provision in light of the overall insurance contract. Instead, it examined the provision in isolation and out of its context. The obvious purpose of the additional insured endorsement was to provide liability coverage to ECI "if, and only to the extent that" ECI became legally obligated to pay as a result of Bolduc's fault. The jury's verdict foreclosed that because it left only ECI's independent acts or omissions as a basis for ECI's potential liability. Under the unambiguous terms of Traveler's additional insured endorsement, ECI is not an insured for such liability. The provisions in the additional insured endorsement work together and must be read together. The first provision extends additional insured status only to the extent that the additional insured becomes legally obligated to pay covered damages that were caused by the acts or omissions of the named insured. The second provision makes clear that the coverage does not apply to any legal obligation the putative additional insured may have to pay as a result of fault that is independent of the named insured's acts or omissions. The district court understood this and correctly ordered summary judgment for Travelers. The dissent in the court of appeals also understood this when it wrote that "[t]he jury's verdict made it clear that Bolduc's actions did not cause the damage to the pipeline. As a result, no additional named-insured coverage is available to ECI under a plain and simple application of the language

of the additional insured endorsement.” (ADD.41). The district court’s order and judgment should be reinstated.

C. Cases from other jurisdictions, and cases construing different policy language, support the district court’s ruling.

Travelers’ additional insured endorsement applies “[o]nly with respect to liability for . . . ‘property damage’ . . . and only to the extent that [] the . . . damage is caused by acts or omissions of [the named insured, Bolduc].” (ADD.19, 21; A.55, A.161). The Florida Supreme Court recently examined a similar clause, which extended additional insured coverage to a person or organization “with respect to liability because of acts or omissions of [the named insured].” *Garcia v. Federal Ins. Co.*, 969 So.2d 288, 289 (Fla. 2007). Focusing on the terms “with respect to” and “because of,” the court reasoned that “[w]hen considered in context, these words clearly indicate that an additional insured is only entitled to coverage *concerning* liability that is *caused by* or occurs *by reason of* acts or omissions of the named insured.” *Id.* at 292 (all emphasis in original). The court therefore concluded: “An additional insured’s liability thus must be *caused by* the acts or omissions – that is, the negligence – of the named insured.” *Id.* (emphasis in original). Plainly, when used in the context of a liability policy’s additional insured provision, the phrase “acts or omissions of [the named insured]” unambiguously refers to the named insured’s negligence, its fault. Therefore, when the additional insured (Garcia) sought indemnity from the named insured’s (Anderson) liability insurer for a settlement Garcia made with an injured plaintiff, Anderson’s additional insured coverage was inapplicable as a matter of law

because Garcia was not liable to the plaintiff on the basis of Anderson's negligence. *Id.*⁵

The identical analysis applies here. Bolduc's additional insured coverage is inapplicable as a matter of law because the jury's verdict makes certain that ECI had no liability for the damaged pipe that was based on Bolduc's fault. As was the court's holding in *Garcia*, the plain meaning of the additional insured endorsement permits no other outcome.⁶

The court of appeals overlooked *Garcia* and other cases that have construed additional insured provisions having limitations tied to the named insured's acts or omissions. Instead, the court relied on an Illinois case that it found "particularly

⁵ A Minnesota district court's recent citation to *Garcia* warrants a disclosure to this court. See *Nor-Son, Inc. v. Western Nat'l Mut. Ins. Co.*, No. 11-1331, 2011 WL 6149940 (Minn. Dist. Ct. Sept. 13, 2011) (A.262). As mentioned above, Western National is ECI's insurer. Although Western National denied coverage to ECI for the costs ECI incurred to repair the pipeline, it later settled that dispute by an agreement under which it retains a substantial monetary interest in the outcome of this case. (A.259-261). Western National's monetary interest in this case is relevant to the discussion because it prevailed in district court against Nor-Son, a company that claimed additional insured status under a Western National policy that contains a similar additional insured provision as the one at issue here. Western National prevailed on the basis of a construction of that endorsement as supported by the *Garcia* decision. 2011 WL 6149940, at 7 (A.268). *Nor-Son* is pending on appeal. Case No. A11-2016.

⁶ See also, *Consolidation Coal Co. v. Liberty Mut. Ins. Co.*, 406 F.Supp. 1292, 1294, 1298 (W.D. Pa. 1976) (construing an additional insured provision that applied "only with respect to acts or omissions of the named insured" and ruling the term "act or omission" to mean the negligence of the contractor, thus foreclosing additional insured coverage for one's own negligence) (and many cases cited therein); *Vulcan Materials Co. v. Casualty Ins. Co.*, 723 F.Supp. 1263 (N.D. Ill. 1989) (construing an additional insured provision that applied "only with respect to his or its liability because of acts or omissions of an insured" and ruling that no coverage applied except to the extent of the named insured's fault).

instructive.” (ADD.34) (citing *J.A. Jones Constr. Co. v. Hartford Fire Ins. Co.*, 645 N.E.2d 980 (Ill. App. 1995)). But the provision at issue in *J.A. Jones* is not even arguably similar to the one here. That case also involved a subcontractor’s agreement to provide insurance, but the corresponding clause in the subcontractor’s liability policy broadly extended to the general contractor additional insured coverage “with respect to [the named insured’s] operations, [the named insured’s] ‘work’ or facilities owned or used by [the named insured].” *Id.* at 982. The provision had no other limitations. It did not even include the terms “with respect to liability;” “caused by; or “acts or omissions of [the named insured].” *Id.* Nor did it have a provision expressly precluding additional insured status “with respect to the independent acts or omissions” of the putative additional insured. *Id.* Given the patently material differences in the policy language, the Illinois appellate court’s ruling that the additional insured was entitled to coverage for its independent fault is of no value in resolving this case.

The same is true of cases where the additional insured provision extends to liability “arising out of” the named insured’s operations. See *Youngquist v. Cincinnati Ins. Co.*, 625 N.W.2d 178 (Minn. App. 2001). As the court of appeals noted in *Youngquist*, the term “arising out of” has a broad application that applies beyond the notion of proximate cause. *Id.* at 183-84. Under Minnesota law, only a “but for” relationship need be established when the term “arising out of” applies. *Id.* (citing *Faber v. Roelofs*, 311 Minn. 428, 436, 250 N.W.2d 817, 822 (1977)). Here, ECI argues for the application of a “but for” construction, but not only is the term “arising out of” missing, the phrase “caused by acts or omissions of [Bolduc]” applies instead. A jury has

determined that the damage was not caused by Bolduc's acts or omissions, and that finding forecloses coverage under the additional insured provision for ECI.

D. The jury's finding of \$0 as ECI's "loss resulting from damage to the pipe" precludes indemnity coverage.

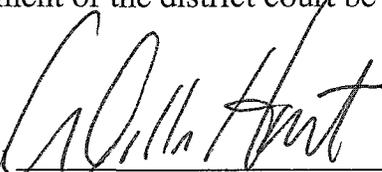
The jury concluded that ECI did not suffer loss. (ADD.17; A. 258). The district court instructed the jury that in answering this question, it should consider what sum of money would fairly compensate "a person who has been harmed." (T.405). Granted, ECI expended money and resources to repair the pipe – although the evidence at trial showed that the amount ECI claimed was badly inflated – but the jury plainly concluded that those expenditures did not constitute harm, perhaps because the evidence strongly supported the conclusion that the repair was ECI's own responsibility. Regardless, ECI did not move to set aside the damages verdict, nor has it challenged the verdict on appeal. The jury's verdict is binding, and it leaves nothing for which ECI could seek indemnity coverage from Travelers. *Orwick*, 304 Minn. at 343, 231 N.W.2d at 94 (stating that jury's special verdict is binding). Having suffered no loss, ECI has nothing for which it can claim a right to indemnity coverage. Regardless of the outcome on the coverage issue itself, the district court's order and judgment must be affirmed on this basis.

CONCLUSION

Travelers Indemnity Company respectfully requests that the court of appeals decision be reversed and that the order and judgment of the district court be reinstated.⁷

Respectfully submitted,

Dated: January 6, 2012

By 

William M. Hart, No. 150526
Charles E. Spevacek, No. 126044
Damon L. Highly, No. 0300044
Meagher & Geer, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
Telephone: (612) 338-0661

and

Daniel A. Haws, No. 193501
Stacy E. Ertz, No. 0267181
John Paul J. Gatto, No. 0387730
Murnane Brandt
30 East Seventh Street, Suite 3200
St. Paul, MN 55101
Telephone: (651) 227-9411

**Counsel for Appellant The Travelers
Indemnity Company of Connecticut**

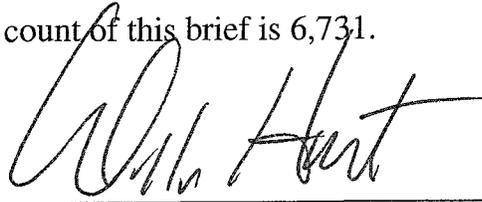
8168151.1

⁷ Travelers' additional insured endorsement provides that coverage thereunder "is excess over any valid and collectible 'other insurance' whether primary, excess contingent or on any other basis, that is available to the additional insured for a loss we cover under this endorsement." (ADD.19, 21; A.55, A.161). The district court did not consider the effect of this provision because it correctly held that Travelers does not provide coverage under the endorsement. Consistent with this court's admonitions, therefore, in the event of an affirmance, Travelers requests a remand to the district court to determine the priority of coverages. *Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assoc.*, 418 N.W.2d 173, 175 (Minn. 1988) (stating that a party may protect itself from a wayward mandate by expressly seeking remand of issues undecided in the district court).

FORM AND LENGTH CERTIFICATION

This brief was drafted using Word 2002. The font is Times New Roman, proportional 13-point font, which includes serifs. The word count of this brief is 6,731.

Dated: January 6, 2012

A handwritten signature in black ink, appearing to read "William M. Hart". The signature is written in a cursive style with a horizontal line extending from the end of the name.

William M. Hart, No. 150526
Charles E. Spevacek, No. 126044
Damon L. Highly, No. 0300044