

NO. A11-159

State of Minnesota
In Supreme Court

Engineering and Construction Innovations, Inc.,
Respondent,

vs.

L.H. Bolduc Co., Inc.,
Appellant,
The Travelers Indemnity Company of Connecticut,
Appellant.

**RESPONDENT ENGINEERING AND CONSTRUCTION
INNOVATIONS, INC.'S RESPONSE BRIEF AND APPENDIX TO
L.H. BOLDUC CO., INC.**

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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).

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III. STATEMENT OF THE LEGAL ISSUE

Is the indemnity and insurance agreement (“Indemnity and Insurance Agreement”) that was bargained for, paid for and included in the construction subcontract between ECI and Bolduc enforceable under Minn. Stat. §§ 337.02(1) and 337.05, subd. 1, where Bolduc (a) agreed to indemnify ECI for "all claims, ...liabilities, obligations, demands, costs, and expenses arising out of... damages to property caused or alleged to have been caused by any act or omission of [Bolduc]" and (b) agreed to obtain insurance to cover its indemnity obligations, where Bolduc admittedly damaged property while performing its work under the Subcontract?

The Court of Appeals held that the Indemnity and Insurance Agreement was enforceable under well-established principles of Minnesota law including Minn. Stat. §§ 337.02 and 337.05; *Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473 (Minn. 1992); *Katzner v. Kelleher Constr.*, 545 N.W.2d 378 (Minn. 1996); and *Hurlburt v. N. States Power Co.*, 549 N.W.2d 919 (Minn. 1996), and that the language of the Indemnity and Insurance Agreement requires Bolduc to indemnify and insure ECI for the damage Bolduc admittedly caused, even though Bolduc was not negligent, because the Indemnity and Insurance Agreement to which Bolduc agreed was not expressly limited to only Bolduc’s negligent acts.

Apposite Cases:

Holmes v. Watson-Forsberg Co., 488 N.W.2d 473 (Minn. 1992).

Hurlburt v. Northern States Power Co., 549 N.W.2d 919 (Minn. 1996).

Van Vickle v. C. W. Scheurer and Sons, Inc., 556 N.W.2d 238 (Minn. App.1996).

Katzner v. Kelleher Constr., 545 N.W.2d 378 (Minn. 1996).

Apposite Statutes:

Minn. Stat. §337.02

Minn. Stat. §337.05

IV. STATEMENT OF THE CASE AND FACTS

This case involves a claim by ECI for promised contractual indemnification and promised insurance coverage. ECI, a subcontractor to prime contractor, Frontier Pipeline, LLC (“Frontier”) on a sewer pipeline project, entered into a sub-subcontract (the “Sub-subcontract”) with Bolduc to drive sheetpiling at the project. *Add.35*. All parties agree that “the pipeline was damaged by Bolduc’s act when it drove a sheet into the pipe.” *App. Bolduc’s Brief at p.11*. After Bolduc and its insurer, The Travelers Indemnity Co. of Connecticut (“Travelers”), refused to act, ECI spent \$233,365.65 to repair Bolduc’s damage to the pipeline (the “Pipe”) and then sought indemnity and insurance coverage from Bolduc under the insurance and indemnity agreement (the “Indemnity and Insurance Agreement”) of the Sub-subcontract. *Add.4*.

Under the Indemnity and Insurance Agreement, Bolduc agreed to (1) indemnify ECI for "all claims, causes of action, liabilities, obligations, demands, costs, and expenses arising out of...damages to property caused or alleged to have been caused by any act or omission of [Bolduc], ..." and (2) obtain insurance to cover its indemnity obligations. *A. Add.38*. The Sub-subcontract also required that Bolduc name ECI as an “additional insured” on its general liability insurance policy. Bolduc obtained insurance from Travelers, including an additional insured endorsement (the “Endorsement”) that provides coverage to ECI as an additional insured for property damage “...caused by acts or omissions of [Bolduc]...in the performance of ...[Bolduc’s] work”. *A.88-9*. After Bolduc and Travelers refused to honor the Indemnity and Insurance Agreement and

Endorsement, respectively, ECI sued Bolduc for negligence and breach of contract and Travelers for breach of contract and a declaration of coverage. *Add.4.*

Prior to trial, the parties bifurcated the negligence and contract claims and formally stipulated that the jury would decide only the negligence claims: *specifically*, whether Bolduc was negligent in damaging the Pipe; whether ECI's negligence resulted in damage to the Pipe; and the amount of damages owed to ECI for Bolduc's negligence. *Id.*; *A.33.* The breach of contract claims against Bolduc and Travelers were "preserved in full" for resolution by the district court post-trial, "including but not limited to ECI's claim that Bolduc breached its obligation to defend and indemnify ECI and obtain insurance to protect ECI." *A.33.* At trial, **the jury did not find that ECI was negligent.** *Add.28.* The jury also did not find that Bolduc was negligent or, accordingly, award ECI any damages for Bolduc's negligence. *Add.27.*

Post-trial, the Honorable Gregg E. Johnson of Ramsey County District Court, granted summary judgment to Bolduc and Travelers on ECI's contract claims and the declaratory judgment claim by unilaterally: (a) re-writing the Indemnity and Insurance Agreement to replace "any acts or omissions" with "negligent acts or omissions" and (b) imposing a finding of negligence upon ECI after the jury had declined to do so. *Add.20.* Judge Johnson held that the Indemnity and Insurance Agreement was unenforceable under Minn. Stat. §§ 337.02 and 337.05 because Bolduc was not negligent and Bolduc was not obligated to indemnify or insure ECI "for ECI's own negligence." *Add.25.* Judge Johnson also held that Travelers did not have any duty to indemnify ECI because the

Endorsement did not cover "...damage caused by the independent acts or omissions of ECI." *Add.26.*

ECI appealed. The Court of Appeals reversed, concluding that the Indemnity and Insurance Agreement was enforceable and that the plain language of the Indemnity and Insurance Agreement and undisputed facts of the case required Bolduc to indemnify and insure ECI for the damage done by Bolduc to the Pipe. *Add.1-19.*

The Court determined that the language in the Indemnity and Insurance Agreement was materially similar to that in *Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473, and, thus, enforceable under §§ 337.02 and 337.05, whereby "a subcontractor agrees both to indemnify for another's negligence and insure that risk." *Add.9-12.* The Court of Appeals then applied the Indemnity and Insurance Agreement's plain language and, because the Indemnity and Insurance Agreement expressly required insurance and indemnification for "any act" of Bolduc that caused damage and refused to do what the trial court had done—*i.e.*, re-write the Indemnity and Insurance Agreement to limit Bolduc's indemnity and insurance obligations to only the "negligent" acts of Bolduc that damaged the Pipe. *Add.12.* The Court of Appeals concluded that Bolduc must indemnify and insure ECI for the damage Bolduc caused to the Pipe "without regard to fault". *Id.*

The Court of Appeals also concluded that the plain language of the Travelers' Endorsement provides coverage to ECI for the damage to the Pipe. *Id.* Travelers failed to expressly limit its coverage obligations in the Endorsement to only those damages caused by Bolduc's "negligent" acts, and the Court of Appeals refused to rewrite the

policy language as the trial court had done. *Add.13*. The Court of Appeals remanded the case to the trial court for further proceedings consistent with its decision. *Add.15*.

Bolduc¹ then petitioned this Court for review of a single focused issue: Whether the Indemnity and Insurance Agreement that requires Bolduc to indemnify and insure ECI “only with regard to damages ‘caused or alleged to have been caused by an ‘act or omission’” of Bolduc is enforceable under Minn. Stat. §§ 337.02(1) and 337.05, subd. 1, “‘without regard to fault’ for construction-related property damage?” This Court granted review of that issue. Yet now, Bolduc seeks to rehash each and every argument it made at the trial court *and* the Court of Appeals rather than simply address the Indemnity and Insurance Agreement’s enforceability.

ECI requests that this Court affirm the decision of the Court of Appeals and remand the case to the trial court for determination of the amount of contractual damages to which ECI is entitled for Bolduc’s (and Travelers’) breaches of contract.

A. The Material Facts.

There are four undisputed facts material to this appeal: 1) Bolduc’s act of driving sheetpiling at the jobsite damaged the Pipe. *App. Bolduc’s Brief, pp. 7, 11 & 46*) under the Indemnity and Insurance Agreement, Bolduc agreed to indemnify and hold harmless ECI for “damages to property caused or alleged to have been caused by any act or omission of [Bolduc]” and agreed to procure insurance to insure its indemnity obligations *Add.38*; Bolduc agreed to the terms of the Sub-subcontract (*Add.42*); and 4) there has

¹ Travelers also petitioned for review, and its petition was granted.

never been a finding that ECI was negligent. *Add.28*. Based on these facts alone, the Court of Appeals decision should be affirmed.

B. The Project.

The Metropolitan Council Environmental Services (“Met Council”) hired Frontier Pipeline, LLC (“Frontier”) as the prime contractor on a construction project for the installation of a new underground sewer pipeline in Hugo and White Bear Township, Minnesota. *Trial Exhibit (“Ex.”) 2; Trial Transcript (“T”).43-4*. Frontier installed the 28-inch high density polyethylene (“HDPE”) sewer pipe (the “Pipe”) in a number of “runs” (typically several hundred feet in length) using a directional drilling process. *T.44*. Frontier subcontracted to ECI the construction of a number of Forcemain Access Structures (“FAS”), underground concrete vaults where individual runs of the Pipe are connected together. *Ex. 1; T.46*. Paragraph 11 of Frontier’s subcontract with ECI provided for the assessment of liquidated damages for each day that completion of the Project was late. *Ex. 1*.

The Pipe was installed at a depth of approximately 25 feet, which required that the FAS be installed at a depth of approximately 30 feet. ECI needed a safe method to excavate the deep pits in which its construction would be performed without the danger of the walls collapsing. ECI ultimately decided to use “sheeted pits” and entered into the Sub-subcontract agreement with Bolduc, a specialized sheeting subcontractor, to build “cofferdams”, a shoring system created by driving metal sheeting into the ground to act

as walls for the sheeted pits during excavation and construction.² *Ex. 2; T.54.* Bolduc's job was to select the size and shape of its sheeting and then use its large vibratory pile driving equipment to drive each piece of sheeting to a particular depth in the ground near the Pipe. *T.384-5.* Bolduc was not supposed to hit the Pipe with its sheeting at this particular location.

After Frontier installed the Pipe, Frontier's surveyor provided the locations of the Pipe for the placement of the FAS and the related cofferdams. *T.51-2,60.* The information from Frontier's surveyor was communicated to Bolduc at an onsite meeting. *T.55,61- 63.*

C. The Performance of Work Agreement.

Under the Sub-subcontract, Bolduc promised to:

...at all times, supply tools, equipment, workers, materials and supplies of sufficient number and quality to prosecute the work efficiently, **properly** and promptly, in accordance with the terms of the General Contract [and]... **No advice, recommendations or assistance that representatives of the Owner or ECI may give to...[Bolduc] shall operate to relieve...[Bolduc] from complete responsibility** for such work as an independent contractor.

(the "Performance of Work Agreement") (emphasis added) *Add.37.*

D. The Indemnity and Insurance Agreement.

Bolduc also promised under the Sub-subcontract to indemnify and insure ECI:

[Bolduc] agrees to protect, indemnify, defend, and hold harmless ECI and Owner, to the fullest extent of the insurance requirements below, from and

² Bolduc's allegation that ECI "erroneously filled the north end of the pipe with grout" as part of this process (*App. Bolduc's Brief p. 15*) is not only untrue, constituting a gross misrepresentation of the actual facts to this Court in violation of Rule 11 of the Minnesota Rules of Civil Procedure, but it is completely irrelevant to the undisputed damage at issue in this case and for which Bolduc is responsible.

against (a) all claims, causes of action, liabilities, obligations, demands, costs, and expenses arising out of ...damages to property caused or alleged to have been caused by any act or omission of [Bolduc], its agents, employees or invitees, and (b) all damages, judgments, expenses, and attorney's fees caused by any act or omission of [Bolduc] or anyone who performs work or services in the prosecution of the Subcontract.

[Bolduc] shall defend any and all suits brought against ECI or Owner on account of any such liability or claims of liability. [Bolduc] agrees to procure and carry until the completion of the Subcontract...such...insurance that specifically covers the indemnity obligations under this paragraph...**and to name ECI as an additional insured on said policies:**

General Liability, with Contractual Liability Coverage-

\$1,000,000.....Bodily Injury and Property Damage,
combined single limit

\$500,000.....Any one person or occurrence;

Subcontractor agrees to obtain, maintain and pay for such insurance coverage and endorsements as will insure the indemnity provisions and coverage limits above and to furnish ECI certificates of insurance evidencing the aforementioned coverage.

A.38 (emphasis original).

E. The Insurance Coverage.

Bolduc obtained commercial general liability ("CGL") insurance coverage from Travelers under two policies, Policy Number DT-CO-9203B020-TCT-07 and Policy Number DT-CO-9203B020-TIA-06 (the "Policies") which, for all points relevant herein, contained identical language and an identical Additional Insured (Contractors)

Endorsement (the “Endorsement”) under which ECI is an additional insured for the Project.³ A.76-122.

F. The Damage.

In August of 2007, Bolduc was performing its work on the Project at one of the pits for the FAS structures (“FAS-1”). There is no dispute that Bolduc drove a piece of its sheetpiling into a section of the Pipe and damaged the Pipe. A.3. This photograph depicts the damage:



In December 2007, ECI discovered the damage. *Id.*; *Exs. 5(b) & 5(c)*. Frontier and the Met Council demanded that ECI repair Bolduc’s damage to the Pipe without delay in order to avoid liquidated damages being assessed under the terms of the General Contract. A.3; T.250; *Exs. 6 & 7*. Prior to any repairs, ECI advised Bolduc and Travelers

³ Complete copies of the Policies are included in the record as Exhibits 3 & 4 to the Affidavit of John Paul Gatto for Travelers’ Memorandum in Support of Summary Judgment.

of the damage and submitted a formal claim. *Ex. 11.* ECI then repaired Bolduc's damage at a cost of \$233,365.65. *A.3.*

ECI then sought reimbursement from Bolduc under the terms of the Sub-subcontract, including the Performance of Work Agreement and the Indemnity and Insurance Agreement. *Add.38; Ex. 11.* Bolduc refused to reimburse ECI. *T.94, 117, 382.* Travelers also denied coverage, alleging the Pipe was not damaged by Bolduc. *A.4; A.16.*

G. The Lawsuit.

In August 2008, ECI brought suit against Bolduc and Travelers, asserting claims of negligence and breach of contract against Bolduc and claims of breach of contract and declaratory judgment against Travelers for denying coverage. *A.1.* ECI's breach of contract claim against Bolduc addressed the Performance of Work Agreement and the Indemnity and Insurance Agreement:

Bolduc was obligated to properly perform its work, avoid damage to other property, and to defend and indemnify ECI from any and all claims, losses or liability relating to or arising out of the performance by Bolduc of its work on this Project... Bolduc breached its obligations to ECI under the Bolduc Subcontract by, among other things, failing to properly perform its work at FAS-1, damaging Frontier's pipe, and failing to indemnify ECI from the costs incurred by ECI in repairing the damage caused by Bolduc to Frontier's pipe.

A.4.

Bolduc and Travelers denied liability. *A.8; A.13.* Bolduc asserted a counterclaim for monetary damages. *A.11.* Travelers asserted a counterclaim for declaratory judgment. *A.20.*

H. The Stipulation.

The case was set for trial on March 8, 2010. A.33. Bolduc's counsel requested that the negligence claims and the contract claims be bifurcated at trial. On March 3, 2010, the Parties entered into a stipulation (the "Stipulation") agreeing that **only the negligence claims** would be decided at trial, specifically:

(a) ECI's claim that Bolduc's negligence resulted in damage to the pipe at FAS-1 on the Met Council Project, (b) Bolduc's defense that it was ECI's negligence that resulted in damage to the pipe, and (c) the amount of damages, if any, to which ECI is entitled if it prevails on its negligence claim.

ECI's claims against Bolduc for breach of contract (including but not limited to ECI's claim that Bolduc breached its obligation to defend and indemnify ECI and obtain insurance to protect ECI), and ECI's claims against Travelers, shall not be tried starting on March 8, 2010, but shall be preserved in full for determination or resolution by the Court at a later date. The parties agree that ECI is not waiving, relinquishing, releasing or impairing its claim against Bolduc for breach of contract and its claims against Travelers.

ECI's claims against Bolduc for breach of contract and ECI's claims against Travelers shall be resolved on cross-motions for summary judgment. If it is determined that there are disputed issues of material fact, these claims will be tried to the Court without a jury. The parties expressly waive their rights to have these claims tried to a jury.

Given the narrow focus of the trial beginning on March 8, 2010, it is agreed by the parties that Travelers and its counsel shall not participate in any way in the trial.

A.33-36.

I. The Negligence Trial.

The Negligence Trial began on March 8, 2010. *Id.* At trial, there was no dispute that Bolduc damaged the Pipe. *R.A.13.* However, conflicting evidence was presented as to who marked the location of the Pipe, as part of determining whether Bolduc used reasonable care in performing its work. *See T. generally.*

ECI presented evidence that Bolduc specializes in sheetpile driving operations, selected the size and shape of the sheet at issue, and then drove its sheetpiling and struck the Pipe. *T.86-92, 362-3, 366-70; Exs. 5(b)-(c).* ECI also presented evidence that Frontier's surveyor determined the Pipe locations. *T.51-52, 60.* The information supplied by Frontier was provided to Bolduc at an onsite meeting. *T.55, T.61- 63.* Bolduc testified that ECI was responsible for marking the Pipe's location. *T.316.*

Before jury deliberations, the trial court charged the jury, using *Civil Jury Instruction Guide* ("CIVJIG") 25.55: "The fact that an accident has happened does not by itself mean that someone was negligent." *R.A.79;* ECI and Bolduc agreed that this instruction was appropriate. *R.A.6-9.*

Also, Bolduc and ECI each submitted a Proposed Special Verdict Form. *R.A.1-5.* Bolduc's form proposed that the jury determine whether ECI was negligent **only if** the jury found Bolduc negligent. *R.A.4-5.* ECI's proposed form required the jury to determine whether ECI was negligent, regardless of whether Bolduc was found negligent. *R.A.1-3.* The trial court adopted Bolduc's proposed form (the "Verdict Form"). *Add.27.*

On March 10, 2010, the jury completed the Verdict Form. *Id.* In response to the question, “Was [Bolduc] negligent?”, the jury answered “No.” *Id.* The jury then properly declined to make any determination on ECI’s negligence. *Id.*

J. The Summary Judgment Motions.

After the Negligence Trial, all parties moved for summary judgment on the contract and declaratory judgment claims. *Add.21.*

Bolduc argued that the jury’s failure to find Bolduc negligent exonerated Bolduc from all of its contractual obligations under the Sub-subcontract. *R.A.10; MT.8-10.* Contrary to the Stipulation, Bolduc also claimed that ECI waived its breach of contract claims under the Performance of Work Agreement and the Indemnity and Insurance Agreement, by not trying these issues at the Negligence Trial. *R.A.10-22; MT.7-8.*

ECI responded that the Negligence Trial did not address the contract claims, including Bolduc’s breaching of the Indemnity and Insurance Agreement and the Performance of Work Agreement, which claims were “fully preserved” by the Stipulation. *R.A.23-30; T.25-28.* Moreover, the plain language of the Indemnity and Insurance Agreement required indemnity and insurance coverage for damages resulting from “any act” of Bolduc not merely negligent acts. *Id.; MT. 27, 33.* ECI requested summary judgment be granted in its favor or, if there was a question of material fact, set the matter on for a court trial as agreed in the Stipulation. *Id.; MT.27.*

Bolduc also argued that ECI was negligent, exonerating Bolduc from its indemnity obligations: “ECI contends that the indemnity and insurance obligations of the contract are triggered...in spite of the fact that the damage was caused by ECI’s own negligence.”

R.A.19. Also disregarding the evidence that Frontier’s surveyor provided the Pipe locates and CIVJIG 22.55, Bolduc argued: “The evidence presented to the jury offered two ‘causes’ for the pipeline damage: Bolduc’s negligence in driving the sheeting, and ECI’s negligence in supplying Bolduc with the incorrect location of the pipeline. Therefore, in continuing its quest for contractual indemnity from Bolduc in spite of the jury’s findings of ‘no negligence’, ECI in reality asks the court to find that its contract with Bolduc requires Bolduc to indemnify ECI for ECI’s own negligence.”⁴ *Id.*

At the Motion hearing, ECI correctly argued that the jury never found that ECI was negligent and “just because the jury found that Bolduc wasn’t negligent does not mean that ECI was...” *R.A.30.* Bolduc admitted that the jury did not decide ECI’s negligence: “In retrospect, perhaps we should have had the jury answer the questions about the fault of ECI at the time of trial.” *MT.10-11.* Judge Johnson replied, “I thought of that as I was reading these briefs.” *MT.10.*

K. The Summary Judgment Ruling.

Judge Johnson granted summary judgment to Bolduc (and Travelers), finding that Bolduc had no obligation to indemnify or insure ECI and that the Policies did not provide coverage to ECI for the damage. *Add.20-26.* Judge Johnson expressly adopted the Jury Verdict, where there is no finding that ECI is negligent, yet in direct conflict with the Jury Verdict, adopted Bolduc’ arguments that ECI’s negligence damaged the Pipe. *Add.2.*

⁴ Travelers made similar arguments. *R.A.31.*

1. ECI's Fictional Negligence.

The trial court ruled that the Indemnity and Insurance Agreement did not require indemnification for ECI's own negligence. *Id.* Minn. Stat. §337.02 requires that parties “remain responsible for their own negligent acts or omissions.” *Add.25 citing Katzner v. Kelleher Construction*, 545 N.W.2d 378 (Minn. 1996). The trial court further determined that Minn. Stat. § 337.05 was inapplicable because the Indemnity and Insurance Agreement “does not require Bolduc to obtain insurance coverage extending to ECI's own negligence.” *Id.*

2. Re-Writing the Sub-subcontract.

Despite agreement by all that Bolduc damaged the Pipe and that the four-corners of the Indemnity and Insurance Agreement require indemnification for “any act or omission of [Bolduc]”, Judge Johnson concluded that Bolduc only had a duty to indemnify ECI for Bolduc’s “negligent” acts or omissions. *Id.* Judge Johnson argued that the Indemnity and Insurance Agreement could “only be interpreted one way: ECI wanted Bolduc to indemnify, and insure, ECI with respect to acts of Bolduc’s own culpable negligence. To read it as requiring Bolduc to indemnify and insure ECI with respect to Bolduc’s ‘non-negligent’ acts would ask Bolduc to indemnify and insure ECI for its own negligence”, which the court erroneously found unlawful. *Id.*

Based on the verdict in the Negligence Trial, the trial court decided, as a matter of law, that “there was no breach of contract by Bolduc and no right to indemnification for ECI's own negligent acts that were not expressly covered by the contract.” Similarly, the

court determined that the Travelers' Policies did not provide coverage "for damage caused by the independent acts or omissions of ECI." *Id.*

L. ECI's Appeal.

ECI appealed. The Court of Appeals reversed, concluding that the Indemnity and Insurance Agreement was enforceable and that its plain language, applied to the undisputed facts, required Bolduc to indemnify and insure ECI for Bolduc's damage to the Pipe. *Add.1.*

1. The Indemnity and Insurance Agreement Is Enforceable.

The Court of Appeals determined that the language in the Indemnity and Insurance Agreement was similar to that in *Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473, and, therefore, enforceable under §§337.02 and 337.05, whereby "a subcontractor agrees both to indemnify for another's negligence and insure that risk." *Add.9-11.*

The trial court erred in concluding that §337.05 did not apply. *Id.* "Under its plain language, the statute applies when a subcontract sets forth or specifies the type of insurance required from the subcontractor." The Minnesota legislature enacted § 337.05, subd. 1 (2010) which allows one party to "provide specific insurance coverage for the benefit of others". *Id. citing* §337.05.

In doing so, the Legislature codified the "long-standing practice in the construction industry by which parties to a subcontract could agree that one party would purchase insurance that would protect 'others' involved in the performance of the construction contract". *Id. citing Holmes*, 488 N.W.2d at 475 and *Hurlburt*, 549 N.W.2d 919 (Minnesota Supreme Court acknowledged this practice is "customary").

Relying upon key caselaw, including *Holmes*, the Court of Appeals held that “the specific statutory language employed will determine whether there is an enforceable agreement to indemnify and insure another’s negligence” and noted that the language of the agreement in *Holmes* constituted an enforceable agreement. *Add.9-10*. The Court then concluded the Indemnity and Insurance Agreement was materially similar to *Holmes* and, as such, enforceable. *Id.*

2. The Indemnity and Insurance Agreement’s Plain Language Applies.

The Court of Appeals then applied the Indemnity and Insurance Agreement’s plain language and refused to do what the trial court had done—rewrite the Indemnity and Insurance Agreement’s requirement of indemnity for “any act” of Bolduc to any “negligent act” of Bolduc that damaged the Pipe. *Add.11-12*. The Court concluded Bolduc must indemnify and insure ECI for Bolduc’s damage to the Pipe "without regard to fault". *Id.*

The Court of Appeals also overruled Judge Johnson’s erroneous conclusion that the jury’s failure to find Bolduc negligent extinguished Bolduc’s contractual indemnity and insurance obligations. *Id.* “(S)uch an argument misconstrues that language of the contract. Under the language of the contract, Bolduc agreed to indemnify ECI from and against ‘all claims, causes of action, liabilities, obligations, demands, costs, and expenses arising out of...damages to property caused *or alleged to have been caused* by any act or omission of [Bolduc], its agents, employes or invitees’ and to carry insurance to cover such an obligation.” *Id.* (emphasis original). The plain language of the Indemnity and Insurance Agreement controls.

The Court similarly concluded that the plain language of the Travelers' Endorsement controls and provides coverage to ECI for Bolduc's damage to the Pipe. *Id.* The Court of Appeals remanded the case to the trial court for further proceedings consistent with its decision.

As for the dissent at the Court of Appeals, the mistaken assumption that ECI is negligent (contrary to the evidence at trial, the jury instructions, and the Jury Verdict), underpins Justice Connolly's position: "ECI is the only other party that could be negligent under the facts of this case. Therefore, Bolduc is being asked to indemnify ECI for its own negligence. This scenario is prohibited by statute." *Add.16.* Judge Connolly made the same mistake as Judge Johnson and, contrary to CIVJIG 25.55, erroneously concluded that if Bolduc was not negligent, then ECI must have been. *Id.*

V. ARGUMENT AND AUTHORITIES

A. The Court of Appeals' Decision Should Be Affirmed.

This Court should affirm the Court of Appeals decision. The undisputed unique facts of this case, the plain language of the Sub-subcontract (and the Endorsement), and deeply rooted principles of Minnesota construction law fully support that the Indemnity and Insurance Agreement is enforceable and that Bolduc must indemnify ECI for all damages arising from Bolduc's damage to the Pipe.

B. The Issues on Appeal Must Be Limited to Those Identified in Bolduc's Petition for Review.

Bolduc presents arguments that must not be considered by this Court, because the vast majority of Bolduc's arguments are unrelated to the single, focused issue presented in its Petition for Review.

A petition for review to this Court must specify all legal issues to be reviewed. Minn. R. Civ. App. P. 117, subd. 3(a). Generally, this Court does not address issues that were not specifically raised in the petition for review. *In re GlaxoSmithKline PLC*, 699 N.W.2d 749, 757 (Minn. 2005); *see also Northwest Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche*, 535 N.W.2d 612, 613 n.1 (Minn. 1995).

According to this Court, "Rule 117 not only provides a procedural mechanism by which a petitioner may seek further review of a court of appeals decision by this court, but the rule is designed to facilitate effective appellate review of that petition by imposing on the petitioner a burden of identifying and discussing all critical issues." *Hapka v. Paquin Farms*, 458 N.W.2d 683, 686 (Minn. 1990)(emphasis added). The "parties cast in the role of respondent are entitled to know [w]hat issues . . . will be raised and, more significantly, this court must be aware of the scope of the review requested." *Id.*

Here, Bolduc's Petition for Review identifies one, specific issue:

Is an indemnity and insurance provision in a subcontract agreement drafted by the promisee (Engineering and Construction Innovations, Inc.) which requires promisor (L.H. Buldoc Co., Inc.) to indemnify and insure the promisee only with regard to damages "caused or alleged to have been caused by an act or omission" of the promisor enforceable under Minn.

Stat. §§ 337.02(1) and 337.05, subd. 1, “without regard to fault” for construction-related property damage?

App. Pet. for Review, p. 1.

This single issue is the *only* issue properly before this Court. Yet, Bolduc does not even reach this argument until page 42 of its 54 page brief. In fact, in complete disregard for this Court and the Rules of Appellate Procedure, Bolduc attempts in its brief to reframe and expand the actual issue on appeal: “BASED ON THE APPLICATION OF MINNESOTA LAW, INCLUDING MINN. STAT. CHAPTER 337, AND AS APPLIED TO THE FACTS OF THE RECORD, WAS PETITIONER L.H. BOLDUC COMPANY, INC. (THE PROMISOR) ENTITLED TO SUMMARY JUDGMENT DISMISSAL OF THIS LAWSUIT BROUGHT AGAINST IT BY ECI?”

When compared to the issue identified in its Petition for Review, Bolduc takes an impermissibly bold step in broadening the issues now on review before this Court. Bolduc argues that this Court can reverse the Court of Appeals decision purely based on the jury findings adopted by the trial court. *App. Bolduc’s Brief, pp. 34-41.* Appellant expressly states “[b]ecause the construction of the Travelers insurance policies is before the Court . . . it is necessary for Bolduc to address alternative grounds that support the grant of summary judgment to Bolduc.” *Id.* at 34 . The utter disregard for the Rules of Appellate Procedure encompassed within this statement is shocking. Bolduc did not seek a complete review of all issues tangential to the summary judgment decision. Yet, now it asks this Court to do just that.

Bolduc attempts to muddy the proverbial waters with issues and arguments that are unrelated to the clear question raised in the Petition. As will be discussed below, these additional issues have no bearing on the interpretation and application of Minnesota Statutes §§ 337.02 and 337.05 and the terms if of the Sub-subcontract. Due to this and Bolduc's utter disregard for the Rules of Appellate Procedure, this court need not address these extraneous issues. Rather, the single issue to be addressed is the enforceability of the Indemnity and Insurance Agreement.

C. Standards of Review

1. Standard of Review for Summary Judgment.

On appeal from a grant of summary judgment, this Court must determine “whether any genuine issues of material fact exist and whether the district court erred in its application of the law.” *Van Vickle v. C. W. Scheurer and Sons, Inc.*, 556 N.W.2d 238, 241 (Minn. App. 1996)(*citation omitted*); *Offerdahl v. Univ. of Minn. Hosp. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). Questions of law are reviewed *de novo*. *Id.*; *Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984).

2. Standard of Review for Statute and Contract Interpretation.

Respondent ECI adopts Appellant Bolduc's standard of review for statute and contract interpretation. In addition, the rules governing the validity, requirements and construction of contracts apply to indemnity agreements. *Am. Druggists' Ins. Co. v. Shoppe*, 448 N.W.2d 103, 104 (Minn. App. 1989).

3. Minnesota Construction Law on Agreements to Indemnify and Insure.

The Court of Appeals decision comports with decades of Minnesota law. Minn. Stat. §§337.02 and 337.05 and their progeny govern the enforceability of agreements in construction contracts to indemnify and to procure insurance. In 1984, the Minnesota Legislature enacted § 337.02, which prohibits certain types of indemnity agreements in a construction contract:

An indemnification agreement contained in, or executed in connection with, a building and construction contract is unenforceable except to the extent that: (1) the underlying injury or damage is attributable to the negligent or otherwise wrongful act or omission, including breach of a specific contractual duty, of the promisor or the promisor's independent contractors, agents, employees, or delegates...(emphasis added).

Before 1984, contractors were able to contract with a subcontractor for indemnification from all claims, even claims arising from the contractor's own negligence, and routinely did so. *Johnson v. McGough Constr. Co.*, 294 N.W.2d 286, 287-88 (Minn.1980); *Katzner*, 545 N.W.2d at 381; *Mytty v. Johnson Constr., Inc.* No. C9-99-639, 1999 WL 768385 (Minn. App. Sept. 28, 1999) R.A.38. In this pre-1984 practice, the risk of bearing the financial burden for damage that occurred during the course of a construction project was shifted from an “upstream” party directly to a “downstream” party, such as from a general contractor to a subcontractor or from a subcontractor (like ECI) to a sub-subcontractor (like Bolduc). *See Id.*

Minn. Stat. § 337.02 restricts, but does not altogether prohibit, an upstream party’s ability to shift liability downstream. An indemnification agreement is enforceable if it provides indemnification for a promisor’s own negligence or otherwise wrongful act or

omission, including breach of a specific contractual duty. § 337.02; *Seifert v. Regents of the Univ. of Minn.*, 505 N.W.2d 83, 85 (Minn. App. 1993). Standing alone, § 337.02 “ensures that each party will remain responsible for its own negligent acts or omissions.” *Katzner*, 545 N.W.2d at 381; *citing Holmes*, 488 N.W.2d at 475.

Yet, as a practical matter, indemnity agreements in construction contracts customarily do not stand alone and, instead, are coupled with a complementary agreement to procure insurance for the protection of another. *Hurlburt*, 549 N.W.2d at 923; *Kuntz v. Park Constr. Co.*, No. A09-669, 2010 WL 346397 at *4 (Minn. App. Feb. 2, 2010) *R.A.29*.

In 1984, the Minnesota Legislature also enacted §337.05, which carves out an express exception to the general prohibitions of §337.02: “Agreements valid. Sections 337.01 to 337.05 do not affect the validity of agreements whereby a promisor agrees to provide specific insurance coverage for the benefit of others.

This Court has commented on the legislative intent underlying the combined impact of §§337.02 and 337.05:

In our view, the legislature both anticipated and approved the long-standing practice in the construction industry by which parties to a subcontract could agree that one party would purchase insurance that would protect ‘others’ involved in the performance of the construction contract. Such a risk allocation method is a practical response to problems inherent in the performance of a subcontract and, in instances where the risk of loss is one directly related to and arising out of the work performed under the subcontract, the parties are free to place the risk of loss upon an insurer by requiring one of the parties to insure against that risk.
Holmes, 488 N.W.2d at 474-5 *citation omitted*.

Read together, §337.02 and 337.05 make an indemnity agreement in a construction contract enforceable where a promisor agrees to indemnify for another's wrongdoing and to insure that risk. *Id.*; *Katzner*, 545 N.W.2d at 381; *Christensen v. Egan Cos. Inc.*, No. A09-1539, 2010 WL 2161822 (Minn. App. June 1, 2010) *RA.45*.

Through §337.05, the legislature approved of shifting the inherent risk of damage on a construction project from an upstream party (contractor) to a downstream party (subcontractor), but with the ultimate burden of financial responsibility (in the first instance) being redirected to the downstream party's insurer rather than being borne by the downstream party itself. *Hurlburt*, 549 N.W.2d at 923; *Van Vickle*, 556 N.W.2d at 241. "It is hardly a profound observation to comment that business as we know it could not exist without the ability to allocate certain risks to the insurance industry." *Hurlburt*, 549 N.W.2d at 923. "An indemnity agreement is, however, worth only as much as the indemnitor's financial ability to respond if called upon. Consequently it became customary to assure the availability of funds by requiring a subcontractor to procure and maintain contractual liability insurance to ensure the subcontractor's ability to carry out his undertaking to indemnify the general contractor." *Id.*

Since 1984, the Minnesota appellate courts have decided more than 30 cases involving §§337.02 and 337.05, providing clarity on the enforceability of construction contract indemnity and insurance agreements. Of these cases, this Court has issued opinions in four: *Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473; *Katzner v. Kelleher Construction*, 545 N.W.2d 378; *Hurlburt v. Northern States Power Co.*, 549 N.W.2d 919; and *Seward Housing Corp. v. Conroy Bros. Co.*, 573 N.W.2d 364 (Minn. 1998).

a. **The Plain Language of the Agreement Controls**

The rules governing the validity, requirements and construction of contracts apply to indemnity agreements. *Am. Druggists' Ins.*, 448 N.W.2d at 104. A contract is construed according to its plain and ordinary meaning. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). The language of the subcontract itself defines the nature of the indemnity and insurance obligations and whether there is an enforceable agreement to indemnify and insure against another's negligence. *Seward Housing Corp.*, 573 N.W.2d at 367.

[I]n *Holmes*, the court upheld a construction contract which required the subcontractor to provide insurance coverage for all damages and injuries, including 'claims for which the Contractor may be or may be claimed to be, liable.' (*citation omitted*). In that case we [the Minnesota Supreme Court] considered the combined effect of sections 337.02 and 337.05 and determined that even though an indemnification provision may be unenforceable under section 337.02, a promise to purchase insurance to cover any negligent acts by the promisee is valid and enforceable.

Katzner, 545 N.W.2d 378 citing *Holmes*, 488 N.W.2d at 474. The insurance and indemnity agreement in *Holmes* read:

The Subcontractor agrees to assume entire responsibility of liability, to the fullest extent permitted by law, for all damage or injury to all persons, whether employees or otherwise, and to all property, arising out of it, resulting from or in any manner connected with, the execution of the work provided for in this Subcontract or occurring or resulting from the use by the Subcontractor, his agents or employees, of materials, equipment, instrumentalities or other property, whether the same be owned by the Contractor, the Subcontractor or third parties, and the Subcontractor, to the fullest extent permitted by law, agrees to indemnify and save harmless the Contractor, his agents and employees from all such claims including, without limiting the generality of the foregoing, claims for which the Contractor may be or may be claimed to be, liable and legal fees and disbursements paid or incurred to enforce the provisions of this paragraph and the Subcontractor further agrees to obtain, maintain and pay for such

general liability insurance coverage and endorsements as will insure the provisions of this paragraph.

488 N.W.2d at 474-5.

The Court found that this language expressed a clear and unequivocal intent for the subcontractor to provide specific insurance coverage for the benefit of the general contractor and confirmed that, "Sections 337.01 to 337.05 do not affect the validity of agreements whereby a promisor agrees to provide specific insurance coverage for the benefit of others." *Id.* at 475. The plain language of the agreement required the subcontractor to indemnify the general contractor to the extent of the insurance specified in the agreement, including claims for the contractor's own fault. *Id.*; *Katzner*, 545 N.W.2d 378.

This Court expressly rejected a restrictive reading of § 337.02 and 337.05 or of the indemnity and insurance agreement language⁵. *Id.* The subcontractor paid a premium and obtained the specific coverage contemplated by the agreement and "(t)o now argue that the agreement is unenforceable is disingenuous." *Id.*

b. Each Case Is Decided on Its Facts.

In *Seifert v. Regents of the University of Minnesota*, the Court upheld the plain language of an indemnity and insurance agreement that differed from *Holmes*:

To the fullest extent permitted by law, [the general contractor] shall indemnify and hold harmless the [owners]... And their agents and employees from and against all claims, damages, losses and expenses including attorney's fees arising out of or resulting from the performance, or

⁵ Rejecting commentary characterizing §337.202 as "restrictive ". *See* fn. 5 referencing Daniel S. Kleinberger, *No Risk Allocation Need Apply: the Twisted Minnesota Law of Indemnification*, 13 Wm. Mitchell L.Rev.775, 811 – 12 (1987) *cited* by Appellant Bolduc.

lack of performance of the Work, provided that any such claim, damage, loss or expense (1) is attributable to... injury... and ,(2) is caused in whole or in part by any negligent act or omission of [the general contractor], any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.

505 N.W.2d at 85.

The Owner of the construction project sought indemnity from the general contractor for injuries sustained by a worker on the job. *Id.* at 84. The general contractor argued the agreement was unenforceable because it required indemnity for the wrongdoing of the Owner. *Id.* However, no determination had been made that the Owner was negligent (agreement stated “negligent act or omission”). *Id.*

The Court held that, based on the facts, the language was an enforceable indemnification agreement, falling *outside* the prohibitions of Minn. Stat. § 337.02. *Id.* § 337.02 allows indemnity “for the promisor's own negligence.” *Id. citing* Minn. Stat. § 645.16 (1992) *R.A.55.*

Also, the mere claim that the Owner was negligent, without evidence creating a material fact issue, did not invalidate the agreement. *Id.* To allow otherwise, would permit the general contractor to avoid its responsibility for paying for the damages it had caused. *Id. citation omitted.* Accordingly **the facts of each case are as critical as the contract language itself.** *See also, D.W. Hutt Consultants Inc. v. Construction and Maintenance Systems, 526 N.W.2d.62 (Minn. App. 1995).*

Upholding the agreement on alternative grounds, the Court further held that the contract required the general contractor to obtain insurance coverage for its

indemnification obligation to the Owner, including “any claim arising out of the insured hold harmless agreement.” *Id.* “The Supreme Court has held that when an indemnitor’s obligations are covered by insurance then section 337.02’s invalidation language does not apply.” *Id. citing Holmes, supra.*

In a subsequent case, *Hurlburt v. Northern States Power Co.*; this Court decided that the plain language of a rider (“Attachment B”) attached to a subcontract did not require the subcontractor to indemnify or insure the general contractor for injuries that arose from the general contractor’s own negligence. 549 N.W.2d 919. At trial, a jury found the general contractor 85% negligent for injuries sustained by a construction worker. *Id.* at 920. The contractor then sought indemnity against the subcontractor under the indemnity and insurance agreement. *Id.*

Paragraph 7 of the subcontract provided an all-encompassing indemnity agreement secured by insurance, identical to that at issue in *Holmes*, which required the subcontractor to indemnify the general contractor “for all damages and injuries in any way connected with the work to be performed pursuant to the subcontract without regard to fault and to procure and maintain insurance to fund that undertaking...” *Id.* at 921.

However, Attachment B “drastically modified” Paragraph 7:

Notwithstanding the provisions of paragraph 7 of this Subcontract Agreement, the indemnity set forth therein shall apply only to the extent that the underlying injury or damage is attributable to the negligence or otherwise wrongful act or omission, including breach of a specific contractual duty, of the Subcontractor or Subcontractor’s independent contractors, agents, employees or delegates. Subcontractor further agrees to indemnify, defend and save harmless contractor his agents and employees from and against all claims arising within the scope and types and limits of insurance Subcontractor has agreed to obtain, maintain and

pay for pursuant to this Subcontract Agreement (a) to the same extent as said insurance if Subcontractor fails to obtain and keep in force said insurance and (b) to the full extent of the deductible amount of self-insured retention of said insurance.

The plain language of Attachment B changed the subcontractor's broad obligation to indemnify the general contractor without regard to fault to a narrow obligation to indemnify for "only injury or damage attributable to [the subcontractor's] own ...negligence or other wrongful act or omission, including breach of contract, and to procure and maintain insurance to pay [the subcontractor's] liability for its fault ...to the extent of the policy limits prescribed ..." *Id.*

Considering that the injury was not in any respect attributable to the subcontractor's "negligence or other wrongful acts" and the jury found the injuries were "solely by reason of [the general contractor's] own fault, there was no basis either for imposing liability on [the subcontractor] or for calling upon [the subcontractor's] insurer for payment of sums for which [the subcontractor] was liable." *Id.* at 924.

c. Ambiguous Language.

In accord with general contract law principles, ambiguous language in an indemnity and insurance agreement will not be enforced. *Katzner*, 535 N.W.2d 825.

Katzner v. Kelleher Construction is the seminal case on ambiguous and unenforceable language to indemnify and insure. *Id.* In *Katzner*, the design/builder was found by a jury to be jointly responsible for injuries sustained by a worker on the job and sought indemnity from its contractors under the following contract language:

1.17 Indemnification against Injury or Damage. The Contractor shall indemnify and hold harmless the owner, the Design/Builder, the

Design/Builder's Architect and consultants and their agents and employees from and against all claims, damages, losses and expenses (including attorneys fees) arising out of or resulting from the performance of the Work, provided that any such claims, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property..., and (b) is caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor or Sub-Subcontractors, and anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.

10.1.1 the Contractor shall purchase and maintain a comprehensive general liability insurance as will protect himself, the Designer/Builder, and the Design/Builder's Architect and consultants and the owner from claims set forth below which may arise out of or result from the Contractor's operations under the Contract, whether such claims arise during Contract performance or subsequent to completion of operations under the Contract and whether such operations be by himself or by any Subcontractor or by anyone directly or indirectly employed by any of them or by anyone for whose acts any of them may be liable.

10.1.3 The insurance required by subparagraph 10.1.1 shall be written for not less than any limits of liability specified below or required by law, whichever is greater, and shall include contractual liability insurance as applicable to the contractor's obligations under paragraph 2.10, 2.17 and 7.2.7.

In reviewing this language, this Court found that it was 'ambiguous as to whether it was intended to indemnify [the builder] from claims arising out of [the builder's] own acts.' *Id.* at 382. "(T)he phrase 'regardless of whether or not [the claim] is caused in part by a party indemnified hereunder' contained in paragraph 2.17 is not equivalent to the indemnity provisions at issue in *Holmes* which clearly protected the indemnitee from 'all such claims including... Claims for which the contractor maybe or may claimed to be, liable.'" *Id. citing Holmes supra.*

Moreover, the “heart” of the case lay in the correct interpretation of the agreement to procure insurance at paragraphs 10.1.1 and 10.1.3. *Id.* This Court found that paragraphs 10.1.1 and 10.1.3 only specified that insurance was to be purchased for the contractors’ own operations – not the builder/designer’s operations. *Id.* "Without an agreement to procure insurance coverage for any claims arising out of [the builder/designer’s] own negligence, any attempt by the parties to relieve [the builders/designer] from liability for its own acts and operations cannot be enforced." *Id.* at 382. While the contractors could have agreed to indemnify and insure the builder/designer for the builder/designer’s own fault, the contract language did not clearly express such an agreement. *Id.*

Applying §337.02, §337.05 and these seminal cases, this Court should affirm the Court of Appeals’ decision. Bolduc’s reliance upon pre-1984 indemnity law and the law of other jurisdictions (for example, Illinois and the 10th Circuit) provides no relevant basis for reversal.

4. The Court of Appeals Correctly Determined that Bolduc Must Fully Indemnify ECI.

The Court of Appeals correctly concluded that the Indemnity and Insurance Agreement is enforceable and requires Bolduc, under the undisputed facts of this case, to indemnify and insure ECI for Bolduc’s damage to the Pipe.

a. **The Indemnity and Insurance Agreement is Enforceable.**

The Court correctly determined that the Indemnity and Insurance Agreement is enforceable under §337.02, §337.05, as well as the holding in *Holmes* and the cases that followed.

The Indemnity and Insurance Agreement includes both an agreement by Bolduc to: 1) indemnify and 2) procure insurance for ECI. *Add.38*. Minnesota law is crystal clear that “when an indemnitor’s obligations are covered by insurance then section 337.02’s invalidation language does not apply.” *Seifert*, 505 N.W.2d at 86. *citing Holmes, supra*. The trial court erred by finding to the contrary and by holding that §337.05 was inapplicable. §337.02 simply does “not affect the validity of agreements whereby a promisor [*i.e.*, Bolduc] agrees to provide specific insurance coverage for the benefit of others [*i.e.* ECI].” §337.05; *Holmes*, 488 N.W.2d at 475.

Certainly, Bolduc and ECI did nothing more than engage in the “long-standing practice in the construction industry by which the parties to a subcontract ..agree that one party [Bolduc] would purchase insurance that would ‘protect’ others [ECI].” *Holmes*, 488 N.W.2d 475. ECI and Bolduc were “free to place the risk of loss upon an insurer by requiring one of the parties [here, Bolduc] to insure against that risk” (*Id.* at 475), a practice that has been expressly approved by the Legislature’s enactment of § 337.05. *Id.*; *Hurlburt*, 549 N.W.2d at 923. The trial court ignored this Legislative intent, misapplied the law, and unlawfully interfered with the parties’ freedom of contract.

By agreeing to the Indemnity and Insurance Agreement, Bolduc promised to do what was “customary”: “procure ...such insurance that specifically covers the indemnity

obligations under this paragraph ...and to name ECI as an additional insured on said policies.” *Add.38*. The Agreement then specifies the insurance requirements followed by language wherein Bolduc agreed to obtain “such insurance coverage and endorsements as will insure the indemnity provisions and coverage limits above.” *Id.* Pursuant to *Holmes*, this agreement to procure insurance validates all of Bolduc’s indemnity obligations to ECI, including (without limitation) any duty to indemnify ECI without regard to fault. 488 N.W.2d 473.

The Court of Appeals then properly determined that the Indemnity and Insurance Agreement clearly and unequivocally required Bolduc to indemnify and insure ECI for the damage to the Pipe and rejected all arguments that the Agreement was ambiguous. *Id.*

Relying upon this Court’s language in *Holmes*, the Court of Appeals held that the statutory language of §§337.02 and 337.05, as employed in the indemnity and insurance agreement, determines whether the agreement is enforceable. *Id.*; *Holmes*, 488 N.W.2d at 474. In *Holmes*, the statutory language that was employed was enforceable and “clearly and unequivocally” required a subcontractor, like Bolduc, to indemnify a contractor, like ECI, for all claims, including those “for which the Contractor may be or may be claimed to be liable.” *Id.*; *Katzner*, 545 N.W.2d at 381

Comparing the *Holmes* language to the Indemnity and Insurance Agreement, the Court of Appeals correctly determined that the Agreement was clear, unequivocal, and requires Bolduc to indemnify and insure ECI for claims “...caused or alleged to have been caused by any act or omission of [Bolduc]...” *Add.38* (emphasis original) Giving

effect to all of the language in the Agreement, the Court correctly determined that Bolduc was required to indemnify and insure ECI “without regard to fault”, especially in light of the fact that Bolduc admittedly damaged the Pipe and the Met Council and Frontier both demanded that ECI fix Bolduc’s damage. *A.3; Holmes*, 488 N.W.2d at 474; *See Brookfield Trade Ctr., Inc.*, 584 N.W.2d at 394 (must give effect to all contract language). Certainly, the damage was “caused or alleged to have been caused” by an act of Bolduc, requiring indemnity.

The Court of Appeals rejected *Katzner* as being controlling, and rightfully so. On its face, the Indemnity and Insurance Agreement is more akin to the enforceable “may be or may be claimed to be” language in *Holmes* than it is to the unenforceable language in *Katzner* that required indemnity and insurance for claims “regardless of whether or not [the claim] is caused in part by any party indemnified hereunder.” 545 N.W.2d at 382. *Add.10*. The ambiguous *Katzner* language differs materially from the clear language of the Indemnity and Insurance Agreement.

The Indemnity and Insurance Agreement also differs from the language at issue in *Hurlburt*, which expressly limited the indemnity and insurance obligation to damages “*attributable to* the negligence or otherwise wrongful act or omission...of the [subcontractor]...” 549 N.W.2d at 922 (emphasis added); *Add.38*. The limiting “attributable to” language is absent in the Indemnity and Insurance Agreement. Neither *Katzner* nor *Hurlburt* control. *Holmes* does and the Court of Appeals properly concluded as much.

b. **ECI's Fictional Negligence Is Not The Critical Inquiry.**

The Court of Appeals correctly rejected the trial court's dependence upon ECI's fictional negligence—a fact never established—for determining enforceability. *Add.1-19*. First, Judge Johnson's disregard for the Jury Verdict is impermissible under Minnesota Law. *See Onvoy, Inc. v. Allete, Inc.*, 736 N.W.2d 611, 612 (Minn. 2007).

Second, the Court of Appeals properly determined in this case that ECI's claimed-negligence is not the "critical inquiry". *Add.8*. The "critical inquiry" (or as coined in *Katzner*, the "heart of the case") is whether the language of the Indemnity and Insurance Agreement required Bolduc to obtain specific insurance to insure its indemnity obligations to ECI. *Id.* **It does.** *Id.* The Court of Appeals, again, got it right.

This conclusion harmonizes perfectly with the holding in *Seifert*, that merely claiming an indemnitee is negligent (as Bolduc has repeatedly done) **fails to invalidate the indemnity agreement.** 505 N.W.2d at 85. Concluding otherwise would allow a promisor like Bolduc to escape its responsibility of paying for damages it caused. *Id.*

Both the trial court and Justice Connolly's dissent focus upon Bolduc's allegations of ECI's pretend-negligence as justification allowing Bolduc to escape its responsibility to pay for the damaged Pipe. This is contrary to the Jury Verdict, contrary to CIVJIG 25.55 given at trial, and contrary to the law as stated in *Seifert*, 505 N.W.2d 83.

Neither the trial court nor the appellate court may disregard "a jury verdict on a specially submitted issue or make findings contrary to or inconsistent with the verdict." *Employers Mut. Cas. Co. v. Chicago, St. P., M. & O. Ry. Co.*, 50 N.W.2d 689, 692 (Minn. 1951) *citations omitted*; *Raleigh v. Indep. Sch. Dist. No. 625*, 275 N.W.2d 572,

578 (Minn. 1978). That is precisely what the trial court and Justice Connolly did, and what this Court must not. Bolduc cannot escape its unequivocal contractual obligation to indemnify and insure ECI.

c. **The Undisputed Facts Require Bolduc to Honor Its Indemnity Obligations.**

The Court of Appeals correctly concluded that the plain language of the enforceable Indemnity and Insurance Agreement when applied to the facts of this case, require Bolduc to indemnify and insure ECI for the damaged Pipe. The Court of Appeals upheld firmly-rooted principles of Minnesota law by enforcing the plain language of the Agreement and refusing to do what the trial court had done: rewrite the contract language to insert the word “negligent” before “act or omission”. *Add.11-12.*

Minnesota follows the objective theory of contract formation, under which the parties’ **outward manifestations determine the duties owed.**” *Riley Bros. Constr., Inc. v. Shuck*, 704 N.W.2d 197, 202 (Minn. App. 2005)(emphasis added). The Court enforces the plain language within the four-corners of a contract and does not rewrite or otherwise modify unambiguous contract terms. *Id.*; *Valspar Refinishing, Inc. v. Gaylord’s, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009) *citations omitted.*

The four-corners of the Indemnity and Insurance Agreement require Bolduc to indemnify ECI for “all claims, causes of action, liability, obligation, demands, costs, and expenses arising out of ...damages to property caused or alleged to have been caused by **any act or omissions** of [Bolduc]....” *Add.11-12*, (emphasis added). The word *negligent* is notably absent. The Court of Appeals properly refused to insert it. *Id.*

Absent express limiting language to the contrary, indemnity agreements under a construction contract are **not** limited by law to only negligent acts. The plain language of §337.02 anticipates a far broader scope of conduct, including damage “attributable to the negligent **or otherwise wrongful act or omission, including breach of a specific contractual duty**, of the promisor.” (emphasis added).

Here, the Indemnity and Insurance Agreement encompasses “any act” of Bolduc that caused damage, which incorporates negligence AND “otherwise wrongful” acts or omissions AND breach of contract. § 337.02; *Add.38*. The ordinary meaning of “any” and “act” applies. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d at 67. “Any” is defined as: “...ALL...unlimited in amount, number or extent” (*Webster’s Ninth New Collegiate Dictionary* p. 93 (1991), and as “one or another without restriction or exception.” *R.A.76-77. The American Heritage Dictionary* 2d Coll. Ed., p. 117 (1985). *R.A.171-3*. “Act” is defined as: “carries idea of performance; ...a deed”. (*Black’s Law Dictionary* Revised 4th Ed. (1968) at p. 42 at *R.A.80-82*), and “the doing of a thing.” (*Webster’s cited supra* at p. 53).

These definitions define Bolduc’s contractual obligations. *Valspar Refinishing, Inc.*, 764 N.W.2d at 364. Without restriction or exception, Bolduc agreed to indemnify ECI from **all** liabilities, **all** obligations, **all** demands, **all** costs, and **all** expenses arising out of the damage to the Pipe by **any act** of Bolduc, as well as **all** damages, **all** expenses, and **all** attorney’s fees caused by **any act** of Bolduc. *Id.*

The Court of Appeals properly determined that the objective intent of the parties, as clearly and unequivocally manifested in the Indemnity and Insurance Agreement, did

not limit Bolduc's indemnity obligations to only negligence. Indemnity is required for damage from "any act". Accordingly, remand is necessary for a determination of all damages owed to ECI. *Id.*; *See Holmes*, 488 N.W.2d at 474.

It must also not be ignored that Bolduc *could have* limited its indemnity and insurance obligation to negligence—*but did not*. In *Hurlburt* the indemnity obligation was limited to damages "attributable to the **negligence** or otherwise wrongful act or omission...of the [subcontractor]..." 549 N.W.2d at 920, 922.⁶ Similarly, the indemnity agreement at issue in *Seifert* expressly limited the indemnitor's obligations to injury/damages caused by "any **negligent** act or omission". 505 N.W.2d at 85. The *Seifert* agreement was drafted 28 years ago in 1984. *Id.* It is not a surprise to anyone in the construction industry, the insurance industry, or the legal system that indemnity agreements can be expressly limited to damages resulting from a party's negligence. Yet, here, Bolduc elected not to do so.

The Indemnity and Insurance Agreement is clear and unambiguous. Bolduc must honor its promise to indemnify and insure ECI for the damage to the Pipe. The Court of Appeals' decision should be affirmed.

⁶ However, the facts at hand are materially distinguishable from *Hurlburt*, where the Court found that the subcontractor had no duty to indemnify the contractor. 549 N.W.2d at 922. Unlike the instant case, a jury had found that the contractor in *Hurlburt* was negligent and 85% at fault for the injuries at issue *and* that the subcontractor was not negligent at all. *Id.* Here, the jury never found ECI negligent or otherwise at fault. *Add.27.*

5. **Indemnity Is Warranted Regardless of Whether the Indemnity and Insurance Agreement Covers ECI's Own Fictional-Negligence.**

Even if this Court disagrees that the Indemnity and Insurance Agreement requires Bolduc to indemnify ECI “without regard to fault”, the Court of Appeals’ decision should still be affirmed. *See Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) (reversal not warranted where right result was reached on alternative grounds).

ECI is not seeking indemnity from Bolduc for ECI’s own fictional negligence. Rather, ECI is seeking indemnity from Bolduc for Bolduc’s “act” that admittedly damaged the Pipe. This is entirely permissible under §337.02 and its progeny.

While §337.02 may prohibit indemnity agreements that require indemnification for the indemnitee’s own wrongdoing (absent a companion agreement to insure), §337.02 clearly allows indemnity for damage arising from an **indemnitor’s own negligence or other wrongful acts**. §337.02; *Seifert*, 505 N.W.2d at 85.

In *Seifert*, discussed *supra*, the language of the indemnity agreement was enforceable *standing alone* (regardless of a companion agreement to insure) because it fell *outside* §337.02’s prohibitions. *Id.* at 83. § 337.02 allows indemnity “for the promisor's own negligence.” *Id. citing* Minn. Stat. § 645.16 (the Court gives effect to all provisions of a statute). *Id.*

The language at issue in *Seifert* required the general contractor “to the fullest extent permitted by law” to “indemnify and hold harmless” the owner of the project “against all claims, damages, losses and expenses including attorney's fees arising out of or resulting from the performance, or lack of performance of the Work, provided that any

such claim, damage, loss or expense (1) is attributable to... injury... and; (2) is caused in whole or in part by any negligent act or omission of [the general contractor]... regardless of whether or not it is caused in part by a party indemnified hereunder.” 505 N.W.2d at 85. Because no determination had been made that the owner was negligent, the Court held that indemnity agreement required the general contractor to indemnify the owner for the injuries at issue related to the general contractor’s negligence. *Id.* (indemnity agreement expressly limited to **“negligent act[s]”**).

The identical result is warranted here. Regardless of whether this Court finds that Bolduc is required to indemnify and insure ECI for ECI’s own [negligent or non-negligent] wrongdoing, Bolduc must indemnify ECI for Bolduc’s wrongdoing—*i.e.*, driving its metal sheetpiling into and damaging the Pipe. *See Seifert*, 505 N.W.2d 83.

Even if this Court finds that the Indemnity and Insurance Agreement does not require Bolduc to indemnify ECI for ECI’s own wrongdoing, the Court of Appeals decision should be affirmed.

6. “Any Act” Means “Any Act”, Including Breach of Contract.

Contrary to Bolduc’s arguments, the Jury Verdict does not extinguish its indemnity and insurance obligations under the Sub-subcontract.

Bolduc’s admission that it hit and damaged the Pipe in the course of performing its work under the Sub-subcontract is undisputed evidence that, as a matter of law, Bolduc breached the Performance of Work Agreement, providing yet another basis for which Bolduc must indemnify ECI. Minn. Stat. §337.02 expressly anticipates that promisors will indemnify others for “breach of a specific contractual duty”.

Here, the “any act” language of the Indemnity and Insurance Agreement incorporates Bolduc’s breach of contract, including the Performance of Work Agreement. In addition to any duties owed under tort law, Bolduc agreed to be contractually liable to “execute [its] work properly” and that “[n]o advice, recommendations or assistance” that ECI (or Frontier) gave or was supposed to give to Bolduc (*i.e.*, the markings of the Pipe locations) relieved Bolduc from “**complete responsibility**” for its work. *Add.37* (emphasis added).

While the Court of Appeals’ ruling did not expressly rely upon the Performance of Work Agreement, Bolduc’s breach is still clear, as are the damages arising from the breach, warranting judgment in ECI’s favor. “Contract interpretation is a question of law.” *Valspar Refinishing, Inc.*, 764 N.W.2d at 364. In conducting a breach-of-contract analysis, the Court first looks to the plain language of the contract to determine the legal rights and obligations thereunder. *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 784 (Minn. 2004) *citations omitted*. Breach occurs where a party fails to perform an obligation set forth in the contract. *Telex Corp. v. Data Prods. Corp.*, 135 N.W.2d 681, 686-7 (Minn. 1965); *Associated Cinemas of America, Inc. v. World Amusement Co.*, 276 N.W. 7, 10 (Minn. 1937).

Bolduc agreed to the terms of the Performance of Work Agreement and then breached those terms by driving sheetpiling into the Pipe. Bolduc contractually promised to be **completely responsible** for driving the sheet piling without striking the Pipe (at the location in question) and agreed that no “advice, recommendations or assistance” from

any party, including ECI or Frontier's surveyor, would alleviate Bolduc from "complete responsibility".

Yet, rather than accepting "complete responsibility" for damaging the Pipe, Bolduc brazenly asks this Court to completely absolve it from having to pay the cost it contractually owes for repairing the damage that it caused. The law forbids that result. *Telex Corp.*, 135 N.W.2d at 686-7; *Associated Cinemas of America, Inc.*, 276 N.W. at 10.

This Court must uphold the plain language of the Performance of Work Agreement. Based on that language and the undisputed facts, Bolduc breached the Performance of Work Agreement as a matter of law and is contractually liable for those damages that arose "naturally from the breach", including the \$233,365.65 in repair costs. *Rediske v. Minnesota Valley Breeder's Ass'n.*, 374 N.W.2d 745, 749-50 (Minn. App. 1985).

7. **ECI Preserved Its Breach of Contract Claims.**

ECI preserved all aspects of its breach of contract claims against Bolduc. Bolduc's arguments to the contrary conveniently ignore the Complaint, the Stipulation that Bolduc signed, and the summary judgment proceedings.

In the Complaint, ECI placed Bolduc (and the entire world) on notice under COUNT ONE, "Breach of Contract Against Bolduc" that "Pursuant to the terms of the Subcontract, Bolduc was obligated to properly perform its work, avoid damage to other property..." A.4 at ¶20-26. Bolduc even admits that ECI "claimed that Bolduc breached its contract by failing to properly perform its work at FAS-1..." *Resp. Bolduc's Court of Appeals Brief.*

Additionally, in the Stipulation, Bolduc agreed:

ECI's claims against Bolduc for breach of contract (**including but not limited to** ECI's claim that Bolduc breached its obligation to defend and indemnify ECI **and obtain insurance to protect ECI**),...shall not be tried starting on March 10, 2010, but shall be **preserved in full** for determination or resolution by the Court at a later date. **The parties agree that ECI is not waiving, relinquishing, releasing or impairing its claim against Bolduc for breach of contract and its claims against Travelers.**

A.33 at ¶1 (*emphasis added*). Bolduc's ridiculous argument that ECI waived its breach of contract claims directly conflicts with the express agreement of the parties that ECI "preserved in full" and was not "**waiving, relinquishing, releasing or impairing**" any of its contract claims against Bolduc *Id.*, including breach of the Performance of Work Agreement and Bolduc's indemnity and insurance obligations under the Indemnity and Insurance Agreement.

Also, it must be noted that Bolduc's insuring obligations have been at issue from the inception of this matter A.1 as they formed the premise for Travelers' involvement. While it has always been ECI's position that the Travelers Policies and the Endorsement provide coverage for the damage to the Pipe, ECI **never** waived its breach of contract claim against Bolduc for failing to procure insurance. Moreover, ECI's breach of contract claim against Bolduc for failing to procure the promised insurance coverage did not become a salient issue until **after** the trial court erroneously determined that the Policies and the Endorsement did not provide coverage for the damaged Pipe and granted summary judgment to Travelers.

At the summary judgment motion hearing, ECI's counsel made clear that ECI had fully preserved the breach of contract claims. *MT.21; MT.25*. ECI also correctly argued

that, “In order to say that this claim has been somehow waived, it has to be clear and express. And in the face of the stipulation...and it is part of the record, Exhibit L, I think, which says that all breach of contract claims are preserved, I don’t think that argument holds water.” *MT.33*.

Minnesota law supports this. The party claiming waiver must make a “clear showing of an intention to do so, or of facts from which an inference of waiver would follow as a matter of law by necessary implication.” *Henry v. Hutchins*, 178 N.W. 807, 810 (Minn. 1920). Bolduc has failed to do so and cannot do so. The Stipulation and the summary judgment proceedings undisputedly show that ECI never intended and did not waive its contract claims. As a matter of law, they were fully preserved. If this Court disagrees, then at a minimum, the issue of waiver must be decided as a question of fact, requiring remand. *See Henry*, 178 N.W. at 810.

8. Bolduc Owes Damages for Damaging the Pipe.

The repairs to the Pipe that Bolduc damaged were not free. ECI expended \$233,365.65 in labor, material and equipment costs to effectuate the repairs. Yet, Bolduc irrationally argues that there are “no damages”, making remand fruitless.

The Stipulation entered into before the Negligence Trial states that the Jury Verdict would not—and did not-- resolve any damages for Bolduc’s breach of contract (including the breach of the Indemnity and Insurance Agreement or the Performance of Work Agreement). *A.33*. Bolduc agreed that the Negligence Trial only determined: “the amount of damages, if any, to which ECI is entitled if it prevails on its negligence claim [against Bolduc].” *A.33*.

The Negligence Trial never determined the amount of *contractual* damages for which Bolduc is liable. Bolduc's argument that the jury would have awarded ECI nothing for its contract damages had the issue been submitted, is the epitome of pure speculation and conjecture. *Bolduc's Brief*, p.35.

The jury only decided negligence, and was, accordingly, only charged with those jury instructions addressing negligence, causation, comparative fault, and damages. *MT.403-408*. The jury's finding that the damages resulting from Bolduc's negligence were "\$0" has no impact on the contractual damages Bolduc (or Travelers) owes for damaging the Pipe.

Minnesota law clearly holds that negligence and breach of contract are distinct causes of action with distinct measures of damages. *Lesmeister v. Dilly*, 330 N.W.2d 95 (Minn. 1983); *Rediske v. Minnesota Valley Breeder's Ass'n.* 374 N.W.2d 745. In *Rediske v. Minnesota Valley Breeder's Ass'n.*, the Court of Appeals held that a party was entitled to claim both breach of contract and negligence arising from the same conduct and remanded the case to the district court to separate those damages attributable to breach of contract from those attributable to negligence. 374 N.W.2d 745.

In *Lesmeister v. Dilly*, 330 N.W.2d 95, the Court explained the measure of damages for breach of contract is those damages "which arose naturally from the breach, or could reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of the breach." *Id.* at 103, citing *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

Unlike negligence damages, contract damages may include attorney fees, legal costs, and expenses. *Van Vickle*, 556 N.W.2d 238. In *Van Vickle v. C.W. Scheurer & Sons, Inc.*, the Court determined that attorneys' fees were owed under an indemnity and insurance agreement and remanded the case to the trial court for a factual finding on the reasonableness of fees and the ultimate damages owed. *Id.*

Here, Bolduc is contractually liable under the Indemnity and Insurance Agreement for "all" liability, obligation, cost or expense incurred by ECI to repair the damage to the Pipe. ECI has requested nothing more from Bolduc, and the district court erred in denying that request. The Court of Appeals correctly ruled that this case, like *Van Vickle*, must be remanded to the trial court for a factual finding on the amount of contractual damages Bolduc owes for damaging the Pipe.

9. **A "Causal Nexus" Exists Between the Damage and Bolduc's Work.**

Bolduc must stop trying to hide behind the limited Jury Verdict. First, Bolduc attempted to escape contractually liability because the jury did not find it negligent. That argument was struck down, and properly so, by the Court of Appeals. Now, in another creative attempt to escape its indemnity and insurance obligations, Bolduc frivolously argues that it could not have a duty to indemnify or insure ECI because there is no "proximate cause" between Bolduc's driving the sheetpiling and the damage to the Pipe.

First, the entire world knows that Bolduc damaged the Pipe. Bolduc has admitted it time and again. *App. Bolduc's Brief*, pp. 7, 11 & 46. Second, Bolduc never raised this argument at the trial court level or at the Court of Appeals. It cannot now be heard to

argue inapplicable technicalities to escape its contractual promises, especially in light of the Indemnity and Insurance Agreement language which makes no reference whatsoever to “proximate cause”. Third, Bolduc’s position flat-out ignores the law.

A party’s obligation to indemnify and insure another in a construction agreement requires a “causal nexus” (not “proximate cause”) between the damage or injury for which indemnity is sought and the work of the indemnitee. *Nat’l Hydro Sys. v. M.A. Mortenson Co.*, 529 N.W.2d 690, 693 (Minn. 1995); *Seward Housing Corp.*, 573 N.W.2d at 367. “Causal nexus” means that there must be a temporal and geographical or a causal relationship, equivalent to a “but for” causal connection between the indemnitor’s work and the damages for which indemnity is sought. *Id.*; *Anstine v. Lake Darling Ranch, Inc.*, 233 N.W.2d 723, 727 (Minn. 1975); *Kuntz*, 2010 WL 346397 at *5 R.A.29; *Howard Holmes Inc. v. Keeler Stucco Inc.*, No. A06-2036, 2007 WL 4234628 at * 2 (Minn. App. Dec. 4, 2007) R.A.50.

Where damages that occur on the construction worksite are related to the promisor’s active performance of work, a temporal and geographic relationship exists. *Oster v. Medtronic, Inc.*, 428 N.W.2d 116, 118 (Minn. App. 1988)(worker injured at the worksite while preparing for work) *cited by Kuntz*, 2010 WL 346397 at *5; *compare to Fossum v. Kraus-Anderson Constr. Co.*, 372 N.W.2d 415 (Minn. App. 1985)(worker injured across the street from the jobsite after he left for the day, no temporal or geographic relationship existed).

Additionally, this Court has specifically defined “but-for” causation as “causally connected with” and **not** “proximately caused by.” *Meadowbrook Inc. v. Tower Ins.* C59

N.W.2d 411, 419 (Minn. 1997) *cited by Christenson*, 2010 WL 2161822 at *5. “But-for” causation is synonymous with “causal nexus”. *Oster*, 428 N.W.2d at 118. By way of illustration, the Court of Appeals held that “but-for” causation was present when an injury occurred while an employee was injured on the jobsite by machinery that he had been using moments earlier to perform work pursuant to the subcontract. *Kuntz*, 2010 WL 346397.

Here, a “causal nexus” exists between Bolduc’s work and the damage to the Pipe. The damage occurred: 1) On the jobsite (the “geographical” requirement); 2) at the time Bolduc was performing its work (the “temporal” requirement); and 3) as a result of Bolduc’s equipment (sheet piling) being driven into the ground by machinery (the large vibratory piling hammer), satisfying “but-for” causation.

Bolduc’s cry of “proximate cause” is meaningless. “Causal nexus” is the standard, fully supporting the Court of Appeals decision that indemnity is owed.

10. Bolduc Owes Indemnity to the Extent of the Promised Insurance.

Regardless of whether the Travelers’ Policies or the Endorsement provides coverage to ECI, Bolduc must indemnify ECI to the extent of the agreed-upon insurance in the Indemnity and Insurance Agreement. *Van Vickle*, 556 N.W.2d 238. If the Endorsement provides coverage, then Travelers must pay. However, if the Endorsement fails to provide coverage, then Bolduc must pay. Bolduc’s arguments to the contrary, based upon Illinois law, ignore Minnesota Law, including §337.05 and *Van Vickle*, 556 N.W.2d 238.

Minn. Stat. §337.05, subd. 2 states:

Indemnification for breach of agreement. If:

- (a) a promisor agrees to provide specific types and limits of insurance; and
- (b) a claim arises within the scope of the specified insurance; and
- (c) the promisor did not obtain and keep in force the specified insurance;

then, as to that claim and regardless of section 337.02, **the promisee shall have indemnification from the promisor to the same extent as the specified insurance.**

(emphasis added). *A.124.*

In *Van Vickle v. C. W. Scheurer and Sons, Inc.*, the Court applied §337.05, subd. 2 where the subcontractor failed to procure the insurance required under a subcontract to insure its indemnity obligations to the general contractor. 556 N.W.2d 238. The Court held that the contractor could recover directly from the subcontractor to the extent of the promised insurance. *Id.*

Here, Bolduc agreed to procure and maintain insurance to insure all of its indemnity obligations to ECI under the Indemnity and Insurance Agreement, including those related to Bolduc's act of driving sheetpiling that damaged the Pipe. If the Travelers Endorsement or Policies fail to provide coverage, then §337.05 and *Van Vickle* require Bolduc to directly indemnify ECI for "all ...costs, and expenses arising out of ...the damages to ...[the Pipe] ..." as well as "all damages, judgments, expenses, and attorney's fees..." for which Bolduc agreed to procure insurance coverage. *Add.38.* This includes, without limitation, ECI's costs to repair the Pipe and legal costs, expenses, and

fees incurred to pursue coverage under the Travelers' Policies. All of these costs, expenses, and fees arose from and were caused by Bolduc's damaging the Pipe. *Id.*

The Court of Appeals correctly determined that the Travelers' Endorsement provides coverage, and this Court should affirm. However, if this Court disagrees and reverses the Court of Appeals, then remand is still warranted for a factual finding by the trial court on the reasonable amount of costs, expenses, and fees that Bolduc directly owes ECI.

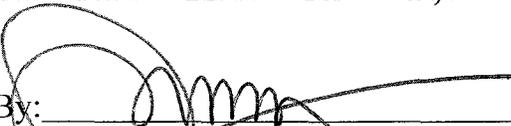
VI. CONCLUSION

Engineering and Construction Innovations, Inc. requests that this Court affirm the Court of Appeals decision that L.H. Bolduc Co., Inc. is required to indemnify Engineering and Construction Innovations, Inc. for all damages, fees, costs, and expenses arising from Bolduc's damage to the Pipe and, if the Travelers' Policies do not provide coverage for said damages, fees, costs, and expenses, then L.H. Bolduc Co. is personally liable to the extent of the promised insurance coverage.

Respectfully submitted,

HAMMARGREN & MEYER, P.A.

Dated: February 7, 2012

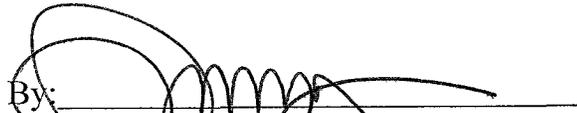
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 12,714 words. This brief was prepared using MS Word 2003-2007.

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