

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  
THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT**

---

Kay Nord Hunt (#138289)  
Bryan R. Feldhaus (#0386677)  
LOMMEN, ABDO, COLE,  
KING & STAGEBERG, P.A.  
2000 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
(612) 339-8131

Louise A. Behrendt (#0201169)  
Michael S. Kreidler (#058191)  
STICH, ANGELL, KREIDLER  
DODGE & UNKE, P.A.  
The Crossings, Suite 120  
250 Second Avenue South  
Minneapolis, MN 55401  
(612) 333-6251

*Attorneys for Appellant L.H. Bolduc Co., Inc.*

*(Attorneys continued on next page)*

David D. Hammargren (#167538)  
Adina R. Bergstrom (#337833)  
Paul S. Almen (#0388844)  
HAMMARGREN & MEYER, P.A.  
3500 American Boulevard West  
Suite 450  
Bloomington, MN 55431  
(952) 844-9033

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

Charles E. Spevacek (#126044)  
William M. Hart (#150526)  
Damon L. Highly (#0300044)  
MEAGHER & GEER, P.L.L.P.  
33 South Sixth Street, Suite 4400  
Minneapolis, MN 55402  
(612) 347-9180

Daniel A. Haws (#193501)  
Stacy E. Ertz (#0267181)  
John Paul J. Gatto (#387730)  
MURNANE BRANDT  
30 East Seventh Street, Suite 3200  
St. Paul, MN 55101  
(651) 227-9411

*Attorneys for Appellant The Travelers  
Indemnity Company of Connecticut*

Curtis D. Ruwe (#0313257)  
Beth A. Jenson Prouty (#0389275)  
ARTHUR, CHAPMAN, KETTERING,  
SMETAK & PIKALA, P.A.  
500 Young Quinlan Building  
81 South Ninth Street  
Minneapolis, MN 55402-3214  
(612) 339-3500

*Attorneys for Amicus Curiae  
Property Casualty Insurance Association of  
America*

Dale O. Thornsjo (#162048)  
JOHNSON & CONDON, P.A.  
7401 Metro Boulevard, Suite 600  
Minneapolis, MN 55439  
(952) 806-0498

Lee H. Ogburn  
Steven M. Klepper  
KRAMON & GRAHAM, P.A.  
One South Street, Suite 2600  
Baltimore, MD 21202  
(410) 752-6030

*Attorneys for Amicus Curiae  
American Insurance Association*

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

*Attorneys for Amicus Curiae Associated  
General Contractors of Minnesota*

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

*Attorneys for Amicus Curiae Minnesota  
Utility Contractors Association*

Curtis D. Smith (#102313)  
MOSS & BARNETT  
A Professional Association  
4800 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402-4129  
(612) 877-5285

*Attorneys 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).

**I. TABLE OF CONTENTS**

	<u>PAGE</u>
I. TABLE OF CONTENTS.....	iii
II. TABLE OF AUTHORITIES .....	vi
III. STATEMENT OF LEGAL ISSUES .....	1
IV. STATEMENT OF THE CASE AND FACTS.....	2
A. The Material Facts .....	6
B. The Project .....	6
C. The Performance of Work Agreement.....	7
D. The Indemnity and Insurance Agreement.....	8
E. The Insurance Coverage .....	9
F. The Damage .....	10
G. The Lawsuit .....	12
H. The Stipulation.....	12
I. The Negligence Trial .....	13
J. The Summary Judgment Motions.....	14
K. The Summary Judgment Ruling .....	17
1. ECI’s Fictional Negligence.....	17
2. Re-Writing the Sub-subcontract .....	17
L. ECI’s Appeal.....	18
1. The Indemnity and Insurance Agreement is Enforceable .....	18

2.	The Indemnity and Insurance Agreement’s Plain Language Applies .....	19
3.	The Endorsement Provides Coverage.....	20
V.	ARGUMENT & AUTHORITIES .....	18
A.	The Court of Appeals Decision Should Be Affirmed.....	21
B.	Standards of Review .....	22
1.	Standard of Review for Summary Judgment.....	22
2.	Standard of Review for Insurance Policy Interpretation .....	22
C.	The Policies and the Additional Insured Endorsement Require Travelers to Indemnify ECI for the Costs ECI Expended in Repairing the Pipe That Bolduc Damaged .....	23
1.	Rules of Construction for Insurance Coverage.....	23
2.	The Coverage Analysis Begins and Ends with the Policy’s Plain Language .....	25
3.	The Plain Meaning of “Acts” Prevails.....	26
4.	The Court of Appeals Properly Interpreted the Endorsement Using “Plain Language” Analysis .....	27
5.	The Cases Upon Which Travelers Relies Ignore the Plain Language of the Endorsement And Provide No Escape for Travelers from Its Coverage Obligations .....	29
6.	Liability Means “Liability” – Including Contractual Liability...	33
7.	“Acts or Omissions” Must Be Interpreted in Favor of Coverage for ECI .....	36
8.	The Court Should Reject Travelers’ Arguments Raised for the First Time on Appeal .....	40

9.	Travelers Has Failed to Meet Its Burden of Proving that Any Exclusionary Language of the Endorsement Applies .....	41
10.	Damages Are Owed for the Damage to the Pipe .....	43
11.	Causation Exists Between Bolduc’s Work and the Damage .....	44
12.	If This Court Finds that the Indemnity and Insurance Agreement Requires Bolduc to Indemnify ECI for ECI’s Own Negligence and Agrees with the Trial Court that ECI Is Negligent, Then Travelers Must Indemnify ECI under the “Insured Contracts” Coverage .....	50
13.	If Travelers Is Not Required to Indemnify ECI under the Endorsement or the Policies, Bolduc Is Directly Responsible for Indemnifying ECI .....	52
14.	This Court Should Require Travelers to Indemnify ECI without Delay .....	53
VI.	Conclusion .....	55
	Word Count Certification.....	56
	Index to Appendix.....	57

## TABLE OF AUTHORITIES

CASES	PAGE
<i>Allstate Ins. Co. v. Steele</i> , 74 F.3d 878 (8th Cir.1996) .....	46
<i>Andrew L. Youngquist Inc. v. Cincinnati Ins. Co.</i> 625 N.W.2d 178 (Minn. App. 2001) .....	Passim
<i>Associated Cinemas of America, Inc. v. World Amusement Co.</i> , 276 N.W. 7 (Minn. 1937).....	35
<i>Auto Owners Ins. Co. v. Northstar Mut. Ins. Co.</i> , 281 N.W.2d 700 (Minn. 1979).....	54
<i>Bobich v. Oja</i> , 104 N.W.2d 19 (Minn. 1960).....	25
<i>Canadian Univ. Ins. Co., Ltd. v. Fire Watch, Inc.</i> , 258 N.W.2d 570 (Minn. 1977).....	25
<i>Cargill, Inc. v. Ace Am. Ins.</i> , 784 N.W.2d 341 (Minn. 2010).....	24
<i>Columbia Heights Motors, Inc. v. Allstate Ins. Co.</i> , 275 N.W.2d 32 (Minn. 1979).....	24, 37
<i>Consolidation Coal Co. v. Liberty Mut. Ins. Co.</i> , 406 F. Supp. 1292 (W.D. Pa. 1976).....	30, 31, 32
<i>Cont.Cas. Co. v. Reed</i> , 306 F.Supp. 1072 (D. Minn. 1969) .....	26
<i>Dillon Cos. Inc. v. Royal Indem. Co.</i> , 369 F.Supp.2d 1277 (D. Kan. 2005).....	Passim
<i>Dyrdal v. Golden Nuggets, Inc.</i> , 689 N.W.2d 799 (Minn. 2004).....	35
<i>Ed Kraemer &amp; Sons, Inc. v. Transit Cas. Co.</i> , 402 N.W.2d 216 (Minn. App. 1987) .....	47
<i>Employers Mutual Cas. Co. v. Chicago, St. P., M. &amp; O. Ry. Co.</i> , 50 N.W.2d 689 (Minn. 1951).....	42
<i>Faber v. Roelofs</i> , 250 N.W.2d 817 (Minn. 0977) .....	48

<i>Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n</i> , 358 N.W.2d 639 (Minn. 1984).....	22
<i>Garcia v. Federal Insurance Co.</i> , 969 So.2d 288 (Fla. 2007) .....	29, 31
<i>General Casualty Co. of Wisconsin v. Wozniak Travel, Inc.</i> , 762 N.W.2d 572 (Minn. 2009).....	24
<i>Hartford Casualty Insurance Company v. Travelers Indemnity Company</i> 110 Cal. App 4th 710 (Cal. App. 1 <sup>st</sup> Dist., Div 1 2003).....	32
<i>Hartley v. Electric Ins. Co.</i> , 919 A.2d 808 (N.H. 2007).....	48
<i>Henry v. Hutchins</i> , 178 N.W. 807 (Minn. 1920) .....	43
<i>Holmes v. Watson-Forsberg Co.</i> , 488 N.W.2d 473 (Minn. 1992).....	4, 18, 19, 50
<i>Huber Engineered Woods v. Canal Ins. Co.</i> , 690 S.E.2d 739 (N.C. App. 2010).....	1, 37, 38, 39
<i>Hurlburt v. Northern States Power Co.</i> , 549 N.W.2d 919 (Minn. 1996) .....	19, 36
<i>Integrity Mut. Ins. Co. v. State Auto Cas. Underwriters Ins. Co.</i> , 239 N.W.2d 445 (Minn. 1976).....	54
<i>J.A. Jones Constr. Co. v. Hartford Fire Ins. Co.</i> , 645 N.E.2d 980 (Ill. Ct. App. 1995) .....	21, 28
<i>Jenoff, Inc. v. N.H. Insurance Co.</i> , 558 N.W.2d 260 (Minn. 1997).....	45
<i>Katzner v. Kelleher Construction</i> , 545 N.W.2d 378 (Minn. 1996) .....	<i>passim</i>
<i>Kuntz v. Park Constr. Co., No. A09-669</i> , 2010 WL 34639 @ *4 (Minn. App. Feb. 2, 2010).....	48
<i>Lesmeister v. Dilly</i> , 330 N.W.2d 95 (Minn. 1983).....	44
<i>Lobeck v. State Farm Mut. Auto Ins. Co.</i> , 582 N.W.2d 246 (Minn. 1998).....	22, 23
<i>Maryland Casualty Co. v. Regis Ins. Co.</i> , 1997 WL 164268 (E.D. Pa. 1997). .....	<i>passim</i>
<i>Meadowbrook Inc. v. Tower Ins.</i> 559 N.W.2d 411 (Minn. 1997) .....	47

<i>Minn. Min. and Mfg. Co. v. Travelers Indem. Co.</i> , 457 N.W.2d 175 (Minn. 1990).....	<i>Passim</i>
<i>Nathe Bros. Inc. v. Am. Nat'l Fire Ins. Co.</i> , 615 N.W.2d 341 (Minn. 2000). ....	24, 31, 49
<i>Nordby v. Atlantic Mut. Ins. Co.</i> , 329 N.W.2d 820.....	24, 37, 49
<i>Northbrook Ins. Co. v. American States Ins. Co.</i> , 495 N.W.2d 450 (Minn. App. 1993).....	25, 40
<i>Offerdahl v. University of Minnesota Hospitals &amp; Clinics</i> , 426 N.W.2d 425 (Minn. 1988).....	22
<i>Oster v. Medtronic, Inc.</i> , 428 N.W.2d 116 (Minn. App. 1988) .....	47
<i>Onvoy, Inc. v. Allete, Inc.</i> , 736 N.W.2d 611 (Minn. 2007).....	42
<i>Pillsbury Company v. National Union Fire Ins. Co.</i> <i>of Pittsburgh, Pennsylvania</i> , 425 N.W.2d 244 (Minn. App. 1988) .....	23
<i>Raleigh v. Indep. Sch. Dist. No. 625</i> , 275 N.W.2d 572 (Minn.1978) .....	42
<i>Rediske v. Minnesota Valley Breeder's Ass'n.</i> , 374 N.W.2d 745 (Minn. App.1985).....	44
<i>Richards v. Fireman's Fund Ins. Co.</i> , 417 N.W.2d 663 (Minn. App. 1988) .....	26, 38
<i>Riley Bros. Constr., Inc. v. Shuck</i> , 704 N.W.2d 197 (Minn. App. 2005).....	<i>passim</i>
<i>In re SRC Holding Corp.</i> , 545 F.3d 661 (8 <sup>th</sup> Cir. 2008).....	34
<i>SCSC Corp. v. Allied Mut. Ins. Co.</i> , 536 N.W.2d 305 (Minn. 1995).....	36
<i>Secura Supreme Ins. Co. v. M.S.M.</i> , 755 N.W.2d 320 (Minn. App. 2008).....	45, 46
<i>Shaffer v. Stewart Const. Co., Inc.</i> , 865 So.2d 213 (La. App. 5th Cir. 2004).....	27
<i>St. Paul Fire &amp; Marine Ins. Co. v. Am. Dynasty Surplus Lines Ins. Co.</i> , 124 Cal.Rptr.2d 818 (Cal. 2002).....	46

<i>Telex Corp. v. Data Prods. Corp.</i> , 135 N.W.2d 681 (Minn. 1965) .....	35
<i>Thommes v. Milwaukee Ins. Co.</i> , 641 N.W.2d 877 (Minn. 2002) .....	<i>Passim</i>
<i>Thiele v. Stich</i> , 425 N.W.2d 580 (Minn. 1988).....	40
<i>Transport International Pool, Inc. D/B/A GE Capital Modular Space v. The Continental Ins. Co., et al</i> , 166 S.W.3d 781 (Tex. App. – Fort Worth 2005, <i>no pet.</i> ) .....	26
<i>Turner v. Alpha Phi Sorority House</i> , 276 N.W.2d 63 (Minn. 1979) .....	22, 26
<i>United Healthcare Group, Inc. v. Columbia Cas. Co. et al</i> , No. 05-CV-1289 (Dist. of Minn., Dec. 27, 2011).....	34
<i>Valspar Refinishing, Inc. v. Gaylord’s, Inc.</i> , 764 N.W.2d 359 (Minn. 2009).....	28, 35
<i>Vulcan Materials v. Casualty Insurance Co.</i> , 723 F.Supp. 1263 (N.D. Ill. 1989).....	32, 33
<i>Van Vickle v. C. W. Scheurer and Sons, Inc.</i> , 556 N.W.2d 238 (Minn. App.1996).....	<i>passim</i>
<i>Wanzek Constr., Inc. v. Employers Ins. of Wausau</i> , 679 N.W.2d 322 (Minn. 2004).....	23, 34
<i>Warrick v. Graffiti Inc.</i> , 550 N.W.2d 303 (Minn. App. 1996).....	25
<i>Wessman v. Mass. Mut. Life Ins. Co.</i> , 929 F.2d 402 (C.A.8 (Minn.) 1991) .....	25, 31
<i>West Bend Mut. Ins. Co. v. Milwaukee Mut. Ins. Co.</i> , 372 N.W.2d 438 (Minn. App. 1985).....	24, 27, 31, 40
<i>Wozniak Travel, Inc.</i> , 762 N.W.2d 572.....	49

**STATUTORY AUTHORITIES**

Minn. Stat. §337.02.....	<i>passim</i>
Minn. Stat. §337.05.....	<i>passim</i>

**SECONDARY AUTHORITIES**

Civil Jury Instruction Guide 25.55	14, 23, 42
Minnesota Rule of Civil Procedure 56.03 .....	22
Black's Law Dictionary Revised 4 <sup>th</sup> Edition (1968).....	26
Black's Law Dictionary 5 <sup>th</sup> Edition (1979) .....	22, 24, 33, 50
Webster's 9 <sup>th</sup> New Collegiate Dictionary (1991) .....	25
The American Heritage Dictionary, 2 <sup>nd</sup> College Edition (1985).....	46

### **III. STATEMENT OF THE LEGAL ISSUES**

1. Does the additional insured endorsement issued by The Traveler's Indemnity Company of Connecticut ("Travelers") provide coverage to Engineering and Construction Innovations, Inc. ("ECI") for damage admittedly caused by L.H. Bolduc Co., Inc. ("Bolduc") during the course of Bolduc's work, without regard to Bolduc's negligence or lack thereof?

The Minnesota Court of Appeals held that ECI is entitled to coverage as an additional insured under the plain policy language drafted by Travelers, which expressly provides coverage for damage "caused by acts or omissions of [Bolduc]."

#### Apposite Cases:

*Huber Engineered Woods v. Canal Ins. Co.* 690 S.E.2d 739 (NC App. 2010).

*Maryland Ins. Cas. Co. v. Regis Ins. Co.*, 1997 WL 164268 (E.D. Pa. 1997).

*Dillon Cos. Inc. v. Royal Indemnity Co.*, 369 F.Supp.2d 1277 (D. Kan. 2005).

*Minn. Min. and Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175 (Minn. 1990).

#### Apposite Statutes:

Minn. Stat. §337.02

Minn. Stat. §337.05

## VI. 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.8*. All parties agree that “the pipeline was damaged by Bolduc’s act when it drove a sheet into the pipe.” *Bolduc’s App. Brief at p. 11*.

After Bolduc and, its insurer, 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.8*. ECI also sought insurance coverage from Travelers under Bolduc’s general liability coverage and an additional insured endorsement (the “Endorsement”) under which ECI is an additional insured. *Add.18-22; A.12-A.213*.

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. *Add.11*. The Sub-subcontract also required that Bolduc name ECI as an “additional insured”. *Id.* Bolduc obtained the insurance from Travelers, including the Endorsement, which 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.” *Add.19-*

22. 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. *A.214.*

Prior to trial, at the request of Bolduc and Travelers, 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. *A.253.* 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." *Id.* At trial, **the jury did not find that ECI was negligent.** *Add.16.* The jury also did not find that Bolduc was negligent or, accordingly, award ECI any damages for Bolduc's negligence. *Add.17.*

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: (a) unilaterally 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.1.* 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.6.* 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.7.*

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.23-41.*

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.31-33.* 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, 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.34.* 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.* In drafting the Endorsement, 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.34-35*. The Court of Appeals remanded the case to the trial court for further proceedings consistent with its decision. *Add.37*.

Travelers and Bolduc then petitioned this Court for review. Bolduc's appeal is addressed separately, in *ECI's Brief, Addendum, and Appendix in Response to Appellant Bolduc*. Travelers identified two separate issues in its Petition for Review:

1. When one party to a construction contract has agreed to procure and maintain insurance, what specificity is required under Minn. Stat. § 337.05 before that agreement will be construed as one to procure insurance for the second party's own negligence?
2. When an insurance policy provides that an "organization [ECI] does not qualify as an additional insured with respect to the independent acts or omissions of [ECI]," and that is covered "only to the extent that the injury or damage is caused by the acts or omissions of" the named insured (Bolduc), is ECI nonetheless entitled to coverage as an "additional insured" for damages it incurred as a result of its own negligence?

In its principal brief, Travelers only addresses the second issue identified above. Bolduc's principal brief attempts to address Minn. Stat. §§337.02 and 337.05, and ECI fully addressed the applicable requirements of these statutes and their progeny in its Response Brief to Appellant Bolduc. To the extent Travelers contends it has properly asserted arguments on the basis of §§337.02 and 337.05, ECI incorporates herein by reference the entirety of its *Brief, Addendum, and Appendix in Response to Appellant Bolduc*.

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 Travelers' and Bolduc's breaches of contract.

**A. The Material Facts.**

There are five 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*); 2) 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.11*); 3) Bolduc procured insurance from Travelers, including the Endorsement which provides coverage to ECI for property damage "...caused by acts ...of [Bolduc]...in the performance of ...[Bolduc's] work." (*Add.19-22*); 4) Bolduc agreed to the terms of the Sub-subcontract (*Add.15*); and 5) there has never been a finding that ECI was negligent. *Add.17*. 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. *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.10.*

**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 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.**

*Id.* (emphasis original).

**E. The Insurance Coverage.**

Bolduc obtained general liability 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. *Add.19-22; A.12-A.213.*

The Policies provide all-risk coverage as the Insuring Agreements of the Policies state: “[Travelers] will pay those sums that the insured [Bolduc] becomes legally obligated to pay as damages because of ... ‘property damage’ to which this insurance applies.” *Add.18.* The Policies contain an exclusion for Contractual Liability, but then restore coverage by way of an exception to the exclusion, agreeing to cover “liability for damages:...(2) Assumed in a contract or agreement that is an ‘insured contract’, provided the ... ‘property damage’ occurs subsequent to the execution of the contract or agreement....” *A.29.* The Policies relevantly define “property damage” as “Physical injury to tangible property....” *A.42.* The Policies relevantly define an “Insured contract” as:

f. that part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for .... ‘property damage’ to a third person or organization. ‘Tort liability’ means a liability that would be imposed by law in the absence of any contract or agreement.

*A.40.*

Each Policy also contained an Additional Insured (Contractors) Endorsement (the “Endorsement”) under which ECI is an additional insured for the Project. *Add.19-22.*

The Endorsement provided coverage as follows:

**BLANKET ADDITIONAL INSURED  
(CONTRACTORS)**

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.

*Id.*

**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. *App. Bolduc’s Brief at pp. 7, 11, & 46.* This photograph depicts the damage:



In December 2007, ECI discovered the damage. *A.216; 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.216; T.250; Exs. 6 & 7*. Prior to any repairs, ECI advised Bolduc and Travelers of the damage and submitted a formal claim. *Ex. 11*. ECI then repaired Bolduc's damage at a cost of \$233,365.65. *A.216*.

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.8; Ex. 11*. Bolduc refused to reimburse ECI. *T.94, 117, 382*. Travelers also denied coverage, alleging without any basis that the Pipe was not damaged by Bolduc. *A.217; A.224*.

**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.217.*

Bolduc and Travelers denied liability. *A.245; A.221.* Bolduc asserted a counterclaim for monetary damages. *A.245.* Travelers asserted a counterclaim for declaratory judgment. *A.228.*

**H. The Stipulation.**

The case was set for trial on March 8, 2010. *A.253.* Bolduc's and Travelers' counsel requested that the negligence claims and the contract claims be bifurcated at trial. *Id.* 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.

*Id.*

#### **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.113; T. 403. ECI and Bolduc agreed that this instruction was appropriate. R.A.7-R.A.9.

Also, Bolduc and ECI each submitted a Proposed Special Verdict Form. R.A.1-R.A.4. Bolduc's form proposed that the jury determine whether ECI was negligent **only if** the jury found Bolduc negligent. R.A.4. ECI's proposed form required the jury to determine whether ECI was negligent, regardless of whether Bolduc was found negligent. R.A.1. The trial court adopted Bolduc's proposed form (the "Verdict Form"). *Add.16*.

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.1-3*.

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.18-21; MT.8-10. Contrary to, and despite the unambiguous terms of the Stipulation to which it had agreed,

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.113; T. 403*. ECI and Bolduc agreed that this instruction was appropriate. *R.A.7-R.A.9*.

Also, Bolduc and ECI each submitted a Proposed Special Verdict Form. *R.A.1-R.A.4*. Bolduc's form proposed that the jury determine whether ECI was negligent **only** **if** the jury found Bolduc negligent. *R.A.4*. ECI's proposed form required the jury to determine whether ECI was negligent, regardless of whether Bolduc was found negligent. *R.A.1*. The trial court adopted Bolduc's proposed form (the "Verdict Form"). *Add.16*.

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.1-3*.

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.18-21; MT.8-10*. Contrary to, and despite the unambiguous terms of the Stipulation to which it had agreed,

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. *MT.7-8; R.A.45; R.A.53-55.*

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.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. *R.A.27; MT. 27, 33.* ECI requested summary judgment be granted in its favor or, if there was a question of material fact, that the matter be set on for a court trial as agreed in the Stipulation. *MT.27.*

Although the jury had never determined that ECI was negligent, 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."<sup>1</sup> *R.A.20.*

Similarly, as part of its position that no coverage was owed, Travelers argued that the Pipe was damaged by ECI's own acts or omissions. *R.A.39.* Travelers argued that the Negligence Trial "focused on the pipeline locates provided by ECI on the ground surface at FAS-1 and the whaler Bolduc used as a template for driving its sheets; whether those were accurate; and/or whether Bolduc drove its sheets appropriately." *R.A.36.* Travelers alleged that, "the clear implication [of the Jury Verdict] is that ECI's acts or omissions in improperly placing the pipeline locates caused the damage to the pipeline." *R.A.39.* "For the last three years, ECI has attempted to shirk its responsibility by ignoring its own negligent acts of improperly locating the pipeline...." *R.A.41.* All of this is pure and unfounded speculation and conjecture on the part of Travelers' counsel, who did not participate in the trial.

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.122.* 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.* Importantly, it was at Bolduc's insistence that ECI's negligence was not decided by the jury. *R.A.4.*

---

<sup>1</sup> Travelers made similar arguments. *A.39.*

**K. The Summary Judgment Ruling.**

Judge Johnson granted summary judgment to Travelers and Bolduc, finding that Bolduc had no obligation to indemnify or insure ECI and that the Policies and the Endorsement did not provide coverage to ECI for the damage. *Add.1-7*. 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*.

**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." *Id. 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, which 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.* The court did not consider the possibility embodied in CIVJIG 25.55 that accidents happen without any party being negligent.

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 Travelers had no duty to indemnify ECI. *Id.* Judge Johnson concluded that "ECI was only entitled to indemnity coverage [from Travelers] for damage caused by Bolduc and not 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, requires Bolduc to indemnify and insure ECI for Bolduc's damage to the Pipe. *Add.23-37.* Also, the plain language of the Endorsement drafted by Travelers provides coverage to ECI for its loss. *Id.*

**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.31-33*.

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." *Id.* 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 v. Northern States Power Co.*, 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.31*. 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.33-4*. The Court of Appeals 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.

### **3. The Endorsement Provides Coverage.**

The Court of Appeals also concluded that Travelers' Endorsement provides coverage to ECI for the damage to the Pipe that resulted from Bolduc's act of driving sheetpiling. *Id.* The plain language of the policy controls:

The (E)ndorsement amends the GCL policy to include as an insured "any person or organization that you agree in a written contract requiring insurance to include as an additional insured." (Quotation marks omitted.) The endorsement limits such coverage to situations where "the injury or damage is caused by acts or omissions of you or your subcontractors in the performance of your work to which the written contract requiring insurance applies." (Quotation marks omitted.)

*Add.34-5.*

Then, reaching a similar result as *J.A. Jones Constr. Co. v. Hartford Fire Ins. Co.*, 645 N.E.2d 980 (Ill. Ct. App. 1995)(discussed in further detail below), the Court found that the plain language of the policy did not limit coverage only to the negligent acts by Bolduc. *Id.* With respect to the requirement in the Endorsement that the injury or damage has been “caused” by the insured, the Court stated, “while a jury has found that Bolduc was not negligent in damaging the pipeline, this finding does not equate to a finding that Bolduc did not cause the damage to the pipeline.” *Id.*

The Court of Appeals remanded the case to the trial court for further proceedings consistent with its decision.

As for the Court of Appeals’ dissent, the mistaken assumption that ECI is negligent (contrary to the evidence at trial, the jury instructions, and the Jury Verdict), also 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.39-41.* Justice Connolly made the same mistake as Judge Johnson by rewriting the Endorsement to insert “negligent” before “acts or omissions” and by concluding, contrary to CIVJIG 25.55, that if Bolduc was not negligent, then ECI must have been. *Add.41.*

## V. ARGUMENT AND AUTHORITIES

### A. **The Court of Appeals’ Decision Should Be Affirmed.**

This Court should affirm the Court of Appeals decision, reversing the trial court’s erroneous grant of summary judgment to Travelers. As required by Minnesota law, the Court of Appeals applied the plain language of the Endorsement to the undisputed facts

of this case and properly determined that the Endorsement provides coverage to ECI for the damage to the Pipe caused by “the act” of Bolduc driving sheetpiling, regardless of whether or not “the act” was negligent.

**B. 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.” Minn. R. Civ. P. 56.03; *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). On appeal the court “need not defer to the district court’s application of the law.” *Id.* (*citation omitted*); *Frost-Benco Elec. Ass’n v. Minnesota Pub. Utils. Comm’n*, 358 N.W.2d 639, 642 (Minn. 1984). 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 Insurance Policy Interpretation.**

Under Minnesota law, insurance policies are interpreted according to general contract principles. *Lobeck v. State Farm Mut. Auto Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998); *Secura Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 323 (Minn. App. 2008). The construction and effect of a contract present questions of law, which the appellate court reviews *de novo*. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979).

A district court's interpretation of an insurance policy and its application to undisputed facts of a particular loss are reviewed *de novo* on appeal. *Lobeck*, 582 N.W.2d at 249; *M.S.M.*, 755 N.W.2d at 323; *Andrew L. Youngquist Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 183 (Minn. App. 2001).

**C. The Policies and the Additional Insured Endorsement Require Travelers to Indemnify ECI for the Costs ECI Expended in Repairing the Pipe That Bolduc Damaged.**

In reviewing the Endorsement of the Policies *de novo*, this Court should affirm the Court of Appeals and require Travelers to honor its coverage obligations to ECI.

**1. Rules of Construction for Insurance Policy Coverage.**

General principles of contract law apply to interpretation of insurance policies. *Lobeck*, 582 N.W.2d at 249; *M.S.M.*, 755 N.W.2d at 323. "An insurance policy is a contract, the terms of which determine the rights and obligations of the contracting parties...The insurer is obligated to pay when the insured suffers a loss covered by the policy." *Pillsbury Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A.*, 425 N.W.2d 244, 248 (Minn. App. 1988) (*citations omitted*).

Policy language must be given its plain, ordinary, and popular meaning. *Id.*; *Wanzek Constr., Inc. v. Employers Ins. of Wausau*, 679 N.W.2d 322, 324 (Minn. 2004) (policy language given "usual and accepted meaning."); *Andrew L. Youngquist, Inc.*, 625 N.W.2d at 184.

The insurer is obligated to pay when the insured demonstrates coverage under an insurance policy." *M.S.M.*, 755 N.W.2d at 323. Once a *prima facie* case of coverage is established under the policy, the burden shifts to the insurer to prove the applicability of

an exclusion. *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 313-4 (Minn. 1995).<sup>2</sup>

**Insurance policy exclusions are to be construed strictly against the insurer.**

*Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002).

The Court broadly interprets policy coverage to provide the greatest possible protection to the insured. *West Bend Mut. Ins. Co. v. Milwaukee Mut. Ins. Co.*, 372 N.W.2d 438, 441 (Minn. App. 1985); *See also Gen. Cas. Co. of Wisconsin v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 575 (Minn. 2009). If an insurer intends a policy term to have a narrow meaning, it is **incumbent upon the insurer** to make that intention clear and write the policy that way. *Minn. Min. & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 181 (Minn. 1990).

If the policy language is subject to more than one reasonable interpretation it is ambiguous. *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32, 34 (Minn. 1979). “Whether the language of an insurance policy is ambiguous is a question of law,” and thus reviewed *de novo* on appeal. *Id.* Ambiguous policy language must be interpreted **in favor of coverage**. *Id.* at 36; *Nordby v. Atlantic Mut. Ins. Co.*, 329 N.W.2d 820, 822 (Minn. 1983)<sup>3</sup>.

This rule comports with the *Doctrine of Contra Preferentum* that instructs the courts to construe an ambiguous contract against the drafter if the non-drafting party’s interpretation is reasonable. *See Id.*; *Nathe Bros. Inc. v. Am. Nat’l Fire Ins. Co.*, 615

---

<sup>2</sup> *Overruled on other grounds by SCSC Corp. v. Allied Mut. Ins. Co.*, 533 N.W.2d 603 (Minn. June 16, 1995) *opinion amended and superseded on denial of rehearing.*

<sup>3</sup> *Overruled on other grounds by Cargill, Inc. v. Ace Am. Ins.*, 784 N.W.2d 341 (Minn. June 30, 2010).

N.W.2d 341, 344 (Minn. 2000); *Warrick v. Graffiti Inc.*, 550 N.W.2d 303, 309 (Minn. App. 1996); *Canadian Univ. Ins. Co., Ltd. v. Fire Watch, Inc.* 258 N.W.2d 570, 572 (Minn. 1977) *citing* *Bobich v. Oja*, 104 N.W.2d 19 (Minn. 1960) (policy construed according to what reasonable person would have understood the words to mean rather than what the insurer intended the language to mean); *Wessman v. Mass. Mut. Life Ins. Co.*, 929 F.2d 402, 404-5 (C.A.8 (Minn.) 1991) (coverage read in insured's favor to satisfy the reasonable expectations of coverage).

One of the functions of an additional insured endorsement is to protect the additional insured from liability due to the actions of the named insured. *Northbrook Ins. Co. v. American States Ins. Co.*, 495 N.W.2d 450, 453 (Minn. App. 1993). Additional insured endorsements are broadly construed to effectuate this purpose. *Andrew L. Youngquist Inc.*, 625 N.W.2d at 183.

Applying this law, the Court of Appeals correctly concluded that the Endorsement provides coverage to ECI for its damages, expenses, fees, and costs expended to repair the Pipe that Bolduc damaged. The trial court erred by finding there was no coverage by improperly imposing negligence on ECI and retrospectively adding the word "negligent" prior to the word "acts" in the Endorsement.

**2. The Coverage Analysis Begins and Ends with the Policy's Plain Language.**

Travelers must honor its coverage obligations and indemnify ECI "with respect to liability for...property damage...caused by acts or omissions of [Bolduc]." *Add.19-22*. The jury's determination that Bolduc was not negligent in damaging the Pipe does not

change the plain language of this Endorsement providing coverage for the “act” of Bolduc that hit and damaged the Pipe.

### 3. The Plain Meaning of “Acts” Prevails.

The Court of Appeals correctly determined that Judge Johnson erred by unduly limiting this broad coverage provision to only provide coverage for Bolduc’s negligent Acts. *Add.7*. “Acts” includes a far broader scope of Bolduc’s actions than simply its *negligent* acts.

The ordinary meaning of “act” in the Endorsement applies. *Turner*, 276 N.W.2d at 67. “Act” is defined as: “carries idea of performance; ...a deed” (*Black’s Law Dictionary* Revised 4<sup>th</sup> Ed. (1968) at p. 42 (*R.A.103*)) and “the doing of a thing.” *Webster’s cited supra* at p. 53 (*R.A.109*). Nothing in these definitions implies a limitation to negligence or tortious conduct.

Travelers’ subjective intent of the meaning of “acts” holds **no relevance**. *See Riley Bros. Constr., Inc.*, N.W.2d at 202 (general contract principal). Had Travelers wanted to limit coverage to only Bolduc’s negligent acts, Travelers bore the duty of drafting clearer policy language, just as other insurers have done for decades. *Minn. Min. & Mfg. Co.*, 457 N.W.2d at 181; *Cont. Cas. Co. v. Reed*, 306 F.Supp. 1072, 1073 (D. Minn.1969) (policy language limited to “negligent” act); *Richards v. Fireman's Fund Ins. Co.*, 417 N.W.2d 663, 665 (Minn. App. 1988) (same); *Transport International Pool, Inc. D/B/A GE Capital Modular Space v. The Continental Ins. Co., et al*, 166 S.W.3d 781 (Tex. App. – Fort Worth 2005, *no pet.*) (express exclusionary language for injury “arising

out of the sole negligence ”); *Shaffer v. Stewart Const. Co., Inc.*, 865 So.2d 213, 223 (La. App. 5th Cir. 2004)(same).

Had Travelers wanted to limit its indemnity obligation to only Bolduc’s negligent acts, then it was **incumbent upon Travelers** to manuscript an endorsement that **expressly limited** its coverage obligations to only “negligent acts” or to the “sole negligence” of Bolduc as the named insured. *Minn. Min. & Mfg. Co.*, 457 N.W.2d at 181. Travelers did not do so and cannot now be heard to complain.

Minnesota law requires that the court apply the coverage afforded under the Endorsement broadly, in order to provide the greatest possible protection to the additional insured ECI, as well as the named insured Bolduc. *West Bend Mut. Ins. Co.*, 372 N.W.2d at 441. The Court of Appeals did just that, and this Court should as well.

**4. The Court of Appeals Properly Interpreted the Endorsement Using a “Plain Language” Analysis.**

Caselaw supports the Court of Appeals finding of coverage. *Maryland Casualty Company v. Regis Insurance Company* concerned similar “act or omission” policy language. 1997 WL 164268 (E.D. Pa. 1997) *R.A.95*. The additional insured endorsement in *Maryland Casualty* stated that the additional insured lessor of fairgrounds would be entitled to coverage “with respect to liability sought to be imposed upon the [lessor] as the result of an alleged act or omission of the [lessee] or its employees.” *Id.* at \*1.

When a fairgrounds patron stepped into a pothole, sustained injuries and commenced suit against both the lessor and lessee, the lessor sought coverage from the lessee’s insurer as an additional insured. *Id.* at \*1-\*2. Because the endorsement provided

broad coverage for any liability “sought to be imposed” as the result of an “alleged” act, and did not merely entitle the lessor to coverage “only with respect to acts” of the lessee, the court determined that a finding of negligence on the part of the lessee was not required for additional insured coverage to be triggered for the lessor. *Id.* at \*5-\*6.

Similarly, *J.A. Jones Construction Company v. Hartford Insurance Company* (one case relied upon by the Court of Appeals) underscored the importance of considering what the policy language does not say in addition to what it does say. 645 N.W.2d 980. The *J.A. Jones* court held that coverage for a general contractor as an additional insured was not limited to claims arising from a subcontractor’s negligence, because that additional insured endorsement (like the Endorsement here) did not expressly limit coverage to damages attributable to only the subcontractor’s negligence. *Id.* at 982.

While Travelers attempts to divert this Court by arguing that *J.A. Jones* is not applicable because of slightly differing causation language (“arising from” vs. “caused by”), that argument fails for two reasons. *See id.* First, the primary point of *J.A. Jones* is that the actual language used by the insurer in drafting the endorsement defines the scope of coverage. *Id.* The court cannot redline or add language that simply is not there. *See id.*

Second, the holding in *J.A. Jones* comports precisely with Minnesota law. The court must enforce the “outward manifestations” objectively memorialized within the four-corners of the contract and cannot rewrite or otherwise modify unambiguous terms. *Riley Bros. Const., Inc.*, 704 N.W.2d at 202; *Valspar Refinishing, Inc.*, 764 N.W.2d at 364.

Yet, this is precisely what Judge Johnson did and for what Justice Connolly advocates in his dissent: the insertion of “negligent” before “acts” in the Endorsement. Minnesota law prohibits this. *Id.*

The Court of Appeals properly applied the plain language in the Endorsement and refused to narrow the meaning of “act” to only “negligent” acts when Travelers had not done so when it drafted the Endorsement. *Minn. Min. & Mfg. Co.*, 457 N.W.2d at 181. This Court should affirm the Court of Appeals.

**5. The Cases Upon Which Travelers Relies Ignore the Plain Language of the Endorsement And Provide No Escape for Travelers from Its Coverage Obligations.**

Try as it might, Travelers’ cannot escape its coverage obligations by ignoring the language of its Endorsement and making arguments that are heavy on rhetoric and light on law. Moreover, Travelers primarily relies upon cases wholly distinguishable from and inapplicable to the critical issues at hand.

For instance, Travelers relies upon *Garcia v. Federal Insurance Co.*, 969 So.2d 288 (Fla. 2007), which unlike the instant case, involved only tort liability for an automobile accident wherein a household employee of a homeowner struck and injured a pedestrian during the course of her work duties, was sued for **negligence**, and then sought coverage under the employer’s homeowner’s insurance policy which covered “any other person or organization with respect to liability because of acts or omissions of” the homeowner-employer. In this context, involving an employer-employee relationship and where only negligence was claimed, the *Garcia* court held that the insurance coverage

was limited to instances of vicarious liability where the acts or omissions of the employer were negligent. *Id.*

Here, unlike *Garcia*, no employer-employee relationship is at issue (negating the issue of “vicarious liability”). Also, negligence was not ECI’s sole cause of action. Bolduc also bore contractual liability under the Sub-subcontract for contractually-based damages. Contract liability was simply not an issue before the *Garcia* court in terms of assessing the overall coverage owed under the policy language. Accordingly, *Garcia* does not control the coverage analysis for the case at hand.

Travelers also references *Consolidation Coal Co. v. Liberty Mut. Ins. Co.*, 406 F. Supp. 1292 (W.D. Pa. 1976), which was argued in depth at the Court of Appeals and, also, is inapplicable. In *Maryland Casualty*, discussed above, the federal district court for the Eastern District of Pennsylvania rejected the decision by its sister court in the Western District of Pennsylvania in *Consolidation Coal Co.* which had held that the phrase “act or omission” limited additional insured coverage to only those situations where the named insured was negligent. *Id.* at \*5-6.

The *Maryland Casualty* court held that “the use of the words ‘act or omission’ in the additional insured endorsement does not require negligence on the part of the named insured. The plain or ordinary meaning of ‘act or omission’ only requires the named insured to do or fail to do something. Negligence would require the named insured to do [or fail to do] something ‘which a reasonable [person] guided by those ordinary considerations which ordinarily regulate human affairs, would do [or would not do].’” *Id.* at \*5.

The *Maryland Casualty* court's coverage analysis and rejection of *Consolidation Coal* harmonizes with Minnesota law, where coverage is broadly construed in order to afford the greatest possible protection to an insured. *West Bend Mut. Ins. Co.*, 372 N.W.2d at 441.

Furthermore, similar to *Garcia*, *Consolidation Coal* involved a personal injury claim premised only upon *negligence*. *Id.* No breach-of-contract claims were at issue. *Id.* In that context, the *Consolidation Coal* court held that “[I]t is reasonable to conclude that the most appropriate construction of the subject phrase is that Consolidation was to be an additional insured under [the named insured’s] policy only when the negligent acts or omissions directly caused Consolidation’s loss.” *Id.* at 1298-9.

Here, the liability of Bolduc, as the named insured, included contract liability—which the district court failed to consider on summary judgment in analyzing the Endorsement—in addition to tort liability. Based on the rationale underlying *Consolidation Coal*, “the most appropriate construction” of the Endorsement is that ECI is entitled to coverage as an additional insured for Bolduc’s tort and contract liability for damaging the Pipe.

This conclusion supports the *Doctrine of Contra Preferentum*, which the *Consolidation Coal* court did not need to consider as *Consolidation Coal* involved a subrogation claim between two insurers. Unlike *Consolidation Coal*, this Court must consider the reasonable expectations of ECI in determining coverage. *See Thommes, Nathe Bros. Inc.* and *Wessman cited supra*.

The California Court of Appeals case of *Hartford Casualty Insurance Company v. Travelers Indemnity Company* also supports a broad application of the *Consolidation Coal* holding. 110 Cal. App 4th 710, 717-8 (Cal. App. 1<sup>st</sup> Dist., Div 1 2003). “The [*Consolidation Coal*] court held that unless the additional insured’s liability was the result of an act or omission of the named insured there was no coverage.” *Id.* The *Hartford* court did not state “tort liability” or mention “negligence,” but rather **liability** alone. *Id.* ECI argues the identical premise herein.

Travelers also references *Vulcan Materials v. Casualty Insurance Co.* in purported support of its position. 723 F.Supp. 1263 (N.D. Ill. 1989). Again, *Vulcan* only involved a negligence claim for wrongful death of a delivery company (J.H. Sandman & Sons) employee that was injured on Vulcan’s premises. *Id. at 1264.* After the administrator of the deceased’s estate sued Vulcan for negligence, Vulcan sought coverage as an additional insured under Sandman’s commercial automobile policy, which provided coverage to “any other person or organization but only with respect to his or its liability because of acts or omissions of...” “(a) the named insured [Sandman]”. *Id.* Vulcan argued that Sandman negligently failed to train the deceased employee and argued that Sandman’s “act” of sending the deceased to the Vulcan plant led to the accident that fatally injured him. *Id. at 1265.*

In denying coverage in this context, the *Vulcan* Court held that “Vulcan’s liability ‘because of’ Sandman’s acts or omissions can exist only if Vulcan **bears some legal responsibility** for Sandman’s acts.” *Id. (emphasis added).* Because the court found no

basis for holding Vulcan liable and the Court was not willing to change the policy language, the court declined to uphold coverage. *Id.*

Here, the undisputed facts differ materially, warranting the opposite result of *Vulcan*, specifically: that the Endorsement provides coverage. Bolduc bears “some legal responsibility” for the undisputed damage to the Pipe and the costs, fees, and expenses resulting therefrom. Unlike *Vulcan*, there is another clear basis, aside from negligence, for holding Bolduc liable for the damage to the Pipe: contractual liability.

#### 6. Liability Means “Liability” – Including Contractual Liability.

The jury’s determination that Bolduc was not negligent for its damage to the Pipe has no impact on ECI’s contract claims against Bolduc or Travelers for Bolduc’s contractual liability for damaging the Pipe as a result of its “acts”.

The Endorsement provides broad coverage for Bolduc’s “liability”. *Add.19* (emphasis added). “Liability” is far broader than mere tort liability for Bolduc’s negligent acts. Black’s Law Dictionary defines “liability”:

The word is a broad legal term ... It has been referred to as of **the most comprehensive significance, including almost every character of hazard or responsibility**, absolute, contingent, or likely. It has been defined to mean: all character of...obligations,...; condition of being responsible for a possible or actual loss,...; **every kind of legal obligation**, responsibility, or duty,...

5<sup>th</sup> Ed. (1979) at p. 823, *R.A.105 citations omitted* (emphasis added).

The Travelers Policies contain specific definitions at SECTION V- DEFINITIONS, yet fail to provide any specialized meaning for “liability”. *A.39*. Accordingly, the plain meaning of “liability” must apply, and that plain meaning, encompasses legal obligations

far broader than mere tort liability for negligent acts. *Wanzek Constr. Inc.*, 679 N.W.2d at 324. Instead, “liability” as used in the Endorsement also includes contractual obligations of the very kind to which Bolduc agreed in the Sub-subcontract and for which Travelers promised to indemnify ECI as an additional insured.

In fact, another portion of the Policies specifically limits coverage for “tort liability”, indicating that Travelers fully comprehends the significance of and understands the distinction between “tort liability” and the more comprehensive term: “liability”. See *Add.29* (Contractual Liability Exclusion). By failing to include “tort” before “liability” in the Endorsement, as it did elsewhere in the Policies, Travelers elected to cover a scope of liability far broader than mere negligence, including contractual liability.

An insurer, like Travelers, that elects to cover breach of contract claims will be held to its promise. See *id.* (contractor may incur contractual liability despite taking measures to control quality of work) and *In re SRC Holding Corp.*, 545 F.3d 661, 668 (8<sup>th</sup> Cir. 2008) cited by *United Healthcare Group, Inc. v. Columbia Cas. Co. et al*, No. 05-CV-1289 (Dist. of Minn., Dec. 27, 2011) *R.A.67*.

Tort liability aside, Bolduc is also *contractually liable* to ECI under the Sub-subcontract. Specifically, under the Indemnity and Insurance Agreement Bolduc is liable for its promise to “protect, indemnify, defend, and hold harmless ECI” for “liabilities, obligations, demands, costs, and expenses arising out of ...damages to property caused or alleged to have been caused by any act ...of [Bolduc]” and to procure insurance to insure these indemnity obligations. *Add.11*. Bolduc is also contractually liable to ECI under the Performance of Work Agreement: 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.10* (emphasis added).

While the Court of Appeals’ ruling did not expressly rely upon the Performance of Work Agreement, Bolduc’s breach is still clear, warranting judgment in ECI’s favor and remand to the trial court for a finding on the amount of damages. “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 that no “advice, recommendations or assistance” from any party, including ECI or Frontier’s surveyor, would alleviate Bolduc from “complete responsibility”. Yet, Bolduc refused to accept “complete responsibility” for damaging the Pipe, in breach of its indemnity and insurance obligations and the Performance of Work Agreement in the Sub-subcontract. *Telex Corp.*, 135 N.W.2d at 686-7.

In turn, as a result of Bolduc's breach of contract and damage to the Pipe, ECI was contractually liable to Frontier for repairing the damage caused by Bolduc, as ECI's subcontractor, as required by its contract with Frontier and as enforced by Frontier's and the Met Council's demand to ECI that the Pipe be immediately repaired. ECI's contract with Frontier contained the exact same indemnity language as the Sub-subcontract.

By honoring its contractual obligations, ECI avoided the imposition of liquidated damages by Frontier or the Met Council for delay of the Project, thereby mitigating the monetary amount for which Travelers (and Bolduc) are contractually liable to pay ECI. While Travelers may argue ECI had no "liability", this argument ignores the undisputed facts of this case and the practical reality of upstream indemnity obligations that are "customary" in complex construction projects like the one at issue. *Hurlburt*, 549 N.W.2d 919 (Minn. 1996)

Bolduc damaged the Pipe. As a direct result, ECI faced "liability" to Frontier "caused by" an "act" of Bolduc that triggered coverage under the plain and ordinary language of the Endorsement. The Court of Appeals properly required Travelers to fulfill its coverage obligations.

**7. "Acts or Omissions" Must Be Interpreted in Favor of Coverage for ECI.**

The phrase "acts or omissions" is clear and unambiguous and contains no express limitation to only Bolduc's negligence. If as Travelers argues, it can be interpreted otherwise, then the Endorsement language is, by definition, ambiguous because there would be two conflicting interpretations of what the term "acts" incorporates. *See*

*Columbia Heights Motors, Inc.*, 275 N.W.2d at 34-6. Ambiguities in the Policy language ***must be resolved in favor of coverage for ECI***, as ECI is an insured under the Policy. *Id.* at 36; *Nordby*, 329 N.W.2d at 822.

A number of cases addressing additional insured endorsements support that coverage is owed to an additional insured for a named insured's "acts or omissions" beyond just "negligent" acts. Among these cases is *Maryland Casualty Co. v. Regis Ins. Co.*, 1997 WL 164268 (A.95) discussed above, as well as *Huber Engineered Woods v. Canal Ins. Co.*, 690 S.E.2d 739 (N.C. App. 2010) and *Dillon Cos. Inc. v. Royal Indem. Co.*, 369 F.Supp.2d 1277 (D. Kan. 2005).

*Huber Engineered Woods* involved similar coverage language in an additional insured endorsement wherein the court ruled that "negligence" is not a precursor to coverage: "[the AI language] does not speak in terms of 'negligent acts or omissions,' but simply in terms of 'acts or omissions' . . . this language is susceptible to two reasonable interpretations." 690 S.E.2d at 745 (emphasis original). Thus, there was coverage, such that Huber would be entitled to coverage for "liability because of acts or omissions of an insured." *Id.* at 744-6.

The *Huber* Court determined that the term "act or omissions" was ambiguous because it did not clearly state that coverage would only be provided for the negligent "acts or omissions" of the named insured. *Id.* at 746. The *Huber* Court also found the term "because of" ambiguous because that term did not imply a requirement of "proximate cause" for coverage to be triggered. *Id.* at 746-47.

The sound reasoning of the *Huber* Court is applicable here. The phrase “liability” for property damage caused by “acts or omissions” of Bolduc contains no requirement of negligence as a precursor to triggering coverage. To re-write the Policy now to insert a “negligence” requirement is completely contrary to Minnesota contract and insurance law. See *Riley Bros. Constr.*, 704 N.W.2d at 202 (general contract principal); *Minn. Min. & Mfg. Co.*, 457 N.W.2d at 181.

In *Dillon Cos. Inc. v. Royal Indem. Co.*, the court again held that negligence is not a prerequisite to coverage under an additional insured endorsement. 369 F.Supp.2d 1277. In *Dillon*, the additional insured endorsement stated that the additional insured grocery store would be entitled to coverage under the policy of the named insured security company “but only with respect to acts or omissions of the named insured arising out of the named insured’s security or investigative operations....” *Id.* at 1282. When a store patron was injured during the course of a robbery after the on duty security officer had been attacked and restrained (through no fault of his own), the grocery store sought coverage from the security company’s insurer as an additional insured. *Id.* at 1280-82.

The *Dillon* court held that the endorsement “only require(d) some connection between acts or omissions of [the named insured] and [the named insured’s] security or investigative operations for [the additional insured].” *Id.* at 1288. Accordingly, coverage under the additional insured endorsement was triggered. *Id.*

While in the instant case, the Endorsement provides coverage for ECI for damage “caused by” the acts or omissions of Bolduc rather than the *Dillon* phrase “arising out of” the acts of Bolduc, the distinction between the two phrases makes no difference because

there is no dispute that Bolduc drove the sheeting that damaged the Pipe. Therefore, the damage at issue arose from and was caused by Bolduc's act.

While the additional insured endorsement language in *Huber* and *Maryland Casualty* also differed slightly in terms of the causal link between the act and the damage (*Maryland Casualty* used "the result of" and *Huber* used "because of"), these linguistic differences are without significance. 1997 WL 164268; 690 S.E.2d 739. The courts in *Dillon*, *Maryland Casualty* and *Huber* all interpreted the term "acts and omissions"—the pivotal language in the instant case—and held the language was either ambiguous or plainly did not require the named insured's negligence, without reference to the policy's causation language. 369 F.Supp 1277; 1997 WL 164268; 690 S.E.2d 739.

Finally, in *Dillon*, the court stated that . . . "[the additional insured endorsement] is ambiguous because it is capable of two reasonable interpretations," and noted that, on one hand, a reasonable insured could understand it to only provide coverage where the named insured was "negligent," whereas, on the other hand, "a reasonable person could also construe the additional insured endorsement to cover all acts or omissions, whether negligent or not." *Id.* 1284 (emphasis added) *citations omitted*. As a matter of law, therefore, the additional insured endorsement was interpreted to cover a broader scope of acts than merely negligent acts. *Id.*

The same reasoning applies here. The Endorsement must be interpreted in favor of coverage for ECI because "a reasonable person could also construe the additional insured endorsement to cover all acts or omissions, whether negligent or not," (*Id.*) and

ambiguous policy language must be interpreted in favor of coverage. *Nordby*, 329 N.W.2d at 822.

Unlike the cases upon which Travelers relies, *Dillon Cos. Inc.*, *Huber Engineered Woods*, and *Maryland Casualty Co.* (discussed above) all uphold basic principals of Minnesota insurance law, where coverage is broadly interpreted to provide the greatest possible protection to the insureds, bearing in mind that one of the primary functions of an additional insured endorsement is to protect an additional insured (ECI) from liability due to the actions of the named insured (Bolduc). *West Bend Mut. Ins. Co. v. Milwaukee Mut. Ins. Co.*, 372 N.W.2d 438, 441 (Minn. App. 1985); *Northbrook Ins. Co., v. American States Ins. Co.*, 495 N.W.2d 450, 453 (Minn. App. 1993). These cases, along with the plain language of the Endorsement, lead to the identical result here: Travelers owes coverage to ECI.

**8. The Court Should Reject Travelers' Arguments Raised for the First Time on Appeal.**

Travelers argues for the first time in this appeal that coverage must be denied because there has been no showing that ECI was "legally obligated" to pay for a loss, as required by the Policies, and ECI made payments arising out of Bolduc's damage to the Pipe "voluntarily." Appellate review is limited to those issues presented to, considered by, and decided by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Moreover, as discussed above, ECI was contractually liable to Frontier for the work of Bolduc as its subcontractor under the terms of its contract with Frontier, and both Frontier and the Met Council demanded of ECI that the Pipe be repaired immediately.

Failure to do so would have resulted in the delay of the project and ECI's contractual liability to Frontier for liquidated damages. Travelers' new argument is unfounded and should be disregarded.

**9. Travelers Has Failed to Meet Its Burden of Proving that Any Exclusionary Language of the Endorsement Applies.**

ECI has demonstrated a covered loss under the Endorsement. Bolduc (the named insured) admittedly hit (an "*act*") and damaged ("*physical damage*")<sup>4</sup> the Pipe (*property*) that led to ECI facing liability to pay for all costs, damage, fees, and expenses related to the damage. Travelers is now obligated to indemnify ECI. *M.S.M*, 755 N.W.2d at 323.

Yet, Travelers refuses to do so based initially on the allegation that Bolduc did not damage the Pipe, which proved to be false, and later on the premise that the Endorsement excluded coverage for damages caused by "the independent acts or omissions" of ECI. *Add.19*. Travelers now bears the onerous burden of proving that the damage to the Pipe falls within its exclusion and is not covered. *Andrew L .Youngquist Inc.*, 625 N.W.2d at 183. Any doubts as to coverage must be resolved against Travelers as the insurer. (*Id.*). Therefore, Travelers will fail.

Travelers' position and the trial court's finding of no coverage both hinge on the speculative presumption that ECI's fictional negligence damaged the Pipe, a fact never established at trial or found by the jury. *A.258*. Judge Johnson specifically concluded that the Endorsement did not provide coverage to ECI because "ECI was only entitled to indemnity coverage for damage caused by Bolduc and not for damage caused by the

---

<sup>4</sup> Per Policy Section V. *A.42*.

independent acts or omissions of ECI.” *Add.7*. By doing so, Judge Johnson disregarded the Jury Verdict, which is forbidden under Minnesota Law. *See Onvoy, Inc, v. Allete, Inc.*, 736 N.W.2d 611, 612 (Minn. 2007).

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 do.

Similarly, any false presumption that ECI is negligent simply because Bolduc is not, directly conflicts with Minnesota law as set forth in CIVJIG 25.55, which was appropriately given at trial in light of Frontier’s surveyor’s involvement with the Pipe locates:<sup>5</sup> “The fact that an accident has happened does not by itself mean that someone was negligent.” *R.A.113*. Yet, Travelers still insists on ignoring the law (and the facts) by arguing that the Jury Verdict somehow implies that the only possible conclusion is that ECI’s acts or omissions caused the damage to the Pipe. The trial court and Justice Connolly both became ensnared in Travelers (and Bolduc’s) web of pure speculation that ECI is negligent by default under the Jury Verdict. This Court must not make the same mistake.

Travelers has failed to meet its burden of proving that any act or omission of ECI caused the damage to the Pipe at issue. To the contrary, Bolduc admittedly hit and

---

<sup>5</sup> No party has ever argued that Civil Jury Instruction 25.55 was given in error.

damaged the Pipe (the photograph above does not lie), and the Court of Appeals properly determined that the Endorsement provides coverage for that damage.

**10. Damages Are Owed for the Damage to the Pipe.**

The repairs to the Pipe that Bolduc damaged were not free. ECI expended \$233,365.65 in labor, materials, and equipment costs to effectuate the repairs. Yet, Travelers irrationally argues that “ECI did not suffer a loss.” *Travelers App. Brief*, p. 23.

The Stipulation entered into before the Negligence Trial states that the Jury Verdict would not and did not resolve any damages for Bolduc’s or Travelers’ breaches of contract (including the breach of the Indemnity and Insurance Agreement or the Performance of Work Agreement or the Endorsement or the Policies). *A.253*. Travelers 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].” *Id.* The Negligence Trial never determined the amount of *contractual* damages for which Bolduc (or Travelers) is liable. *A.253*.

Moreover, under the Stipulation, Travelers clearly waived its right to participate in the Negligence Trial. *Id.*; *Henry v. Hutchins*, 178 N.W. 807, 810 (Minn. 1920)(clear showing of an intention to waive). Yet now, it purports to sit as judge and jury by arguing that ECI’s damages are “badly inflated” and that “the repair was ECI’s own responsibility”. *Travelers App. Brief*, p. 23. This is pure speculation and conjecture.

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 Travelers (or Bolduc) owes for damaging the Pipe.

As fully set forth in ECI’s Brief in Response to Appellant Bolduc, 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. 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.” *Lesmeister*, 330 N.W.2d at 103 *citation omitted*. Unlike negligence damages, contract damages may include attorney fees, legal costs, and expenses. *Van Vickle*, 556 N.W.2d 238; *Andrew L. Youngquist, Inc.*, 625 N.W.2d 178. As such, the jury’s limited decision on damages at the Negligence Trial, fails to exonerate Travelers from its contractual indemnity obligations.

The amount of contractual damages that Travelers (or Bolduc) owes to ECI for Bolduc’s damaging the Pipe has never been determined. The Court of Appeals correctly determined that this case must be remanded to the trial court for a factual finding on the amount of damages owed.

#### **11. Causation Exists Between Bolduc’s Work and the Damage.**

The Court of Appeals properly concluded that Travelers cannot escape its coverage obligations based on the jury decision in the Negligence Trial regarding causation. *Add.34-5*. Specifically, the Court correctly stated that the jury’s finding that Bolduc was not negligent in damaging the Pipe “does not equate to a finding that Bolduc

did not cause the damage to the [Pipe].” *Id.* Causation is still clear, because there is no question that Bolduc drove the sheetpiling, hit the Pipe, and damaged the Pipe as depicted in the photograph above. *Bolduc’s App. Brief, pp. 7, 11 & 46.*

Also, Travelers never raised this argument before Judge Johnson or at the Court of Appeals. It cannot now be heard to argue inapplicable technicalities to escape its coverage obligations, especially considering the Endorsement language which makes no reference to “proximate cause”, the only type of causal link the jury was asked to decide. *A.257.* Had Travelers intended to limit its coverage obligation to those damages “proximately caused” by Bolduc, it was incumbent upon Travelers to expressly include the word “proximately” before “caused by” in the Endorsement language. *Minn. Min. & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d at 181. Travelers failed to do so. *Add.19.*

Furthermore, basic principles of Minnesota insurance law indicate that “caused by” is synonymous with “related to” and “arising from”.

Where a term is undefined in the policy, it must be given its plain, ordinary or everyday meaning. *Jenoff, Inc. v. N.H. Ins. Co.*, 558 N.W.2d 260, 262 (Minn. 1997); *Andrew L. Youngquist, Inc.*, 625 N.W.2d at 184. Here, the Travelers Policies fail to contain any definition for “caused by” in SECTION V- DEFINITIONS or in the Endorsement itself. *A.39; A.55.* Therefore, the plain, ordinary or everyday meaning of “caused by” must be applied. *Jenoff, Inc.*, 558 N.W.2d at 262; *Andrew L. Youngquist, Inc.*, 625 N.W.2d at 184.

The type of causal link required by the term “caused by” is an issue of first impression. However, the Minnesota Court of Appeals case of *Secura Supreme Ins. Co.*

v. *M.S.M.*, 755 N.W.2d 326, provides guidance on the proper analysis for making a determination. In *M.S.M.*, the Court analyzed the different types of causal links potentially required by the term “arising out of” and the term “resulting from”. *Id.* The Court held that the two terms were synonymous and required the same causal connection. *Id.*

The Court reached this conclusion by applying the plain and ordinary meaning of the words. *Id. citation omitted* “(T)he plain meaning of the term ‘arise’ indicates that it carries the same meaning as the word ‘result’” *Id.* Citing to the *American Heritage Dictionary of the English Language* 99 (3d ed.1992), the Court found that the definition of “arise” included “result”. *Id.* Accordingly, the Court could arrive at “no principled basis on which to treat the two phrases differently.” *Id.*; *Allstate Ins. Co. v. Steele*, 74 F.3d 878, 881 (8th Cir.1996) (applying Minnesota law, the phrase “results from” in the insurance contract was equivalent to the phrase “arising out of”); *St. Paul Fire & Marine Ins. Co. v. Am. Dynasty Surplus Lines Ins. Co.*, 124 Cal.Rptr.2d 818, 826 (Cal. 2002) (“arising out of” and “resulting from” broadly interpreted in insurance policy).

Applying the identical analysis to this case, the plain meaning of “cause” is synonymous with “result”. The *American Heritage Dictionary of the English Language* (2d college ed.1985) at page 249, defines “cause” as “(s)omething that produces an effect, **result** or consequence.” *R.A.112* (emphasis added). Applying the identical reasoning used in *M.S.M.*, “cause” includes “result”. *Id.* As such, “caused by” is the same as “resulting from”, which was determined in *M.S.M.* to be the same as “arising from”.

755 N.W.2d 326.

This is significant because Minnesota caselaw clearly defines the meaning of “arising from”. As fully set forth in ECI’s Brief in Response to Appellant Bolduc, “arising from” only requires “but-for” causation, which means “causally connected with” and **not “proximately caused by.”** *Meadowbrook Inc. v. Tower Ins.* 559 N.W.2d 411, 419 (Minn. 1997). “But-for” causation is synonymous with “causal nexus” (a temporal and geographical or a causal relationship). *Oster v. Medtronic, Inc.*, 428 N.W.2d 116, 118 (Minn. App. 1988). Therefore, the logical legal conclusion is that “caused by” is synonymous with “arising out of”, which does not require “proximate cause” and, instead, only requires a “causal nexus” or “but-for” causation. *Seward Housing Corp. v. Conroy Bros. Co.*, 573 N.W.2d 364, 367 (Minn. 1998); *Oster*, 428 N.W.2d at 118.

As discussed in *ECI’s Brief in Response to Appellant Bolduc*, the damage to the Pipe occurred on the jobsite at the time Bolduc was performing its work and as a result of Bolduc’s equipment (sheet piling) being driven into the ground by Bolduc’s large vibratory piling hammer. A “causal nexus” and “but-for” causation exists between Bolduc’s act and the damage to the Pipe, sufficient to trigger coverage under the Endorsement.

The Minnesota Court of Appeals case of *Ed Kraemer & Sons, Inc. v. Transit Cas. Co.*, supports this broad interpretation of “caused by”. 402 N.W.2d 216 (Minn. App. 1987). **“The contractual words ‘caused by accident and arising out of’ are broad and comprehensive in their meaning.”** *Id.* at 219 (emphasis added).

In *Ed Kramer & Sons*, the general contractor on a construction project (Kraemer) was sued by a subcontractor's employee that was injured while driving a steerable trailer that rolled out of control. *Id.* Kramer sought coverage from the insurer of the trailer as an omnibus insured, which provide coverage for all sums which an insured became legally obligated to pay as damages for injuries to any person "caused by accident and arising out of the ownership, maintenance, and use of an automobile." *Id.* at 219 (emphasis original). The Court held that the insurer owed coverage and that the insurer's coverage obligations did not depend on the general contractor's negligence. *Id.*

Although the negligence of the general contractor must be a proximate cause of the accident in order to establish his liability in tort for the payment of damages, it does not necessarily follow, *once his liability in damages has been established*, that proximate cause is an essential element to establish coverage under an insurance policy provision ... The determination of **the scope of coverage and the nature of the peril insured against is dependent upon a proper interpretation of the contract to discover the intent of the contracting parties, and that interpretation is not controlled by tort concepts of liability.**

*Id.* (emphasis added). See also, *Faber v. Roelofs*, 250 N.W.2d 817, 822 (Minn. 0977)(interpreting "arising out of" in motor vehicle policy identical to *Kuntz v. Park Constr. Co.*, No. A09-669, 2010 WL 346397 at \*4 (Minn. App. Feb. 2, 2010) (R.A.58).

This broad interpretation of "caused by" is further supported by the foreign case of *Hartley v. Electric Ins. Co.*, 919 A.2d 808 (N.H. 2007)(uninsured motorist case). In *Hartley*, the New Hampshire Supreme Court interpreted "caused by" policy language as a matter of first impression and applied the term's plain meaning: "'Caused by' *Webster's Third New International Dictionary* 356 (unabridged ed.2002) defines 'to cause' as 'to

serve as cause or occasion of: bring into existence: make.’” The court determined that direct proximate causation was not required to establish coverage. *Id.*

Based on the plain and ordinary meaning of “caused by” and firmly rooted principles of Minnesota insurance law regarding the broad causal link sufficient to trigger coverage, Travelers cannot avoid its coverage obligations based on the Jury Verdict.

If this Court would somehow disagree that the meaning of “caused by” is clear and, instead, finds the term susceptible to more than one meaning, then the term is, by definition, ambiguous and must be resolved in favor of coverage. *Nathe Bros. Inc.*, 615 N.W.2d at 344; *Wozniak Travel, Inc.*, 762 N.W.2d 572. As discussed above, in *Maryland Casualty Co. v. Regis Ins. Co.*, the court found that “because of” was ambiguous and did not imply a requirement of negligence. 1997 WL 164358. Similarly, in *Dillon Cos. Inc. v. Royal Indemnity*, also discussed above, the court found “arising out of” ambiguous and refused to impose a prerequisite of negligence in order to trigger coverage. 369 F.Supp.2d 1277.

The ambiguous policy language in both *Dillon* and *Maryland Casualty* was interpreted in favor of coverage. *Id.*; 1997 WL 164358. Here, any ambiguity must also be resolved in favor of coverage for ECI. *Nordby*, 329 N.W.2d at 822. Doing so supports ECI’s reasonable expectation that the Endorsement and/or the Policies would provide coverage for Bolduc’s acts that damaged the Pipe, as clearly required by the Indemnity and Insurance Agreement. *See Thommes and Nathe Bros. Inc. cited supra.*

The Court of Appeals properly rejected Travelers' argument that the Jury Verdict's failure to find "proximate cause" alleviates its coverage obligations. There is no dispute, Bolduc hit and damaged the Pipe, triggering coverage under the Endorsement and, potentially, the main insuring agreement of the Policies.

**12. If This Court Finds that the Indemnity and Insurance Agreement Requires Bolduc to Indemnify ECI for ECI's Own Negligence and Agrees with the Trial Court that ECI Is Negligent, Then Travelers Must Indemnify ECI under the "Insured Contracts" Coverage.**

If this Court agrees that the Indemnity and Insurance Agreement requires Bolduc to indemnify and insure ECI for ECI's own negligence and that the trial court had properly found ECI negligent (contrary to the Jury Verdict and CIVJIG 25.55), then Travelers still owes full indemnity to ECI under the main insuring agreement of the Policies as the Agreement is an "Insured Contract."

Minn. Stat. § 337.05 allows one party to agree to insure another party's negligence. *Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473, 475 (Minn. 1992). Under the Policies procured by Bolduc, Travelers agreed to "pay for those sums that the insured [Bolduc] becomes legally obligated to pay as damages because of ...'property damage'<sup>6</sup> to which this insurance applies. *Add.18*. This broad all-risk coverage includes coverage for an "Insured Contract". *A.29*.

The Policies contain a general exclusion for Contractual Liability but then restore coverage by way of an exception to this exclusion by agreeing to cover: "(L)iability for damages:...(2) Assumed in a contract or agreement that is an 'insured contract', provided

---

<sup>6</sup> The Policies relevantly define "property damage" as "Physical injury to tangible property..." (*A.42*) which would include Bolduc's damage to the Pipe.

the ...'property damage' occurs subsequent to the execution of the contract or agreement..." *Id.* The Policies relevantly define "Insured Contracts" to include:

f. that part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for .... 'property damage' to a third person or organization. 'Tort liability' means a liability that would be imposed by law in the absence of any contract or agreement.

A.40.

This Insured Contract coverage arises from an exception (restoring coverage) to an exclusion (which takes away coverage). This Court strictly construes any policy exclusions against Travelers and in favor of coverage for ECI. *Thommes*, 641 N.W.2d 877 at 880.

The Indemnity and Insurance Agreement of the Subcontract qualifies as an "Insured Contract". The Agreement pertained to Bolduc's business, and if this Court finds that the Agreement requires Bolduc to indemnify ECI for ECI's own negligence and that the trial court did not err when it concluded ECI was negligent, then Bolduc assumed the tort liability of ECI and agreed to pay for the property damage, *i.e. physical injury*, to the Pipe that occurred after Bolduc and ECI executed the Subcontract.

If this Court finds that the Indemnity and Insurance Agreement requires Bolduc to indemnify and insure ECI for ECI's own negligence and that the trial court had correctly determined that ECI is negligent,<sup>7</sup> Travelers still owes coverage to ECI and remand is

---

<sup>7</sup> Travelers is not entitled to remand on the issue of whether ECI is negligent. As discussed above, Travelers knowingly waived its right to participate in the Negligence Trial by stipulating that it would not participate. A.253.

necessary to determine the reasonable amount of damages, costs, expenses, and fees that Travelers must pay.

**13. If Travelers Is Not Required to Indemnify ECI under the Endorsement or the Policies, Bolduc Is Directly Responsible for Indemnifying ECI.**

As fully argued in ECI's Brief in Response to Appellant Bolduc, if the Travelers' Policies and the Endorsement fail to provide coverage to ECI for the damage to the Pipe, Bolduc is directly liable for indemnifying ECI to the extent of the agreed-upon insurance required in the Indemnity and Insurance Agreement. Minn. Stat. § 337.05, subd. 2; *Van Vickle v. C. W. Scheurer and Sons, Inc.*, 556 N.W.2d 238, 241 (Minn. App. 1996).

Where a subcontractor fails to procure the insurance required under a subcontract to insure its indemnity obligations to another contractor, then the contractor can recover directly from the subcontractor to the extent of the promised insurance. *Id.*

Here, Bolduc agreed to procure insurance to insure all of its indemnity obligations to ECI under the Indemnity and Insurance Agreement, including Bolduc's act of driving sheetpiling that damaged the Pipe. *Add.11*. If the Travelers Endorsement or Policies fail to provide coverage, then ECI is entitled to recover directly from Bolduc all damages, costs, fees, and expenses related to the damaged Pipe. §337.05, subd. 2; *Van Vickle*, 556 N.W.2d at 241. Yet, it must not be overlooked that vitiating coverage under the Endorsement and the Policies will fail to uphold ECI and Bolduc's reasonable expectations of coverage, as fully discussed above. *See Thommes and the Doctrine of Contra Preferentum* discussed above.

If this Court determines that the Travelers' Policies and the Endorsement do not provide coverage to ECI for the damage to the Pipe, then ECI respectfully requests that this Court order Bolduc to directly indemnify ECI to the extent of the insurance promised in the Indemnity and Insurance Agreement, for all damages, costs, fees, and expenses arising from Bolduc's damage to the Pipe.

**14. This Court Should Require Travelers to Indemnify ECI without Delay.**

Bolduc damaged the Pipe 4 ½ years ago, in 2007, and since then Travelers (and Bolduc) have continually avoided and delayed indemnifying ECI for the damages, costs, expenses and fees owed for that damage. The delays must stop now. Travelers' request in a footnote that this case to be remanded to the trial court for a determination on whether the Travelers' Policies and Endorsement provide primary coverage over the Western National policy must be denied.

Where a party has coverage under more than one insurance policy, Minnesota law imposes an independent requirement on any insurer that covers a mutual insured to honor its coverage obligations in accordance with its particular policy. *Andrew L. Youngquist, Inc.*, 625 N.W.2d at 186. "Separate insurers of a mutual insured have an independent duty to cover the insured." *Id. citation omitted*. Simply because more than one insurer shared a mutual insured does not alleviate each insurer from doing what is agreed and was paid a premium to do—provide coverage to the insured. *Id.* Minnesota has adopted a contract-based approach regarding coverage because the benefits are "a contractual right of the insured respective of other insurance and irrespective of primary or excess coverage." *Id. citation omitted*.

Moreover, the Travelers Policies and Endorsement were purchased for and more closely contemplated the risk that Bolduc would damage property, such as the Pipe, at the Project in the course of Bolduc performing its work driving its sheetpiling. *Integrity Mut. Ins. Co. v. State Auto Cas. Underwriters Ins. Co.*, 239 N.W. 2d 445 (Minn. 1976); *Auto Owners Ins. Co. v. Northstar Mut. Ins. Co.*, 281 N.W.2d 700 (Minn. 1979).

Travelers has continually refused to honor its independent duty to indemnify ECI for Bolduc's damage to the Pipe. Travelers' footnote-request that this Court remand this case for a finding on whether its Policies and Endorsement provide primary coverage or excess coverage will result in further undue delay and must be denied. While remand is necessary for a factual finding on the amount of damages, costs, fees, and expenses Travelers (and Bolduc) owe for the damage to the Pipe, once that determination is made, Travelers must immediately honor its independent coverage obligations to ECI without further delay.

## VI. CONCLUSION

Engineering and Construction Innovations, Inc. requests that this Court reaffirm the Court of Appeals decision that The Travelers Indemnity Company of Connecticut must indemnify Engineering and Construction Innovations, Inc. for all fees, costs, and expenses arising from Bolduc's damage to the Pipe and, if the Travelers' Policies do not provide coverage for said 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

By:   
Adina R. Bergstrom (#337833)  
David D. Hammargren (#167538)  
Elizabeth R. Rein (#34980X)  
3500 American Boulevard, Suite 450  
Bloomington, MN 55431  
(952) 844-9033

**CERTIFICATION**

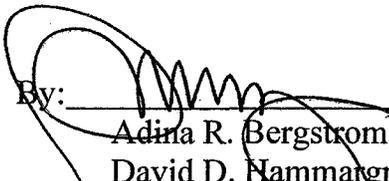
I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 13,847 words. This brief was prepared using MS Word 2003-2007.

HAMMARGREN & MEYER, PA

Dated:

*February 7, 2012*

By:

  
Adina R. Bergstrom (#337833)  
David D. Hammargren (#167538)  
Elizabeth R. Rein (#34980X)  
3500 American Blvd. W, Suite 450  
Bloomington, MN 55431  
(952) 844-9033