

NO. A11-159

State of Minnesota
In Court of Appeals

Engineering and Construction Innovations, Inc.,
Appellant,

vs.

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

**APPELLANT'S REPLY BRIEF
AND SUPPLEMENTAL ADDENDUM**

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

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ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY DETERMINING THAT BOLDUC DID NOT BREACH THE INSURANCE AND INDEMNITY AGREEMENT OF THE SUBCONTRACT BECAUSE “THE CONTRACT DID NOT REQUIRE BOLDUC TO INDEMNIFY ECI WITH REGARD TO ECI’S OWN NEGLIGENCE.”

A. The District Court Committed Prejudicial and Reversible Error by Adopting Respondent’s Arguments that ECI Was Negligent.

In granting summary judgment, the district court’s Finding of Facts, Conclusions of Law, and Order for Judgment and Memorandum, (*Add.2*) improperly relied upon Respondents’ summary judgment arguments that ECI’s negligence damaged the Pipe.

Despite Bolduc’s and Travelers’ arguments that the district court did not alter the jury’s findings of fact or make a *de facto* finding that ECI was negligent, the language of the district court’s Finding of Facts, Conclusions of Law, and Order for Judgment and Memorandum speaks to the contrary. *Add.2*. The court’s Memorandum states that Bolduc did not breach the Insurance and Indemnity Agreement (“IIA”) of the Subcontract because “the Contract did not require Bolduc to indemnify ECI with regard to ECI’s own negligence” and that Travelers had no duty to indemnify ECI because “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.* The rationale of the district court hinged on the purported negligence of ECI.

In fact, the Order for Judgment and Memorandum reflects that the district court erroneously adopted Respondents’ written and oral arguments made during the summary judgment proceedings that ECI was negligent.

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.” *A.41*. Considering the jury’s verdict, “the clear implication is that ECI’s acts or omissions in improperly placing the pipeline locates caused the damage to the pipeline.” *A.44*. “For the last three years, ECI has attempted to shirk its responsibility by ignoring its own negligent acts of improperly locating the pipeline...” *A.46*.

Similarly, Bolduc argued “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.” *A.58*. “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.” *A.59*. “(T)he court should find that ECI’s contract did not require Bolduc to defend, indemnify, or insure ECI with respect to ECI’s own negligence.” *A.60*.

While during the summary judgment arguments ECI properly advised the district court 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...” (*A.69*), the district court disregarded ECI’s position and the record and clearly adopted the Respondents’

unsupported allegations that ECI was negligent. In doing so, the district court committed reversible error. *Add.7.*

B. The District Court's Erroneous Grant of Summary Judgment Was Premised Upon Its Improper Determination of ECI's Fault.

The district court's determination of ECI's negligence was critical to granting summary judgment to Bolduc for its obligations under the IIA and to Travelers for its coverage obligations under the Additional Insured Endorsement (the "AIE"). As such, the district court's wrongful determination of ECI's negligence constitutes prejudicial and reversible error.

The district court specifically decided that ECI had no right to indemnification from Bolduc for "ECI's own negligent acts that were not expressly covered by the [Subcontract]" (*Add.7-8*) and 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.* ECI's "negligence" or "fault" was the critical lynchpin for the district court's decision.

Despite Respondent's arguments in their response briefs that any determination of ECI's negligence was harmless and irrelevant, the district court's Order for Judgment and Memorandum directly contradicts their position, as does Judge Johnson's agreement with Bolduc's counsel at the summary judgment motion hearing that "in retrospect, perhaps

we should have had the jury answer the question about the fault of ECI at the time of trial". *MT.10, ll. 19-22; MT.11*¹.

On appeal, Bolduc has swiftly changed its position by arguing that ECI's negligence is unimportant and, incredulously, that ECI is somehow challenging the Special Verdict Form. ECI has no objection to the Special Verdict Form **as completed by the Jury**. Rather, ECI is challenging the district court's failure to follow the findings in the Special Verdict Form, wherein the jury did not find that ECI was negligent.

Yet, despite the jury having never found that ECI was negligent, the district court specifically determined that ECI was not entitled to indemnity under the IIA or under the AIE because of ECI's own negligence and fault. *Add.7-8*. Because the district court exceeded its authority in determining ECI's fault, reversal of the court's summary judgment decision is warranted.

II. ECI PROPERLY PRESERVED ALL ASPECTS OF ITS BREACH OF CONTRACT CLAIMS.

A. The Record Shows that ECI Fully Preserved Its Contract Claims against Bolduc and Any of Its Claims Against Travelers.

The record fully supports that ECI preserved all aspects of its breach of contract claims against Bolduc, including breach of the Subcontract's Performance of Work Agreement and the indemnity and insurance obligations under the IIA. Bolduc's arguments to the contrary ignore the Complaint, the Stipulation to which Bolduc agreed, as well as the summary judgment proceedings.

¹ This comment by Bolduc at the motion hearing also stands in stark contrast to Bolduc's current position that it has no issue with the Verdict Form.

In the Complaint, ECI placed Bolduc (and the entire world) on notice under COUNT ONE, "Breach of Contract Against Bolduc" that "Pursuant to the terms of the Subcontract, Bolduc was obligated to properly perform its work, avoid damage to other property..." A.4 at ¶20-26. Bolduc even admits that ECI "claimed that Bolduc breached its contract by failing to properly perform its work at FAS-1..." *Resp. Bolduc's Brief at pp. 4-5*. Bolduc clearly had notice that ECI claimed that Bolduc breached the Performance of Work Agreement.

Additionally, all parties signed the Stipulation and agreed:

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

A.25 at ¶1 (*emphasis added*). The Stipulation plainly shows that the parties agreed that ECI "preserved in full" each and every one of its breach of contract claims against Bolduc and all of its claims against Travelers. All parties agreed that ECI was not "waiving, relinquishing, releasing or impairing" any of its contract claims against Bolduc (A.25), including Bolduc's breach of the Performance of Work Agreement or any of ECI's claims against Travelers.

The Stipulation also expressly preserved ECI's claim for breach of Bolduc's contractual duties to "**obtain, maintain and pay for such insurance coverage and endorsements as will insure the indemnity provisions and coverage limits**" set forth in the Subcontract . A.25 at ¶1; *Add.10*, ¶9. Also, this Court cannot ignore that Bolduc's

insuring obligations were clearly at issue from the inception of this matter (*see A.1*) as they formed the premise for Travelers' involvement.

While on February 24, 2010, ECI's counsel did correspond with Bolduc's counsel and discuss "one way" in which Bolduc had breached the Subcontract, the entirety of the record shows that ECI's breach of contract claims were multi-faceted and not limited to only one provision of the Subcontract. Additionally, the March 3, 2010 Stipulation is crystal clear. ECI fully preserved *all* of its breach of contract claims against Bolduc and *all* of its claims against Travelers for resolution after the Negligence Trial.

At the post-trial summary judgment motion hearing, ECI's counsel again made clear that ECI had not waived and had fully preserved these claims, including but not limited to Bolduc's breach of the Performance of Work Agreement to properly perform its work and that "no advice, recommendations or assistance that representatives of the Owners or ECI may give to...[Bolduc] shall operate to relieve...[Bolduc] from complete responsibility to such work as an independent contractor." *See Add.9, ¶4; MT.21, ll. 20-5; MT.25, ll. 15-23.* ECI also correctly argued that, "In order to say that this claim has been somehow waived, it has to be clear and express. And in the face of the stipulation...and it is part of the record, Exhibit L, I think, which says that all breach of contract claims are preserved, I don't think that argument holds water." *MT.33, ll. 14-21.*

ECI's argument comports perfectly with Minnesota law regarding waiver. The party claiming waiver must make a "clear showing of an intention to do so, or of facts from which an inference of waiver would follow as a matter of law by necessary implication." *Henry v. Hutchins*, 178 N.W. 807, 810 (Minn. 1920). Here, the Stipulation

shows that ECI never intended and did not waive its right to pursue post-trial all of its breach of contract claims against Bolduc and all of its claims against Travelers.

In *Stephenson v. Martin* (cited by Bolduc), this Court reviewed the contents of a stipulation to see if a particular claim had been expressly preserved and, finding that it had not, found that the claim was waived. 259 N.W.2d 467, 470 (Minn. App. 1977) . Unlike *Stephenson*, the Stipulation signed by ECI, Bolduc, and Travelers expressly and specifically preserves in full all of ECI's breach of contract claims against Bolduc and all claims against Travelers. Under the rationale of *Stephenson*, Bolduc's waiver argument fails.

Furthermore, where material facts are disputed regarding a waiver of rights, the issue of waiver must be decided as a question of fact. *See Henry*, 178 N.W. at 810. While the record supports that no waiver occurred, at best Bolduc's argument only raises another basis for remanding this case to the district court for further factual findings.

B. ECI Fully Preserved All of Its Breach of Contract Claims against Bolduc in the Summary Judgment Proceedings.

ECI fully preserved all of its contract claims against Bolduc in the summary judgment proceedings before the district court. Bolduc's argument to the contrary ignores that: 1) ECI filed and served its Notice of Motion and Motion within the timeframe required by Minnesota Rules of General Practice for the District Courts 115.02 (*Supp.A.2*); 2) ECI filed and served substantive written briefs and exhibits in support of its summary judgment position and in opposition to Respondents' motions (*A.62-77*); 3) Minnesota General Rule of Practice 115.06 affords the district court judge broad

discretion to hear a motion despite a party not following the paperwork requirements of General Rule of Practice 115.03 with respect to dispositive motions; 4) Judge Johnson exercised his judicial discretion and heard ECI's motion and supporting arguments at the summary judgment motion hearing (*MT.3-MT. 35*); and 5) Neither Bolduc nor Travelers objected to ECI arguing that summary judgment should be granted in ECI's favor. *Id.*

Minnesota General Rule of Practice 115.03 generally requires that a party seeking summary judgment file moving papers including a memorandum and exhibits that support its motion. ECI complied with the substance of this Rule by filing substantive briefs opposing Bolduc's and opposing Travelers' motions including memoranda of law, exhibits, and letter briefs, fully articulating ECI's position. *See A.62-77 & A.136.*

In addition, Minnesota General Rule of Practice 115.06 allows the district court judge to exercise its discretion and hear a motion even when a party does not follow the paperwork requirements of General Rule of Practice 115.03. The Advisory Comments to General Rule of Practice 115 (following Rule 115.11) relevantly provide: "The language of Rule 115.06 permits the court, but does not require it, to strike a motion where the rule is not followed. The permissive language is included to make it clear the court retains the discretion to hear matters even if the rules have been ignored..." (1997 Amendments).

At the summary judgment motion hearing, Judge Johnson correctly exercised his discretion by allowing ECI to make its arguments as to why the court should grant summary judgment in ECI's favor. *See MT.3-MT.35.* ECI's counsel properly argued that Bolduc had breached the Performance of Work Agreement in the Subcontract (*MT.21, ll. 19-25*), that none of ECI's breach of contract claims were waived and all were fully

preserved in the Stipulation (*MT.25, ll. 4-23*), and “ECI has not yet had its day in court on the breach of contract claim that would establish responsibility on Bolduc’s part to reimburse ECI for what it paid to fix the pipe.” *Id. at ll. 19-23*.

Moreover, at the motion hearing, ECI specifically moved the court for summary judgment, “and the court has the authority to do that under Rule 56...to declare that ECI is an additional insured under the policy and that it has coverage for the loss that’s at issue in this case. Second, we would ask that the court either deny Bolduc’s motion and set the case down for trial on the breach of contract claim, or to grant summary judgment in favor of ECI on its breach of contract claim, because there isn’t any defense, that I am aware of, to that claim. They did the work, and it was while they were doing the work, and because of their work, that the damage occurred.” *MT.27, ll. 10-25, MT.28, ll. 1-2*. Neither Respondent objected, and the district court permitted ECI to make its motion and argument. *See MT.3-MT. 35*.

Accordingly, the breach of contract claims against Bolduc were properly and substantively raised before the district court on summary judgment.

III. THE NEGLIGENCE TRIAL DID NOT RESOLVE ANY LIABILITY OR DAMAGES OWED FOR BREACH OF CONTRACT.

Any damages that Bolduc or Travelers owes for breach of their respective contractual obligations remain undetermined. The terms of the Stipulation show that the Negligence Trial only resolved “the amount of damages, if any, to which ECI is entitled if it prevails on its negligence claim [against Bolduc].” *A.25*. Accordingly, the jury’s

finding that the damages resulting from Bolduc's negligence were "\$0" fails to determine those damages for which Bolduc and Travelers bear contractual responsibility.

The measure of damages for breach of contract is those damages "which arose naturally from the breach, or could reasonably supposed to be contemplated by the parties when making the contract as a probable result of the breach." *Lesmeister v. Dilly*, 330 N.W.2d 95 (Minn. 1983). Unlike negligence damages, contract damages may include attorney fees, legal costs, and expenses (*See Add.9*), as well as liquidated damages of the very type that ECI was facing for failing to immediately repair the Pipe after Bolduc damaged it.

Given the Stipulation of all the parties, the jury at the Negligence Trial was never asked to decide any of ECI's breach of contract claims against Bolduc, nor asked to decide the amount of contractual damages for which Bolduc was liable as a result of breaching the Performance of Work Agreement or the IIA. Rather, the jury was asked to decide only Bolduc's negligence and, accordingly, charged only with those jury instructions addressing negligence, causation, comparative fault, and damages. *MT.403-408*.

Neither the Negligence Trial nor the Special Verdict Form provides a legal basis for Respondents to escape their contractual liability or the damages arising naturally therefrom.

IV. REVERSAL OF THE DISTRICT COURT'S ERRONEOUS GRANT OF SUMMARY JUDGMENT TO BOLDUC REQUIRES REVERSAL OF THE COUNTERCLAIM AWARD.

If this Court reverses the district court's grant of summary judgment to Bolduc (as it should), then reversal of the district court's Final Judgment awarding Bolduc its counterclaim in the amount of \$45,965.53 must, as a logical consequence, follow.

Generally, Bolduc's counterclaim is based upon amounts that ECI did not pay Bolduc for work completed on the Project, after ECI incurred over \$200,000 in costs to repair the Pipe that Bolduc damaged. *Add.2*. ECI agrees that it withheld the \$45,965.53 payment to Bolduc as an offset to those repair costs. *Id.*

When the district court incorrectly granted summary judgment to Bolduc, the district court also determined that Bolduc was entitled to recover on its counterclaim, as ECI admitted \$45,965.53 was outstanding and the district court incorrectly determined that Bolduc did not owe ECI any amounts to repair the Pipe. ECI paid the \$50,000 in full, plus some interest.

Reversal by this Court of the district court's summary judgment decision would also require reversal of the district court's Final Judgment awarding Bolduc its counterclaim as the issue of Bolduc's contractual obligations to pay for the damage to the Pipe would, again, be at issue. Moreover, the \$45,965.53 ECI paid to Bolduc would potentially need to be repaid to ECI, in the event that ECI prevailed in its contract claim.

V. TRAVELERS MUST HONOR ITS INDEMNITY OBLIGATIONS TO ECI.

A. The Plain Language of the AIE Requires Travelers to Indemnify ECI.

Travelers and ECI agree that this Court must first apply the plain language contained in the four-corners of the AIE to determine coverage. *Resp. Travelers' Brief, p. 21; Valspar Refinishing, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009). The four-corners of the AIE do not limit Travelers' coverage obligation to ECI to only the "negligent" acts or omissions of Bolduc.

Travelers' spends sixteen pages of its brief (*see pp. 18-34*) advocating that this Court must rewrite the AIE to insert the word "negligent" before "acts or omissions". This argument ignores basic principles of insurance law in Minnesota (and elsewhere) that the plain language of the insurance policy controls. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879-80 (Minn. 2002).

Similarly, Travelers' argument that it subjectively only intended to provide coverage for Bolduc's negligent acts, fails to provide a sustainable legal basis for denying coverage. *See Riley Bros. Constr., Inc. v. Shuck*, 704 N.W.2d 197, 202 (Minn. App. 2005). Travelers' subjective intent is irrelevant. *Id.* Rather, the words contained in the AIE control. *Id.*

J.A. Jones Construction Company v. Hartford Insurance Company, 645 N.W.2d 980 (Ill. App. 1st Dist. 4th Div. 1995) underscored the importance of considering what policy language does not say in addition to what it does. 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 AIE here) did not expressly limit coverage to damages attributable to only the subcontractor's negligence. *Id.* at 982.

Travelers exercised full and complete control in selecting the language of the AIE and could have expressly limited coverage to those damages attributable to only Bolduc's negligence. Travelers failed to do so. *Add.11*. Similarly, Travelers could have carved out an exception for Bolduc's contractual fault, but again failed to do so. *Id.* Coverage cannot be changed on Travelers' whim. Instead, Travelers' "outward manifestations" memorialized in the four-corners of the AIE control and cannot be retrospectively rewritten. *See Riley Bros.*, 704 N.W.2d at 202; *Valspar Refinishing*, 764 N.W.2d at 364; *Wanzek Constr., Inc. v. Employers Ins. Of Wausau*, 679 N.W.2d 322 (Minn. 2004).

B. Any Ambiguity in the AIE Must Be Construed in Favor of Coverage for ECI.

The AIE and the Subcontract language clearly show that Travelers must indemnify ECI. Travelers' untenable position that the word "negligent" is implied in the AIE requires, as a preliminary matter, a finding that the AIE is ambiguous. This Court "should be vigilant against finding ambiguity when none actually exists" (*Secura Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 323-4 (Minn. App. 2008)), and here, none exists.

If this Court determines the AIE is ambiguous, then the AIE must be construed in favor of coverage for ECI under the *Doctrine of Contra Preferentum*. *Thommes*, 641 N.W.2d 877, 879-80; *Nathe Bros. Inc. v. Am. Nat'l Fire Ins. Co.*, 615 N.W.2d 341 (Minn. 2000); *Wessman v. Mass. Mut. Life Ins. Co.*, 929 F.2d 402 (C.A.8 (Minn.) 1991).

Travelers ignores this *Doctrine* altogether. Instead, Travelers attempts to dodge coverage under guise of caselaw from other jurisdictions that is materially distinguishable from the case at hand.

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 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. *Garcia* fails to dispositively control the coverage analysis for the case at hand.

Travelers' reliance upon *Consolidation Coal Co. v. Liberty Mut. Ins. Co.*, 406 F. Supp. 1292 (W.D. Pa. 1976) is similarly misplaced. Similar to *Garcia*, *Consolidation* also involved a personal injury claim premised only upon *negligence*. *Id.* No breach of

contract claims were at issue. *Id.* In that context, the *Consolidation* 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 conducting the AIE analysis—in addition to tort liability. As such, based on the rationale underlying *Consolidation*, “the most appropriate construction” of the AIE 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* court did not need to consider as *Consolidation* involved a subrogation claim between two insurers. Unlike *Consolidation*, this Court must consider the reasonable expectations of ECI (and Bolduc) 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* supports a broad application of the *Consolidation* holding. 110 Cal.App 4th 710, 717-8 (Cal. App. 1st Dist., Div 1 2003). “The [*Consolidation*] 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 improperly relies upon *Vulcan Materials v. Casualty Insurance Company*, 723 F.Supp. 1263 (N.D.Ill. 1989). *Vulcan* again involved only 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.*

The facts of the case at hand differ materially from those in *Vulcan*, warranting the opposite result of *Vulcan* and a determination of coverage under the AIE at issue. Bolduc does bear "some legal responsibility" for the undisputed damage to the Pipe and the costs that ECI incurred to repair that damage. Bolduc admits it damaged the Pipe and voluntarily agreed to properly perform its work at the Project and that "no advice, recommendations or assistance" of ECI would relieve Bolduc "from complete

responsibility” for its work. *Add.9*. Unlike *Vulcan*, there is a clear basis for holding Bolduc liable for the damage to the Pipe.

In contrast to *Garcia*, *Consolidation*, and *Vulcan*, the cases cited by ECI, including *Maryland Casualty Company v. Regis Insurance Co.*, 1997 WL 164268 (E.D. Pa. 1997); *Dillon Cos. Inc. v. Royal Indem. Co.*, 369 F.Supp.2d 1277 (D. Kan. 2005); and *Huber Engineered Woods v. Canal Ins. Co.*, 690 S.E.2d 739 (N.C. App. 2010) comply with general principals of insurance law in Minnesota by interpreting coverage to provide the greatest possible protection to the insured and bears in mind that 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. *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 reading of the AIE both lead to the identical reasonable result: Travelers must indemnify ECI under the AIE.

C. There Has Never Been a Finding that the “Independent” Acts or Omissions of ECI Caused Any Damage to the Pipe.

It is undisputed that Bolduc—not ECI—drove the sheetpiling that hit and damaged the Pipe and that ECI did not act alone on the Project in determining the location of the Pipe. As such, Travelers’ argument that ECI’s “independent” acts or omissions damaged the Pipe fails and provides no means for escaping its coverage obligations.

Travelers misstates the record in contending that “Bolduc was acting solely at the direction of ECI and that ECI’s failure to accurately locate the pipeline as required by the

contract was the actual cause of the damage.” *Resp. Travelers’ Brief*, p. 33. No finder of fact has ever made these factual determinations. A.34. Travelers’ arguments are pure speculation.

In fact, the testimony at Trial indicates that multiple parties were present at the Project site and were involved with the locations of the Pipe, including Frontier, Frontier’s surveyor, Bolduc, and ECI. *Appellant’s Brief*, p. 11; T.86-92, 362-3, 366-70, 51-2, 60-63, 55, 316, 319-25, 378.

Given the numerous entities involved with determining and marking the location of the Pipe and the fact that Bolduc drove the sheetpiling that struck the Pipe, the record clearly shows that ECI did not act “independently” in terms of its involvement with the Pipe locates that may or may not (as no finder of fact has determined this) have played a role in the damage to the Pipe. Because there has been no finding that any act or omission of ECI --much less any “independent” act or omission of ECI – caused the damage to the Pipe, Travelers’ attempt to avoid coverage on this basis lacks merit.

Similarly, Travelers’ public policy argument that coverage under the AIE for ECI would result in some sort of imaginary “loophole” underwhich ECI might avoid “business risk it might face due to its own negligence” (*Resp. Travelers’ Brief*, p. 33), ignores that no finder of fact has ever found ECI negligent. Travelers’ “loophole” argument also ignores that the Minnesota legislature has already established public policy on this issue in that, under Minn. Stat. § 337.05, Bolduc could have agreed to procure insurance for ECI’s own negligence.

D. Under the District Court's Interpretation of the IIA, the "Insured Contracts" Provision of the Policies Provides Indemnity Coverage.

If this Court agrees with the district court that a broad reading of "any act" in the IIA would result in Bolduc agreeing to indemnify and insure ECI for ECI's own negligence, then ECI has met its *prima facie* burden of showing coverage under the "Insured Contract" provision of the Policy. Travelers has failed to prove that any exclusion applies. *See Thommes*, 641 N.W.2d at 879-80. Thus, coverage is owed. *Id.*

In order for an agreement to effectively indemnify and insure another for its own negligence, Minnesota law applies a strict construction standard which requires that such agreement clearly and unequivocally demonstrates such an intent. *See example, Katzner v. Kelleher Constr.*, 545 N.W.2d 378 (Minn. 1996). The district court's determination that to read the IIA 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," (*Add.7-8*) implicitly incorporates these legal principles. Accordingly, if Bolduc assumed ECI's tort liability under the Subcontract (the "Insured Contract"), then Travelers owes coverage to ECI for the damage to the Pipe under the Insured Contracts Coverage.

Travelers argues that the Subcontract fails to clearly and unequivocally demonstrate an intent to indemnify and insure ECI for its own negligence, as the district court implicitly found. However, at the same time, Travelers argues that the district court properly granted summary judgment. Travelers cannot have it both ways. If the district court wrongfully granted summary judgment, then Travelers owes coverage under the

AIE. If the district court properly granted summary judgment to Travelers, then Travelers must indemnify ECI under the Insured Contracts Coverage. Try as it might, Travelers cannot escape its contractual coverage obligations.

VI. TRAVELERS OWES AN INDEPENDENT DUTY TO ECI TO HONOR ITS COVERAGE OBLIGATIONS.

In yet another creative attempt to avoid its coverage obligations, Travelers argues that the AIE provides only excess coverage. Not only is this argument not properly before the Court on appeal, it lacks merit.

A. Travelers Failed to Properly Raise the Issue of Excess Coverage at the District Court Level.

Travelers did not properly raise its excess-coverage argument at the district court level and, therefore, cannot now ask this Court to consider it on appeal. Travelers did not raise its excess-coverage argument in its summary judgment memorandum (*A.36*) or in its summary judgment reply memorandum. *A.78*. Rather, the first time Travelers argues “excess coverage” is in an August 27, 2010 letter to Judge Johnson after the summary judgment motion hearing (*A.103*), to which ECI immediately objected. *Supp.A.3*. Thereafter, the district court did not address this issue in its summary judgment decision. *Add.2-8*. This Court must also decline to do so.

Under the Advisory Committee Comments to Minnesota General Rule of Practice for District Courts 115.03, new issues cannot be raised in a reply summary judgment memorandum: “In many cases, ...a reply brief will be unnecessary or, where no new matters are raised, inappropriate.” Travelers did not raise its excess-insurance argument in response to new facts or new law raised by ECI during the summary judgment

proceedings. *See A.62.* Rather, Travelers belatedly asserted its novel excess-insurance argument after submitting its summary judgment memoranda and after the motion hearing, which violated Rule 115.03 and prejudiced ECI's ability to fully respond to Travelers' argument. *See also Bradley v. First Nat'l Bank of Walker*, 711 N.W.2d 121, 128 (Minn. App. 2006) (prejudice demonstrated by lack of notice, procedural irregularities, or lack of meaningful opportunity to respond).

This Court must disregard Travelers' excess-insurance argument as it was not properly raised at the district court level and cannot now be decided.

B. The AIE and the Policies Provide Primary Coverage.

At the time of the Project, ECI had a commercial general liability ("CGL") insurance policy with Western National Mutual Insurance Company ("Western"), Policy Number CP30006543 (the "Western Policy"). However, it is undisputed that ECI was also covered as a additional insured under Bolduc's CGL Policy with Travelers.

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. v. Cincinatti Ins. Co.*, 625 N.W.2d 178, 186 (Minn. App. 2001). "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.*

Yet, rather than honoring its independent duty to provide coverage to ECI, Travelers attempts to avoid coverage based upon an *assumption* that the Western Policy “more closely contemplates the risk of damage caused during the performance of ECI’s contract.” *See Resp. Travelers’ Brief, p. 40.* An analysis of the applicable law, the Western Policy, and the Travelers’ Policy shows otherwise.

Under Minnesota law, where two insurance policies provide overlapping coverage, the Court determines as a matter of law which policy provides primary coverage. *U.S. Fid. & Guarantee Ins. Co. v. Commercial Union Midwest Ins.*, 430 F.3d. 929, 933 (8th Cir. 2005); *Integrity Mut. Ins. Co. v. State Auto and Cas. Underwriters Ins. Co.*, 239 N.W.2d 445 (Minn. 1976). As with all insurance coverage determinations, the Court first looks to the policy language, specifically, the “other insurance” provisions in order to determine the priority rules set forth in each policy. *Id.*

The language of the Western Policy “Other Insurance” provision provides:

If other valid and collectable insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. **Primary Insurance**

This insurance is primary except when b. applies.

b. **Excess Insurance**

This insurance is excess over:...

(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

Supp.Add.1.

The Travelers' AIE provides: the "insurance in this endorsement is excess over any valid and collectible 'other insurance', whether primary or excess, contingent, or on any other basis, that is available to the additional insured under this endorsement. However, if the 'written contract requiring insurance' specifically requires that this insurance apply on a primary basis or a primary and non-contributory basis, then the insurance is primary to 'other insurance'...and we will not share with that 'other insurance'..." *Add.11.*

The plain language of the Western Policy states that it is excess over the AIE of the Policies issued by Travelers under which ECI was "added as an additional insured by attachment of an endorsement". *Supp.Add.1.* Also, the Travelers' Policies are primary because the IIA of the Subcontract specifically and required that Bolduc obtain the AIE to protect ECI.

Alternately, the "other insurance" language of the Travelers' and Western policies conflict, warranting a "Closeness to the Risk" analysis. Where "other insurance" clauses conflict, the Court looks beyond the language of the policies and applies the Closeness to the Risk Test, assigning primary coverage to that policy that more closely contemplates the risk. *Integrity Mut. Ins. Co. v. State Auto Cas. Underwriters Ins. Co.*, 239 N.W. 2d 445 (Minn. 1976). Where policies contemplate the risk equally, the Court prorates the loss among the applicable policies. *Id.*

[T]he better approach is allocate respective policy coverages in light of the *total policy insuring intent*, as determined by the primary

policy risks upon which each policy's premiums were based and as determined by the primary function of each policy. The Minnesota Courts examine the policies and determine whether the insurers are concurrently liable on the risk, or one is primarily liable and another only secondarily liable. If they are concurrently liable, each party must pay a *pro rata* share of the entire loss. (*citations omitted*)... The nub of the Minnesota Doctrine is that coverages of given risk shall be "stacked" for payment in the order of their *closeness to the risk*. That is, the insurer whose coverage was effected for the primary purpose of insuring that risk will be liable first for payment, and the insurer whose coverage of the risk was the most incidental to the basic purpose of its insuring intent will be liable last. If two coverages contemplate the risk equally, then the two companies providing those coverages will prorate the liability between themselves on the bases of their respective limits of liability.

Id. at 446-7.

The Closeness to the Risk Test involves 3 questions: "1) Which policy specifically described the accident-causing instrumentality? 2) Which premium is reflective of the greater contemplated exposure? 3) Does one policy contemplate the risk and use of the accident-causing instrumentality with greater specificity than the other policy, than the other policy, that is, is such coverage of the risk primary in one policy and incidental to the other?" *Auto Owners Ins. Co. v. Northstar Mut. Ins. Co.*, 281 N.W.2d 700 (Minn. 1979) citing *Fed. Ins. Co. v. Presteman*, 153 N.W. 2d 429, 436 (Minn. 1967).

As for prong 1, the Travelers' CGL Policies that incorporate the AIE specifically identify Bolduc as the named insured and provide general liability coverage for the performance of Bolduc's commercial operations. *Add.11*. Also, Bolduc obtained the AIE to comply with the IIA requirements of the Subcontract for Bolduc's work at the Project,

such as driving the sheetpiling that damaged the Pipe. Under prong 1, Travelers owes primary coverage under the AIE.

As for prong 2, Bolduc paid two premiums for the Travelers Policies: \$35,256 for policy number DT-C0-9203B020-TCT-07 and another \$38,605 for policy number DT-CO-9203B020-TIA-06 (*Supp. Add. 4*), for a combined total premium of \$73,861 (*Supp. Add. 5*).² In contrast, ECI paid \$13,457 for the General Liability Premium of the Western Policy, *Supp. Add. 2*. Moreover, Bolduc's premium was paid as part of its express promise to procure insurance coverage in compliance with the IIA, to add ECI as an additional insured under its CGL Policies with Travelers, and to secure insurance coverage for Bolduc's operations at the Project that caused damage.

As for prong 3, the Travelers' CGL Policies and the AIE more specifically contemplate covering those risks posed by Bolduc's work on the Project as a subcontractor driving sheetpiling. In contrast, these risks were incidental to the Western Policy, as ECI did not drive the sheetpiling and specifically hired Bolduc to perform that work. Under prong 3, the Travelers Policies and the AIE are primary.

If this Court considers Travelers' excess-insurance argument, then it should find as a matter of law that Travelers must provide primary coverage to ECI for the costs expended to repair Bolduc's damage to the Pipe. While ECI did enter into a settlement agreement (the "Settlement Agreement") with Western (*See A.111-A.113*), ECI has not been fully indemnified for the costs it expended to repair the Pipe. Western paid \$125,000 upon the contingency that ECI would repay Western a certain percentage of

² It is unclear whether this is the CGL premium, or the package policy premium.

any recovery that ECI successfully obtained from Travelers or Bolduc. *A.112 at ¶4.* Accordingly, this is not a circumstance where Travelers should be allowed to avoid coverage under a theory that ECI has already been indemnified. Despite the Settlement Agreement, Travelers must honor its independent coverage obligations to provide full indemnity to ECI as the primary insurer responsible for covering the costs of repairing the damage to the Pipe.

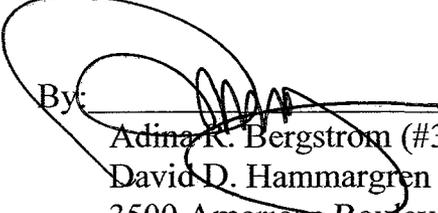
CONCLUSION

Engineering and Construction Innovations, Inc. requests that the judgment of the lower court in favor of L.H. Bolduc Co., Inc. and The Travelers Indemnity Company of Connecticut be reversed on the grounds that: 1) The lower court committed reversible error by finding ECI negligent when the factual findings of the Jury Special Verdict made no such finding; 2) The Subcontract between Bolduc and ECI required Bolduc to indemnify ECI for the costs expended to repair the Pipe that Bolduc damaged; 3) The insurance coverage under the Policies requires Travelers to indemnify ECI for the costs ECI expended to repair the Pipe that Bolduc damaged; and 4) If the Travelers' Policies do not provide coverage to ECI for the costs to repair the Pipe, then Bolduc breached its contractual obligations under the Subcontract by failing to procure promised insurance coverage.

Respectfully submitted,

HAMMARGREN & MEYER, P.A.

Dated: May 9, 2011

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CERTIFICATION

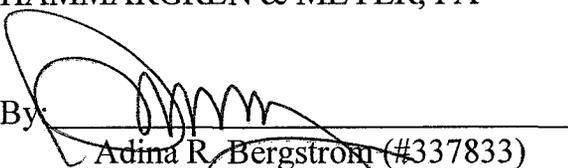
I certify that this Brief conforms to Minnesota Rule of Civil Appellate Procedure 132.01 and was prepared using Microsoft Office Word 2007 as follows:

Monospaced font – Times New Roman, font size 13. This Reply Brief contains 613 lines of text, 6,888 words, and 27 pages.

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