

Court File 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.

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**BRIEF AND APPENDIX OF  
RESPONDENT L.H. BOLDUC CO., INC.**

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

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## I. ISSUES PRESENTED

A jury found in March, 2010 that Respondent L.H. Bolduc Co., Inc. was not negligent with regard to a damaged underground sewer pipe, and also found that Appellant Engineering & Construction Innovations, Inc.'s damages resulting therefrom were zero. Based on these undisputed and unchallenged findings, did the district court thereafter properly grant Respondent's motion for summary judgment on Appellant's claim of breach of contract, when the court found, as a matter of law, that the indemnity language in the contract did not obligate Respondent to indemnify Appellant for Respondent's non-negligent acts?

Yes.

1. Respondent Bolduc moved for summary judgment on Appellant's claim for breach of contract. App. A.49-61.<sup>1</sup>

2. On October 6, 2010 the district court issued Findings of Fact, Conclusions of Law and an Order for Judgment granting Respondent Bolduc's motion, and judgment was thereafter entered in Bolduc's favor on December 1, 2010. Add. 1-4.<sup>2</sup>

3. Appellant filed its Notice of Appeal on January 27, 2011. App. A. 138.

4. *Am. Druggists' Ins. Co. v. Shoppe*, 448 N.W.2d 103 (Minn. Ct. App.1989); *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511 (Minn.1997); *Bd. of Regents of Univ. of Minn. v. Royal Ins. Co. of Am.*, 517 N.W.2d 888 (Minn.1994); *Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc.*, 281 N.W.2d 838 (Minn.1979).

## II. STATEMENT OF THE CASE AND FACTS

### A. Introduction.

The claims of Appellant Engineering & Construction Innovations, Inc. (ECI) against Respondent L.H. Bolduc Co., Inc. arise out of damage to an underground sanitary

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<sup>1</sup> "App. A. " refers to the Appendix attached to Appellant's opening brief.

<sup>2</sup> "Add." refers to the Appellant's Addendum.

sewer pipe that occurred in the course of constructing an underground sewer system in Hugo and White Bear Township. As ECI states in its opening brief, the owner of the project was the Metropolitan Council Environmental Services, and the prime contractor was Frontier Pipeline LLC. Frontier was responsible to install the sewer pipe, and it subcontracted with ECI to install Forcemain Access Structures (FAS)<sup>3</sup> along the route of the pipeline. Because installation of the FAS structures involved excavation of pits, ECI subcontracted with Bolduc to furnish, drive and remove “sheeting cofferdams” that would shore up the walls of the pits and keep them from collapsing. Bolduc was to drive its sheets in areas where two runs of pipe, installed by Frontier, had already been installed. *See generally*, Appellant’s Brief (“App. Br.”), p. 5, and support cited therein.

**B. The contract between ECI and Bolduc.**

The contract between ECI and Bolduc—which was drafted by ECI—was executed in March of 2006. The specific portion of the contract that describes the work to be performed obligated Bolduc to furnish, drive and remove several sheeting cofferdams over “existing pipe, per ECI location.” *See* Respondent Bolduc’s Appendix (“RBA”) 1 – 2.<sup>4</sup>

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<sup>3</sup> Forcemain Access Structures are underground concrete vaults into which sewer pipe is run.

<sup>4</sup> This portion of the contract was not included within either ECI’s Addendum or Appendix.

With regard to indemnity and insurance, the contract specifically states in relevant part as follows:

9. INDEMNITY AND INSURANCE:

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

General Liability, with Contractual Liability Coverage:

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

....

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.

RBA. 4 (¶ 9).

Consistent with the obligations of the contract, Bolduc obtained commercial general liability insurance coverage from Travelers which named ECI as an additional insured. *See generally* App A. 2-3. Under a “Blanket Additional Insured (Contractors)” endorsement the policy provided, *inter alia*, that ECI was considered an additional

insured with respect to property damage caused by the acts or omissions of Bolduc, but was not an additional insured with respect to ECI's independent acts or omissions. *See* Add. 11.

**C. The pipe damage at FAS-1.**

Some time in August, 2007, Bolduc began the process of installing the sheeting into one of the pits (specifically Force Main Structure No. 1, "FAS-1"). It was undisputed that, while driving one of its sheets, Bolduc struck and damaged a section of pipe previously installed by Frontier.

Apparently pursuant to its contract with Frontier—which contained a liquidated damages clause—Frontier demanded that ECI immediately repair the pipeline, and ECI did so at a cost which it claimed exceeded \$200,000. *See generally* App. Br. 9. ECI then sought reimbursement from Bolduc, but Bolduc refused to pay. *Id.* ECI also tendered the claim to Travelers (Bolduc's liability insurer) contending that, as an additional insured under Bolduc's liability policy, ECI was entitled to reimbursement of the repair costs it paid to Frontier. Travelers denied the claim. *Id.* In addition, ECI tendered the claim to its own insurer, Western National, which also denied the claim.

**D. The lawsuit.**

ECI commenced suit against Bolduc and Travelers in August, 2008. App. A. 1-7. As against Bolduc, ECI claimed that Bolduc breached its contract by failing to properly perform its work at FAS-1, and failing to indemnify ECI for the costs it incurred in

repairing the damage. App. A. 4-5. It also alleged that the pipe was damaged because of Bolduc's negligence in driving the sheeting. App. A. 5. As against Travelers, ECI asserted a claim for breach of contract and also sought a declaration that it was entitled to coverage under the Travelers' policy. App. A. 5-6. In its Answer, Bolduc denied that it was negligent, or that it breached the contract with ECI. App. A. 19-20. It also asserted a counterclaim against ECI for \$45,965.53, for unpaid costs and services under the contract. App. A. 22-23.

1. *Denial of motion by ECI's insurer to intervene.*

ECI also asserted a separate declaratory judgment action in Ramsey County against its own insurer, Western National, relative to the damaged pipe at FAS-1. *See Engineering & Construction Innovations, Inc. v. Western National Mutual Ins Co.*, Ramsey County District Court File No. 62-CV-09-10134.<sup>5</sup> Western National filed a motion to either intervene in ECI's lawsuit against Bolduc and Travelers, or consolidate it with ECI's claim against Western National. While ECI joined in the motion, both Bolduc and Travelers opposed it.

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<sup>5</sup> ECI asserted an earlier claim against Western National relative to damages ECI was required to pay Frontier concerning problems and damages resulting from ECI's improper injection of cementitious grout into the pipeline. *See Engineering & Construction Innovations, Inc. v. Western National Mutual Ins Co.*, Ramsey County District Court File No. 62-CV-08-2879. On January 30, 2009 Ramsey County District Court Judge Joanne Smith granted ECI's motion for summary judgment against Western National (and denied Western National's motion). Western National appealed, and this court reversed. *See Engineering & Constr. Innovations, Inc. v. Western Nat'l Mutual Ins. Co.*, No. A10-150, 2010 WL 3220139 (Minn. Ct. App. Aug. 17, 2010), *rev. denied* (Minn. Oct. 27, 2010).

In a Pretrial Order issued November 6, 2009, the Ramsey County District Court, the Honorable Gregg E. Johnson presiding, denied Western National's motion in its entirety, and at the same time scheduled the matter for trial on the issue of "liability and damages." RBA. 9 – 10. The memorandum accompanying the order explained the court's rationale for denying Western National's motion, noting that "ECI's case against Bolduc involves fact questions of who caused damage to the pipeline," and that "the issues to be tried between ECI and Bolduc involve negligence, breach of contract and damages." RBA. 13-14. In so doing the court specifically stated: "The court believes that judicial economy will be best served by trial of ECI's negligence claim against Bolduc . . . . The trial will resolve the factual issue of who is responsible for causing the damage to the pipeline. . . ." *Id.* at 14.

2. *The stipulation regarding bifurcation.*

As the matter headed towards trial, counsel for ECI wrote to the court on February 23, 2010, stating that id did not believe the court's November 6, 2009 served to bifurcate the claims it had asserted against Bolduc and Travelers, and ECI thus stated its intention to proceed to trial "on all claims against L.H. Bolduc and all claims against Travelers." RBA. 15. One day later, counsel for ECI wrote to counsel for Bolduc for the apparent purpose of articulating the basis of its breach of contract claim. RBA. 16-18. Therein, ECI stated that "*one* of the ways in which ECI believes Bolduc has breached its contract" is in failing to indemnify ECI for the loss resulting from the damage to the pipe, and failing to procure insurance coverage to insure the indemnity obligation. RBA. 16

(emphasis added). The letter goes on to explain ECI's position with regard to the contractual indemnification issue, as well as its position regarding why it believed there was coverage for ECI under the Travelers policy. RBA. 17-18. ECI's letter does not articulate any other "way" in which Bolduc allegedly breached the contract. *See id.* In fact, the letter stated that "ECI cannot try its breach of contract claim against Bolduc without also trying the coverage claim against Travelers (a claim, by the way, that Bolduc should be supporting)." RBA. 17.

Thereafter, there was a flurry of activity concerning exactly what claims the trial would encompass. On February 25, 2010 counsel for Travelers wrote to counsel for ECI explaining why the upcoming trial "must necessarily be restricted to a determination of who caused the damage to the pipeline." RBA. 19-21. Counsel for Travelers followed that up with a letter to the court on February 26, 2010, asking the court's assistance in resolving the issue. RBA. 22-23.

Shortly thereafter the issue was resolved without court intervention when the parties executed a Stipulation which was filed with the court in early March, 2010. RBA. 24-27. Among other things this Stipulation states: "It is stipulated and agreed . . . that, pursuant to the Court's Order dated November 6, 2009, the only issues to be tried are (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." RBA. 24 ( ¶ 1). The document goes on to state: "The parties stipulate and agree that 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 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." RBA. 24-25 (¶ 2). Thereafter the document states: "ECI's claims against Bolduc for breach of contract . . . 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." RBA. 25( ¶ 3).

3. *The jury trial by ECI against Bolduc.*

The matter proceeded to trial before a Ramsey County jury in early March, 2010. In opening statements, counsel for ECI asserted that while there was no question the pipe at FAS-1 was damaged by Bolduc in its sheetpiling operations, "the question that will be answered by you is, who is negligent; who is the party that is responsible for the damage." See Trial Transcript ("TT") 18-19. Counsel went on to assert that while there was no dispute that ECI's contract with Bolduc obligated ECI to tell Bolduc where the pipe was located, ECI's own contract with Frontier obligated *Frontier* to provide these locations. *Id.*

Counsel for Bolduc agreed in his opening statement that the subject pipe was damaged by one of the sheets driven by Bolduc. Nevertheless, he asserted that Bolduc

was not responsible for the damage, because the evidence would show that ECI provided Bolduc improper information regarding the location of the buried pipe. TT. 38.

The jury heard testimony from ECI's principal, Shane McFadden, to the effect that Frontier was supposed to tell ECI where the buried pipe was located, and that ECI—pursuant to its contract with Bolduc—would, in turn, tell Bolduc where the pipe was buried. TT. 51, 55. McFadden agreed that ECI was responsible to locate the pipe that was ultimately damaged. TT. 119.

On March 10, 2010 the jury rendered its verdict finding that Bolduc was not negligent. RBA. 32. The jury also answered the damages question: “What sum of money will fairly compensate Engineering and Construction Innovations, Inc. for its loss resulting from damage to the pipe?” The jury answered: \$ 0. RBA. 33. Because it found that Bolduc was not negligent, the jury did not answer—and was not asked to answer—the question of whether ECI was negligent. *Id.*

4. *The post-trial summary judgment motions.*

In late May, 2010 ECI served and filed a document entitled “Notice of Motions and Motions for Summary Judgment and Motion for Consolidation.” RBA. 28-29. Therein, ECI expresses its intention to move “for summary judgment on its *claim* against L.H. Bolduc Co., Inc. for breach of contract.” *Id.* (emphasis added). It also moved to consolidate this case with its declaratory judgment action against Western National in Case no. 62-CV-09-10134. *Id.* The hearing was noticed for August 18, 2010. *Id.*

Bolduc also served and filed its notice of motion and motion, setting the hearing for the same date as the hearing on ECI's motion.<sup>6</sup> After discussing the law in Minnesota with regard to indemnity agreements in construction contracts, Bolduc's supporting memorandum argued, *inter alia*, that it was entitled to summary judgment on ECI's claim of breach of contract because the indemnity language in the ECI - Bolduc contract did not obligate Bolduc to indemnify ECI with regard to Bolduc's non-negligent acts, or with regard to anyone *else's* negligent acts, including those of ECI. App. A. 55-60. Bolduc also argued that it was entitled to summary judgment because it had obtained the insurance coverage required by the contract. App. A. 60-61.

Bolduc did not receive a Memorandum from ECI in support of its motion. Instead, ECI only filed a memorandum in opposition to Bolduc's motion. App. A. 70-77.<sup>7</sup> ECI simply asked that Bolduc's motion (as well as Travelers' motion) be denied. RBA. 30, 31.

With regard to the contractual indemnity issue, ECI specifically argued that the indemnity language in its subcontract required Bolduc to indemnify ECI for "damage"

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<sup>6</sup> Travelers filed its own motion for summary judgment. Its argued that, under the coverage obligations contained within the plain language of the policy it issued to Bolduc, it was not obligated to provide coverage to ECI. Bolduc makes no argument herein concerning Travelers' motion, the district court's grant of that motion, or Appellant's challenge to the court's order.

<sup>7</sup> ECI also filed a separate memorandum opposing Travelers' summary judgment motion. App. A. 62-69. Both memoranda were prepared by counsel at Gislason, Martin, Varpness & Janes, who had been counsel of record for Western National. Apparently by that time, ECI and Western National had reached some sort of settlement concerning ECI's claim for coverage with regard to the damaged pipe at FAS-1. *See* RBA. 34-38.

caused by Bolduc's non-negligent "acts." App. A. 73-75. ECI also argued that it was entitled to a second trial (not a "new" trial), focusing on the issue of Bolduc's liability to ECI on a breach of contract theory. App. A. 75-77. On this point, ECI argued that the prior trial concerned only its claim of negligence, that claims of negligence are not the same as claims for breach of contract, and that via the pre-trial bifurcation stipulation, ECI preserved its right to a trial on its claim that the pipe at FAS-1 resulted from Bolduc's breach of contract, because it failed to perform the work in a "good and workmanlike manner." *Id.* Thus, ECI claimed it was entitled to its "day in court" on its liability-based breach of contract claim. App. A. 77.

ECI made no argument that Bolduc breached its contract by failing to obtain the insurance required by the contract. *See generally* App. A. 70-77.

In its Reply Memorandum, Bolduc argued that ECI's "indemnification for all acts" argument really asks the court to order Bolduc to indemnify ECI for Bolduc's non-negligent "acts," which result in damages for which someone other than Bolduc is liable. Bolduc argued that implied indemnification obligations are not enforceable in Minnesota, and that the indemnity obligation articulated in the contract between ECI and Bolduc was ambiguous and unenforceable. App. A. 90-98. Bolduc also asserted that ECI was not entitled to a second trial on its liability-based claim for breach of contract because, *inter alia*, the court made it clear in its Pretrial Order of November 6, 2009 that the trial would establish *the liability* issues—"negligence, breach of contract and damages"—and that the parties' actions in the wake of that order demonstrated as a matter of law that ECI waived its right to have a trial on the issue of whether the damaged pipe resulted from

Bolduc's failure to perform the work "in a good and workmanlike manner." *See* App. A. 98-101.

5. *Oral argument on summary judgment motions.*

At the August 18, 2010 oral argument, Bolduc asserted that ECI had apparently abandoned its claim that Bolduc breached its contract by failing to get appropriate additional insured coverage for ECI. *See* Transcript of August 18, 2010 Argument ("TA") 5. ("I think ECI concedes . . . that the coverage, the additional insured coverage that Bolduc obtained through Travelers, satisfies the terms of the contract."). As to the indemnity obligation in the subject contract, Bolduc reiterated the arguments it made in its briefs, articulated the differences between the parties relative to their interpretations of the obligations contained within the contract's indemnity language, and specifically argued that if the court found both interpretations reasonable, then there is an ambiguity which "must be construed against the drafter." TA. 9 – 10.

ECI's arguments were substantially and primarily directed towards the coverage issue with Travelers. TA. 17 – 24. Interestingly, in making an alternative argument that the Additional Insured (AI) endorsement in the Travelers' policy was ambiguous because it did not include the words "negligent" or "careless," counsel for ECI stated: ". . . I know that I walk a thin line in arguing that the AI endorsement is ambiguous because it doesn't say negligent or careless, and our indemnity agreement does not contain similar limiting language. So maybe I lose on the case against Bolduc on that ambiguity issue . . . ." TA. 19.

ECI went on to argue that it did not believe that Bolduc had been “exonerated” at trial with regard to the damage to the pipe, because only the negligence claim was tried, and there was no adjudication that Bolduc did not breach its contract with ECI. TA. 21. ECI further argued that the stipulation regarding bifurcation provided that only the negligence claim was to be tried, that ECI preserved its right to a trial on the liability-based breach of contract claim, and that there had been no waiver of that right. TA. 25. ECI thus argued that it was entitled to its “day in court on the breach of contract claim that would establish liability on Bolduc’s part.” *Id.* Then, in an argument that is not entirely clear, ECI seemed to assert (although it had not so argued in any of its briefs) that it was entitled to summary judgment as a matter of law on the liability-based breach of contract claim, simply because it was undisputed that Bolduc’s “work” caused damage to the pipe. TA. 26-27. Finally, ECI argued that it was “our intent to be moving for summary judgment ourselves and time just got away from us.” TA. 27. Nevertheless, ECI asked that the court affirmatively declare that ECI was an additional insured under the Travelers’ policy and that it owes ECI coverage for the loss at issue in this case, and that the court either deny Bolduc’s motion or set the matter on for trial on ECI’s claim of breach of contract. TA. 27-28

ECI made no argument that Bolduc was in breach because it failed to get the insurance contemplated by the contract.

6. *The district court's Findings of Fact, Conclusions of Law and Order for Judgment.*

On December 1, 2010 the Ramsey County District Court, the Honorable Gregg E. Johnson again presiding, issued its Findings of Fact, Conclusions of Law and Order for Judgment, which addressed both the jury's findings on the special verdict form, and the parties' summary judgment motions. Add. 2 – 4. In its "Findings of Fact," the court specifically adopted the facts found by the jury in the special verdict, and found that—based on the stipulation and agreement of the parties—Bolduc was entitled to recover damages from ECI in the amount of \$45,965.53. Add. 2.

It made no other findings of fact. *Id.*

Then, in its Conclusions of Law and Order, the court dismissed ECI's negligence claim against Bolduc, granted Bolduc's summary judgment motion against ECI, and granted Travelers' summary judgment motion against ECI. Add. 3-4. The court also specifically denied ECI's "motions for summary judgment" against these parties. *Id.* p. 4. Finally, the court concluded that Bolduc was entitled to judgment against ECI in the amount of \$45,965.53, plus interest. *Id.*<sup>8</sup>

In an accompanying Memorandum, the court noted that the jury had found that Bolduc was not negligent and that ECI was not entitled to damages. Add. 5. After discussing the well-known standards for assessing motions for summary judgment, the court went on to discuss why it granted Bolduc's motion for summary judgment on

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<sup>8</sup> In the present appeal, ECI does not challenge the court's findings and conclusions relative to Bolduc's counterclaim.

ECI's contractual indemnity claim. Add. 6-7. In so doing it quoted the indemnity language from ECI's contract, noted that ECI drafted the language, and stated the positions of both ECI and Bolduc relative to this language. Add. 6-7. After discussing Minnesota law concerning indemnity agreements in construction contracts, the court stated: "Bolduc is not in breach of the indemnity provisions in its contract because the contract did not require Bolduc to indemnify ECI with regard to ECI's own negligence. The contract does not expressly require Bolduc to indemnify for ECI's own negligence." Add. 7.

The court went on to state that the contract does not raise concerns under Minn. Stat. § 337.05, because it does not require Bolduc to obtain insurance coverage extending to ECI's own negligence and that, instead, it only obligates Bolduc to defend, indemnify and insure ECI with respect to "*liabilities* resulting from Bolduc's own acts or omissions." Add. 7 (emphasis in original). The court then explained that the proposition Bolduc's acts or omissions "must be *negligent* is confirmed by reading the indemnification language in its entirety," going on to note that the language used in the agreement "can only be interpreted one way: ECI wanted Bolduc to indemnify, and insured, ECI with respect to acts of Bolduc's own culpable negligence." Add. 7 (emphasis in original). The court then concluded: "To read it [the contractual indemnity language] 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." *Id.* Finally, the court stated: "A jury has determined that Bolduc was not negligent and that ECI's damages were zero. Therefore the court concludes 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." Add. 8.

The court did not specifically address ECI's argument that it was entitled to its "day in court" on its liability-based breach of contract claim. Thus the court did not specifically address Bolduc's argument that ECI had waived this claim when it proceeded to a jury trial on its claim of negligence.

No party filed any motions relative to the court's findings, or to its conclusions. And no party filed any motion with regard to the contents of the special verdict form, or challenging, in any respect, the jury's conclusions articulated therein.

### **III. SUMMARY OF ARGUMENT**

The present case comes before this court in a unique procedural posture. Appellant ECI's negligence claim against Respondent Bolduc—arising out of damage to an underground sewer pipe—was tried before a Ramsey County jury in March, 2010. The jury returned a verdict finding that Bolduc was not negligent, and that ECI's damages were "zero." ECI does not challenge any of these findings and conclusions on this appeal.

Instead, ECI's appeal focuses on the parties post-trial summary judgment motions, which were decided by the district court in October, 2010. At that time, the district court granted summary judgment to Bolduc on ECI's claim of breach of contract, granted

Travelers' motion for summary judgment relative to insurance coverage issues, and denied ECI's motions.<sup>9</sup>

On this appeal as to Bolduc, ECI specifically challenges the district court's conclusion that Bolduc was entitled to summary judgment on ECI's claim of contractual indemnity, raising what amount to four arguments in favor of reversal: First, that the district court erred in "changing" the jury's answers to the special verdict form when it "found" that ECI was negligent; second, that the court erred in failing to grant ECI's motion on its liability-based breach of contract theory or failed to allow ECI its "day in court" on this claim; third, that the court erred in finding that the indemnity language in ECI's contract with Bolduc did not require Bolduc to indemnify ECI for Bolduc's non-negligent acts; and fourth and finally (and alternatively) that the court erred in failing to find that Bolduc breached its contract with ECI because it did not obtain the insurance coverage required by the contract.

None of these arguments have merit.

First, the district court neither changed any of the jury's findings, nor made any express findings of its own with regard to ECI's liability. Instead, it made various statements in the memorandum supporting its Findings, Conclusions and Order, which served to explain the court's rationale for granting Bolduc's summary judgment motion. Such statements do not rise to the level of a "finding," much less one that "changes" the

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<sup>9</sup> Bolduc makes no argument herein with regard to the arguments raised by ECI in its effort to secure reversal of the district court's grant of summary judgment to Travelers on the coverage issue.

jury's answers to the special verdict form. Moreover, whatever inferences may be drawn from the statements contained within the court's memorandum concerning ECI's "negligence" do not require reversal in any event, because the court's ultimate rationale for granting Bolduc's motion was primarily based on the indemnity language in ECI's contract with Bolduc, construed in light of the fact that the jury found that Bolduc was *not negligent*, and that ECI's damages were *zero*. ECI is not entitled to reversal on this basis.

Second, the proposition that ECI was entitled to summary judgment on its liability-based breach of contract claim was never specifically argued by ECI in any brief submitted to the district court, and was instead only briefly mentioned at oral argument. Regardless, this "motion" was thereafter not specifically addressed or decided by the court in its October, 2010 Order. The district court also did not address or decide ECI's request that it be allowed a *second* liability trial; this one directed towards the issue of whether Bolduc breached its contract to perform its work in a "good and workmanlike manner." ECI's arguments are therefore not properly before this court on appeal. However, in objecting to ECI's request for a second trial, Bolduc argued before the district court that ECI had waived its right to a trial on its liability-based breach of contract claim. Because Bolduc made its waiver argument before the district court in support of its own motion for summary judgment, Bolduc may properly raise it again herein in favor of affirmance. Consequently, ECI is not entitled to reversal on this basis—and is certainly not entitled to reversal so that there can be a second trial.

Third, the district court properly employed well-established Minnesota law concerning interpretation of contracts when it found that the indemnity language in ECI's contract with Bolduc did not require it to indemnify ECI for Bolduc's non-negligent "acts," which did not result in the imposition of legal liability. Indeed, at oral argument, counsel for ECI all but conceded the ambiguity in the contract. Accordingly, ECI is not entitled to reversal on this basis.

Fourth and finally, before the district court below, ECI did not ever brief or argue the proposition that Bolduc breached its contract by failing to procure the insurance required by the contract. Thus, even if the court affirms the grant of summary judgment to Travelers to the effect that there is no coverage for ECI, the issue of Bolduc's "failure" to obtain appropriate coverage is not properly before the court on the present appeal.

#### IV. LEGAL ARGUMENT

##### A. Standard of review.

This court reviews a trial court's grant of summary judgment to determine whether there are any genuine issues of material fact, and whether the trial court erred in its application of the law. *H.B. ex. rel. Clark v. Whittemore*, 552 N.W. 2d 705, 707 (Minn. 1996). The facts must be reviewed in the light most favorable to the non-moving party, and any doubts regarding the existence of a material fact should be resolved in that party's favor. *Id.* This court's review of a legal issue is de novo. *See Frost-Benco Elec. Ass'n v. Minnesota Pub. Util. Comm'n*, 358 N.W. 2d 639, 642 (Minn. 1984).

The rules governing the requisites, validity, and construction of contracts apply to indemnity agreements. *Am. Druggists' Ins. Co. v. Shoppe*, 448 N.W.2d 103, 104 (Minn. Ct. App.1989). The construction and effect of a contract presents a question of law, which this court reviews de novo. *See Trondson v. Janikula*, 458 N.W.2d 679, 681 (Minn.1990).

**B. The district court properly granted Bolduc's motion for summary judgment on ECI's claim for breach of contract, and that decision must be affirmed.**

- 1. The district court's decision to grant Bolduc's summary judgment motion was not based on the court's "changes" to any of the jury's answers to the special verdict form; it was based on the jury's findings that Bolduc was not negligent and that ECI's damages were zero.*

ECI's brief goes on at great length to describe how the district court committed reversible error in "changing" the jury's answers to the special verdict form to "find" that ECI was negligent. *See generally* App. Br. pp. 18-25. In so doing, ECI cites substantial case law concerning when a court may "set aside" answers to special verdict forms, argues that the issue of negligence was properly one for the jury, asserts that the jury "never found that ECI was negligent," and suggests that Minnesota law supports the jury's "failure to decide that ECI was negligent." *Id.* pp. 18 - 23. It then cites evidence in the record suggesting that conflicting evidence was presented at trial regarding who was

at fault for damage to the pipe, which such fault could have been borne by ECI, by Bolduc, by the prime contractor (Frontier) or by Frontier's surveyor. *Id.* p. 22.<sup>10</sup>

In point of fact, while the jury did not find that ECI was negligent, it also did not find that ECI was *not* negligent. Instead, because it expressly found that *Bolduc was not negligent*, the jury was told that it did not have to answer the negligence question as to ECI, which was question number 3 on the verdict form.

Regardless, in granting Bolduc's summary judgment motion, the record shows that the district court was never asked to—by motion or otherwise—“set aside” any of the jury's factual findings. And the court did not ever, on a *sua sponte* basis, expressly or impliedly, “change” the jury's answer to special verdict question number 3, or its answers to any other question. Instead, the court merely articulated, in a memorandum accompanying its order, the reasons why it granted Bolduc's summary judgment motion, as well as the motion made by Travelers.

Therefore, despite ECI's best efforts at turning the district court's summary judgment decision into something it is not, the fact of the matter is that the issues presented by ECI on appeal flow, purely and simply, from the district court's grant of summary judgment to Bolduc, in a case where the parties asked the court to construe their relative obligations arising out of a contract. As such, the court's order is properly

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<sup>10</sup> The record does not show that, at the March, 2010 trial, ECI ever contemplated asking the jury to apportion any fault to Frontier or its surveyor. Instead, ECI's Revised Proposed Special Verdict Form reveals that it did, at one time, contemplate asking the court to put “Sheryl's Construction Company” on the verdict form. *See* App. A. 31-32. Sheryl's was a subcontractor to Bolduc. TT. 404. Sheryl's was ultimately not placed on the final form. RBA. 32-33.

assessed under the typical standards employed by this court in reviewing summary judgment motions: first, deciding whether there were any genuine issues of *material* fact; and second, whether the lower court erred in its application of the law. *See State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn.1990).

Examination of the district court's memorandum supporting its order granting Bolduc's motion reveals that its decision turned on the jury's factual findings—unchallenged herein on appeal—to the effect that *Bolduc was not negligent*, coupled with the fact that the jury found that *ECI's damages were zero*. To be sure, the court's memorandum explains that the indemnity provisions in the subject contract did not require Bolduc to indemnify ECI with regard to ECI's own negligence, and that to read it any other way (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. As such, the court stated: "A jury has determined that Bolduc was not negligent and that ECI's damages were zero. Therefore the court concludes 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." Add. 8.

The foregoing statements might suggest that the court concluded ECI was negligent, even though the jury did not expressly so find (because it was not asked to find that ECI was negligent or not negligent). But whether the court believed—or even "found"—ECI negligent is immaterial, because the district court's ultimate conclusion regarding the meaning and import of the contractual indemnity language in the ECI-Bolduc contract did not depend on any factual "finding" that ECI was negligent. Instead,

it turned on the jury's unchallenged factual conclusion that Bolduc was not negligent, coupled with the jury's damage finding of "zero."

Accordingly—and as Bolduc more fully asserts in Section B(3), *infra*—the court's decision granting summary judgment to Bolduc on the contractual indemnity issue ultimately turned on the court's interpretation of the language used by ECI in the indemnity portion of the contract—a question of law—construed in light of the jury's unchallenged determination that Bolduc was not negligent and ECI's damages were zero. As such, the district court's statements regarding ECI's "negligence," articulated only in the court's supporting memorandum, do not rise to the level of "changing" the jury's special verdict answers to question number 3, do not constitute inappropriate "findings" of disputed fact on summary judgment, and—most importantly—do not establish a material issue of fact requiring reversal of the district court's ultimate legal determination that Bolduc was entitled to summary judgment under the language used in the contract.

In this context, ECI argues that the court could have and should have asked the jury to answer the "pivotal" special verdict question as to ECI's negligence, and asserts that the court's erroneous factual "finding" with regard to ECI's negligence was the "linchpin" of the court's decision to grant Bolduc's motion for summary judgment. App. Br. p. 25. It further argues that Bolduc cannot now be heard to complain about the verdict form that was sent to the jury. *Id.* p. 24.

But Bolduc has no issue with the verdict form. On its summary judgment motion before the district court—as well as in the present appeal—Bolduc takes the position that the only truly "pivotal" or "linchpin" issue relative to its contractual indemnity

obligation to ECI was the jury's finding that Bolduc was not negligent, combined with the jury's conclusion that the damages were zero. If ECI thought, subsequent to trial, that its position *vis a vis* contractual indemnity would be strengthened if the jury had been asked to answer the question as to its negligence, ECI should have specifically objected to the form provided to the jury, and then could have filed a post-trial motion claiming error in this regard. There is no record that it did so.

Failure to object to the special verdict form ultimately submitted to the jury constitutes a waiver, on appeal, of any issue a party may raise concerning the questions contained therein. *See H Window Co. v. Cascade Wood Prods.*, 596 N.W.2d 271, 274 (Minn. Ct. App.1999), *rev. denied* (Minn. Aug. 17, 1999). In this case, the record does, to be sure, show that ECI requested a different special verdict form—one that had the jury answer the negligence question as to ECI regardless of their answer to the question as to Bolduc's negligence. *See* App. A. 31-33. But without evidence that ECI specifically objected to this omission, or raised this issue before the district court on a post-trial motion, ECI has waived any issue on appeal relative to the special verdict form. *See Estate of Hartz v. Nelson*, 437 N.W. 2d 749, 752 (Minn. Ct. App. 1989), *rev. denied* (Minn. July 12, 1989).

In the final analysis, either a "yes" or a "no" answer to the negligence question as to ECI would not have changed Bolduc's contractual indemnity obligations. Either way—and as Bolduc articulates below in section B(3),—Bolduc had no obligation to indemnify ECI, simply because the contract did not obligate Bolduc to pay damages for a non-negligent "act" which did not result in the imposition of any legal liability.

Consequently, Bolduc respectfully asks that this court affirm the district court's grant of summary judgment.

2. *ECI's substantive "breach of contract" theory was not properly presented to the district court, was not decided by the district court, and may not be reviewed by this court on appeal.*

Based on a series of arguments that are not entirely clear, but which seem to be based on ECI's assertion that the district court was asked to (and somehow did) decide Bolduc's liability for damage to the pipe at FAS-1 on a breach of contract theory, ECI next asks this court to reverse the grant of summary judgment in Bolduc's favor and "order judgment in ECI's favor," or alternatively "remand" the case for "further factual findings should this court find that a material fact question exists." *See* App. Br. pp. 25 - 30. These arguments seem to be based, in the first instance, on the notion that the district court substantively decided that Bolduc did not breach its contract with ECI, and in so doing "improperly co-mingled" the obligations of negligence and breach of contract. *See* App. Br. pp. 25-27. These arguments are also based on the proposition that the court "did not even address Bolduc's breach of contract for failing to properly perform its work in compliance with the Performance of Work Agreement." *Id.* p. 29. Thus ECI seems to ask that *this* court now decide whether Bolduc is liability to ECI for damage to the pipe under a breach of contract theory, and do so as a matter of law. Alternatively, ECI asks that the matter be remanded to the district court for a trial. *Id.* pp. 28 - 30.

In order to understand why these arguments have no merit, it is important to understand the procedural history concerning the summary judgment motions presented

to and decided by the district court. The record establishes that while ECI filed a notice of motion regarding summary judgment, it never briefed its motion. Instead, it filed a brief opposing Bolduc's motion, in which ECI primarily argued that the indemnity language in the subject contract—which ECI drafted—obligated Bolduc to indemnify ECI with regard to “any act,” regardless of negligence and regardless of whether legal liability had been imposed.<sup>11</sup> ECI also specifically requested that the court set the matter on for a *second* liability trial against Bolduc, this one directed towards Bolduc's alleged breach of contract.

At the August 18, 2010 summary judgment hearing, counsel for ECI argued that while it intended to brief a summary judgment motion, “time just got away.” Then (after affirmatively asking for summary judgment as to the coverage issue concerning Travelers), counsel argued that the court should either “set this case down for trial” on the breach of contract claim, or outright order that ECI was entitled to summary judgment on the contract claim, because “there isn't any defense, that I am aware of, to that claim.”

Ultimately, the district court's Findings, Conclusions and Order suggests that it did, in fact, consider the matter on the parties' “cross-motions” for summary judgment. Specifically, the court granted Bolduc's motion, granted Travelers' motion, and denied ECI's motions against both Bolduc and Travelers. In so doing, the court—in its

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<sup>11</sup> Bolduc's own motion, timely briefed before the district court, was premised entirely on the contractual indemnity issue. *See* App. A. 49-61. Bolduc never moved for summary judgment on a “substantive” breach of contract claim because it had no idea that ECI would ever assert—after the March, 2010 trial—that such a claim was still in play.

accompanying memorandum—substantively addressed only the issue of ECI’s entitlement to contractual indemnity based on the language in the contract (as well as the coverage issues concerning Travelers). The court did not specifically address ECI’s tardy (and un-briefed) argument—raised for the first time at the August 18, 2010 hearing—that it was entitled to summary judgment on a liability-based breach of contract theory. And it did not expressly consider ECI’s argument that it should be entitled to a second liability trial.

A reviewing court generally may consider only those issues that the record shows were presented to and considered by the district court in deciding the matter before it. *Toth v. Arason*, 722 N.W. 2d 437, 443 (Minn. 2006) (citing *Funchess v. Cecil Newman Corp.*, 632 N.W. 2d 666, 673 (Minn. 2001); *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn.1988)). The record in this matter does not suggest that the district court ever considered ECI’s belated and un-briefed argument that it was entitled to summary judgment on a liability-based breach of contract theory. Instead, it simply denied ECI’s motion. This court may not, therefore, consider ECI’s liability-based breach of contract arguments on the present appeal. *See Thiele*, 425 N.W. 2d at 582.

The court also did not expressly address ECI’s argument that it was entitled to a second liability trial, this one based on a breach of contract theory. This argument cannot be reviewed on the present appeal, either. *Id.*

Nevertheless, if for some reason the court is inclined to review ECI’s argument that it should have been entitled to a second trial, this court must consider Bolduc’s argument, made in its reply memorandum to the district court, to the effect that ECI

waived its “right” to a second trial on the issue of Bolduc’s liability to ECI for the damaged pipe at FAS-1 on a breach of contract theory. While the district court did not specifically address this argument below, Bolduc may raise it on appeal for the purpose of asking this court to affirm the district court’s grant of summary judgment in its favor. *See Day Masonry v. Indep. School Dist.* 347, 781 N.W. 2d 321, 331 (Minn. 2010)(a party may “stress any sound reason for affirmance” even if “it is not the one assigned by the trial judge, in support of the decision”)(citing *Penn Anthracite Mining Co. v. Clarkson Sec. Co.*, 205 Minn. 517, 520, 287 N.W. 15, 17 (1939)).

Waiver is the “voluntary and intentional relinquishment or abandonment of a known right.” *In re Estate of Sandgren*, 504 N.W. 2d 786, 790 (Minn. Ct. App. 1993)(citing *Montgomery Ward & Co. v. County of Hennepin*, 450 N.W.2d 299, 304 (Minn.1990)). The knowledge of the right may be actual or constructive and the intention may be inferred from the party's conduct. *Stephenson v. Martin*, 259 N.W.2d 467, 470 (Minn.1977). The question of waiver may be decided as a matter of law where the facts are not in dispute. *Montgomery Ward*, 450 N.W.2d at 304.

In the present matter, the district court’s order of November 6, 2009 clearly contemplated that the parties would first try to a jury the issue of *who was responsible for the damage to the pipe*. Nevertheless, communications between the parties thereafter indicated concern and confusion over what, exactly, would be tried. Specifically, in late February, 2010, shortly before trial was scheduled to begin, ECI communicated with Bolduc explaining “one of the ways” in which ECI felt Bolduc had breached its contract; that letter articulates only ECI’s position that the breach was demonstrated by Bolduc’s

failure to “indemnify ECI for the loss resulting from the damage to the pipe” and its failure to “procure insurance covering Bolduc’s indemnification obligation.” No other “way” in which Bolduc was in “breach” was articulated in this letter.

One day later, counsel for Travelers wrote to counsel for ECI, expressing a concern about what claims would be tried and declaring that the upcoming trial “must necessarily be restricted to a determination of who caused the damage to the pipeline.” Travelers thus recommended that once “the initial determination of who caused the damage to the pipeline” is resolved, issues concerning “ECI’s breach of contract claim against Bolduc and its coverage dispute with Travelers” be decided via motion practice.

The bifurcation stipulation which followed immediately thereafter appeared to embody and address these concerns, and provided that the issues to be tried were to be limited to ECI’s claim that Bolduc’s negligence resulted in damage to the pipe at FAS-1; Bolduc’s defense that it was ECI’s negligence that resulted in damage to the pipe; and the amount of damages, if any, to which ECI was entitled if it prevails on its negligence claim. Admittedly, the stipulation includes language to the effect that 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,” would not be tried to the jury in March, 2010, and that such claims “shall be preserved in full for determination or resolution by the court at a later date.” But nowhere within this Stipulation, or in the correspondence that preceded it, did ECI mention, or seek to preserve, a separate liability-based claim for breach of contract.

If, throughout the negotiations concerning bifurcation, ECI really did intend to specifically preserve its liability-based contract claim based on Bolduc's alleged "breach" of its contractual obligations *vis a vis* FAS-1, ECI could have and should have expressly said so before the March, 2010 trial commenced. Had it done so, the parties—and the district court—could have, before the trial began, specifically rejected ECI's unreasonable and wasteful suggestion that it should be allowed to await the jury's conclusion on the negligence claim, and then decide whether it wanted another bite at the liability apple in a second trial focused on a breach of contract theory. Consequently, this court can and should therefore specifically find that when ECI proceeded to trial in March of 2010 only on its liability-based negligence claim against Bolduc, it waived its right to a trial on its liability-based breach of contract claim, and is not now entitled to its "day in court" on this issue. *See In re Estate of Sandgren*, 504 N.W. 2d at 790 (insurer waived right to insist on written consent for assignment when, at time of assignment made in its presence, it failed to object on basis of lack of written authorization).

Accordingly, the district court's "failure" to address ECI's substantive, liability-based breach of contract claim provides this court with no reason to reverse the grant of summary judgment in Bolduc's favor. Instead, this court must affirm summary judgment to Bolduc.

3. *The district court properly construed Minnesota law with regard to interpretation of contracts when it found that the ECI contract did not require Bolduc to indemnify ECI when Bolduc was found to be not negligent and ECI's damages were zero.*

Minnesota's anti-indemnity law expressly provides, *inter alia*, that "[a]n indemnification agreement contained in, or executed in connection with, a building and construction contract is unenforceable except to the extent that: (1) the underlying injury or damage is attributable to *the negligent or otherwise wrongful act or omission, including breach of a specific contractual duty*, of the promisor or the promisor's independent contractors, agents, employees, or delegates ." Minn. Stat. § 337.02 (emphasis added). Under this law, a construction contract does not run afoul of Minnesota's anti-indemnity prohibitions when it requires the subcontractor to defend and indemnify a general contractor for the subcontractor's *own* negligence, "wrongful act or omission," or breach of a contractual duty. *See id*; *see also Seifert v. Regents of the Univ. of Minn.*, 505 N.W. 2d 83 (Minn. Ct. App. 1993)(enforcing agreement to indemnify Regents with respect to subcontractor's own negligence), *rev. denied* (Minn. Oct. 28, 1993). The Minnesota Supreme Court has construed this law as ensuring that "each party will remain responsible for its own negligent acts or omissions." *Katzner v. Kelleher Constr*, 545 N.W. 2d 378, 381 (Minn. 1996).

The indemnity language in the contract between ECI and Bolduc provided, in relevant part, as follows:

#### 9. INDEMNITY AND INSURANCE:

**Subcontractor [Bolduc] agrees to protect, indemnify, defend, and hold harmless ECI . . . to the fullest extent permitted by law and to the extent of**

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

RBA. 4 (emphasis added).

Read according to its plain terms, this contract comports with Minn. Stat.

§ 337.02, because it does not expressly obligate Bolduc to indemnify ECI for ECI's own negligence or fault (or the negligence or fault of any other party involved in the project).

That said, the simple argument Bolduc advanced to the district court was that the contract does not require Bolduc to indemnify ECI in *this* case, because the trial held in March of 2010 resulted in a jury determination—not challenged on the present appeal—that Bolduc was *not negligent*, and that ECI's damages were zero.

On the present appeal, as it argued before the district court, ECI continues to advance the proposition that isolated terms in the indemnity agreement—specifically the terms “any,” “act” and “all”—should be extracted from the context in which they are used, and instead should be construed according to their “plain,” dictionary meanings. *See App. Br. pp. 30-32.* ECI thus takes the position that the indemnification portions of its contract with Bolduc apply *regardless* of whether Bolduc was negligent or in any

sense at fault. Accordingly, ECI argues that the indemnity language—which it drafted—still obligates Bolduc to indemnify ECI, because the damage at FAS-1 was caused by Bolduc’s non-negligent “act” in driving the sheeting into the pipe. Therefore ECI argues that Bolduc owes ECI indemnity for any and all “acts” committed by Bolduc, regardless of whether the “act” was negligent, and regardless of whether the “act” resulted in damages.<sup>12</sup>

The rules governing the requisites, validity, and construction of contracts apply to indemnity agreements. *Am. Druggists' Ins. Co.*, 448 N.W.2d at 104. The primary goal of contract interpretation is to determine and enforce the parties' intent. *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn.2004). In so doing the court cannot read words or phrases in isolation but must, instead, interpret the contract “upon the meaning assigned to the words or phrases in accordance with the apparent purpose of the contract as a whole.” *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn.1997); *Bd. of Regents of Univ. of Minn. v. Royal Ins. Co. of Am.*, 517 N.W.2d 888, 892 (Minn.1994) (“the sense of a word depends on how it is being used”); *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn.1998)(court must read contract terms in the context of the entire contract and must interpret contract so as to give meaning to all of its provisions).

In this case, and as the district court below properly found, the proposition that Bolduc’s acts or omissions must be *negligent* is confirmed by reading the indemnification

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<sup>12</sup> If that was, in fact, ECI’s interpretation of the indemnity obligation all along, then the negligence trial was superfluous.

language in its entirety. Specifically, the contract's reference to damages "caused by the acts or omissions of the Subcontractor," to "judgments, expenses and attorneys fees" caused by an act or omission of the Subcontractor, and to a defense obligation arising out of "such liability," can only be interpreted in one way: ECI wanted Bolduc to indemnify (and insure) ECI only with respect to acts of Bolduc's own culpable negligence or fault. It is incongruous to obligate a party to pay "damages" for "acts" or omissions that are not negligent, or for which that party is not legally liable. Indeed, how can one incur the obligation to pay "damages" absent liability?

If there is a legal liability to pay damages, someone needs to be found at fault. Therefore, to read the contract as requiring Bolduc to indemnify and insure ECI with respect to Bolduc's "non-negligent" acts would really ask Bolduc to indemnify ECI for someone else's negligence, including ECI's own negligence. As such, ECI's argument that its contract should be interpreted to impose indemnity obligations upon Bolduc based upon a non-negligent "act" is just another way of saying that Bolduc was really obligated to indemnify ECI for its own negligence, or the negligence of another party.

But under Minnesota law, agreements obligating an indemnitor to indemnify an indemnitee for losses occasioned by its own negligence are not favored by the law. *Nat'l Hydro Sys. v. M.A. Mortenson Co.*, 529 N.W.2d 690, 694 (Minn.1995). Indemnity agreements are to be strictly construed when the indemnitee essentially seeks to be indemnified for its own negligence. See *Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc.*, 281 N.W.2d 838, 842 (Minn.1979); *Nat'l Hydro*, 529 N.W.2d at 694; *Bogatzki v. Hoffman*, 430 N.W.2d 841, 845 (Minn.Ct.App.1988); *Braegelmann v.*

*Horizon Dev. Co.*, 371 N.W.2d, 644, 646 (Minn.Ct.App.1985). Bolduc argued before the district court that because the indemnification language contained within ECI's contract with Bolduc does not contain express language requiring Bolduc to defend and indemnify ECI for its own negligence—or anyone else's negligence—the court could not infer such an obligation.<sup>13</sup>

Again, the jury's verdict did not expressly find ECI negligent—or not negligent. Indeed, having found Bolduc "not negligent," they were asked to ignore the negligence question as to ECI. Regardless, the key, undisputed fact here is that the jury found Bolduc was *not negligent* with regard to the damaged pipe at FAS-1. To enforce ECI's indemnity agreement in the face of same would clearly require Bolduc to indemnify ECI for damages incurred because of *some one else's fault*. Under Minnesota law, indemnity agreements may not vaguely intimate such an obligation; it must be spelled out clearly. ECI's contract did not do so. Thus for this reason alone, the court should as a matter of law affirm the district court's conclusion that Bolduc was entitled to summary judgment on ECI's claim of breach with regard to this indemnity obligation.

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<sup>13</sup> On appeal, ECI raises a confusing alternative argument based on an implied indemnity obligation, which such argument seems to suggest that the district court erred in failing to consider that Minn. Stat. § 337.05 permits the enforcement of agreements by which one party agrees to insure another for its own negligence. *See* App. Br. pp. 34-35. But the district court never found that the subject indemnity language implied such an obligation—probably because to do so is clearly forbidden by Minnesota law. *See, e.g. Farmington Plumbing & Heating Co* 281 N.W.2d at 842. Because the district court properly refused to imply an indemnity obligation, it also properly refused to impose a theoretical obligation upon Bolduc to insure ECI for its own negligence.

Further, even if the court finds that ECI's indemnity obligation may legitimately be premised on a non-negligent "act," the fact of the matter is that the jury in this matter found that Bolduc's "non-negligence" did not result in any damages. As noted above, the jury was asked to answer the following damages question: "What sum of money will fairly compensate [ECI] for its loss resulting from damage to the pipe?" The jury answered: Zero. Thus even if Bolduc were obligated to "indemnify" ECI for *damages* arising out of Bolduc's non-negligent "acts," the fact of the matter is that *the jury found there were no damages*. Consequently, there is no indemnity obligation because the jury found that Bolduc's "acts" did not result in any damages.

Finally, and ironically, it is interesting to note that in the context of the present appeal, and specifically as to the district court's grant of summary judgment to Travelers, ECI argues that if the court finds that there are two ways to interpret certain terms in the Travelers' policy—specifically the terms "acts or omissions"—the insurance contract is ambiguous, and that such ambiguity must be construed against the drafter of the policy: Travelers. *See App. Br. pp 42-45*. At oral argument below, counsel for ECI recognized that he walked "a fine line" making an argument as to contractual ambiguity, because the indemnity language in the ECI – Bolduc contract (which ECI drafted) has clearly been interpreted in two different ways, by ECI and by Bolduc.

It is black letter law in Minnesota that "a contract is ambiguous if, based upon its language alone, it is reasonably susceptible to more than one interpretation." *Art Goebel, Inc.*, 567 N.W. 2d at 515 (citations omitted). The determination of whether a contract is ambiguous is a question of law for the court. *Id.* If this court finds that the language in

ECI's indemnity agreement can reasonably construed both in the manner here urged by Bolduc and in the manner urged by ECI, the contract is ambiguous and must be construed against ECI.

The district court's interpretation of the obligations contained within the contractual indemnity portion of ECI's contract with Bolduc was made in complete accordance with longstanding Minnesota law. Therefore this court should affirm the district court's conclusion that Bolduc was entitled to summary judgment on ECI's claim for breach of contract.

4. *The issue of whether Bolduc "breached" its contract with ECI by failing to obtain appropriate insurance coverage is not properly before this court on appeal.*

ECI's final argument in support of reversal is an alternative one, which depends on whether this court affirms the district court's grant of summary judgment to Travelers on the coverage question. If the court does so (and finds that there is no coverage for ECI under the Travelers' policy), ECI argues that this court should then find that Bolduc is in breach of its obligation to procure appropriate insurance covering the contractual indemnity obligation. App. Br. pp. 47-49.

Reference to Appellant's memoranda filed with the district court in opposition to Bolduc's motion does not reveal that ECI ever made any argument below to the effect that Bolduc should be found in breach because of its failure to procure appropriate insurance coverage. In fact, at oral argument before the district court, counsel for Bolduc specifically asserted that ECI did not brief this issue, and as such, waived it. The district

court's findings, conclusion and order, as well as its supporting memorandum, provide no indication that the district court ever considered this argument.

In deciding a matter before it, this court may consider only those issues which were presented to and considered by the trial court. *Funchess*, 632 N.W. 2d at 673 (citing *Thiele*, 425 N.W.2d at 582). Appellant's alternative argument regarding Bolduc's "failure" to obtain the coverage required by the contract is not properly before this court on appeal. See *Swarthout v. Mutual Service Life Ins. Co.*, 632 N.W. 2d 741, 746-47 (Minn. Ct. App. 2001)(on appeal, this court will not address issue of improper release of records, as that issue was not addressed by the trial court). Consequently, ECI is not entitled to reversal on this "alternative" argument.

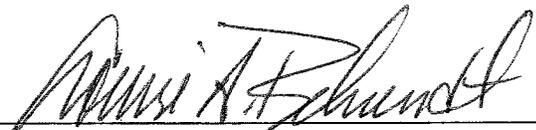
## V. CONCLUSION

The present appeal by Appellant Engineering & Construction Innovations, Inc. focuses on the district court's grant of summary judgment to Respondent L. H. Bolduc Co., Inc. on ECI's claim of breach of contract (as well as on the court's grant of summary judgment to Travelers on insurance coverage issues). The district court properly found that Bolduc did not breach the indemnity requirements of the subject contract between ECI and Bolduc, because the language in the contract—construed according to well-established Minnesota law—required Bolduc to indemnify ECI only with regard to Bolduc's own negligent acts. A jury trial held in March, 2010 resulted in a Ramsey County jury finding that Bolduc was *not negligent* with regard to damages incurred by ECI relative to an underground sewer pipe project, and found that ECI's damages were

zero. Neither finding is challenged herein on appeal. The district court therefore properly granted summary judgment to Bolduc, when it found that it was not obligated to contractually indemnify ECI for Bolduc's non-negligent acts. That conclusion must be affirmed.

Dated this 29<sup>th</sup> day of April, 2011.

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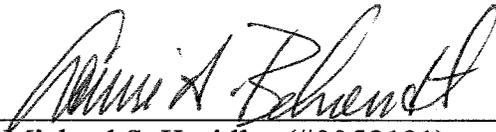
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**CERTIFICATE OF COMPLIANCE**

This brief complies with the word/line limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). This brief was prepared using Microsoft Word Version 12.0 in 13-pt. font, which reports that the brief contains 10,886 words.

Dated this 29th day of April, ,2011.

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