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State of Minnesota
In Supreme Court

Engineering and Construction Innovations, Inc.,

Respondent,

v.

L.H. Bolduc Co., Inc.,

Petitioner,

and

The Travelers Indemnity Company of Connecticut,

Petitioner.

BRIEF AND ADDENDUM OF PETITIONER 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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STATEMENT OF THE ISSUE

I. UNDER RESPONDENT ENGINEERING AND CONSTRUCTION INNOVATIONS, INC.'S (ECI) DRAFTED SUBCONTRACT, PETITIONER L.H. BOLDUC COMPANY, INC.'S (THE PROMISOR) OBLIGATION UNDER THE INDEMNITY AND INSURANCE PROVISION TO ECI (THE PROMISEE) IS LIMITED TO THE "FULLEST EXTENT PERMITTED BY LAW AND TO THE EXTENT OF THE INSURANCE REQUIREMENTS BELOW . . . ." BASED ON THE APPLICATION OF MINNESOTA LAW, INCLUDING MINN. STAT. CHAPTER 337, AND AS APPLIED TO THE FACTS OF RECORD, WAS PETITIONER L.H. BOLDUC COMPANY, INC. (THE PROMISOR) ENTITLED TO SUMMARY JUDGMENT DISMISSAL OF THIS LAWSUIT BROUGHT AGAINST IT BY ECI?

Following a jury trial where the jury found that L.H. Bolduc Company, Inc. was not negligent and ECI was otherwise entitled to no compensation for damage to a pipe, the trial court adopted the jury's findings and then granted L.H. Bolduc Company, Inc.'s motion for summary judgment. (Addendum [Add.] 20). The issues were raised in L.H. Bolduc Company, Inc.'s motion for summary judgment and in reply to ECI's response and are raised here because of the Court of Appeals' resulting reversal of that summary judgment grant.

Katzner v. Kelleher Constr., 545 N.W.2d 378 (Minn. 1986).

Minn. Stat. § 337.05, subd. 2.

Seward Housing Corp. v. Conroy Bros. Co., 573 N.W.2d 364 (Minn. 1998).

Foley v. Honeywell, Inc., 488 N.W.2d 268 (Minn. 1992), *reh'g denied.*

STATEMENT OF THE CASE AND FACTS

Respondent/Plaintiff Engineering and Construction Innovations, Inc. (ECI) sued Appellants/Defendants L.H. Bolduc Company, Inc. (Bolduc) and The Travelers Indemnity Company of Connecticut (Travelers) seeking to recover costs alleged to have been incurred to repair an underground pipe damaged during a construction project involving both ECI and Bolduc. (Petitioner's Appendix [A.] 1). Bolduc, as part of its contract with ECI, was required to procure insurance coverage and to name ECI as an additional insured on Bolduc's General Liability Policy with contractual liability coverage with specified limits. Bolduc so complied by procuring such insurance coverage from Travelers. (Complaint ¶¶ 8, 9, 10; A. 3; Addendum [Add.] 38). On March 10, 2010, a Ramsey County jury determined Bolduc was not negligent and ECI was not entitled to any money to compensate it for loss resulting from damage to the pipeline. (Add. 28).

Following the jury's determination, the trial court, the Honorable Gregg E. Johnson, by Order filed October 6, 2010, adopted the jury findings. (Add. 21). ECI did not file a post-trial motion challenging those findings. In that same order, the trial court granted Bolduc and Travelers summary judgment, resulting in judgment of dismissal with prejudice of all claims asserted against them by ECI, including ECI's breach of contract claim. (Add. 21-22). The Court of Appeals, in its Opinion filed September 6, 2011, with Judge Connolly dissenting, reversed the grants of summary judgment to both Bolduc and Travelers. (Add. 1). It did so, citing Minn. Stat. § 337.05 and based on its conclusion "Bolduc's indemnity and insurance obligations under the contract and Travelers'

obligations under the insurance policy were not limited to damage attributable to Bolduc's negligence." (Add. 15). It remanded the matter to the district court "for further proceedings not inconsistent with this opinion." (Add. 15). This Court granted the Petitions for Further Review of both Bolduc and Travelers.

Bolduc challenges the Court of Appeals reversal as to it. The material facts, as they relate to Bolduc, are as follows.

A. This Case Arises Out of a Pipeline Construction Project That Took Place in White Bear Lake, Minnesota During 2006 and 2007.

This cases arises out of a pipeline construction project that took place in White Bear Lake and Hugo, Minnesota. (Complaint ¶ 4; A.2). Metropolitan Council Environmental Services (MCES) was the project's owner. (Complaint ¶ 4; A.2). MCES hired Frontier Pipeline, LLC (Frontier) as its prime contractor. (Id. at ¶ 5; A.2).

B. ECI and Frontier Entered Into a Contractual Agreement Whereby ECI Agreed to Indemnify Frontier.

Frontier subcontracted with ECI for the installation of a lift station and a number of Forcemain Access Structures (FAS). The FAS's were to be installed and constructed by ECI at various locations along the pipeline. (Id. at ¶ 6; A.2).

Under the Subcontract Agreement drafted by ECI, ECI agreed to procure certain specified insurance to indemnify Frontier for "all damages . . ." caused by any act or omission of ECI or anyone who performs work or services in the prosecution of the Subcontract. (Trial Exhibit 1; T. 48-49; A. 47). ECI's insurer is Western National Mutual Insurance Company (Western National). (A. 41).

C. ECI Entered into a Written Subcontract With Bolduc.

In December 2006, ECI entered into a Subcontract Agreement with Bolduc. The contract is not an industry standard contract, but is a contract drafted by ECI which ECI refers to as "ECI Standard Subcontract Agreement." (Add. 35; A. 44). Bolduc contracted to "[f]urnish, drive and remove six . . . sheeting cofferdam(s) over existing pipe at FAS-1, FAS-2, FAS-3, FAS-5, FAS-6 and FAS-8 per ECI location." (Subcontract Agreement ¶ 2; Trial Exhibit 2; T. 45; Add. 36) (hereafter Subcontract). Accordingly, Bolduc was to drive its sheets "per ECI location" in areas where Frontier's pipe had already been installed. (Id.)

This Subcontract contained an indemnity and insurance provision under which Bolduc was to indemnify ECI to the extent of procuring insurance with certain insurance requirements. The provision in relevant part states:

> 9. INDEMNITY AND INSURANCE: Subcontractor agrees to protect, indemnify, defend, and hold harmless ECI and Owner, to the fullest extent permitted by law and to the extent of the insurance 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 attorney's fees caused by any act or omission of Subcontractor or anyone who performs work or services in the prosecution of the Subcontract. Subcontractor shall defend any and all suits brought against ECI or Owner on account of any such liability or claims of liability. Subcontractor agrees to procure and carry until the completion of the Subcontract, worker's compensation and such other insurance that specifically covers the indemnity obligations under this paragraph, from an insurance carrier which ECI finds

> financially sound and acceptable, and to name ECI as an additional insured on said policies:
>
> General Liability, with Contractual Liability Coverage–
>
> $1,000,000 . . . Bodily injury and Property Damage, combined single limit
> $ 500,000 . . . . Any one person or occurrence;
>
> Comprehensive Automobile Liability–
>
> $1,000.000 . . . Each Accident;
>
> Worker's Compensation–
>
> Statutory;
>
> Employer's Liability (Coverage B on the Workers Compensation Policy–
>
> $ 100,000 . . . . Each accident or employee injury/disease
> $ 500,000 . . . . Aggregate for injury or disease;
>
> Umbrella Coverage–
>
> $2,000,000.
>
> 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. If Subcontractor should subcontract any of this work to a third party, Subcontractor shall require that such third party also shall carry insurance and furnish said evidence thereof to ECI. No cancellation or material changes in the policies shall become effective except on thirty (30) days' written notice thereof to ECI. . . .

(Add. 38-39) ("Indemnity/Insurance Provision").

This provision is identical to the Indemnity/Insurance Provision also drafted by ECI (except with regard to insurance coverage limits) contained in ECI's Subcontract with Frontier. (A. 47).

D. Travelers Issued Policies of Insurance to Bolduc Containing a Blanket Additional Insured (Contractors) Endorsement and an Insured Contractor's Coverage Exception.

Travelers issued two insurance policies to Bolduc relevant to this case, a General Liability Policy with Contractual Liability Coverage effective from October 1, 2006 to October 1, 2007, and a policy with the same coverage effective from October 1, 2007 to October 1, 2008. (A. 76; 92). Per its obligation under the Subcontract with ECI, ECI was named an additional insured on the Travelers policies and such policies contain the requisite policy limits. (Complaint ¶¶ 9, 10; A. 3; 95; 119). The Blanket Additional Insured endorsement issued by Travelers states, in pertinent part:

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

(A. 95, 119). Also, coverage is provided for liability assumed in any contract or agreement that is an "insured contract," provided the bodily injury or property damage occurs subsequent to the execution of the agreement. (A. 87, 90, 115, 121).

E. ECI Discovers Pipeline Damage and Submits a Claim to Western National and Travelers for Reimbursement, Which Western National and Travelers Deny.

In December 2007, and after Bolduc had completed a substantial portion of its work on the project (including work at FAS-1), ECI discovered Frontier's pipe at the FAS-1 location had been damaged. (Complaint ¶ 12; A.3). While driving sheets "per ECI location," Bolduc struck a section of the pipe previously installed by Frontier. (Id. at ¶¶ 13, 14, 15; A. 3).

On December 27, 2007, ECI informed the MCES, Frontier and Bolduc of the discovered damage. (Trial Exhibit 4(a); T. 71; A. 56). Two days later ECI wrote to Bolduc stating "[t]hough a comprehensive investigation as to the cause of this damage must take place, this correspondence shall act [sic] a formal notice as to the damage." (Trial Exhibit 5(b); A. 60; T. 73).

In a letter to ECI dated January 9, 2008, Frontier acknowledged discussions had taken place as to whether the pipe was accurately located prior to the sheeting being driven. (A. 61; Trial Exhibit 7; T. 80-81).[1] Shortly thereafter, ECI reached a settlement agreement with Frontier (and before it did any pipe repair). (T. 172-73).

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[1] ECI told the jury that "ECI's contract with Frontier says that Frontier will tell ECI where the pipe is." (T. 19). The jury was provided that contract as Trial Exhibit 1. (T. 50-51; A. 44). Unlike Bolduc's contract with ECI, which states "per ECI location," ECI's contract with Frontier does not state "per Frontier location." (A. 44). At trial, ECI, through its president, asserted that Frontier had the obligation to locate the pipe for ECI based on the definition of ECI's bid proposal that states: "Survey and layout of structure locations by others." (T. 51; A. 53).

As previously stated, ECI in its Subcontract with Frontier, also drafted by ECI, had obligated itself to indemnify Frontier by procuring insurance coverage under the same basic terms as it subsequently imposed on Bolduc. (Compare A. 47 and Add. 38). Western National, ECI's insurer, denied ECI reimbursement for the repair costs. (ECI's Response to Travelers' Request for Admissions at Response No. 20; A. 73-74).

In March 2008, ECI, as an additional insured to Bolduc's Travelers policies, submitted its claim to Travelers seeking $235,339.89. (Complaint ¶ 16; A. 4). ECI asserts the "insurance policies written by Travelers for Bolduc and which name [ECI] as an additional insured provide coverage for the damages sought by [ECI]." (A. 65). Travelers denied ECI's claim. (Travelers' Answer, Counterclaim and Crossclaim for Declaratory Judgment, Answer at ¶ II; A. 13; Counterclaim and Crossclaim ¶¶ 4, 5; A. 22). Travelers asserted "[t]he FAS-1 pipe was not damaged by any act or omission of L.H. Bolduc Co., Inc." (A. 22). ECI refused to pay Bolduc the $45,965.53 it was owed per their Subcontract. (T. 393).

F. In August 2008, ECI Filed This Lawsuit Against Bolduc and Travelers.

In August 2008, ECI filed this lawsuit against Bolduc and Travelers. (Complaint; A. 1). ECI asserted two causes of action against Bolduc – breach of contract and negligence. Both claims were based on ECI's assertion Bolduc failed to properly perform its work at FAS-1 and thereby caused damage to the pipeline. (Id. at ¶¶ 20-26; A. 4-5). ECI also asserted a breach of contract claim that Bolduc improperly refused to indemnify ECI for the costs incurred in repairing the pipe. (Id.) ECI acknowledged Bolduc had

procured insurance and "ECI was expressly named as an additional insured under the [Travelers'] policy." (Complaint ¶¶ 8-10; A. 2-3).

Bolduc denied that it was negligent or had breached its contract with ECI. It also asserted a counterclaim against ECI for $45,965.53 for unpaid costs and services under the Subcontract. (A. 8; 11).

ECI claimed, as a Travelers additional insured, that Travelers breached its policies to ECI by not indemnifying ECI for the costs incurred in repairing the pipeline. (Complaint ¶¶ 27-31; A. 5-6). ECI also sought declaratory relief that "the liability, costs, expenses and damages incurred by ECI as a result of Bolduc's damage to Frontier's pipes are covered under the Travelers policy." (Id. at ¶ 27; A. 6).

Travelers denied that Bolduc damaged the pipe. It also counterclaimed and cross-claimed for declaratory judgment that it had no duty to indemnify ECI and breached no contractual duty to ECI. (A. 13).

G. In 2009, the Trial Court Denied Western National's Motion to Intervene and Scheduled This Matter for Trial on the Issue of "Liability and Damages" Between ECI and Bolduc.

At the same time ECI brought this lawsuit against Bolduc and Travelers, it brought a declaratory judgment action against its own insurer, Western National, relative to the damaged pipe at FAS-1. (Add. 33; A. 133, 135). Western National sought to either intervene in this lawsuit or consolidate it with ECI's pending lawsuit against Western National. (Id.) Western National asserted ECI was seeking coverage for the repairs from both Western National and Travelers and there was a dispute as to who provides coverage

for the damaged pipe. (A. 136).[2] ECI supported such intervention, stating it believed ECI, as an additional insured under the Travelers policy, had coverage for the repair costs. (A. 133). Even assuming ECI was found to have no coverage from Travelers, ECI believed it had coverage under its Western National policy. (A. 134).

By order issued November 6, 2009, the trial court denied Western National's intervention. (Add. 30). At the same time, the trial court set this case for a jury trial between ECI and Bolduc on "liability and damages." (Id.) ECI's declaratory judgment action against Travelers was bifurcated from ECI's claim against Bolduc. (Add. 33). The trial court ruled: "[T]he issues to be tried between ECI and Bolduc involve negligence, breach of contract and damages," and "[t]he trial will resolve the factual issue of who is responsible for causing the damage to the pipeline." (Add. 34).

As the matter headed toward trial, ECI's counsel wrote the trial court on February 23, 2010, stating ECI did not believe the trial court's November 6, 2009 Order served to bifurcate the claims it asserted against Bolduc and Travelers. (A. 26). One day later, ECI's counsel wrote Bolduc's counsel for the apparent purpose of articulating the basis of its breach of contract claim. Therein, ECI stated "[o]ne of the ways in which ECI believes Bolduc breached its contract is that Bolduc has (a) failed to indemnify ECI for the loss resulting from the damage to the pipe, and (b) failed to procure insurance

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[2] Notably, under the indemnification provision ECI drafted, it does not require the insurance to be provided be primary to any other applicable insurance. See Federated Service Ins. Co. v. Alliance Const., LLC, 805 N.W.2d 468, 640-41 (Neb. 2011) (subcontractor required insurance procured must be primary).

coverage to insure Bolduc's indemnification obligation to ECI." (A. 27). ECI then clarified its position regarding breach of contract stating if "there is coverage for ECI under the Travelers policy . . . ECI loses its breach of contract claim against Bolduc . . . ." (A. 28).

Thereafter, there was a flurry of activity concerning exactly what claims the trial would encompass. The issue was resolved when the parties executed a stipulation which was filed in early March 2010. (A. 33). The parties agreed the jury trial would resolve ECI's claim it was Bolduc's negligence that resulted in damage to the pipe and Bolduc's defense it was ECI's negligence that resulted in damage to the pipe. (Id.) The parties further agreed ECI's claims against Bolduc for breach of contract and against Travelers were to be preserved. (Id.) The parties stipulated these remaining issues would be resolved by cross-motions for summary judgment. Any disputed issue of material fact would be tried to the court. (A. 34).

H. The Trial of ECI's Negligence Claim Against Bolduc Commenced on March 8, 2010 and Resulted in a Jury Verdict in Favor of Bolduc.

At trial the parties agreed the pipeline was damaged by Bolduc's act when it drove a sheet into the pipe. (T. 18-19, 38). The question for the jury was whether Bolduc and/or ECI was negligent and, regardless of the jury's answer to the negligence question, whether ECI was entitled to any compensation because of the damaged pipe. (Id.; Add. 27).[3]

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[3] Because the jury found in favor of Bolduc, the facts from that trial are viewed in a light most favorable to those findings. Milbank Mut. Ins. Co. v. Proksch, 309 Minn. 106, 244 N.W.2d 105, 107 (1975).

The existing sewer pipe was undersized. (T. 44). The prime contractor, Frontier, installed a 28-inch diameter HDPE [high density polyethylene] pipe using a directional drilling process and bored the pipe underground, replacing the existing undersized sewer pipe. (T. 44-45). Because pipes came into the ground in sections, the pipes need to be connected. This is done by excavating an area and constructing Forcemain Access Structures (FAS). To do this, large pits are dug to an approximate depth of 30 feet. The FAS is then constructed within the pit. (T. 45-46). These FAS were built in several locations and wherever sections of the pipe needed to be connected. (Trial Exhibit 1; T. 45-46; A. 51-53).

ECI would identify where the FAS would be located and subcut that area by stripping off the asphalt. ECI hired Bolduc to install the sheets in the vicinity of the FAS so ECI could then remove the soil and construct the structure in that pit. (T. 53-54). The sheets served as the pit walls during construction and were held in place by the use of walers, which are large metal templates. (T. 53). Mr. McFadden, ECI's president, explained:

> [ECI] set a driving template or a waler, they are interchangeable, but one of these walers which supports the inside of the sheet pile once we excavate, we would set that down and locate the pipe and ream hole on that waler. At that point, the subcontractor, L.H. Bolduc, would come in and drive the sheets in and then we would excavate inside.

(Id.)

Bolduc drove the sheets in a rectangular arrangement, which is described as a cofferdam. ECI would then excavate the inside of this cofferdam. (T. 55).

Pursuant to the Subcontract ECI executed with Bolduc, it was ECI's responsibility to locate for Bolduc any underground structures, including the HDPE pipe. (T. 119; 192-93; 377-78). As stated in the parties' contract and presented to the jury, Bolduc would "[f]urnish, drive and remove six . . . sheeting cofferdams over existing pipe . . . per ECI location." (Add. 36).[4] Robert Werness, Bolduc's president, explained that per its contract with ECI, ECI was to give directions to Bolduc on how to drive the sheeting and where to put the pit. (T. 377-78). It was critical that underground utilities and the HDPE pipe be accurately identified by ECI before Bolduc drove in its sheets. There was a very small margin for error. (T. 118-19). If ECI's location was wrong, damage could be caused if the sheets penetrated the HDPE pipe or underground utilities. (Id.)

ECI understood that Bolduc was to rely on ECI's location markings in driving its sheets. (T. 192-93; 201). Bolduc was not responsible for locating the underground pipe. (Id.) ECI's procedure in locating the HDPE underground pipe was twofold. ECI first used survey information to establish the location of the HDPE pipe. (T. 64-65). It then marked the waler with an S. (T. 64-65; 244-45). The S was to notify Bolduc that the pipe was located directly below it. (T. 244-45).

ECI also used mouchettes to identify the pipe's precise location. (Id.) A mouchette is a two-inch diameter piece of PBC or steel pipe that is pushed into the ground. (T. 58). ECI used such pipe to inject grout into the ground, which created a plug

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[4] The jury was also given a copy of ECI's contract with Frontier. (Trial Exhibit 1; T. 50-51; A. 44).

to stop underground water. It is also used by ECI to locate HDPE pipe. (T. 57-59). David Street, an ECI supervisor, explained pipe survey information will "get you close," but it was very important to have a precise location of the HDPE pipe. If ECI did not precisely locate the pipe, it could be damaged by the sheeting driven by Bolduc. (T. 302-03). Street testified:

> Q. The use of these mouchettes to locate the underground pipe, is that the most accurate way to accomplish that in your experience?
>
> A. I don't know how else to, you know, I would do it, I guess.
>
> . . .

(T. 303).

FAS-1 was the sixth FAS structure constructed. (T. 119). At FAS-1, like the other pits, ECI had installed walers. (T. 320-21). In the prior FAS's, mouchettes were used by ECI to confirm the exact location of the HDPE pipe. (T. 120). At FAS-1 ECI told Bolduc there was "pink paint on the street with nails every 30 feet" and Bolduc "should line up those pink paint spots" and that would give Bolduc "a line indication on where the [HDPE] pipe was located." (T. 322).

Bolduc objected. (Id.) Locating the HDPE pipe was not its job and Bolduc insisted ECI positively locate the pipe. (Id.) As a result, ECI sent someone to mark where the pipe would cross the waler by spray painting the letter S on the interior wall of the H-beam waler. (T. 322-23).

Unlike the other pits, however, ECI chose not to use mouchettes to verify the HDPE pipe location. (T. 321-22). When Bolduc noticed there were no mouchettes, it made inquiry. ECI informed Bolduc it had decided not to use the mouchettes at this location. ECI expressed its confidence that painting "S's on the walers" to indicate the approximate center of the underground HDPE pipe was accurate. Bolduc voiced its disagreement, but ECI responded "that was all the location [Bolduc was] going to get and [Bolduc] should proceed." (T. 323, 325).[5] Bolduc proceeded to drive the sheets into the ground. (T. 326-27).

Long after Bolduc's work was completed at FAS-1 on December 22, 2007, ECI discovered there was an issue with the HDPE pipe at FAS-1. ECI had erroneously filled the north end of the pipe with grout. (T. 69-70). In the process of removing the grout, one of ECI's superintendents further probed the pipe. He found that at the pipe's south end there had been contact between a sheet and the pipe. (T. 70-71). The sheet that had penetrated the pipe was a foot or more from the S marked on the waler. (T. 328). It was also the first sheet installed by Bolduc at FAS-1. (T. 328).

Testimony was presented by ECI attempting to substantiate its claimed cost of $233,365.65 to repair that damage. (T. 94-116, 135-49). ECI included in its claim a 62 percent markup of what it actually paid its employees to do the repairs and a 15 percent markup on materials. (T. 116, 137-38). A Hitachi 450 excavator owned by Frontier was

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[5] At FAS-6, the location information provided by ECI to Bolduc was inaccurate, being off approximately five feet. (T. 317).

used in the repair. (T. 144). ECI could not "recall" if it actually paid Frontier to use that excavator, but included as part of ECI's claimed "cost" $32,000 for its use. (T. 143-46). Also included were such things as a claimed cost for ECI's use of its own on-site office trailer and its pickup truck. (T. 149).

ECI, based on the testimony of record, argued Bolduc was responsible. ECI told the jury Bolduc had used "the wrong sheet, wrong dimension sheet in the wrong location and [made] a mathematical miscalculation; and number two, not being careful as they drove their pile down." ECI argued Bolduc "shouldn't have just driven the pile willy nilly into the ground without proceeding carefully and with caution" and "should have felt the pipe when they were driving it down." (T. 463). ECI further asserted ECI "shouldn't be penalized for doing the right thing" in fixing the pipe and "[t]he party that is responsible for the damage should be held accountable, and that party is Bolduc." (T. 467). ECI asserted it was entitled to $233,365.65 from Bolduc. (T. 467).

The jury was instructed that if it concluded Bolduc was not negligent, it need not answer the special verdict question whether ECI was negligent or answer the comparative fault question. (T. 406-08). The jury, however, was instructed without objection by ECI that regardless of its answer to the negligence question, the jury was to answer the special verdict question which asks "what sum of money will fairly compensate [ECI] for its loss resulting from damage to the pipe." (T. 408). The jury was further instructed that it was not to consider the possible effect of its answers to the other questions. (T. 405).

The jury found Bolduc was not negligent. (Add. 27; T. 471). It concluded "zero" was the sum of money that will fairly compensate ECI for its loss resulting from damage to the pipe. (Add. 28; T. 472).

I. The Parties Filed Motions for Summary Judgment.

Following the jury trial, any remaining issues were to be submitted by motions for summary judgment. (A. 34). In late May 2010, ECI served and filed a document entitled "Notice of Motions and Motions for Summary Judgment and Motion for Consolidation." (A. 37). Therein, ECI expressed its intention to move "for summary judgment on its claim against [Bolduc] for breach of contract." It also moved to consolidate this case with its declaratory judgment action against Western National. The hearing was noticed for August 18, 2010. (Id.) No memorandum accompanied that motion.

Bolduc and Travelers served and filed their motions for summary judgment, setting their hearing for the same date. (A. 126; Add. 21). Bolduc asserted it was entitled to summary judgment on ECI's breach of contract claim alternatively because:

- Bolduc obtained the insurance required by its contract with ECI. (L.H. Bolduc Co.'s Memo. Supp. Mtn. Summ. J. on Plaintiff's Claim for Contractual Indemnity, dated 7/21/10, pp. 12-13).
- The indemnity agreement drafted by ECI is ambiguous and unenforceable. (Id., pp. 7-9).
- The jury had found Bolduc was not negligent and the parties' contract did not require Bolduc to indemnify ECI with regard to ECI's own negligence or the negligence of any other party involved in the project. (Id., pp. 9-12).

Travelers argued that it was entitled to summary judgment since ECI, an additional insured of Travelers, is only entitled to indemnity coverage to the extent damage was "caused by an act or omission of Bolduc." (Travelers' Memo. Supp. Mtn. Summ. J./Decl. J., dated 7/16/10, p. 9). Since the jury determined Bolduc was not negligent and "therefore not a cause of the damage," ECI was not entitled to coverage. (Id.)

J. Before the Hearing on Summary Judgment, ECI Settles With Western National and ECI Is Now Represented by Counsel Who Formerly Represented Western National.

Prior to the summary judgment hearing, ECI entered into a confidential settlement agreement with its insurance carrier, Western National. (A. 41). ECI and Western National agreed if ECI recovered from Travelers or Bolduc, Western National would be repaid certain unspecified sums it had paid ECI. Western National was granted "sole authority on behalf of ECI to settle ECI's claims against Bolduc and Travelers." (A. 42). They also agreed Western National's counsel would represent ECI in the pending action. (Id.)

ECI, now represented by Western's counsel, did not file a memorandum in support of its motion for summary judgment. (A. 39, 40). Instead, it only filed memoranda in opposition to Bolduc's and Travelers' motions.

K. ECI Does Not Assert That Bolduc Breached Its Contract With ECI Regarding Its Procurement of Insurance.

In response to Bolduc's summary judgment motion, ECI asserted the "indemnity and breach of contract actions are still viable, notwithstanding the jury verdict." (ECI's Memo. Opp. Bolduc's Mtn. Summ. J., dated 8/5/10 , p. 1). ECI argued the Subcontract

required Bolduc to indemnify ECI for "damage" caused by Bolduc's non-negligent "acts." (Id., pp. 4-6). The jury verdict, according to ECI, was therefore irrelevant. (Id., p. 5). ECI denied it was seeking indemnification for its actions but was "only asking to be indemnified to the extent the damage was caused by Bolduc's 'act or omission.'" (Id., p. 6). ECI did not assert Bolduc breached its contract by failing to obtain the insurance required by the parties' contract.

After asserting the jury's verdict was irrelevant, it argued it was entitled to a "second trial" focusing on the issue of Bolduc's liability to ECI on a breach of contract theory. Its sole breach of contract claim was that Bolduc failed "to perform its work in a good and workmanlike manner" and "hitting Frontier's pipe was a violation of that obligation." (Id., pp. 6-7). ECI did not articulate what express contractual provision Bolduc had purportedly breached or how ECI was damaged. (Id.) Nor did ECI explain how the evidence at such "second trial" would vary from that presented to the jury and rejected by the jury when it found Bolduc not negligent and ECI was not entitled to any compensation. (Id.) ECI also did not explain how this claim was relevant given its assertion the verdict on negligence was irrelevant to its indemnity claim. (Id.)

Bolduc, in reply, explicitly pointed to the fact that "ECI [in response to Bolduc's motion for summary judgment] makes no argument in any way intimating or suggesting that the policy Bolduc obtained from Travelers did not embody the coverage contemplated by the contract." (L.H. Bolduc Co.'s Reply Memo. Supp. Mtn. Summ. J. on Plaintiff's Claim for Contractual Indemnity, dated 8/13/10, n. 6, p. 10 & n. 8, p. 11).

Therefore, Bolduc was entitled to summary judgment. (Id.) Moreover, given the jury's verdict, Bolduc had no indemnification obligation to ECI. (Id., pp. 9-10). The trial court's order of November 6, 2009, states that the trial would establish the liability issues – including that of damages. There were no damages. (Id.)

ECI's "indemnification for all acts" argument really requested that the trial court order Bolduc to indemnify ECI for Bolduc's non-negligent "acts," that is, require Bolduc to pay for others' actions. Such an implied obligation is not enforceable in Minnesota. The indemnity obligation articulated in the contract between ECI and Bolduc was ambiguous and unenforceable. (Id., pp. 8-9).

ECI also was not entitled to a second trial on breach of contract based on Bolduc's alleged failure to perform work in a "good and workmanlike manner." That claim was redundant to the negligence claim tried. Such claim had been waived. (Id., pp. 10-13).

L. ECI Asserted the Jury's Verdict Was Irrelevant to Determination of Travelers' Coverage.

In response to Travelers' motion, ECI asserted the undisputed fact that damage to the pipeline was caused by Bolduc's acts or omissions. Travelers had agreed to provide coverage for Bolduc's "acts or omissions" not Bolduc's "negligent acts or omissions." (Id., pp. 6-8). ECI further asserted the jury's verdict of no Bolduc negligence was irrelevant to the coverage issue. (ECI's Memo. Opp. Travelers' Mtn. Summ. J., dated 8/5/10, p. 1). In a footnote, ECI asserted the jury's award of "$0" was simply "a 'throwaway' damage award once the jury decided that Bolduc wasn't negligent" and has "no impact." (Id., n. 2, p. 8).

M. At the Summary Judgment Hearing, ECI Did Not Assert Bolduc Breached Its Contract With ECI by Failing to Procure Insurance.

At the August 18, 2010 summary judgment motion hearing, and in accord with its briefing, Bolduc asserted that ECI abandoned any claim that Bolduc breached its obligation to procure insurance. (T. 8/18/10 at p. 5). Bolduc's counsel explained:

> I think ECI concedes at this point in time that the coverage . . . Bolduc obtained through Travelers satisfies the terms of that [sub]contract. So I am not going to address that beyond that unless [ECI's counsel] in his reply happens to take issue with that.

(Id., pp. 5-6).

Bolduc reiterated that any claim of breach of contract based on its workmanship was resolved by the trial. (Id., pp. 6-11). The jury found ECI was entitled to "zero," so there was nothing to indemnify. (Id., pp. 11-12).

ECI's oral argument was substantially and primarily directed to ECI's issues with Travelers. (Id., pp. 17-27). ECI did not assert Bolduc could be found in breach of contract based on the insurance coverage it had procured from Travelers. ECI acknowledges it failed to file a memorandum in support of ECI's summary judgment motion, stating it was "our intent to be moving for summary judgment ourselves and time got away from us." (Id., p. 27). ECI argued the Travelers policy provided it coverage. (Id., pp. 19-20). In so asserting, ECI acknowledged the Indemnity/Insurance Provision in its Subcontract with Bolduc, and which ECI drafted, may be ambiguous. ECI's counsel stated:

> I know that I walk a thin line in arguing that the [Travelers] [additional insured] endorsement language 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. . . .

(Id., p. 19).

As to the zero damage award, ECI contended "[w]ho can explain what happened, at least when the jury comes in and says, and what's more, ECI, you didn't have any damage." (Id., p. 17). According to ECI, the jury's answer was "moot." (Id.)

N. The District Court Issued Its Findings of Fact and Conclusions of Law on December 1, 2010 Based on the Trial and Also Granted Summary Judgment of Dismissal to Bolduc and Travelers.

In its Order filed December 1, 2010, the trial court specifically adopted the Special Verdict answers, including that ECI suffered no loss. (Add. 21). The trial court, based on the stipulation and agreement of the parties, found Bolduc was entitled to recover damages from ECI on its counterclaim in the amount of $45,965.53. (Id.)

The trial court granted Bolduc summary judgment on ECI's breach of contract claim. (Add. 22). The trial court turned to this Court's decision in Katzner v. Kelleher Constr., 545 N.W.2d 378, 381 (Minn. 1986), reasoning the Subcontract does not expressly obligate Bolduc to indemnify for ECI's own negligence. (Add. 25). Therefore, there was no concern regarding Minn. Stat. § 337.05,[6] which addresses agreements to insure because the Subcontract "did not require Bolduc to obtain insurance coverage

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[6] Minn. Stat. § 337.05, as well as Minn. Stat. § 337.02, for the Court's convenience are contained in the Appendix at A. 123 & 124.

extending to ECI's own negligence." (Add. 25). "To read [the indemnification provision] as requiring Bolduc to indemnify and insure with respect to Bolduc's 'non-negligent' acts would ask Bolduc to indemnify and insure ECI for its own negligence," which the trial court refused to do. (Id.) Since the jury found Bolduc was not negligent and ECI's damages were zero, there could be no breach of contract by Bolduc. ECI had "no right to indemnification for ECI's own negligent acts that were not expressly covered by the contract." (Add. 26).

As to Travelers, the trial court relied on the same reasoning, concluding "ECI was only entitled to indemnity coverage for damage caused by Bolduc," and the jury had determined there was none. (Id.) Travelers, therefore, was granted summary judgment as well. (Id.)

O. The Minnesota Court of Appeal Reverses as to Both Bolduc and Travelers and Remands the Case.

1. ECI did not contest the jury's findings on appeal.

ECI appealed the grants of summary judgment. On appeal, ECI did not contend the jury's findings adopted by the trial court were in error. ECI instead asserted the trial court, by its ruling, had wrongly concluded ECI was negligent and neither the trial court nor the appellate court were empowered to make or modify the jury's findings of fact. (Appellant ECI's Brief to Court of Appeals, dated 3/31/11, pp. 18-25). According to ECI, Bolduc did not execute its work at FAS-1 properly and, despite the trial and the jury's determination, Bolduc owed ECI $233,365.65. (Id., pp. 29-30).

ECI argued "[i]n light of § 337.05, Holmes, [488 N.W.2d 473 (Minn. 1992)] Katzner, [545 N.W.2d 378 (Minn. 1996)] and Van Vickle, [556 N.W.2d 238 (Minn. Ct. App. 1996)] any theoretical agreement to insure ECI for the negligent acts under [Indemnity and Insurance Agreement] was valid and enforceable." (Id., p. 35). ECI admitted that it was undisputed Bolduc had obtained insurance through Travelers with the limits required by ECI and ECI was an additional insured on the Travelers policies. (Id., p. 47). "By adding ECI as an 'Additional Insured to the Policies,' Bolduc clearly intended and expected to comply with its agreement to insure ECI and per the plain Policy language did satisfy this contractual requirement if this Court finds (as it should) there is coverage for ECI." (Id., p. 41; emphasis in the original). If the Court of Appeals found the policies failed to provide insurance coverage, then, according to ECI, the Court of Appeals should reverse as to Bolduc. (Id., pp. 16, 49).

2. Bolduc contended that alternative grounds it had raised before the trial court also support the grant of summary judgment.

Bolduc, urging affirmance of the grant of summary judgment to it, also asserted the Court of Appeals was obligated to affirm on any "sound reason for affirmance" even if "it is not the one assigned by the trial judge in support of the decision," quoting this Court's decision in Day Masonry v. Indep. Sch. Dist. 347, 781 N.W.2d 321, 331 (Minn. 2010). (Respondent Bolduc's Brief to Court of Appeals, dated 4/29/11, p. 28). ECI had not preserved any breach of contract claim against Bolduc. (Id., pp. 25-30, 37-38). In addition, the jury's verdict, adopted by the trial court and not challenged by ECI through post-trial motion or appeal, resolved any issue as to Bolduc. (Id., p. 36).

3. The Court of Appeals reversed the grant of summary judgment to both Bolduc and Travelers.

The Court of Appeals, with Judge Connolly dissenting, reversed the grant of summary judgment to both Bolduc and Travelers. (Add. 1). As to Bolduc, the Court of Appeals reasoned that Minn. Stat. § 337.05 applies "when a subcontract sets forth or specifies the type of insurance required from the subcontractor." (Add. 8). The Court of Appeals concluded that Bolduc agreed "both to indemnify for another's negligence and to insure that risk." (Add. 9). Citing Hurlburt v. N. States Power Co., 549 N.W.2d 919, 923 (Minn. 1996), and "the common practice in the insurance industry of requiring subcontractors to insure their indemnification obligations," the Court of Appeals concluded § 337.05's purported "'narrow exception' appears to have swallowed the rule" of prohibition against such indemnity contained in Minn. Stat. § 337.02. (Add. 9).

The Court of Appeals stated, without explanation, that it found the indemnity language in the ECI drafted Subcontract similar to that approved by this Court in Holmes v. Watson-Forsberg Co., 488 N.W.2d 473, 474-75 (Minn. 1992). (Add. 10-11). Bolduc "agreed to indemnify ECI without regard to fault" and "because the indemnification and insurance obligations coincide, section 337.05 exempts the contract from the application of section 337.02." (Add. 11). It ordered the grant of summary judgment to Bolduc reversed and "remanded the matter to the district court for further proceedings not inconsistent with this opinion." (Add. 12).

The Court of Appeals also reversed the grant of summary judgment to Travelers concluding the finding Bolduc was not negligent in damaging the pipeline did not equate "to a finding that Bolduc did not cause the damage to the pipeline." Travelers' policy "does not limit coverage to injury or damage caused by negligent acts or omissions." (Add. 13; emphasis in the original). As with Bolduc, the case against Travelers was remanded "for further proceedings not inconsistent with this opinion." (Id.)

Bolduc and Travelers were granted further review.

ARGUMENT

THE GRANT OF SUMMARY JUDGMENT TO BOLDUC SHOULD BE AFFIRMED

A. This Case Comes Before the Court Following a Jury Trial and the Subsequent Grant of Summary Judgment.

1. This Court reviews the Court of Appeals' reversal of the grant of summary judgment to Bolduc de novo.

A court must grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On an appeal, this Court asks two questions: (1) are there any genuine issues of material fact, and (2) did the district court commit error in its application of the law? State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). This Court applies a de novo standard of review and views the evidence in a light most favorable to the nonmoving party. Valspar Refinish, Inc. v. Gaylord's, Inc., 764 N.W.2d 359, 364 (Minn. 2009).

If the moving party makes out a prima facie case, the burden of producing genuine issues of material fact falls on the nonmoving party. Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988) ("This principle is reflected in our frequent holdings that summary judgment is proper where the nonmoving party fails to provide the court with specific indications that there is a genuine issue of fact."). This Court may affirm the grant of summary judgment on alternative grounds raised even if "it is not the one assigned by the trial judge, in support of the decision." Day Masonry, 781 N.W.2d at 331.

2. The Court views the facts in a light most favorable to the jury's verdict.

Here the grant of summary judgment followed a jury trial. The trial was to resolve "liability and damages." (Add. 30). The jury was asked not only whether Bolduc was negligent, but also to decide what sum of money will fairly compensate ECI "for its loss resulting from damage to the pipe." (Add. 28). The damage issue was expressly not conditioned on the answer to the liability issues. The jury's answer was ECI was entitled to "zero." (Id.)

The Court is generally bound by the jury's determination of a factual issue. Onvoy, Inc. v. Allete, Inc., 736 N.W.2d 611, 616 (Minn. 2007). The Court on appeal must view the evidence in a light most favorable to the jury's special verdict answers. Milbank Mut. Ins. Co. v. Proksch, 309 Minn. 106, 244 N.W.2d 105, 107 (1975). A special verdict is to be liberally construed to give effect to the intention of the jury. Kelly v. City of Minneapolis, 598 N.W.2d 657, 662 (Minn. 1999).

3. Construction and interpretation of Minnesota statutes and contracts present questions of law.

This case presents questions of contract and statutory construction and application. The construction and effect of a contract present questions of law which this Court reviews de novo. Turner v. Alpha Phi Sorority House, 276 N.W.2d 63, 66 (Minn. 1979). Whether a contract is ambiguous is a question of law. Carlson v. Allstate Ins. Co., 749 N.W.2d 41, 45 (Minn. 2008).

Similarly, interpretation and application of Minnesota statutes are questions of law which this Court reviews de novo. Milner v. Farmers Ins. Exchange, 748 N.W.2d 608, 618 (Minn. 2008). The aim "is to give effect to the intention of the legislature in drafting the statute." Id.

B. Bolduc Complied With Minn. Stat. § 337.05 and the Parties' Contract, and Therefore, ECI's Claim Against Bolduc, Was Properly Dismissed.

Under the ECI drafted Subcontract, Bolduc's indemnification obligation is limited "to the fullest extent permitted by law and to the extent of the insurance requirements below . . . ." (Add. 38). This language is one of limitation, evidencing an intent to fashion an obligation of the promisor to be in conformance with state law. Brooks v. Judlau Contracting, Inc., 898 N.E.2d 549, 552 (N.Y. 2008). The Court of Appeals concluded that Minn. Stat. § 337.05 applied to the parties' Subcontract, but did not explain why, on this record, such holding leads to reversal of the grant of summary judgment to Bolduc. (Add. 8-12). Rather, Minn. Stat. § 337.05, as applied to the

procedural history of this case and the facts of record, supports affirmance of summary judgment to Bolduc, albeit on grounds different from that articulated by the trial court.

1. All indemnity agreements are strictly construed.

All indemnity agreements in Minnesota are subject to strict construction. Yang v. Voyagaire Houseboats Inc., 701 N.W.2d 783, 792 n. 5 (Minn. 2005). Under Minnesota law, indemnification agreements that purport to indemnify the indemnitee for losses occasioned by the indemnitee's own negligence are disfavored. National Hydro Sys. v. M.A. Mortenson Co., 529 N.W.2d 690, 694 (Minn. 1995); Farmington Plumbing & Heating Co. v. Fischer Sand & Aggregate, Inc., 281 N.W.2d 838, 842 (Minn. 1979), *superseded by statute*, Minn. Stat. § 337.02, as recognized in Katzner, 545 N.W.2d at 381.

Prior to 1984, contractors were able to contract with a subcontractor for indemnification from all claims, even those claims arising from the contractor's own negligence. Such agreements were subject to the above-stated rule of strict construction, requiring a clear and unequivocal expression imposing indemnity for losses caused by the negligence of the indemnitee. Farmington Plumbing, 281 N.W.2d at 842. Absent such an expression by the parties in "clear and unequivocal terms," indemnity was precluded. National Hydro Sys., 529 N.W.2d at 694.

2. Minn. Stat. § 337.02 invalidates all forms of indemnity in construction contracts.

In 1983, the Minnesota Legislature enacted Chapter 337, the purpose of which was to restrict a contractor's ability to shift liability to another contractor. Minn. Stat.

§ 337.02, by its terms, invalidates all forms of indemnity in construction contracts. (A. 123). It states "[a]n indemnification agreement contained in, or executed in connection with, a building and construction contract is unenforceable . . . ." (Id.) That statutory bar is subject to several exceptions. Section 337.02 itself resurrects indemnification agreements "to the extent that . . . 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 delegatees." (Id.)

This statute voids indemnity provisions that indemnify a promisee against its own wrongful act, regardless of whether damages were caused by the party's joint or concurrent negligence. The purpose of this statute is to prohibit parties to construction contracts from avoiding risks created by their own fault associated with contract performance, to require employers to provide employees with a safe place to work and to preclude delegating to subcontractors such duty. Katzner, 545 N.W.2d at 381, citing Holmes, 488 N.W.2d at 475 (the purpose of this prohibition is to ensure "each party will remain responsible for its own negligent acts or omissions"); Holmes, 471 N.W.2d 109, 111-12 (Minn. Ct. App. 1991) (quoting legislative history), *rev'd* 488 N.W.2d 473 (Minn. 1992). The statute levels the playing field for small contractors who are often powerless to negotiate favorable agreements.

3. Minn. Stat. § 337.05 provides a narrow exception to the anti-indemnity provision of § 337.02 whereby a promisor may obligate itself to obtain insurance for the benefit of another.

Minn. Stat. § 337.05 offers an alternative method of risk allocation which has been acknowledged by this Court to be a "narrow exception" to the section 337.02 prohibition. Katzner, 545 N.W.2d at 381. Section 337.05, subd. 1, preserves the right of a party to require that insurance be provided for its benefit or the benefit of the other. Katzner, 545 N.W.2d at 381. Section 337.05, subd. 1, provides: "[s]ections 337.01 to 337.05 do not affect the validity of agreements whereby a promisor agrees to provide specific insurance coverage for the benefit of others." One does this by requiring the promisor to name the would-be promisee as an "additional insured" (AI) on the promisor's own general liability policy with contractual liability coverage and with certain stated limits. Additional insured status gives the promisee direct rights under the policy against the insurer. 4 Bruner & O'Connor on Construction Law § 11:164 (June 2011); Daniel S. Kleinberger, No Risk Allocation Need Apply: The Twisted Minnesota Law of Indemnification, 13 Wm. Mitchell L. Rev. 777, 809-10 (1987).

If the promisor breaches its promise to procure the "specific types and levels of insurance," the statute requires the promisor to indemnify the promisee to the same extent of the promised insurance coverage if three conditions are met. Minn. Stat. § 337.05, subd. 2. (A. 124). Specifically, Minn. Stat. § 337.05, subd. 2, provides if (a) a promisor agrees to provide specific types and limits of insurance; and (b) a claim arises within the specified insurance scope; and (c) the promisor did not obtain and keep in force that

specified insurance then "as to that claim and regardless of Section 337.02 the promisee shall have indemnification from the promisor to the same extent as the specified insurance." (A. 124; emphasis added). Accordingly, "when a party breaks a promise to provide specific insurance and harm materializes within the scope of the bargained for insurance, the proper measure of contract damages is the value which the specified insurance would have provided the promisee." Kleinberger, 13 Wm. Mitchell L. Rev. at 809-10; Seward Housing Corp. v. Conroy Bros. Co., 573 N.W.2d 364, 368 (Minn. 1998) (where subcontractor contracted to obtain specific insurance and failed to do so, the only issue is whether the disputed claim "arises within the scope of the specified insurance").

Reading Minn. Stat. § 337.05 in its entirety, all that can be promised by the promisor is to obtain specified insurance. Contrary to the Court of Appeals' assertion that the "narrow exception" contained in § 337.05 "appears to have swallowed the rule" against the "general prohibition of indemnification from the indemnitee's own negligence," the anti-indemnity provision of § 337.02 in all cases survives to prevent direct indemnification by the promisor unless all three conditions in § 337.05, subd. 2 are found to apply. Hurlburt, 549 N.W.2d at 925 (Anderson, J. concerning specially) (discussing § 337.05, subd. 2). The procurement of the specified insurance coverage discharges all obligations of the promisor and prohibits the promisee from obtaining indemnity directly from the promisor. Minn. Stat. § 337.05, subd. 2. Accordingly, as this Court recognized in Katzner, § 337.05 is a narrow exception. 545 N.W.2d at 381.

4. Under the Court of Appeals' analysis, Bolduc obtained the promised insurance coverage and the dismissal of Bolduc from this lawsuit should have been affirmed.

The Court of Appeals concludes § 337.05 applies because the Subcontract "sets forth or specifies the type of insurance from the subcontractor." (Add. 8). But any obligation to indemnify ECI is limited by the three conditions stated in § 337.05, subd. 2. The Subcontract drafted by ECI specifies that ECI is to be an "additional insured" on a "General Liability with contractual liability coverage" with a $1,000,000 bodily injury and property damage combined single limits and $500,000 limits for any one person or occurrence. (Add. 38). Certifications of insurance were to be furnished to ECI "evidencing the aforementioned coverage." (Add. 38). Bolduc did just that. (A. 76, 97).

Per the Travelers policies, and as stated by the Court of Appeals, coverage is provided where "the injury or damage is caused by acts or omissions of you or your subcontractor in the performance of your work to which the written contract requiring insurance applies." (Add. 13; A. 95, 119). The Court of Appeals held the Travelers policies do not limit coverage to injury or damage caused by Bolduc's "negligent acts or omissions." (Add. 13). And there has never been any dispute that the pipeline was damaged by a sheet driven by Bolduc. (Add. 3; T. 18, 38). Under the Court of Appeals' analysis, Bolduc, by its act, caused damage to the pipe, which Travelers' policies cover. (Id.) Under the Court of Appeals' analysis, there is no basis to conclude Bolduc owed ECI a direct indemnity obligation under Minn. Stat. § 337.05, subd. 2. The Court of Appeals should have affirmed the grant of summary judgment in favor of Bolduc.

C. Based on the Jury's Findings, Adopted by the Trial Court, and the Submissions on Summary Judgment as Applied to Minnesota Law, There Is No Basis in Fact or Law to Conclude Bolduc Can Be Held Responsible to ECI for Purported Breach of Contract, and Therefore, the Grant of Summary Judgment Should Have Been Affirmed.

Because the construction of the Travelers insurance policies is before the Court pursuant to Travelers' Petition for Review, it is necessary for Bolduc to address alternative grounds that support the grant of summary judgment to Bolduc. Here, the record presents good reasons, even though not the one assigned by the trial judge, to affirm the grant of summary judgment to Bolduc. Penn Anthracite Mining Co. v. Clarkson Securities Co., 205 Minn. 517, 287 N.W. 15, 17 (1939).

The Court of Appeals, on the record presented, had no basis to reverse the grant of summary judgment to Bolduc. This is true regardless of its determination as to Travelers' obligation to ECI under its insurance policies or its (erroneous) conclusion that the Subcontract unambiguously extends to indemnify for ECI's negligence. The Court is to affirm on any alternative ground raised, even if it was "not the one assigned by the trial judge in support of the decision." Day Masonry, 781 N.W.2d at 331.

1. Based on the jury's verdict, adopted by the trial court, Bolduc has no obligation to indemnify ECI and renders any claim against Bolduc moot.

The jury found, and the trial court adopted, the finding that ECI sustained no loss. (Add. 21, 28). That finding was not challenged by ECI either by post-trial motion or appeal. There simply is nothing owed by Bolduc to ECI and any ECI claim against Bolduc is precluded as a matter of law.

The trial court, prior to the jury trial, informed the parties that the trial was to resolve the issue of "damages." (Add. 34). The jury was then asked "[w]hat sum of money will fairly compensate [ECI] for its loss resulting from damage to the pipe?" (Add. 28). This broad special verdict question was presented unfettered and unrestrained by the other questions posed. ECI requested no damage issue other than that submitted. The damage issue was expressly not conditioned on the answer to the liability issue. Thus, if all of ECI's purported issues on liability had been submitted, including breach of contract, ECI would be entitled to zero.

The Court of Appeals, while acknowledging the jury found "ECI was not entitled to any money for its loss resulting from damage to the pipeline," does not then explain what it is possibly asking the trial court to do on remand. (Add. 15). The fact is ECI is entitled to nothing from Bolduc. The grant of summary judgment to Bolduc should have been affirmed.

2. A party who fails to raise a contention in opposition to summary judgment is precluded from raising that issue as a basis for reversal on appeal and, therefore, ECI waived any issue of breach of contract for failure to procure insurance coverage.

The parties stipulated that after the jury trial they would submit any remaining issues of breach of contract to the trial court for resolution. Prior to the jury trial, it was clear ECI's breach of contract claim against Bolduc was premised on the issue of insurance coverage procured. (A. 28). Bolduc asserted after the jury trial and by summary judgment that it complied with its obligation to procure insurance and was entitled to summary judgment. (Bolduc's Memo. Supp. Summ. J., dated 7/21/10, pp. 12-

13; Bolduc's Reply Memo. Supp. Summ. J., dated 8/13/10, n. 6, p. 10 & n. 8, p. 11; T. 8/18/10, pp. 5-6).

Even though Travelers refused to pay ECI based on its construction of the insurance contract, ECI did not assert at summary judgment or in response to Bolduc's motion that Bolduc failed to procure the agreed-upon insurance coverage under the Subcontract. ECI knew the terms of the insurance procured, yet it did not assert any direct indemnity obligation to ECI based on the elements of Minn. Stat. § 337.05, subd. 2. It made no assertion in response to Bolduc's summary judgment motion that the Travelers policies procured did not comply with the terms of the Indemnity/Insurance Provision it had drafted.[7] Having failed to so advance such arguments in response to Bolduc's motion for summary judgment, ECI cannot revive that issue on appeal. Thiele, 425 N.W.2d at 582 (cannot revive an abandoned theory on appeal); Jenkins v. County of Riverside, 398 F.3d 1093, 1095, n. 4 (9th Cir. 2005) (plaintiff waived challenge to claims by failing to raise them in opposition to defendant's motion for summary judgment); Witte v. Wis. Dep't of Corr., 434 F.3d 1031, 1038 (7th Cir. 2006) (party forfeits any arguments it fails to raise in a brief opposing summary judgment); Palmer v. Marion County, 327 F.3d 588, 597-98 (7th Cir. 2003) (claim deemed abandoned when plaintiff "failed to delineate his negligence claim in the district court brief in opposition to summary judgment"); Dale

[7] ECI did broadly assert entitlement to indemnity because the damage was caused by Bolduc's act or omission of hitting the pipe, but does not assert that the insurance procured was in any way not in accord with the parties' agreement per that Indemnity/Insurance Provision. (ECI's Memo. Opp. Summ. J., pp. 3-6).

and Selby Superette & Deli v. U.S. Dept. of Agriculture, 838 F. Supp. 1346, 1348 (D. Minn. 1993) (failure to raise an issue in opposition to a motion for summary judgment operates as a waiver).

As previously stated, the narrow indemnity exception in § 337.05, subd. 2 (A. 124) requires three elements be present before the promisee "shall have indemnification from the promisor to the same extent as the specified insurance." The promisor, once it obtains the requisite insurance, bears no responsibility if the insurer should breach its agreement with its additional insured or otherwise contest coverage, as Minn. Stat. § 337.05, subd. 2 makes clear. Zettel v. Paschen Contractors, Inc., 427 N.E.2d 189, 192 (Ill. Ct. App. 1981), *appeal denied.* The fact that an insurance carrier has denied coverage for a claim does entitle the promisee to indemnity by the promisor under the § 337.05, subd. 2 narrow exception. In other words, an agreement under § 337.05 to obtain insurance is not an agreement of insurance. The promisor does not by that promise become an insurer. It assumes the liabilities of one only where the promisee can establish all three requirements of Minn. Stat. § 337.05, subd. 2. Because ECI did not establish (or even seek to establish) the elements of subd. 2, it cannot now claim indemnity from Bolduc.

A party opposing a motion for summary judgment cannot rely on general facts but must present specific facts in existence which create a genuine issue for trial. Foley v. Honeywell, Inc., 488 N.W.2d 268, 272 (Minn. 1992), *reh'g denied.* It is a general principle of contract law that one claiming breach bears the burden of proving the terms of the contract and how they were breached. Brown v. Farnham, 58 Minn. 499, 60 N.W.

344, 345 (1894); Grenier v. Air Express Intern. Corp., 132 F. Supp. 2d 1198, 1202 (D. Minn. 2001) (citing Buchman Plumbing Co., Inc. v. Regents of Univ. of Minnesota, 298 Minn. 328, 215 N.W.2d 479, 486 (1974), that in a breach of contract action plaintiff has the burden of proving not only breach but that damages arose from that breach). Where the promisee seeks to recover for breach of a contract to procure insurance, the general elements of the promised insurance policy are an essential part of its case. Seward Housing Corp. v. Conroy Bros. Co., 573 N.W.2d 364, 368 (Minn. 1998); Action ADS, Inc. v. Judes, 671 P.2d 309, 311 (Wyo. 1983); see also Howarth v. First Nat'l Bank of Anchorage, 596 P.2d 1164, 1167-68 (Alaska 1979) (in an action for breach of a promise to procure insurance, the promisee has the burden to prove, directly or inferentially, the subject matter of the contract, the risks to be insured, the amount of coverage, the terms of the policy, and the payment of premiums). And Minn. Stat. § 337.05, subd. 2, demands that the promisee meet its three elements before the promisee "shall have indemnification from the provision to the same extent as the specified insurance." (A. 124). Under Minnesota law, the general rule is that the burden of proof rests on the party seeking to benefit from the statutory provision. C.O. v. Doe, 757 N.W.2d 343, 352 (Minn. 2008), *reh'g denied.* ECI did not so meet its burden.

As ECI has admitted and the record unequivocally establishes, ECI is an additional insured on General Liability policies with contractual liability coverage procured by Bolduc. The record shows the requisite limits were purchased. The fact Travelers denied coverage does not and cannot lead to the conclusion that § 337.05, subd. 2 is triggered,

and thereby Bolduc owes ECI indemnity. ECI, in response to Bolduc's summary judgment motion, would have to provide facts that satisfy all three elements of § 337.05, subd. 2. It did not do so.

ECI never made any argument, let alone presented any fact, refuting Bolduc's position that it had procured the requisite insurance. Having failed to assert to the contrary before the trial court, and in response to Bolduc's motion for summary judgment, such an argument cannot be resurrected on appeal. That issue is waived. Even if this Court were to conclude the Travelers policies do not provide ECI coverage, that determination cannot result in reversal of summary judgment to Bolduc. Bolduc instead is entitled to affirmance of the trial court's grant of summary judgment dismissal.

3. There is no basis to reverse and remand based on any claim of breach of contract for faulty workmanship at FAS-1.

In response to Bolduc's motion for summary judgment and after the jury's no Bolduc negligence verdict, ECI asserted there should be a second trial on whether Bolduc properly performed its work at FAS-1. (ECI Memo. Opp. Bolduc's Mtn. Summ. J., dated 8/5/10, p. 8). Before the Court of Appeals, ECI reasserted such breach of contract argument. (Appellant ECI's Brief to Court of Appeals, dated 3/31/11, pp. 27-30). The Court of Appeals did not address this argument, presumably because, under its analysis, ECI was entitled to indemnity without regard to fault and such assertion is irrelevant. (Add. 11). The Court of Appeals, however, in reversing and remanding, did not explain what it thought should be done on remand.

Clearly, there should be no "second trial" on breach of contract. This claim (in addition to being redundant of ECI's negligence claim from the first trial and otherwise waived) would provide no value in determining any indemnity obligation. All issues between Bolduc and ECI have been resolved by the fact Bolduc has no obligation to ECI under Minn. Stat. § 337.05, subd. 2.

a. ECI's claimed breach of contract for alleged faulty workmanship is redundant to ECI's claim of Bolduc's negligence; it also was not preserved and is not a basis to reverse the grant of summary judgment.

In addition, and as the record reflects, any claimed breach for faulty workmanship is redundant and subsumed in ECI's claim of Bolduc negligence. For that reason also, no such second trial should be held. A party's contractual relationship can create duties under both contract and tort law. In Moundsview Indep. Sch. Dist. No. 629 v. Buetow & Assocs., Inc., 253 N.W.2d 836, 839 (Minn. 1977), this Court looked to contractual provisions detailing the defendant architect's scope of duty to determine whether the architect breached his duty in tort "to perform his services with reasonable care and competence." Id. at 839. In Buetow, this Court held the provisions of the contract define the due care. Id. As ECI articulated prior to that jury trial, its breach of contract claim was tied to the procurement of insurance coverage, not Bolduc's faulty workmanship. (A. 28). While the parties stipulated ECI's claims for breach of contract were preserved, the parties also stipulated the trial court would, after the jury trial, resolve any remaining issues by cross-motions for summary judgment. If the trial court concluded there was a material issue of fact, such issue would be tried to the court. (A. 33). See also Milner v.

Farmers Ins. Exchange, 748 N.W.2d 608, 618 (Minn. 2008) ("Issues of fact that are not submitted to the jury on a special verdict form are left to the district court to decide.").

As ECI's Complaint makes clear, ECI's claim that Bolduc failed to properly perform its work at FAS-1 is the same as ECI's negligence claim. (A. 5). As presented to the jury in the negligence trial, it was the parties' Subcontract that defined Bolduc's duty of due care. Bolduc was to "furnish, drive and remove . . . sheeting cofferdams . . . per ECI location." (Add. 36). This it did do and, according to the jury, did so properly. (Add. 27, 36). There was no faulty workmanship by Bolduc.

The trial court, having presided over the trial and having heard the testimony, was correct in concluding there could be no remaining material issue of fact as to any breach of contract claim by ECI based on Bolduc's alleged faulty workmanship. After the jury's no negligence verdict, and in response to Bolduc's motion for summary judgment, ECI did not articulate what specific and express contractual duty as to workmanship arose from the parties' Subcontract that Bolduc purportedly breached. To preserve such a claim, it was ECI's obligation in response to Bolduc's motion for summary judgment both to so articulate and explain how ECI was damaged. Brown, 60 N.W. at 345; Grenier, 134 F. Supp. 2d at 1202 (citing Minnesota law). Having failed to do so, any such breach of contract claim was not preserved. Following the jury trial, there is no basis in fact or law to conclude Bolduc could be held responsible under a breach of contract analysis.

D. The Indemnity/Insurance Provision Is Unenforceable Because It Is Ambiguous and, Therefore, Bolduc Was Entitled to Summary Judgment.

Not only did the Court of Appeals find Minn. Stat. § 337.05 applicable, it also concluded that Bolduc agreed to indemnify and insure ECI "without regard to fault." (Add. 9; 11). According to the Court of Appeals, "without regard to fault" means the subcontractor agrees to indemnify for another's negligence. (Add. 9, 11). Any purported attempt to shift liability from ECI to Bolduc for ECI's (or another's) fault is not stated in clear and unequivocal terms sufficient to pass muster under Minnesota's strict construction of indemnification agreements. (Add. 17; Judge Connolly dissenting). Because the ECI drafted Indemnity/Insurance Provision is ambiguous, it is therefore unenforceable and the grant of summary judgment to Bolduc must for this reason also be reinstated.

1. An indemnification and insurance provision that attempts to indemnify an indemnitee for the indemnitee's own negligence must be clear and unequivocal.

As one court aptly noted:

> Contractual indemnification and liability insurance coverage issues, arising out of construction contracts have spawned, and continue to spawn what appears to be a never ending series of legal disputes . . . .

Crespo v. City of New York, 2004 WL 737536 at *1 (N.Y. Sup. Ct. 2004) (A. 128). The court attributed that to evolving from the "the vague, imprecise ambiguous language which is either ineptly or purposefully employed by the parties to such written contracts and insurance agreements . . . ." (Id.) Thus, it is imperative the language of the

agreement by which a subcontractor agrees to procure insurance for the benefit of the promisee be clear and unequivocal. A promisee cannot draft a vague and/or confusing provision using sweeping and imprecise language, and then assert the promisor should be held responsible if the coverage procured does not match what the promisee later claims to be the "agreement." The only "interpretive rule with universal application to express indemnity agreements is that the broader the scope of the purported indemnity obligation and the less specific the language utilized, the more difficult the enforcement." 3 Bruner & O'Connor on Construction Law § 10:12 (June 2011).

Moreover, to fit within the "narrow exception" of § 337.05, the indemnity/insurance provision must be clear and unequivocal as to the specific insurance coverage to be provided "for the benefit of others." Minn. Stat. § 337.05, subd. 1. "Indemnity agreements are to be strictly construed when the indemnitee . . . seeks to be indemnified for its own negligence. There must be an express provision in the contract to indemnify the indemnitee for liability occasioned by its own negligence; such an obligation will not be found by implication." Nat'l Hydro Sys., 529 N.W.2d at 694, quoting Farmington Plumbing & Heating Co., 281 N.W.2d at 840. This requires the parties' intentions be expressed in "clear and unequivocal terms" such that no other meaning can be ascribed to the terms of the provision. Nat'l Hydro. Sys., 529 N.W.2d at 694, quoting Braegelmann v. Horizon Dev. Co., 371 N.W.2d 644, 646 (Minn. Ct. App. 1985), *rev. denied.* Absent such an expression, indemnity is precluded. Nat'l Hydro Sys., 529 N.W.2d at 694.

If the language is equivocal, or contains any limiting language that renders an otherwise clear and unequivocal provision equivocal, any claim as to indemnity must be precluded. Nat'l Hydro Sys., 529 N.W.2d at 694. This high standard of strict construction must apply here because Bolduc, the subordinate party and promisor, will be liable under § 337.05, subd. 2 if it fails to provide the promised insurance coverage. Federated Service Ins. Co., 805 N.W.2d at 469. So not only does any agreement to indemnify a party for its own negligence need to be abundantly clear, there must be a specific agreement to provide insurance to cover that party's conduct. If the Indemnity/Insurance Provision drafted by ECI fails on either one of these counts, which it does, there is no right to proceed against Bolduc.

This is in accord with Minnesota law, which requires a court to give the contract language its plain and ordinary meaning when interpreting a contract. The contract is to be interpreted in such a way as to effectuate all of its provisions. Employers Mut. Liab. Ins. Co. v. Eagles Lodge, 282 Minn. 477, 479, 165 N.W.2d 554, 556 (1969). If the contract is reasonably susceptible to more than one interpretation, the contract is ambiguous. Lamb Plumbing & Heating Co. v. Kraus-Anderson, Inc., 296 N.W.2d 859, 862 (Minn. 1980). Upon a finding of ambiguity, all doubts and ambiguities in the contract must be construed against the drafter. Katzner, 545 N.W.2d at 382, quoting Salminen v. Frankson, 309 Minn. 438, 245 N.W.2d 839, 841 (1976).

Here, ECI drafted the Indemnity/Insurance Provision. Its lack of clarity should not and cannot work to Bolduc's detriment. Since the provision is not clear, the analysis ends and the grant of summary judgment to Bolduc must be affirmed.

2. The Indemnity/Insurance Provision does not clearly and unequivocally shift liability to Bolduc for ECI's negligence.

Contrary to the Court of Appeals' ruling, the indemnity language in the ECI drafted Subcontract does not evidence a mutual understanding of the parties that Bolduc would indemnify ECI even if its work was not negligently performed. If ECI, as the party drafting the Subcontract, had intended to include an indemnity provision that would apply regardless of Bolduc's negligence, and would apply so as to indemnify ECI against injuries or damages caused by ECI's own negligence, it needed to use specific, unequivocal language to that effect, given that such provisions are strictly construed against the indemnitee. It did not do so.

The Indemnity/Insurance Provision in the Subcontract is ambiguous. Lamb Plumbing & Heating Co., 296 N.W.2d at 862. The provision, on its face, does not by its very terms clearly and unequivocally reflect a mutual intent to require Bolduc provide indemnity for loss caused by ECI. As the lower courts have concluded, the concept of fault is crucial to the reading of the provision. According to the Court of Appeals, as long as there is a causal connection between the injuries or claimed loss and the promisor's work on the construction project, the loss falls on the promisor. (Add. 11). This requires the promisor to indemnify the promisee against the promisee's share of responsibility for such injuries or loss. (Add. 9). But if the reference to indemnitor's work meant the

clause covers only that which results from the indemnitor's wrongful conduct, it would exclude responsibility based on the indemnitee's conduct.

The ambiguity in the Indemnity/Insurance Provision here is confirmed by the differing interpretations reached by the trial court, the Court of Appeals majority, Judge Connolly in dissent, and by ECI's counsel's own admission at the summary judgment hearing. Hurlburt, 549 N.W.2d at 924 (Anderson, J. concurring specially). Both the trial court and Judge Connolly concluded the indemnification and insurance provision between Bolduc and ECI was unlike the indemnification provision in Holmes and therefore unenforceable. (Add. 17, 25). ECI's counsel also acknowledged before the trial court it may well lose "on the case against Bolduc on that ambiguity issue . . . ." (T. 8/18/10 at p. 19).

ECI's admission before the trial court and its litigation strategy in this case confirms the ambiguity of the Indemnity/Insurance Provision and that such provision only applies upon instances of Bolduc's fault. The parties agreed the pipeline was damaged when Bolduc drove a sheet into the pipe. If fault is irrelevant, ECI would not have pressed on summary judgment for a "second trial" after the jury's verdict of no negligence, to focus on Bolduc's liability to ECI on a faulty workmanship theory. ECI's claimed breach of contract theory was that Bolduc breached its contract because it failed to perform its work in a "good and workmanlike manner." (ECI Memo. Opp. Bolduc's Mtn. Summ. J., dated 8/5/10, pp. 6-7). This claim (in addition to being redundant of ECI's negligence claim from the first trial and otherwise waived) would have provided no

value in determining Bolduc's indemnity obligation if such obligation existed without regard to Bolduc fault.

Given ambiguity has resulted from the interpretation of the Indemnity/Insurance Provision, all doubts and ambiguities of such provision must be construed against ECI, the drafter. The strict construction rule applicable to indemnity provisions applies to the provision at issue because, as the Court of Appeals concluded, it is being invoked to require a party to be indemnified against its own fault. Coverdill v. Lurgi Corp., 496 N.E.2d 1007, 1009 (Ill. App. Ct. 1986) (insurance procurement clause must clearly and explicitly provide that indemnitor must obtain insurance to indemnify the indemnitee against the indemnitee's own negligence); Kennecott Copper Corp. v. General Motors Corp., 730 F.2d 1380, 1382 (10th Cir. 1984) (court looked to general purpose of an insurance procurement clause in its decision to strictly read the contested contract provision). Once it is determined that the provision is ambiguous, that ends the inquiry and the provision is unenforceable.

a. The indemnification agreement between Bolduc and ECI is "at best, ambiguous" like the indemnity obligation in Katzner.

In Katzner, this Court held an indemnification provision in a construction contract between a subcontractor and contractor was not enforceable because it did not "clearly and unequivocally shift liability" for any claims, damages, loss or expense, from a promisee to its promisor and require a corresponding promise to purchase insurance. Katzner, 545 N.W.2d at 381-382. The indemnification language in Katzner stated:

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

Id. at 379.

This Court explained the provision was unenforceable because it was "at best, ambiguous as to whether it was intended to indemnify [the design/builder] from claims arising out of [the design/builder's] own acts." Id. at 382; see also Nat'l Hydro Sys, 529 N.W.2d at 694 (concluding indemnification provision stating "which arise out of or result from performance of the work by contractor . . ." was equivocal). The ambiguity resulted from the provision being read in one of two ways: "either as an agreement to indemnify [the designer/builder] from all claims regardless of who is at fault, or as an agreement to only indemnify [the designer/builder] from claims caused 'in whole or in part by any negligent act or omission of the Contractor.'" Id. at 382. Absent such an agreement to procure insurance coverage arising out of the indemnitee's own negligence, the Katzner Court concluded any attempt to relieve the indemnitee from liability for its own acts and operations could not be enforced. Katzner, 545 N.W.2d at 382.

The Katzner provision was also unenforceable because it was unlike the provision in Holmes, which obligated the indemnitor to indemnify the indemnitee for "all such claims including . . . claims for which the Contractor may be or may be claimed to be, liable." Katzner 545 N.W.2d at 382, quoting Holmes, 488 N.W.2d at 475. In Holmes, the indemnification obligation was acceptable because it was clear and unequivocal and required the indemnitor to procure liability insurance coverage, thus satisfying the narrow exception of § 337.05. Holmes, 488 N.W.2d at 475;[8] Katzner, 545 N.W.2d at 381-82. It should be noted that, although not reflected in the Court's opinion in Holmes, Pro-Tech, the subcontractor, through its insurer, Fireman's Fund, had settled the claims of Holmes

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[8] The indemnification provision in Holmes, which this Court referred to as an "industry accepted standard subcontract," 488 N.W.2d at 474, provides:

> The Subcontractor agrees to assume entire responsibility and liability, to the fullest extent permitted by law, for all damages or injury to all persons, whether employees or otherwise, and to all property, arising out of it, resulting from or in any manner connected with, the execution of the work provided for in this Subcontract or occurring or re sulting from the use by the Subcontractor, his agents or employees, of materials, equipment, instrumentalities or other property, whether the same be owned by the Contractor, the Subcontractor or third parties, and the Subcontractor, to the fullest extent permitted by law, agrees to indemnify and save harmless the Contractor, his agents and employees from all such claims including, without limiting the generality of the foregoing, claims for which the Contractor may be or may be claimed to be, liable and legal fees and disbursements paid or incurred to enforce the provisions of this paragraph and the Subcontractor further agrees to obtain, maintain and pay for such general liability insurance coverage and endorsements as will insure the provisions of this paragraph." 488 N.W.2d at 475.

and EBA against Watson and Pro-Tech within the limits of its coverage. It was Pro-Tech, through its insurer, that argued the provision was not enforceable under Minn. Stat. § 337.02. (Minnesota Supreme Court Brief of Appellant Watson-Forsberg, Case No. C9-90-2637, at p. 7).

Here, the Court of Appeals majority concludes the Indemnity/Insurance Provision was enforceable because it "employs language that is similar to that approved by the supreme court in Holmes." (Add. 10). But similar to the provision in Katzner, the agreement between Bolduc and ECI is "at best, ambiguous." As in Katzner, the Indemnity/Insurance Provision at issue can be read in competing respects: either as an agreement by Bolduc to insure any indemnification obligation to ECI without regard to fault and thereby insure ECI's wrongful conduct, or as an agreement by Bolduc to indemnify ECI only for damages caused by Bolduc's fault based on acts and omissions in Bolduc's prosecution of the Subcontract. These differing interpretations render the Indemnity/Insurance Provision ambiguous at best.

The Indemnity/Insurance Provision is also unlike that in Holmes because there is no express reference to ECI's liability. As Judge Connolly explained in his dissenting opinion, the provision in Holmes was tied to the broader nature of the work being performed and not strictly to the damages caused by the acts or omissions or alleged acts or omissions of Bolduc. (Add. 17). In Holmes, the provision explicitly referred to the indemnitee's liability stating "to all such claims including . . . claims for which the Contractor may be or may be claimed to be, liable . . . ." 488 N.W.2d at 475. Here,

however, Bolduc's indemnity/insurance obligation is limited to those damages caused by Bolduc's acts or omissions in the "prosecution of the Subcontract." (Add. 38). Thus, Bolduc's obligation only arises for damages resulting from Bolduc's acts or omissions and did not extend to the broader work being performed.

The Indemnity/Insurance Provision between Bolduc and ECI also differs from that in Holmes because it does not obligate Bolduc to indemnify ECI for ECI's own work or ECI's provision of materials, equipment, instrumentalities or other property. (Add. 38). In Holmes, the provision broadly referred to the "work provided for in this Subcontract," and the contractor's "materials, equipment, instrumentalities or other property." 488 N.W.2d at 475. No such reference is made to ECI or ECI's "materials, equipment, instrumentalities or other property" in the Subcontract. (Add. 38). Nor is any reference made to ECI's liability such that the intent to shift liability from Bolduc to ECI for ECI's negligence can be deemed clear and unequivocal.[9]

b. Bolduc's indemnification obligation is not without regard to fault.

The trial court concluded indemnity is limited to instances in which Bolduc's negligent acts proximately caused the damage. (Add. 25). The language of the Sub-contract, which incorporates the terms "liabilities," "damages" and "judgments," all of

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[9] The only reference to ECI's liability in the indemnification provision is the language that "Subcontractor shall defend any and all suits brought against ECI or Owner on account of any *such liability* or *claims of liability*." (Add. 38) (emphasis added). The use of the language "such liability" in this provision limits the provision to those liabilities resulting from Bolduc's acts or omissions.

which sound in negligence, restrict Bolduc's indemnity obligation to instances of Bolduc's negligence and is, therefore, with regard to fault. (Id.) If Bolduc's non-negligent acts were sufficient to trigger Bolduc's obligation to indemnify ECI under the Subcontract, as concluded by the Court of Appeals majority, then the terms "liabilities," "damages," and "judgments," would be superfluous.

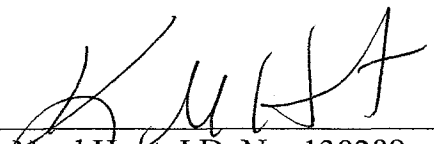
Bolduc's indemnity obligation is also limited to instances of damage proximately caused by Bolduc's acts or omissions. The Indemnity/Insurance Provision requires Bolduc to indemnify ECI for any damages "caused by any act or omission of Subcontractor or anyone who performs work or serves in the prosecution of the Subcontract." (Add. 38). The evidence at trial established that the pipeline damage was caused either by Bolduc's negligence in driving the sheeting at FAS-1, or ECI's negligence in identifying the incorrect location for the sheeting at FAS-1. (T. 18-19, 38). The jury determined Bolduc was not negligent and ECI was not entitled to any damages for its loss. (Add. 28, 29; T. 471-72). Because of the jury's verdict, Bolduc's conduct was not the direct cause of the damage sufficient to trigger any purported indemnity obligation in the Subcontract. See Lane v. Comm. of Pennsylvania, 954 A.2d 615, 623 (Pa. Super. Ct. 2008); Hortman v. Otis Erecting Co., 322 N.W.2d 482, 485 (Wis. Ct. App. 1982).

CONCLUSION

Petitioner L.H. Bolduc Company, Inc. respectfully requests that the Court of Appeals' reversal of the grant of summary judgment to it be reversed. Bolduc is entitled to dismissal and the grant of summary judgment to it should be ordered reinstated.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: January 6, 2012

BY 

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 13,820 words. This brief was prepared using Word Perfect 10.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

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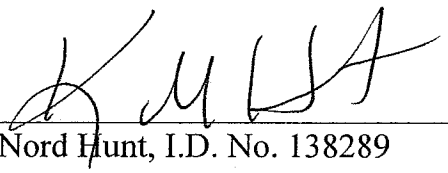
BY 

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