

NO. A11-159

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State of Minnesota  
*In Court of Appeals*

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Engineering and Construction Innovations, Inc.,  
*Appellant,*

vs.

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

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**RESPONDENT THE TRAVELERS INDEMNITY COMPANY OF  
CONNECTICUT'S BRIEF AND ADDENDUM**

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

## TABLE OF CONTENTS

LEGAL ISSUES .....	1
INTRODUCTION.....	3
STATEMENT OF THE CASE .....	3
STATEMENT OF FACTS.....	6
I.    The Construction Project.....	6
II.   The ECI-Bolduc Subcontract .....	6
III.  Bolduc’s Policies of Insurance .....	7
IV.   Pipeline Damage.....	10
V.    ECI Files Suit Against Bolduc and Travelers .....	11
VI.   Trial of ECI’s Negligence Claim Against Bolduc .....	11
VII.  Travelers’ Motion for Summary Judgment .....	12
VIII. Summary Judgment Granted .....	15
IX.   ECI’s Declaratory Judgment Action Versus Western National .....	16
STANDARD OF REVIEW .....	17
SUMMARY OF ARGUMENT .....	17
ARGUMENT.....	18
I.    THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT UNDER THE AIE TRAVELERS WAS ONLY OBLIGATED TO COVER ECI FOR DAMAGE CAUSED BY THE NEGLIGENT ACTS OF BOLDUC; SUCH AN INTERPRETATION OF THE AIE IS IN ACCORDANCE WITH DECISIONS FROM OTHER COURTS APPLYING AND INTERPRETING ALMOST IDENTICAL POLICY LANGUAGE, AND IS THE ONLY REASONABLE INTERPRETATION OF	

THE AIE IN LIGHT OF THE UNDERLYING FACTS OF THE CASE .....	18
A. The Plain Language of the AIE and the Subcontract Indicate that ECI would Only Be Indemnified, or Covered, For Damage Caused by Bolduc’s Negligent Acts .....	18
B. Some Negligence on the Part of the Insured Is Required to Trigger Additional Insured Coverage, Especially Under the Facts of this Case .....	20
1. The Court Must Give the Language of the AIE its Plain Meaning, But Must Also Take Into Consideration the Underlying Facts in Interpreting the AIE .....	21
2. Relevant Case Law Indicates that Bolduc’s “acts or omissions” Must Have Been “Negligent” to Trigger any Coverage Obligation .....	22
3. The Cases Cited By ECI Did Not Concern Policy Language Similar to the AIE and Are Not Persuasive .....	28
C. The Underlying Facts Further Support the District Court’s Interpretation of the AIE to Include Coverage ONLY for Bolduc’s Negligent Acts .....	31
D. Whether ECI was Negligent Does Not Impact Travelers’ Coverage Obligation, or Lack Thereof .....	34
II. THE SUBCONTRACT DOES NOT QUALIFY AS AN “INSURED CONTRACT,” NOR DOES THE INDEMNITY PROVISION IN THE SUBCONTRACT CREATE AN ENFORCEABLE OBLIGATION UNDER MINNESOTA LAW THAT BOLDUC WOULD INDEMNIFY, AND INSURE, ECI FOR ECI’S OWN NEGLIGENCE .....	35
III. EVEN IF ECI WAS ENTITLED TO COVERAGE UNDER THE AIE, THAT COVERAGE WOULD BE EXCESS ONLY OVER THE AMOUNTS ECI ALREADY RECOVERED FROM WESTERN NATIONAL .....	38

CONCLUSION .....40  
CERTIFICATE OF BRIEF LENGTH .....41

## TABLE OF AUTHORITIES

### Cases

<i>Bank of the West v. Superior Court</i> , 833 P.2d 545 (Cal. 1992) .....	21, 22
<i>Bankhead Welding Serv., Inc. v. Florida E.C. R.R. Co.</i> , 240 So.2d 648 (Fla. Dist. Ct. App. 1970) .....	25
<i>Cal. State Auto Assoc. Inter-Ins. Bureau v. Superior Court</i> , 177 Cal. App. 3d 855 (Cal. Ct. App. 1986) .....	21
<i>Cargill, Inc. v. Commercial Union Ins. Co.</i> , 889 F.2d 174 (8th Cir. 1989) .....	39
<i>Chergosky v. Crosstown Bell, Inc.</i> , 463 N.W.2d 522 (Minn. 1990) .....	19
<i>Christensen v. Milbank Ins. Co.</i> , 658 N.W.2d 580 (Minn. 2003) .....	2, 39
<i>Consolidation Coal Co. v. Liberty Mut. Ins. Co.</i> , 406 F.Supp. 1292 (W.D. Pa. 1976) .....	<i>passim</i>
<i>Dillon Cos. Inc. v. Royal Indem. Co.</i> , 369 F.Supp.2d 1277 (D. Kan. 2005) .....	15, 28, 29, 30, 32
<i>Edgley v. Lappe</i> , 342 F.3d. 884 (8th Cir. 2003) .....	22
<i>Farmington Plumbing &amp; Heating Co. v. Fischer Sand &amp; Aggregate, Inc.</i> , 281 N.W.2d 838 (Minn. 1979) .....	1, 36
<i>Garcia v. Fed. Ins. Co.</i> , 969 So.2d 288 (Fla. 2007) .....	1, 22, 23, 24, 27
<i>Holmes v. Watson-Forsberg, Co.</i> , 488 N.W.2d 473 (Minn. 1992) .....	1, 36, 37
<i>Huber Eng'd Woods v. Canal Ins. Co.</i> , 690 S.E.2d 739 (N.C. Ct. App. 2010) .....	15, 28, 30, 31, 32
<i>Hutchinson v. Sunbeam Coal Corp.</i> , 519 A.2d 385 (Pa. 1986) .....	22
<i>Kaspar v. Clinton-Jackson Corp.</i> , 254 N.E.2d 826 (Ill. App. Ct. 1969) .....	25
<i>Katzner v. Kelleher</i> , 545 N.W.2d 378 (Minn. 1996) .....	1, 36, 37
<i>Lititz Mut. Ins. Co. v. Steely</i> , 785 A.2d 975 (Pa. 2001) .....	22

<i>Maryland Casualty Co. v. Regis Ins. Co.</i> , 1997 WL 164268 (E.D. Pa. 1997) .....	14, 15, 28, 29, 32
<i>Minn. Prop. Ins. v. Slater</i> , 673 N.W.2d 194 (Minn. Ct. App. 2004) .....	17
<i>Mut. Serv. Cas. Ins. Co. v. Wilson Twp.</i> , 603 N.W.2d 151 (Minn. Ct. App. 1999) .....	1, 22
<i>N. Star Mut. Ins. Co. v. Midwest Family Mut. Ins. Co.</i> , 634 N.W.2d 216 (Minn. Ct. App. 2001) .....	2, 39
<i>Nat'l Hydro Sys. v. M.A. Mortenson Co.</i> , 529 N.W.2d 690 (Minn. 1995) .....	36
<i>Ohio Cas. v. Terrace Enter.</i> , 260 N.W.2d 450 (Minn. 1977) .....	21
<i>Rowe v. Munye</i> , 702 N.W.2d 729 (Minn. 2005) .....	34
<i>Schwartz v. Merola Bros. Constr. Corp.</i> 48 N.E.2d 299 (N.Y. 1943) .....	25
<i>Secura Supreme Ins. Co. v. M.S.M.</i> , 755 N.W.2d 320 (Minn. Ct. App. 2008) .....	21
<i>Soo Line R. Co. v. Brown's Crew Car of Wyoming</i> , 694 N.W.2d 109 (Minn. Ct. App. 2005) .....	1, 35
<i>State Farm Ins. Cos. v. Seefeld</i> , 481 N.W.2d 62 (Minn. 1992) .....	17
<i>Turner v. Alpha Phi Sorority House</i> , 276 N.W.2d 63 (Minn. 1979) .....	19
<i>U.S. Fid. &amp; Guar. Ins. Co. v. Commercial Union Midwest Ins.</i> , 430 F.3d 929 (8th Cir. 2005) .....	2, 39
<i>Vulcan Materials Co. v. Cas. Ins. Co.</i> , 723 F.Supp. 1263 (N.D. Ill. 1989) .....	1, 26, 27
<i>Wanzek Constr., Inc. v. Employers Ins. of Wausau</i> , 679 N.W.2d 322 (Minn. 2004) .....	21

**Statutes**

MINN. STAT. § 337.05 .....36

## LEGAL ISSUES

1. Whether Travelers' policies of insurance provide coverage to ECI as an additional insured where the policies state that ECI would be covered "with respect to liability . . . for 'property damage' . . . and . . . if, only to the extent that, . . . damage is caused by acts or omissions of [Bolduc]," when a jury determined that Travelers' insured, Bolduc, was not negligent in causing damage to the pipeline and that ECI is entitled to \$0 in damages.

- Trial court's ruling – No, summary judgment granted, ECI's declaratory judgment action dismissed with prejudice.
- Most apposite authorities:

*Garcia v. Fed. Ins. Co.*, 969 So.2d 288 (Fla. 2007).

*Consolidation Coal Co. v. Liberty Mut. Ins. Co.*, 406 F.Supp. 1292 (W.D. Pa. 1976).

*Vulcan Materials Co. v. Cas. Ins. Co.*, 723 F.Supp. 1263 (N.D. Ill. 1989).

*Mut. Serv. Cas. Ins. Co. v. Wilson Twp.*, 603 N.W.2d 151 (Minn. Ct. App. 1999).

2. Whether the subcontract entered into between ECI and Bolduc constitutes a covered "insured contract" under Travelers' policies.

- Trial court's ruling – No, summary judgment granted, ECI's declaratory judgment action dismissed with prejudice.
- Most apposite authorities:

*Soo Line R. Co. v. Brown's Crew Car of Wyoming*, 694 N.W.2d 109 (Minn. Ct. App. 2005).

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

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

*Farmington Plumbing & Heating Co. v. Fischer Sand & Aggregate, Inc.*, 281 N.W.2d 838 (Minn. 1979)

3. Whether, if ECI is entitled to coverage as an additional insured under Travelers' policies, that coverage is excess only over the primary coverage ECI has already obtained from its primary insurer, Western National.

- Trial court's ruling – N/A, the trial court did not address this issue by virtue of its grant of summary judgment as to issue No. 1.
- Most apposite authorities:

*U.S. Fid. & Guar. Ins. Co. v. Commercial Union Midwest Ins.*, 430 F.3d 929 (8th Cir. 2005).

*Christensen v. Milbank Ins. Co.*, 658 N.W.2d 580 (Minn. 2003).

*N. Star Mut. Ins. Co. v. Midwest Family Mut. Ins. Co.*, 634 N.W.2d 216 (Minn. Ct. App. 2001).

## **INTRODUCTION**

Appellant Engineering and Construction Innovations, Inc. (“ECI”) seeks reversal of the district court’s grant of summary judgment as to Respondent the Travelers Indemnity Company of Connecticut (“Travelers”) (as well as Respondent L.H. Bolduc Co., Inc. (“Bolduc”)), but fails to show that the district court’s coverage ruling – that the finding of no negligence on the part of Bolduc precluded any additional insured coverage for ECI under Travelers’ policies - was contrary to applicable law. Instead ECI advocates for an unreasonable interpretation of plain policy language contrary to language that has been interpreted by a number of courts consistent with the interpretation given by the district court in this case. In addition, ECI asks this Court to turn a blind eye to the underlying facts of this case even though those facts (that Bolduc was acting at the direction of ECI), when examined in conjunction with the already plain policy language, demonstrate the clear fallacy in ECI’s arguments and suggested policy interpretation, and instead support the interpretation of the policy language applied by the district court. Because ECI has failed to establish any basis to reverse the district court’s coverage decision, that decision should be affirmed.

## **STATEMENT OF THE CASE**

This case arises out of a pipeline construction project in White Bear Lake, Minnesota, during 2006 and 2007. ECI, a subcontractor on the project, entered into a subcontract with Bolduc (hereinafter referred to as the “Subcontract”) for certain work to be performed on the project, including the driving of sheetpiling at

various locations along the pipeline in accordance with ground locates provided by ECI. Damage was discovered to the pipeline sometime after Bolduc completed its sheetpiling work in reliance on ECI's ground locates.<sup>1</sup> ECI subsequently repaired the pipeline at a claimed cost of approximately \$230,000.00.

Bolduc was insured by Travelers during all relevant times (two policies spanning October 1, 2006 - October 1, 2008). Pursuant to the Subcontract, Bolduc agreed to list ECI as an additional insured under its policies (hereinafter referred to as the "Policies"). The Additional Insured Endorsement (hereinafter referred to as the "AIE") within the Policies stated, among other things, that ECI would be entitled to coverage "with respect to liability ... for 'property damage' ... caused by acts or omissions of [Bolduc]."

After Travelers denied coverage for ECI's repair costs, and after ECI's primary insurer Western National Mutual Insurance Company ("Western National") also denied coverage, ECI brought claims for negligence and breach of contract against Bolduc, claims for breach of contract and declaratory judgment against Travelers, and commenced a separate action seeking declaratory judgment against Western National. Bolduc and Travelers denied

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<sup>1</sup> Despite ECI's representations, the damage was not "caused" by Bolduc, (App.'s Br. at p. 3) as made clear by the jury's ultimate finding that Bolduc was not negligent in driving its sheetpiling. (Special Verdict Form, RT Add. 1-2) "RT Add." refers to Respondent Travelers' Addendum.

liability. Bolduc also counterclaimed for amounts owed for work on the pipeline project, and Travelers also counterclaimed for declaratory judgment.

Because ECI's breach of contract claim against Bolduc and its declaratory judgment action against Travelers required a preliminary finding of whether Bolduc was at fault for causing the damage to the pipeline, those claims were bifurcated from ECI's negligence claim against Bolduc, and ECI's negligence claim against Bolduc was tried before a Ramsey County jury on March 8-10, 2010. On March 10, 2010, the jury returned a verdict finding that Bolduc was not negligent, and therefore not at fault, in causing the damage. The jury also determined that ECI was entitled to \$0 in damages.

Following the verdict ECI settled its declaratory judgment action against Western National, and Bolduc and ECI moved for summary judgment on ECI's outstanding claims. ECI did not file its own motion for summary judgment.<sup>2</sup> The Ramsey County District Court, Judge Gregg E. Johnson, granted both Bolduc and Travelers' motions on October 6, 2010. As to Travelers' motion, Judge Johnson specifically found that under the language of the AIE ECI was only entitled to coverage for damage caused by Bolduc's negligent acts. Since the jury determined that Bolduc was not negligent, Judge Johnson concluded that

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<sup>2</sup> ECI incorrectly represents that "the parties brought cross-motions for summary judgment on the remaining contract and declaratory judgment claims." (App.'s Br. at p. 4) In fact, during the hearing on Travelers' and Bolduc's motions for summary judgment ECI's counsel stated ". . . to be sure it was our intent to be moving for summary judgment ourselves and time got away from us[.]" (Transcript of Proceedings, p. 27, RTA 27) "RTA" refers to Respondent Travelers' Appendix.

ECI was not entitled to coverage and that Travelers was entitled to summary judgment.

Judgment was entered on December 1, 2010 and ECI now appeals from that Judgment.

### **STATEMENT OF FACTS**

#### **I. The Construction Project**

The Metropolitan Counsel Environmental Services (“MCES”) was the owner of the underground pipeline project that forms the basis for this suit. (See Pl.’s Compl., ¶ 4, RTA 38) MCES hired Frontier Pipeline, LLC (“Frontier”) as the prime contractor on the project. (Id. at ¶ 5, RTA 38) Frontier contracted with ECI for the installation of a lift station and a number of Forcemain Access Structures (“FAS”) at various locations along the pipeline. (Id. at ¶ 6, RTA 38)

#### **II. The ECI-Bolduc Subcontract**

ECI entered into a Subcontract with Bolduc in December 2006 for Bolduc to “[f]urnish, drive, and remove . . . sheeting cofferdam[s] over existing pipe . . . ***per ECI location.***” (Subcontract<sup>3</sup>, p. 2, RT Add. 4) (Emphasis added) The Subcontract contained an “Indemnity and Insurance” provision which stated as follows:

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<sup>3</sup> Travelers notes that the Subcontract included in ECI’s Addendum is incomplete. (See ECI’s Add. 9 & 10) A portion of the Subcontract that is excluded is the clause set forth above which obligated ECI to provide ground locates for Bolduc to reference in driving its sheetpiling. (Subcontract, p. 2, RT Add. 4)

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 requirement 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 invites, 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 under the policies . . .

(Id. at p. 4, RT Add. 6) (Emphasis added)

Bolduc complied with the Subcontract by naming ECI as an additional insured under the Policies issued by Travelers. (Pl.'s Compl. at ¶ 10, RTA 39)

### **III. Bolduc's Policies of Insurance**

Travelers issued two policies of insurance to Bolduc, one that was effective from October 1, 2006 to October 1, 2007, and one that was effective October 1, 2007 to October 1, 2008. (See 2006/2007 Policy of Insurance, RTA 44-145, 2007/2008 Policy of Insurance, RTA 146-245) Both Policies contained the following coverage language and relevant definitions:

#### **SECTION I – COVERAGES**

#### **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

##### **1. Insuring Agreement**

- a We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . “property damage” to which this insurance applies. . . .

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## 2. Exclusions

This insurance does not apply to:

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### b. Contractual Liability

. . . “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

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- (2) Assumed in a contract or agreement that is an “insured contract”, provided the . . . “property damage” occurs subsequent to the execution of the contract or agreement. . .

(Commercial General Liability Coverage Form, CG 00 01 10 01, pp. 1 & 2, RTA 60-61 & 166-67) (All emphasis in original)

## SECTION V - DEFINITIONS

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### 9. “Insured contract” means:

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- f. That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for . . . “property damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. . . .

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### 17. “Properly damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property . . .

(Id. at pp. 13 & 15, RTA 72, 74, 178 & 18) (All emphasis in original)

The Policies also contained an identical Blanket Additional Insured (Contractors) Endorsement (the AIE). (See Blanket Additional Insured (Contractors) Endorsement, Form CG D2 46 08 05, pp. 1-2, RT Add.<sup>4</sup> 11-12)

The AIE provided, in pertinent part, as follows:

**BLANKET ADDITIONAL INSURED**

**(CONTRACTORS)**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE  
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 the performance of “your work”*** to which the “written contract requiring insurance” applies. ***The person or organization does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization.***

\* \* \*

3. The insurance provided to the additional insured by this endorsement is excess over any valid and collectible “other insurance”, whether primary, excess, contingent or on any other basis, that is available to the additional insured for a loss we cover under this endorsement. However, if the “written contract requiring insurance” specifically requires that this insurance apply on a primary basis or a primary and non-

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<sup>4</sup> The AIE is reproduced as part of the entire Policies in Travelers’ Appendix.

contributory basis, this insurance is primary to “other insurance” available to the additional insured which covers that person or organization as a named insured for such loss, and we will not share with that “other insurance”. But the insurance provided to the additional insured by this endorsement still is excess over any valid and collectible “other insurance”, whether primary, excess, contingent or on any other basis, that is available to the additional insured when that person or organization is an additional insured under such “other insurance”.

(Id., RT Add. 11-12) (Capitalization in original, all other emphasis added)

#### **IV. Pipeline Damage**

In December 2007, after Bolduc had completed a substantial portion of its work on the project, ECI discovered damage to the pipeline at one of the FAS sites, FAS-1. (Pl.’s Compl. at ¶ 12, RTA 39) At the request of Frontier and MCES, ECI repaired the damage at a claimed cost of \$235,339.89. (Id. at ¶¶ 13, 14 & 15, RTA 39) Western National, ECI’s primary insurer, denied coverage for the repair costs incurred by ECI. (ECI’s Response to Travelers’ Requests for Admissions at Response No. 20, RTA 250-251)

In March 2008, ECI submitted a claim to Travelers seeking reimbursement for the repair costs based on ECI’s claim that Bolduc “mistakenly and negligently drove its sheeting into and damaged the [pipeline] . . . at FAS-1.” (Pl.’s Compl. at ¶ 16, RTA 40; ECI’s Answers to Travelers’ Interrogatories, Answer to Interrogatory No. 1, RTA 254) Travelers refused to reimburse ECI for its repair costs claiming that Bolduc was not the cause of the damage since it relied upon the locations provided by ECI in driving its sheetpiling. (See Travelers’ Answer

and Counterclaim and Crossclaim for Declaratory Judgment, Answer at ¶ 32, Counterclaim and Crossclaim at ¶¶ 4 & 5, RTA 265 & 268)

#### **V. ECI Files Suit Against Bolduc and Travelers**

ECI filed suit against Bolduc and Travelers in August 2008. (See Pl.'s Compl., RTA 37-43) ECI asserted two causes of action against Bolduc; breach of contract and negligence, both of which were based on ECI's claim that Bolduc caused the damage to the pipeline at FAS-1 and that Bolduc improperly refused to indemnify ECI for the costs incurred in repairing the damaged pipe. (Id. at ¶¶ 20-26, RTA 40-41) As for Travelers, ECI claimed that Travelers breached its Policies by not indemnifying ECI as an additional insured for the costs incurred in repairing the pipeline. (Id. at ¶ 27, RTA 41)

Travelers once again denied that ECI was entitled to coverage as an additional insured. (Travelers' Answer and Counterclaim and Crossclaim for Declaratory Judgment, RTA 259-269) Travelers also asserted a Counterclaim for declaratory judgment. (See id., RTA 266-269)

#### **VI. Trial of ECI's Negligence Claim Against Bolduc**

In November 2009, ECI's declaratory judgment action against Travelers was bifurcated from ECI's claims against Bolduc. (Pretrial Order and Memorandum dated November 6, 2009, p. 5, RTA 274) The district court determined that "judicial economy w[ould] be best served by trial of ECI's negligence claim against Bolduc" first; a trial which would "resolve the factual issue of who is responsible for causing the damage to the pipeline." (Id. at p. 6,

RTA 275) The district court further held that after the trial, “ECI’s declaratory judgment action against Travelers can be resolved through the appropriate motion.” (Id., RTA 275)

Trial of ECI’s negligence claim against Bolduc commenced March 8, 2010. The trial focused on the pipeline locates provided by ECI on the ground surface at FAS-1, whether those locates were accurate and/or whether Bolduc drove its sheets appropriately. (See App.’s Br. at p. 11)

On March 10, 2010, the jury returned a Special Verdict Form that had been previously agreed upon by ECI and Bolduc. (See Special Verdict Form dated March 10, 2010, RT Add. 1-2) The jury answered two questions only. (Id., RT Add. 1-2) In response to the question “Was [Bolduc] negligent?” the jury answered “No.” (Id., RT Add. 1) Having answered “No” to that question, the only question the jury was left to answer was “What sum of money will fairly compensate [ECI] for its loss resulting from damage to the pipe?” (Id., RT Add. 2) The jury answered “\$0.” (Id., RT Add. 2)

## **VII. Travelers’ Motion for Summary Judgment**

Following the underlying trial Bolduc and Travelers filed motions for summary judgment. (Bolduc’s Motion for Summary Judgment, RTA 276-277, Travelers’ Motion for Summary Judgment, RTA 278-279)

### **A. Travelers’ Principal Brief**

In its principal brief Travelers argued that ECI was not entitled to coverage under the AIE since Bolduc was not a cause of the damage to the pipeline and

that coverage only attached under the AIE to the extent Bolduc was found to be a cause of the damage. (Travelers' Memorandum of Law in Support of Motion for Summary Judgment at pp. 10-12, RTA 289-291)

**B. ECI's Opposition Brief**

ECI opposed Travelers' motion arguing that Bolduc's interpretation of the AIE was "wholly unreasonable" because the AIE did not state that ECI would only be entitled to damage caused by Bolduc's "*negligent* acts or omissions" but only stated that ECI would be entitled to coverage for Bolduc's "acts or omissions." (ECI's Memorandum in Opposition to Travelers' Motion for Summary Judgment, at p. 7, RTA 299) Alternatively, ECI argued that the language of the AIE was ambiguous since it did not specifically state that ECI would only be entitled to damage caused by Bolduc's "negligent acts or omissions." (Id. at p. 8, RTA 300) Nowhere in ECI's brief was there a discussion of any case law to support its position. (See generally, id., RTA 293-300)

**C. Travelers' Reply Brief**

Travelers replied to ECI's opposition reasserting its arguments that ECI was not entitled to coverage under the plain language of the AIE and citing relevant case law in support of its position. (Travelers' Reply Memorandum of Law in Support of its Motion for Summary Judgment, pp. 6-9, RTA 306-309)

**D. Summary Judgment Hearing**

A hearing on the motions was held August 18, 2010. (Transcript of Proceedings, p. 1, RTA 1) Counsel for ECI, for the first time, presented

Travelers with case law which it claimed supported its interpretation of the AIE language. (Id. at pp. 13-14 & 18-24, RTA 13-14 & 18-24) Because Travelers did not have the benefit of reviewing the cited case law before the hearing, Travelers requested, and the Court agreed, to allow Travelers an opportunity to serve a supplemental letter brief. (Id. at pp. 30 & 33-35, RTA 30 & 33-35)

**E. Travelers' Supplemental Letter Brief**

Travelers submitted its letter brief on August 27, 2010. (Correspondence from John Paul J. Gatto to Judge Johnson dated August 27, 2010, RTA 312-319) In that brief Travelers argued (1) because the jury determined that ECI was entitled to \$0 in damages, ECI was seeking to obtain coverage for nothing, or, stated otherwise, ECI was seeking to obtain coverage where there was no "liability," (2) the language of the AIE itself, and especially read in context with the underlying facts and applicable law, made clear that ECI was only entitled to coverage caused by Bolduc's negligent acts, and (3) to the extent ECI was entitled to coverage from Travelers, that coverage was excess only. (Id., RTA 312-319)

**F. ECI's Responsive Letter Brief**

On August 31, 2010 ECI served its responsive letter brief. (Correspondence from James Martin to Judge Johnson dated August 31, 2010, RTA 320-321) ECI cited the three cases it relied upon at the hearing, *Maryland*

*Casualty Co. v. Regis Ins. Co.*, 1997 WL 164268 (E.D. Pa. 1997)<sup>5</sup>, *Dillon Cos. Inc. v. Royal Indem. Co.*, 369 F.Supp.2d 1277 (D. Kan. 2005), and *Huber Eng'd Woods v. Canal Ins. Co.*, 690 S.E.2d 739 (N.C. Ct. App. 2010), and restated its arguments that those cases supported its policy interpretation. (Id., RTA 320-321)

### **VIII. Summary Judgment Granted**

On October 6, 2010 the district court issued an Order granting Travelers' and Bolduc's motions for summary judgment. (Findings of Fact, Conclusions of Law and Order for Judgment dated October 6, 2010, RT Add. 13-19) In his Order Judge Johnson concluded that under the language of the indemnity provision of the Subcontract, as well as the AIE, Bolduc was only obligated to indemnify ECI, and in turn Travelers was only obligated to cover ECI, for damage caused by Bolduc's *negligent* acts. (Id. at pp. 6-7, RT Add. 18-19) According to Judge Johnson, the Subcontract "can only be interpreted one way: ECI wanted Bolduc to indemnify, and insure, ECI with respect to acts of Bolduc's own culpable negligence." (Id. at p. 6, RT Add. 18) Relying on that same logic, and applying the jury's verdict, Judge Johnson concluded that Bolduc was not obligated to indemnify ECI, and ECI was not entitled to coverage from Travelers. (Id. at p. 7, RT Add. 19) Judgment was entered on Judge Johnson's Order on December 1, 2010. (Notice of Entry of Judgment, RT Add. 20)

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<sup>5</sup> A copy of *Maryland Casualty Co. v. Regis Ins. Co.* has been provided by ECI in its Appendix, A140-146.

## IX. ECI's Declaratory Judgment Action Versus Western National

At the same time that ECI was pursuing its claims against Bolduc and Travelers, ECI was also pursuing a declaratory judgment action against its primary insurer, Western National, in Ramsey County District Court (Case No. 62-CV-09-10134), for the same repair costs at issue in this case. (Register of Actions for Case No. 62-CV-09-10134, RTA 322-323) That matter was settled on or about July 6, 2010. (See Settlement Agreement, RTA 324-326) The terms of the Settlement Agreement stated that "in the event of a recovery of monies for Travelers or Bolduc . . . Western National will be *repaid* the sum of . . ." subject to certain other conditions. (Id. at ¶ 4, RTA 325) (Emphasis added) The Settlement Agreement also provided that counsel for Western National, Gislason, Martin, Varpness & Janes, P.A., would be substituted as counsel for ECI, Hammargren & Meyer, P.A., in its claims against Bolduc and Travelers - indeed ECI's briefs in response to Travelers' summary judgment motion were prepared by Gislason, Martin, Varpness & Janes, P.A. (Id. at ¶ 5, RTA 325; Notice of Substitution of Counsel dated June 15, 2010, RTA 327; ECI's Memorandum of Law in Opposition to Travelers' Motion for Summary Judgment, RTA 293-300; Correspondence from James Martin to Judge Johnson dated August 31, 2010, RTA 320-321) Following the district court's grant of summary judgment in favor of Bolduc and Travelers, and prior to filing this appeal, original counsel for ECI, Hammargren & Meyer, P.A., were re-substituted as counsel for ECI for the

purposes of this appeal. (Notice of Substitution of Counsel dated January 31, 2011, RTA 328)

### **STANDARD OF REVIEW**

A district court's interpretation and application of an insurance policy to the facts in a case is a question of law that is reviewed de novo. *State Farm Ins. Cos. v. Seefeld*, 481 N.W.2d 62, 64 (Minn. 1992); *Minn. Prop. Ins. v. Slater*, 673 N.W.2d 194, 196 (Minn. Ct. App. 2004).

### **SUMMARY OF ARGUMENT**

ECI is not entitled to coverage under the AIE because Travelers was only obligated to cover ECI for damage caused by Bolduc's negligent acts or omissions. This is the only reasonable interpretation of the AIE language given the underlying facts of the case, is consistent with the AIE's plain language standing alone, and is in line with decisions from other courts interpreting almost identical policy language. The district court should be affirmed.

The Subcontract does not constitute an "insured contract" under the language of the Policies, nor does the Subcontract create an enforceable obligation under Minnesota law that Bolduc would indemnify ECI for ECI's own negligent acts. Accordingly ECI is not entitled to coverage under the Policies and the district court should be affirmed.

Finally, in the event that ECI is determined to be covered by Travelers (which it should not be), such coverage would be excess over any payment already received by ECI's primary insurer, Western National.

## ARGUMENT

- I. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT UNDER THE AIE TRAVELERS WAS ONLY OBLIGATED TO COVER ECI FOR DAMAGE CAUSED BY THE NEGLIGENT ACTS OF BOLDOC; SUCH AN INTERPRETATION OF THE AIE IS IN ACCORDANCE WITH DECISIONS FROM OTHER COURTS APPLYING AND INTERPRETING ALMOST IDENTICAL POLICY LANGUAGE, AND IS THE ONLY REASONABLE INTERPRETATION OF THE AIE IN LIGHT OF THE UNDERLYING FACTS OF THE CASE.**

The district court did not err when it concluded that the AIE only obligated Travelers to cover ECI for damage to the pipeline that was caused by Bolduc's negligent acts. The plain language of the policy, when applied in concert with the Subcontract and in context with the underlying facts, required the district court to make that finding in order for the AIE to be reasonable. Case law interpreting almost identical policy language further supports the decision of the district court, and the case law cited by ECI in support of its position is distinguishable and unpersuasive. The district court should be affirmed.

- A. The Plain Language of the AIE and the Subcontract Indicate that ECI would Only Be Indemnified, or Covered, For Damage Caused by Bolduc's Negligent Acts.**

ECI argues that it is entitled to coverage regardless of the jury's finding of no negligence on the part of Bolduc because the AIE did not specifically state that ECI would be entitled to coverage only for the "negligent" acts or omissions of Bolduc. (App.'s Br. at p. 38) However, when the complete language of the AIE is examined in concert with the language of the Subcontract, it is clear that ECI was only entitled to coverage to the extent Bolduc was causally negligent for

causing the damage to the pipeline, and that ECI was not entitled to coverage to the extent its own independent actions were the cause of the damage.

The purpose of contract interpretation is to give effect to the parties' intent. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979). When the parties' intent can be totally ascertained from the writing, construction is for the court. *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525 (Minn. 1990). The court should construe the contract as a whole and try to harmonize all of its provisions. *Id.* Because it is presumed that the parties intended the language used in the contract to have effect, the court should avoid any interpretation that would render a contract provision meaningless. *Id.* at 526.

In this case, the Subcontract required Bolduc to furnish insurance for ECI that would cover ECI for damage "caused by an act or omission of Bolduc." (Subcontract, p. 2, RT Add. 4) Bolduc satisfied this requirement by naming ECI as an additional insured under the Policies. However the Policies contained plain and unambiguous additional insured coverage qualifications which stated that additional insured coverage would be triggered (1) "only to the extent that" (2) damage was "*caused by acts or omissions of [Bolduc],*" but that (3) [ECI] *does not qualify as an additional insured with respect to the independent acts or omissions of [ECI].*" (Blanket Additional Insured Endorsement, Form CG D2 46 08 05, pp. 1-2, RT Add. 11-12) (Emphasis added) This language makes it clear that the intent of the parties was that Bolduc, and Travelers, would provide coverage to ECI "only to the extent that" ECI became responsible for payment of

damages due to the improper acts of Bolduc, but that Bolduc and Travelers would not provide coverage to ECI for damage that resulted from ECI's independent actions, or the actions of some third party. Reading the language any other way (or reading only the words "acts or omissions" as advocated by ECI) disregards the full scope of the policy, and precludes a full assessment of the parties true intent; namely that ECI would be entitled coverage caused by Bolduc's negligent acts. And since the jury determined that Bolduc was not negligent for causing the damage to the pipeline and that ECI was entitled to \$0 in damages, the jury's verdict made it clear that Bolduc's actions did not cause the damage to the pipeline. (Special Verdict Form, RT Add. 1-2) As a result, no additional insured coverage is available to ECI under a simple and plain application of the language of the AIE.

**B. Some Negligence on the Part of the Insured Is Required to Trigger Additional Insured Coverage, Especially Under the Facts of this Case.**

In addition, the specific language of the AIE at issue here - that ECI would only be covered to the extent damage was "caused by acts or omissions of [Bolduc]" - has been interpreted by a number of courts to require some finding of negligence, or causal fault, on the part of the insured in order for the additional insured to be entitled to coverage. A similar interpretation is appropriate here not only based on the plain language of the AIE, but when applied in the context of the underlying facts of this case.

1. The Court Must Give the Language of the AIE its Plain Meaning, But Must Also Take Into Consideration the Underlying Facts in Interpreting the AIE.

In interpreting the language of an insurance policy the Court must give the language its plain meaning, but must also consider the underlying facts in applying the language. “General principles of contract interpretation apply to insurance policies.” *Secura Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 323 (Minn. Ct. App. 2008) (citation omitted). “When the language in an insurance policy is unambiguous, the language must be given its plain and ordinary meaning.” *Id.*; see also *Wanzek Constr., Inc. v. Employers Ins. of Wausau*, 679 N.W.2d 322, 324 (Minn. 2004) (holding that “[w]hen insurance policy language is clear and unambiguous, ‘the language used must be given its usual and accepted meaning.’”). “Courts will not redraft insurance policies to provide coverage where the plain language of the policy indicates that no coverage exists.” *Id.* Therefore, “courts should be vigilant against finding ambiguity when none actually exists.” *Secura Supreme Ins. Co.*, 755 N.W.2d at 323-24.

In addition, policy language is never interpreted and applied in a vacuum. Language that might be clear and unambiguous when applied in one factual setting, may not be so in another. *Ohio Cas. v. Terrace Enter.*, 260 N.W.2d 450, 453 (Minn. 1977). In a leading insurance coverage case, *Bank of the West v. Superior Court*, 833 P.2d 545 (Cal. 1992), the California Supreme Court noted that “language in a contract must be construed in context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be

ambiguous in the abstract.” *Id.* at 555 (emphasis added). Put another way, “there cannot be an ambiguity *per se*, i.e. an ambiguity unrelated to an application.” *Cal. State Auto Assoc. Inter-Ins. Bureau v. Superior Court*, 177 Cal. App. 3d 855, 859 (Cal. Ct. App. 1986); *Hutchinson v. Sunbeam Coal Corp.*, 519 A.2d 385, 390 (Pa. 1986) and *Lititz Mut. Ins. Co. v. Steely*, 785 A.2d 975 (Pa. 2001) (whether ambiguity exists cannot be resolved in vacuum . . . but must, instead, be considered in reference to a specific set of facts). In addition, when a provision within a policy is subject to both a reasonable and an unreasonable interpretation, the reasonable construction controls, thereby eliminating any ambiguity. *Edgley v. Lappe*, 342 F.3d. 884, 888 (8th Cir. 2003); *Mut. Serv. Cas. Ins. Co. v. Wilson Twp.*, 603 N.W.2d 151, 153 (Minn. Ct. App. 1999).

2. Relevant Case Law Indicates that Bolduc’s “acts or omissions” Must Have Been “Negligent” to Trigger any Coverage Obligation.

ECI argues that the language of the AIE obligated Travelers to cover ECI for damage caused by *any* “act or omission” of Bolduc, and not solely for damage caused by the *negligent* “acts or omissions” of Bolduc. (App.’s Br. at p. 38) But a finding of negligence as a prerequisite to additional insured coverage is precisely the interpretation given to similar policy language by courts in other jurisdictions (no Minnesota Court has expressly addressed the language at issue in the AIE), and is the same interpretation that is appropriate here.

To illustrate, in *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288 (Fla. 2007), the Florida Supreme Court was asked to determine “whether a clause covering ‘any

other person with **respect to liability because of** acts or omissions' of the named insured covers only vicarious liability for the negligence of the named insured." *Id.* at 291 (emphasis added). The case involved a caregiver, Garcia, who worked for the insured, Anderson. *Id.* at 289. Garcia's duties included running errands using a car owned by Garcia's son-in-law, but which Anderson was also allowed to use. *Id.* at 290. While running one of her errands, Garcia's foot slipped off the brake pedal and she struck a pedestrian. *Id.* The pedestrian sued Garcia, Anderson and Anderson's son-in-law claiming that each was negligent in allowing the brake pedal to wear down. *Id.* At the time of the accident Anderson maintained a homeowners policy that covered any person "with **respect to liability because of** acts or omissions of" Anderson, thus making Garcia an additional insured. *Id.* (emphasis added). Garcia sought coverage from Anderson's insurer citing this language of the policy, but coverage was denied. *Id.*

The Florida Supreme Court focused on the language "with respect to" and "because of" in determining whether the denial of coverage was appropriate. *Id.* at 291. The court held that the phrase, "with respect to," is defined as "concerning," and that the phrase "because of," is defined as "by reason of." *Id.* at 292 (citations omitted). The court then concluded:

[w]hen considered in context, these words clearly indicate that an additional insured is only entitled to coverage *concerning* liability that is *caused by* or *occurs by reason of* acts or omissions of the named insured. **An additional insured's liability thus must be**

**caused by the acts or omissions-that is, the negligence-of the named insured.**

*Id.* (italics in original, bold and underlined emphasis added). Based on this interpretation of the policy, the court held that Garcia was not entitled to coverage from Anderson's homeowners' insurer because she had been sued for her own negligence. *Id.*

In rendering its decision, the court cited a number of decisions from other jurisdictions that had interpreted similar policy language in the same manner. *See id.* In particular, the Florida Supreme Court cited *Consolidation Coal Co. v. Liberty Mut. Ins. Co.*, 406 F.Supp. 1292 (W.D. Pa. 1976), a case involving a coal company, Consolidation, that had been named as an additional insured under a policy of insurance issued to a hauler, Long, that had been hired by Consolidation. *Id.* at 1294. The additional insured endorsement within Long's policy covered Consolidation, "but only with **respect to acts or omissions** of [Long]. . . ." *Id.* (emphasis added). At some point after the policy became effective a Consolidation train nearly struck an employee of Long who was operating a truck and attempting to cross railroad tracks on Consolidation's property. *Id.* The employee brought suit against Consolidation for injuries sustained in jumping from his truck to avoid the train, and the claim eventually settled. *Id.* After the claim settled, Consolidation sought indemnification from Long's insurer, Liberty. *Id.* Liberty denied coverage and Consolidation brought suit. *Id.*

Consolidation argued that coverage was not predicated upon Long causing the accident, but that because the accident would not have occurred “but for” the employee driving his truck across railroad tracks on Consolidation’s property, coverage was triggered. *Id.* at 1295. Liberty argued that the intent and plain meaning of the endorsement was to restrict coverage to those accidents caused by the negligence of Long. *Id.* Liberty further claimed that “the words ‘acts or omissions’ inject a causation factor into the endorsement.” *Id.*

The Western District of Pennsylvania agreed with Liberty. *Id.* at 1299. The court held that “[t]o interpret that endorsement in the manner proposed by plaintiff would require the court to ignore the ‘but only’ phrase and treat the endorsement as falling within the ‘arising out of’ language of the cases cited by plaintiff.” *Id.* at 1300. Rather than apply that construction, the court held that “[i]t is reasonable to conclude that the most appropriate construction of the subject phrase is that Consolidation was to be an additional insured under [Long’s] policy **only when the negligent acts or omissions of Long directly caused Consolidation’s loss.**” *Id.* at 1298 & 1299 (emphasis added) (citing *Kaspar v. Clinton-Jackson Corp.*, 254 N.E.2d 826, 830 (Ill. App. Ct. 1969); *Bankhead Welding Serv., Inc. v. Florida E.C. R.R. Co.*, 240 So.2d 648, 649 (Fla. Dist. Ct. App. 1970); *Schwartz v. Merola Bros. Constr. Corp.* 48 N.E.2d 299, 302-03 (N.Y. 1943)). Stated differently, the court held that “[t]he most likely meaning of the subject phrase is that it attempts to limit coverage to those instances where the

acts or omissions-the negligence-of [Long] leads to [Consolidation's] liability." *Id.* at 1300 (emphasis added).

A similar interpretation of policy language like that at issue in *Consolidation Coal* was issued by the Northern District of Illinois in *Vulcan Materials Co. v. Cas. Ins. Co.*, 723 F.Supp. 1263 (N.D. Ill. 1989). In that case an employee of J.H. Sandman & Sons ("Sandman") delivered a load of scrap metal to a Vulcan plant in a truck that had been insured by Casualty. *Id.* at 1263-64. While the employee was cleaning out the truck he was struck and killed by a magnet falling from Vulcan's crane. *Id.* at 1264. The employee's estate sued Vulcan and Vulcan sought coverage from Casualty. *Id.* Casualty denied coverage and Vulcan commenced suit. *Id.*

The Casualty policy identified Sandman as an insured as well as "any other person or organization but only with **respect to his or its liability because of acts or omissions of an insured.**" *Id.* Vulcan claimed that under the language of the policy it was entitled to coverage because Sandman's "act" of sending the employee to Vulcan's plant led to the accident taking place. *Id.* at 1265. The court disagreed holding:

[i]n the normal sense of the language employed by the Policy, Vulcan's liability "because of" Sandman's acts or omissions can exist only if Vulcan bears some legal responsibility for Sandman's acts. In the legal (and sensible) sense only Vulcan's own acts, or the acts of others for whom Vulcan is viewed as responsible, can "cause" (that is, can give rise to) liability on Vulcan's part. [The operative provision] is plainly a vicarious liability provision and nothing more: It insures all those who may be vicariously liable for acts or omissions of the named insured. . . ."

*Id.* Because there was no basis for finding Vulcan vicariously liable for Sandman's acts, the court found that Vulcan was not entitled to coverage from Casualty. *Id.*

The decisions in *Garcia*, *Consolidation Coal*, and *Vulcan Materials* (as well as the cases discussed therein) all concerned policy language similar to that included in the AIE at issue in this case. The only clear difference between the AIE in this case and the operative provisions in *Garcia* and *Vulcan Materials* is that the term "because of" in the endorsements at issue in *Garcia* and *Vulcan Materials* has been replaced by the language "caused by." However, as discussed by the *Garcia* Court, the language "because of" is merely a synonym for the term "caused by," therefore one can be substituted for the other while having the same effect. 969 So.2d at 292. Likewise, the only difference between the AIE in this case and the endorsement in *Consolidation Coal* is that the term "in connection with" has been replaced with "caused by." However, the *Consolidation Coal* Court equated the term "in connection with" with "caused by" for purposes of its coverage analysis. 406 F.Supp. at 1299.

Accordingly, the policy interpretations in *Garcia*, *Consolidation Coal*, and *Vulcan Materials* are directly applicable to this case. Those interpretations make clear that where an additional insured endorsement states that an additional insured is to be covered "only with respect to **liability**," and "only to the extent that" damage was "caused by acts or omissions of" the named insured, the

additional insured is only covered for damage that results from the negligence of the additional insured. In other words, the AIE at issue in this case only covered ECI for **liability**, and only to the extent that property damage was caused by the negligent acts or omissions of Bolduc. Since the jury determined that Bolduc was not negligent in damaging the pipeline, ECI does not face any “liability” as that term is interpreted in the context of an insurance policy that was caused by Bolduc. ECI is therefore not entitled to coverage as an additional insured under Travelers’ Policies and the district court’s coverage decision should be affirmed.

3. The Cases Cited By ECI Did Not Concern Policy Language Similar to the AIE and Are Not Persuasive.

ECI cites three cases which it claims supports its position on coverage, *Maryland Casualty Co. v. Regis Ins. Co.*, 1997 WL 164268 (E.D. Pa. 1997); *Dillon Cos. Inc. v. Royal Indem. Co.*, 369 F.Supp.2d 1277 (D. Kan. 2005); and *Huber Eng’d Woods v. Canal Ins. Co.*, 690 S.E.2d 739 (N.C. App. 2010). A close reading of those cases reveals that the operative policy provisions were not analogous to the provision in this case, and therefore the cases are not persuasive.

In *Maryland Cas. Co.* the additional insured endorsement stated that the additional insured lessor of fair grounds would be entitled to coverage “with respect to liability **sought to be imposed upon** the [lessor] as the result of an **alleged act or omission** of the [lessee] or its employees.” 1997 WL 164268 at \*1 (emphasis added). When a fair grounds patron stepped into a pothole,

sustained injuries, and commenced suit against both the lessor and the lessee, the lessor sought coverage from the lessee as an additional insured. *Id.* at \*1 & \*2. Because the endorsement provided broad coverage for any liability “sought to be imposed” as the result on an “alleged” act, and did not merely entitle the lessor to coverage “only with respect to acts” of the lessee, the court determined that a finding of negligence on the part of the lessee was not required for additional insured coverage to be triggered for the lessor. *Id.* at \*5-\*6.

The AIE in this case is not similar to the endorsement in *Maryland*. The AIE obligates Travelers to provide coverage to ECI for “liability for . . . property damage . . . **caused by an act or omission of**” Bolduc. There is no language which states that ECI will be covered for liability “sought to be imposed upon” ECI as the result of an “alleged” act of Bolduc. The AIE is much narrower in its scope of coverage than the endorsement at issue in *Maryland Cas. Co.* as the AIE clearly requires some showing of causation, not merely an allegation of causation, for ECI to be entitled to coverage. Moreover, because the AIE excludes coverage for damage caused by the “independent acts or omissions” of ECI, the clear intent of the AIE is that ECI would only be entitled to coverage for damage caused by Bolduc’s negligence.

Likewise, in *Dillon* the additional insured endorsement at issue stated that the additional insured grocery store would be entitled to coverage from the named insured security company “but only with respect to acts or omissions of the named insured arising out of the named insured’s security or investigative

operations . . . .” 369 F.Supp.2d at 1282 (emphasis added). When a store patron was injured during the course of a robbery after the on duty security guard had been attacked and restrained (through no fault of his own), the grocery store sought coverage from the security company as an additional insured. *Id.* at 1280-82. Because the endorsement contained the “broad and vague” “arising out of” language, the *Dillon* Court held that the endorsement “only require[d] **some connection** between acts or omissions of [the named insured] and [the named insured’s] security or investigative operations for [the additional insured]” to be entitled to coverage. *Id.* at 1288 (emphasis added). Accordingly, even though the security guard had not been negligent in his duties, the Court found that the additional insured endorsement was triggered. *Id.*

In this case, unlike *Dillon*, the AIE does not contain the broad “arising out of” language. The AIE is more narrowly defined to provide coverage to ECI only for damage “caused by” the acts or omissions of Bolduc. Because the “arising out of” language is not present in the AIE there must be more than “some connection” between Bolduc’s acts and the damage at issue for coverage to be triggered. In particular, and consistent with the decisions cited above, there must be some showing that the damage was “caused by” Bolduc’s negligence.

Finally, in *Huber* the additional insured was only entitled to coverage for “liability **because of** acts or omissions of an insured.” 690 S.E.2d at 744 (emphasis added). The *Huber* Court found the term “because of” ambiguous because it did not imply a requirement of “proximate cause” for coverage to be

triggered. *Id.* at 746-47. In this case, however, the AIE specifically states that ECI was only entitled to coverage for damage “caused by” Bolduc. The use of the phrase “caused by” rather than “because of” alleviates the ambiguity which the *Huber* Court found with regard to the phrase “because of” as it makes clear that a finding of “proximate cause,” negligence, is necessary for additional insured coverage to be triggered. In other words, the AIE is far narrower in its scope than the endorsement at issue in *Huber*.

The case law cited by ECI is not persuasive. The policy language at issue in those cases was markedly different from the language at issue in this case and therefore has limited, if any, application in interpreting the subject AIE. Accordingly, ECI has failed to come forth with a sufficient legal basis to support its claim for coverage in this case. Summary judgment should be affirmed.

**C. The Underlying Facts Further Support the District Court’s Interpretation of the AIE to Include Coverage ONLY for Bolduc’s Negligent Acts.**

Not only does the plain language of the AIE support the grant of summary judgment in favor of Travelers, but the underlying facts of this case make clear that the only reasonable interpretation of the AIE is that advocated by Travelers - there must have been some negligent act on the part of Bolduc that caused damage in order for additional insured coverage to be triggered. The factual context of this case is undisputed. ECI was responsible for providing Bolduc with ground locates that corresponded to the location of the underground pipeline. (Subcontract at p. 2, RT Add. 4) Bolduc was to refer to these locates in driving

its sheetpiling, and Bolduc did rely upon the locates provided by ECI in driving its sheets.<sup>6</sup>

ECI is now seeking coverage for damage (which the jury concluded was nonexistent) it alleges was caused by an “act or omission” of Bolduc at FAS-1. However, the context of this case reveals that Bolduc was simply acting at ECI’s direction. The AIE provided that ECI would only be entitled to coverage “to the extent that” damage was “caused by” Bolduc, but that ECI would not be covered for its own “independent acts or omissions.” Given the context of this case (that Bolduc would rely upon ECI’s locates in driving its sheets) there was nothing ambiguous about the AIE; it was clearly designed to provide ECI coverage only to the extent that Bolduc caused damage to the pipeline despite accurate locates provided by ECI (i.e. damage caused by Bolduc’s negligence), but that it would

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<sup>6</sup> None of the cases cited by ECI involved circumstances similar to the circumstances underlying this case. Those cases involved additional insureds who were seeking coverage for damage that resulted from an independent act of the insured or of some other person; not damage or injuries resulting from an act of the insured that was undertaken at the express direction of the additional insured. See *Huber*, 690 S.E.2d at 742 (employee of named insured injured when he fell from truck while attempting to secure a load of plywood at additional insured’s plant - no indication that the employee had been instructed by additional insured to secure the load in any specific manner prior to his fall); *Dillon*, 369 F.Supp.2d at 1280-81 (additional insured grocery store sought coverage from named insured security company whose guard was present during a store robbery wherein another patron was injured by the assailants); *Maryland*, 1997 WL 164268 at \*1 (additional insured lessor sought coverage from named insured lessee where a patron slipped and fell on a pothole). Since none of the additional insureds in these cases directed the named insured to undertake an act that resulted in damage, the circumstances of those cases do not mirror the circumstances in this case.

not cover damage that was caused because ECI provided improper locates (i.e. damage caused by ECI's negligence).

Reading the AIE any other way would lead to an unreasonable result. Under ECI's suggested interpretation of the AIE, ECI could have directed Bolduc to drive its sheets at FAS-1 based solely upon ECI's guess as to where the pipeline was located. If Bolduc happened to strike the pipeline causing damage, ECI could turn to Travelers for coverage since, according to ECI, it was Bolduc whose "act" in driving its sheet resulted in damage to the pipeline. This would, of course, ignore the fact that Bolduc was acting solely at the direction of ECI and that ECI's failure to accurately locate the pipeline, as required by contract, was the actual cause of the damage.

Not only does ECI's argument disregard the facts of this case and ignore the operative language of the AIE, but acceptance of ECI's argument would lead to an impractical and certainly unintended result whereby ECI could immunize itself from the risk of ever having to accept responsibility for its own negligent actions, and thus relieve itself from ever having to procure its own insurance coverage. In essence, ECI asks the Court to condone a loophole whereby a general contractor (ECI), could insulate itself from any business risk it might face due to its own negligence. The Court should not accept ECI's argument for insurance coverage and should not recognize this loophole.

In sum, under the facts of this case, a finding of negligence on the part of Bolduc was a prerequisite to any finding of coverage to ECI. Because there was

a finding of no negligence on the part of Bolduc, ECI is not entitled to coverage from Travelers.

**D. Whether ECI was Negligent Does Not Impact Travelers' Coverage Obligation, or Lack Thereof.**

ECI misses the mark in arguing that the district court erred when it concluded that ECI's negligent acts caused the damage to the pipeline. As a preliminary matter, ECI is incorrect in asserting that the district court made such a finding. It did not. Judge Johnson did not *sua sponte* answer the question on the verdict form of whether or not ECI was negligent. Judge Johnson merely noted that reading the Subcontract and the AIE as requested by ECI would "ask Bolduc to indemnify and insure ECI for its own negligence," an agreement not spelled out in the Subcontract or the Policies. (Findings of Fact, Conclusions of Law and Order for Judgment dated October 6, 2010 at p. 6, RT Add. 18) That being said, it can reasonably be implied from the jury's award of "\$0" in damages to ECI that ECI was the cause of the damage to the pipeline, particularly considering that the trial focused almost solely on Bolduc and ECI.

Further, and more importantly for the purposes of this coverage discussion, whether or not ECI's negligence was a cause of the damage is irrelevant (and any finding that ECI was negligent constitutes harmless error). See, e.g., *Rowe v. Munye*, 702 N.W.2d 729, 743 (Minn. 2005) (holding that harmless error is not grounds for reversal). Under the language of the AIE, and as discussed above, the only relevant fact was whether Bolduc's negligence was

a cause of the damage. Unless Bolduc's negligence caused the damage, which the jury determined it did not, no coverage was available to ECI. Accordingly ECI's assignment of error as to the district court's alleged determination of ECI's negligence is not only factually inaccurate, but legally inconsequential as it relates to the available coverage under the Policies.

**II. THE SUBCONTRACT DOES NOT QUALIFY AS AN "INSURED CONTRACT," NOR DOES THE INDEMNITY PROVISION IN THE SUBCONTRACT CREATE AN ENFORCEABLE OBLIGATION UNDER MINNESOTA LAW THAT BOLDUC WOULD INDEMNIFY, AND INSURE, ECI FOR ECI'S OWN NEGLIGENCE.**

ECI has also failed to present a convincing argument that the Subcontract constitutes an "insured contract" under the language of the Policies that might trigger a coverage obligation for Travelers. The Policies, under the "Contractual Liability" exclusion, do not provide coverage for damages caused by the fault of another unless the parties have entered into an "insured contract" where the insured has agreed to indemnify the other party for damages caused by the other party's own "tort liability." (See Policies at CG 00 01 10 01, pp. 2 & 13, RTA 61, 72, 167 & 178). This definition of an "insured contract" as set forth in the Policies is in line with the definition given that term by other Minnesota Courts. See *Soo Line R. Co. v. Brown's Crew Car of Wyoming*, 694 N.W.2d 109, 113-14 (Minn. Ct. App. 2005) (refusing to apply contractual liability exclusion because the insured entered into an "insured contract" wherein it agreed to assume the tort liability of another party). It is also in line with Minn. Stat. § 337.05 which provides a party

may agree to insure another for the other party's negligence. MINN. STAT. § 337.05.

However, in order for an agreement to effectively indemnify and insure another for its own negligence, Minnesota courts apply a strict construction standard, thereby requiring that agreements to indemnify the indemnitee from its own negligent acts clearly and unequivocally demonstrate such an intent. See *Farmington Plumbing & Heating Co. v. Fischer Sand & Aggregate, Inc.*, 281 N.W.2d 838, 842 (Minn. 1979); see also *Nat'l Hydro Sys. v. M.A. Mortenson Co.*, 529 N.W.2d 690, 694 (Minn. 1995) (requiring an unequivocal expression of indemnity for losses occasioned by the negligence of the indemnitee). For example, in *Katzner v. Kelleher*, 545 N.W.2d 378 (Minn. 1996), the alleged liability shifting indemnity provision stated that:

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 . . . 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 374 (emphasis added). The Supreme Court “[did not] agree that this language clearly and unequivocally shifts liability for all such claims from [the designer/builder] to [the contractors].” *Id.* at 382. In comparing the indemnity provision to the indemnity provision in *Holmes v. Watson-Forsberg, Co.*, 488

N.W.2d 473 (Minn. 1992), the Supreme Court further held that “[t]he phrase ‘regardless of whether or not [the claim] is caused in part by a party indemnified hereunder’ . . . is not equivalent to the indemnity provisions at issue in *Holmes* which clearly protected the indemnitee from ‘all such claims including \* \* \* claims for which the Contractor may be or may be claimed to be, liable.’” *Id.* (quoting *Holmes*, 488 N.W.2d at 474).

In this case, however, Bolduc did not clearly and unequivocally agree to indemnify ECI for damages caused by ECI’s own fault. Bolduc merely agreed “to indemnify, defend, and hold harmless ECI” for “damages to property caused or alleged to have been caused by any act or omission of [Bolduc]. . . .” (Subcontract p. 4, RT Add. 6) Bolduc did not agree to protect ECI for all claims for which ECI may be or may be claimed to be, liable, like the contractor in *Holmes*. If anything the indemnity language in the Subcontract mirrors the language at issue in *Katzner*, which, as the Supreme Court held, was insufficient to shift liability from one party to another.

In sum, because the language of the Subcontract did not clearly and unequivocally obligate Bolduc to indemnify and insure ECI for ECI’s own negligence, the Subcontract does not qualify as an “insured contract” under the Policies, and does not trigger any coverage obligation on the part of Travelers.

**III. EVEN IF ECI WAS ENTITLED TO COVERAGE UNDER THE AIE, THAT COVERAGE WOULD BE EXCESS ONLY OVER THE AMOUNTS ECI ALREADY RECOVERED FROM WESTERN NATIONAL.**

Finally, in the event that this Court determines that coverage was triggered under the AIE, any such coverage would be excess only over the amounts ECI already has recovered from Western National. The AIE specifically provides that coverage under the AIE **“is excess over any valid and collectible ‘other insurance,’** whether primary, excess, contingent or on any other basis, that is available to the additional insured for a loss we cover under this endorsement.” (Blanket Additional Insured (Contractors) Endorsement, Form CG D2 46 08 05, p. 1, RT Add. 11) (Emphasis added) ECI cannot reasonably dispute that it maintained primary insurance coverage through Western National. ECI also cannot reasonably dispute that coverage from Western National was “collectible,” especially considering the settlement of ECI’s declaratory judgment action against Western National as opposed to a voluntary dismissal, as well as the representation gymnastics where original counsel of record for ECI was substituted for counsel for Western National as part of the settlement agreement, only for ECI’s original counsel to then be re-substituted back in as counsel for ECI when Travelers’ and Bolduc’s motions for summary judgment were granted. In addition, the terms of the Settlement Agreement between ECI and Western National indicate that Western National would be “repaid” monies to the extent any recovery was secured from Bolduc or Travelers, an indication that monies were “paid” in the first place as part of Western National’s coverage obligation.

Therefore, if this Court should find that Travelers was required to cover ECI under the AIE, this Court should only require Travelers to cover ECI for the amount of the loss not already covered by Western National.

ECI has never produced, or made part of the record, its policy with Western National. Therefore it is unclear whether the language of Travelers' Policies and Western National's policy directly conflict as to which policy is primary. Under Minnesota law the following rules apply in evaluating coverage obligations where two policies may provide coverage for the same loss:

[w]hen two policies provide coverage for the same incident, the question of which policy provides primary coverage is a legal determination that we make by looking to the language of the policies at issue. See *Christensen v. Milbank Ins. Co.*, 658 N.W.2d 580, 587 (Minn. 2003). Minnesota courts determine the order of coverage by looking to the priority rules contained in each policy, generally found in the policies' "other insurance" provisions. See *N. Star Mut. Ins. Co. v. Midwest Family Mut. Ins. Co.*, 634 N.W.2d 216, 222 (Minn. Ct. App. 2001). If the "other insurance" clauses contained in the applicable policies conflict, then the court looks beyond the language of the policies and assigns primary coverage to the policy that more closely contemplated the risk. *Christensen*, 658 N.W.2d at 587. Where the policies equally contemplate the risk, Minnesota courts pro rate the loss among the applicable policies. See *Cargill, Inc. v. Commercial Union Ins. Co.*, 889 F.2d 174, 179-80 (8th Cir. 1989) (applying Minnesota law and apportioning liability based on the proportion that each insurer's policy limit bears to the total available insurance limits).

*U.S. Fid. & Guarantee Ins. Co. v. Commercial Union Midwest Ins.*, 430 F.3d 929, 933 (8th Cir. 2005). Since ECI's policy with Western National has not been made part of the record, it is not possible to tell whether that policy language conflicts with the excess coverage provisions of the AIE. Notwithstanding, and

even assuming a conflict exists, it is likely that ECI's primary policy more closely contemplates the risk of damage caused during the performance of ECI's contract since that is, conceivably, the reason why ECI procured insurance in the first place, and why Western National agreed to settle its declaratory judgment action. Therefore, even though the policy language cannot be evaluated, the Court should nonetheless find that ECI's policy with Western National was, indeed, an excess policy, and that the AIE merely provided excess coverage.

**CONCLUSION**

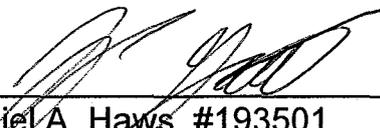
For the reasons set forth above, Travelers respectfully requests that the Court affirm the decision of Judge Johnson.

Respectfully submitted,

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Dated: 4/29/2011

  
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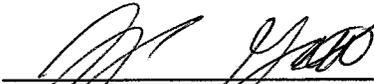
**CERTIFICATE OF BRIEF LENGTH**

The undersigned, counsel for The Travelers Indemnity Company of Connecticut, certify that this Brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in proportionately spaced typeface utilizing Microsoft Word 2002 and contains 10,349 words, excluding the Table of Contents and Table of Authorities.

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