

NO. A11-0159

State of Minnesota
 In Supreme Court

Engineering and Construction Innovations, Inc.,
Respondent,

v.

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

REPLY BRIEF AND APPENDIX OF
 THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT

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ARGUMENT

- I. The district court correctly ruled that the Travelers policy provides no coverage to ECI, as an additional insured, for the cost ECI incurred to repair the underground pipe.**
- A. Given the jury's binding verdict, ECI's legal obligation to pay, if any, could only be grounded in its own independent acts or omissions, for which it does not qualify as an additional insured.**

Travelers' policy provides *liability* coverage. It is not a performance bond. For coverage to apply, therefore, *someone* must be legally obligated to pay covered damages. (Add.18; A.28, 134). That is why ECI's repeated reference to the rule that an accident, by itself, does not mean that someone was negligent has no application here. (ECI at 14, 18, 42). If no one is at fault, the policy is inapplicable as a matter of law. The policy also requires that the party who is legally obligated to pay must be the "insured." (Add.18, A.28, 134) ("We will pay those sums that *the insured* becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies. . . .") (emphasis added). In other words, the policy's coverage clause requires two things: (1) the party claiming coverage must be an "insured;" and (2) the party claiming coverage must have been legally obligated to pay for the damages.

Here, Bolduc is an insured, but it has been found free of fault, so it has no legal obligation to pay for the damaged pipe. If ECI points to itself as the party legally obligated to pay: (1) it faces the policy provision that it "does not qualify as an additional insured with respect to [its own] independent acts or omissions . . ."; and (2) it again faces the jury's verdict, which forecloses any argument that ECI became legally

obligated to pay as a result of Bolduc's fault. *See Orwick v. Belshan*, 304 Minn. 338, 343, 231 N.W.2d 90, 94 (1975) (holding that the findings of a jury under a special verdict are binding). Thus, Travelers' argument does not rest on a "false presumption that ECI is negligent." (ECI at 42). It rests on the legal certainty, derived from the jury's binding verdict, that if ECI was legally obligated to pay at all, it was because of its own acts or omissions, a circumstance that precludes ECI from qualifying as an "additional insured."¹ The district court was directly on target when it reasoned that coverage is inapplicable because ECI is not entitled to coverage "for damage caused by the independent acts or omissions of ECI." (Add.7).

ECI implies that maybe it was not at fault, and therefore not legally obligated to pay, because the arguments on appeal "disregard[] the evidence that *Frontier's* surveyor provided the [p]ipe locates." (ECI at 15) (emphasis added). The response to this is self-evident. Voluntarily paying for someone else's fault is not a covered *legal* obligation. If ECI paid for what Frontier negligently caused, its remedy was to sue Frontier to recoup its loss, not to have *Frontier's* legal obligation paid by Bolduc's liability coverage.² The policy's additional-insured provision applies "only to the extent that" the damage is caused by Bolduc's acts or omissions. (Add.19). Frontier's acts or omissions do not trigger the policy's additional insured provision.

¹ Of course, if ECI was not legally obligated to pay, then a threshold element of coverage is missing.

² In fact, ECI and Frontier reached an agreement before ECI ever began repair efforts. (T.172-73).

In light of ECI's argument, Travelers reminds the court that this is an action seeking *indemnity* coverage only. An insurer's duty to defend is not at issue. ECI *voluntarily* paid for the pipeline repair and then sued Bolduc and Travelers seeking to recoup its payment. Had both ECI and Bolduc been sued and *alleged* to be at fault, Travelers would have accepted a request to defend ECI. *See, e.g., Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 415 (Minn. 1997) (stating that duty to defend is broader than duty to indemnify). But had Bolduc later been adjudicated not at fault (as it was here), the result of Travelers' *indemnity* obligation would be the same – ECI would not be entitled to indemnity as an additional insured because the damage would not be “caused by the acts or omissions of [Bolduc].” Similarly, had a jury in such a case found *both* ECI and Bolduc at fault — and assigned percentages of fault to each — then the additional insured endorsement would also have provided *indemnity* coverage to ECI, “but only to the extent that [] the damage [was] caused by acts or omissions of [the named insured, Bolduc],” that is, only to the extent that the jury had assigned a percentage of fault to Bolduc. Because that percentage is necessarily zero, there is no indemnity coverage for ECI's claim in this case.

ECI tries to avoid the fact that Bolduc's fault is zero by arguing at length that Bolduc may yet become liable for damage to the pipe based upon a breach of its contract with ECI, an issue it argues remains to be tried. (ECI at 29-35, 43-44). Although ECI's brief does not say so, presumably this argument is meant to provide a basis for ECI to contend that despite the jury's verdict, *Bolduc's* acts or omissions, as opposed to ECI's

independent acts or omissions, might yet provide a basis for ECI's incurring of the pipeline repair costs. This argument is without merit and should be rejected.

As a threshold matter, ECI contends that its claim for breach of contract remains to be tried because the parties stipulated before trial that ECI's breach of contract claim against Bolduc would be preserved for resolution after trial. (Bolduc A.33). But this argument is misleading. The "preserved" breach of contract claim refers to ECI's separately stated claim that Bolduc breached the parties' contract by refusing to indemnify ECI for the costs it incurred in repairing the pipe. (Bolduc A.4-5). Therefore, by court order, the trial was not for the purpose of resolving Bolduc's contractual duty to indemnify ECI, but for the purpose of "resolv[ing] the factual issue of who is responsible for causing the *damage to the pipeline.*" (Bolduc Add.34) (emphasis added). The parties tried that issue, and the jury found that Bolduc was not at fault for damaging the pipe. (Add.16).

Despite the jury's verdict, ECI argues that Bolduc might *still* be liable for damaging the pipe on the basis of its breach of the contractual duty to "execute [its] work properly." (ECI at 34 (quoting sub-contract, Add.10)) (alteration in ECI brief). But this is precisely the issue *not* preserved.³ The responsibility for damaging the pipe has been tried and resolved by the jury. ECI obscures that fact by arguing that the trial was a *tort* case that had no connection to Bolduc's contractual duties. (ECI at 30 (arguing that "negligence was not ECI's sole cause of action"); at 33 (arguing that "there

³ Nor would a court ever permit parties to "preserve" the right to try the same issue twice. Our courts are busy enough without permitting parties to try fault in successive trials based upon a re-labeling of the same duty.

is another clear basis, aside from negligence, for holding Bolduc liable for the damage to the [p]ipe: contractual liability”)) (emphasis in original). But Bolduc’s *contractual* duty to “execute its work properly” was the *only* source of its duty. Unlike the duty to keep a proper lookout on the road, or to keep one’s driveway free of hidden dangers, the duty to “properly” drive sheeting cofferdams does not apply to just anyone. It derives *solely* from what a person or company agrees by contract to do. *See D & A Dev. Co. v. Butler*, 357 N.W.2d 156, 158 (Minn. App. 1984) (“[T]he duties between the parties here arose out of the contract. WBC had a contractual duty to complete the architectural plans by the date agreed upon; that duty was created by its promise, not by law or by public policy. Apart from the contract, WBC had no duty to complete the plans at all.”). Granted, some parties might call a breach of this duty “failure to use reasonable care,” while others might call it “failure to perform in a workmanlike manner” or “failure to meet the standard of care for drivers of sheeting cofferdams.” But regardless of the terminology, the *contract* defines the extent of the duty of care. *Moundsview Indep. Sch. Dist. No. 621 v. Buetow & Assocs., Inc.*, 253 N.W.2d 836, 839 (Minn. 1977). There is no such thing as a separate tort duty in these circumstances. Bolduc’s sole duty – derived from its *contractual* promise to drive sheeting cofferdams “per ECI location” – has been tried to a jury. No “second” duty exists upon which another trial for “breach of contract” might be

held. ECI's argument to the contrary derives from a fundamental misapplication of the concept of duty.⁴

In a directly related argument, ECI attempts to re-try its case against Bolduc by contending on appeal that the inaccurate pipeline markings – which Bolduc relied on in driving the sheets – were “advice, recommendations or assistance,” thus foreclosing any defense Bolduc could have to what ECI claims is its yet-to-be-tried “breach-of-contract” claim. (ECI at 34-35) (citing sub-contract provision at Add.10). This argument must fail for two reasons. First, the argument is founded upon an abuse of the terms of the parties’ contract (drafted, not incidentally, by ECI). The contract’s “Scope of Work” paragraph expressly states that Bolduc must drive the sheets “per ECI location.” (Add.9). Given this provision – which ECI’s brief on this point fails to even mention – ECI’s argument that the markings were merely “advice” or a “recommendation” is not a good-faith construction of what Bolduc’s contractual “work” consisted of. The markings were not advice; they were a *requirement* of the contract’s “Scope of Work” paragraph, as the

⁴ In addition to confusing the concept of duty, ECI’s argument confuses the difference between the *named insured* and the (putative) *additional insured*. Had Bolduc been found at fault, Travelers would have provided indemnity coverage to Bolduc, as the *named insured*, under the policy’s Insuring Agreement. ECI, however, argues that the *additional insured endorsement* provides coverage to Bolduc. (ECI at 33) (arguing that “[t]he Endorsement provides broad coverage for Bolduc’s ‘liability.’”) (emphasis added, original emphasis omitted). This is a confused and erroneous argument. The provision of the additional insured endorsement at issue here is an amendment to a definition. (Add.19) (stating that WHO IS AN INSURED – (Section II) is amended to include”). First, Bolduc is already an insured – the “named insured” – pursuant to the unamended (original) definition. Second, the amendment does not provide coverage to Bolduc. That is what the Insuring Agreement is for. To the extent ECI was attempting to argue that the policy would provide coverage had Bolduc been found to be in breach of duty in damaging the pipe (the sole source of which was its contract), that point has never been in dispute.

drafter of the contract well knows.⁵ Indeed, if Bolduc had treated the markings as “advice,” and ignored them, it would surely have faced a valid claim that it failed to “execute its work properly.”

Second, at trial, Bolduc understood that its duty of care derived solely from what it agreed in its contract to do; namely, to drive the sheeting “per ECI location.” Therefore, Bolduc’s defense was that it performed its duties as required, and that the “ECI location” was wrong, thus causing a properly driven sheet to strike the pipe. (T. 412-13, 420-22, 426-29, 436-37). ECI’s theory, in turn, was that Bolduc failed to drive the sheets plumb (vertically), causing them to list off course and strike the pipe. (T. 87, 92). The very purpose of the trial was to determine as a matter of fact whether Bolduc had “executed its work properly.” In fact, the district court issued a pre-trial order so stating. (Bolduc Add.34). Had ECI wanted to also argue that Bolduc was not entitled to proceed “per ECI location,” the proper time to raise that (frivolous) theory was at trial, when Bolduc asserted it as a defense. This, however, is an appeal from a post-trial summary judgment in which the facts determined by the jury are binding, and therefore undisputed. The scope and performance of Bolduc’s contractual duty has been tried to a jury. No

⁵ Travelers reminds the court about what transpired in fact at the time Bolduc drove the sheets in question. Bolduc *objected* to ECI’s markings because they were not backed up by information from a mouchette probe. (T.325, *see also* 303, 319, 321-22, 331). When Bolduc objected, ECI responded that “they were confident that the surveyor’s marks were accurate and that was all the location we were going to get and we should proceed.” (T.325).

potential liability remains for Bolduc to become legally obligated to pay for damaging the pipe.⁶

In sum, the jury's verdict established the now-undisputed and binding fact that Bolduc was not at fault for the damaged pipeline. This makes certain that ECI's legal obligation to pay for the pipeline repair, if any, was the result of its own independent acts or omissions in failing to use mouchettes and in failing to accurately mark the pipe location on the waler. The Traveler's policy in turn provides that ECI "does not qualify as an additional insured with respect to the independent acts or omissions of [ECI]." (ADD.19, 21; A.55, A.161). The district court was correct in ruling that Travelers' policy provides no coverage to ECI as an additional insured, and its order and judgment should be reinstated.

B. The Additional Insured Endorsement unambiguously applies to make ECI an additional insured only to the extent that the named insured, Bolduc, was at fault for the damage. Because Bolduc was not at fault, ECI is not an additional insured.

The Additional Insured endorsement provides that ECI qualifies as an additional insured "[i]f, and only to the extent that, the injury or damage is caused by acts or omissions of [Bolduc]." (ADD.19, 21; A.55, A.161). ECI, however, seeks to construe

⁶ The issue on appeal is whether Travelers must provide indemnity coverage to ECI, as an "additional insured," for the monies it expended in repairing the pipe. In an exceptionally confused argument, ECI contends that Travelers must provide coverage to ECI if Bolduc becomes legally obligated to pay ECI under those parties' contractual indemnity agreement, which is the subject of Bolduc's appeal. (ECI at 50) (arguing that if Bolduc becomes liable to ECI under the parties' contractual Indemnity and Insurance Agreement "[t]hen Travelers [m]ust [i]ndemnify ECI . . ."). This is utterly backwards. Under the described circumstance – which would contradict Minnesota law, as Bolduc's brief explains – Bolduc would be the "insured" seeking indemnity coverage, a question never presented in any pleading, argument, motion, or decision in this case.

this provision by isolating a single word – “acts” – and construing it without regard to the provision’s overall context. (ECI at 25-28, 36-40). Because in the abstract the term “act” does not always include fault, argues ECI, it does not include fault when used in this liability insurance policy. This approach contradicts Minnesota law, which requires the court to construe the disputed provision “not by a process of dissection in which words or phrases are isolated from their context, but rather from a process of synthesis in which the words and phrases are given meaning in accordance with the obvious purpose of the contract as a whole.” *Republic Nat’l Life Ins. Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349, 354 (Minn. 1979) (citations omitted).

The subject of the limiting clause is Bolduc’s legal duty and the ways it can be breached, *i.e.*, by acts or omissions. ECI’s argument obscures that fact because it improperly isolates the term “acts” from its immediate, and mirror-image term, “omissions.” And it isolates both from the provision requiring that the damage be *caused by* an act or omission. In isolation, omission can mean anything not done. In the context of insurance for legal liability, however, omission means a neglect of *duty*. See *Black’s Law Dictionary* 1121 (8th ed. 2004). A person commits an “omission” by breaching a legal duty to act affirmatively. Any other meaning would be unreasonable, indeed absurd. In this case, for example, had Bolduc failed to drive the sheets “per ECI location,” and thereby caused damage, that would be an omission within the meaning of the additional insured endorsement. Bolduc had a duty to drive the sheets per ECI location, and failing to do so would be a neglect (*i.e.*, a breach) of duty, an omission. In the absence of a *duty to act*, however, no one could reasonably conclude that *failing to*

act (an omission) could be considered the cause of damage. See *Collins Truck Lines, Inc. v. Metro. Waste Control Comm'n*, 274 N.W.2d 123, 126 (Minn. 1979) (“An instrument is ambiguous if it is *reasonably* susceptible of more than one construction. * * * In order to be ambiguous in the legal sense, both constructions must be reasonable.”) (emphasis added).⁷ For example, Bolduc had no duty to conduct an independent survey or to probe for the pipe with mouchettes. Therefore, the undisputed fact that Bolduc failed to do those things cannot be an “omission” *within the meaning of the policy*, even though Bolduc *omitted* doing those things, and doing those things would undoubtedly have avoided damage to the pipe. To determine whether a person’s failure to act is an “omission,” one must examine the scope of the person’s legal duty to act affirmatively, and the policy need not specify “omissions for which an affirmative legal duty to act exists” for that construction to be required under Minnesota law.

The same analysis is required for the term “acts.” It is, after all, part of the indivisible phrase “acts or omissions.” Minnesota law requires synthesis, not dissection. *Republic Nat’l Life Ins. Co.*, 279 N.W.2d at 354; see also *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961) (“The maxim *noscitur a sociis*, [is] that a word is known by the

⁷ Without analysis, ECI’s brief several times uses the term “reasonable expectations,” as though that doctrine holds that a bare claim of an expectation provides a basis for a finding of coverage. But unambiguous policy language negates “any legitimate expectation” of coverage. *Jostens v. Northfield Ins. Co.*, 527 N.W.2d 116, 118 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995). In other words, where “there is no ambiguity, there is no basis for application of the reasonable-expectations doctrine.” *SECURA Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 329 (Minn. App. 2008), *review denied* (Minn. Nov. 18, 2008). In addition, it is difficult to understand how the doctrine could ever apply to the claim of a party like ECI, which is a complete stranger to the contract.

company it keeps * * * .”). The law does not require that the word “negligent” be inserted into the phrase “acts or omissions” in order for its meaning to be clear and unambiguous. In the context of liability insurance, just as the term “omissions” can only have reasonable meaning in conjunction with the breaching of a legal duty, so too “acts” can only have reasonable meaning in conjunction with the breaching of a legal duty. The terms are mirrored parts of an indivisible phrase. One term cannot be construed to mean the breaching of a legal duty by omission while the other is construed to mean literally anything engaged in, *without regard* to whether the act was in breach of a legal duty. That is the unreasonable construction ECI’s argument would require, and it cannot withstand legal scrutiny. Given the jury’s verdict finding Bolduc free of fault, damage to the pipe was not “caused by acts or omissions of [Bolduc]” within the meaning of that clause as it appears in Travelers’ liability insurance policy. (ADD.19, 21; A.55, A.161). Although Bolduc’s workers drove the sheet, they did so properly. The act *causing the damage* was the directive to drive the sheet in the wrong place, an act not attributable to Bolduc. Therefore, ECI does not qualify as an additional insured for its claim under the Travelers’ policy.

Only by isolating the term “acts” from the rest of the endorsement is ECI able to conclude that because Bolduc drove the sheet (an “act”), ECI has become an additional insured. The antecedent clause providing additional insured coverage “only to the extent that” the damage was “caused by acts or omissions of [Bolduc]” further exposes ECI’s isolationist construction as unreasonable, and reinforces the conclusion that the endorsement is unambiguously inapplicable here for purposes of ECI’s claim for

indemnity.⁸ (Add.19, 21; A.55, A.161). The clause “only to the extent that” plainly contemplates a division of causal fault between the named insured (Bolduc) and any other at-fault party, with additional insured status extending “only to the extent that” the damage was caused by Bolduc’s acts or omissions. Here, that extent is zero, and we know this because a jury heard all the evidence and so concluded. Indeed, a jury (or other fact finder) is the only way parties could measure “the extent that” someone’s acts or omissions caused damage. When accidents happen in the real world, many factors contribute to the ultimate outcome. But there is no magic meter that measures “the extent that” one person’s act or omission caused damage. When referring to “the extent that” acts or omissions cause damage, therefore, the parties intended to employ a mechanism for measuring the extent of cause. The only mechanism to measure that extent is a finder of fact, and finders of fact weigh legal fault. Read in full and in context, the only reasonable construction of the provision for additional insured coverage “[i]f, and *only to the extent that*, the injury or damage is *caused by acts or omissions of you or your subcontractor*” is that it refers to Bolduc’s acts or omissions constituting legal fault. Because Bolduc has no legal fault, ECI is not entitled to indemnity as an additional insured.

⁸ Travelers again reminds the court that this is an action seeking *indemnity* coverage only and that an insurer’s duty to defend is not at issue. Had both ECI and Bolduc been sued and *alleged* to be at fault, Travelers would have accepted a request to defend ECI. The right to indemnity coverage, however, is limited by the *extent* that the damage was “caused by acts or omissions of [Bolduc].” Here, that extent is zero.

The meaning of the phrase “caused by” is informed by a similar analysis. But as with its argument about the meaning of “acts,” ECI engages in a lengthy analysis about the phrase “caused by” without any reference to the surrounding words and how they fit together. (ECI at 44-50). Travelers finds no need to provide a point-by-point response because ECI’s argument is the same as for its “acts” argument: “Causation is still clear, because there is no question that Bolduc drove the sheetpiling, hit the [p]ipe, and damaged the [p]ipe” (ECI at 45). In other words, ECI contends that when read in isolation, the term “caused by” does not refer to legal fault. But the term does not appear in isolation. It appears between the phrases “only to the extent that” and “acts or omissions.” And not a single case cited in ECI’s brief construed a provision with those terms, much less one with those terms in that contextual sequence.

Ultimately, ECI seeks to become an additional insured based upon the bare existence of “but for” cause – but for the fact that Bolduc properly drove a sheet as demanded in its contract, the pipe would not have been damaged. As support, ECI relies on a line of cases construing the clause “arising out of.” (ECI at 45-47). Minnesota law is indeed well-settled that “arising out of” – a phrase widely used in statutes and contracts – has a broad meaning, beyond causation, that requires only a showing of “but for” cause. *Faber v. Roelofs*, 311 Minn. 428, 436, 250 N.W.2d 817, 822

(1977). Plainly, however, that construction rests on the term “arising,” a term decidedly absent from Travelers’ policy.⁹ Indeed, the insurance industry as a whole *replaced* the term “arising out of” with “caused by” in standard “additional insured” forms issued beginning in 2004.¹⁰ See *Dale Corp. v. Cumberland Mut. Fire Ins. Co.*, 2010 WL 4909600 at *5-6 (E.D. Pa. Nov. 30, 2010) (Reply App.5-7). The intent behind this change was to make clear that a simple “but for” test is not sufficient to trigger additional insured coverage. *Id.* at *5 (Reply App.5-6). As the court in *Dale Corp.* stated, “[t]his history significantly undercuts [the putative additional insured’s] argument that a simple ‘but for’ test is what was intended when the parties chose to use the words ‘caused by’ rather than ‘arising out of.’” *Id.* at *6 (Reply App.6-7).

⁹ Regarding the phrase “arising out of,” ECI’s reliance on *Ed Kraemer & Sons, Inc. v. Transit Cas. Co.*, 402 N.W.2d 216 (Minn. App. 1987), *review denied* (Minn. May 18, 1987) deserves a brief comment. ECI argues that the decision in that case supports a “broad reading” of the term “caused by.” (ECI at 47-48) (citing *id.* at 219). In fact, however, the policy at issue in that case did not even contain the term “caused by.” See 402 N.W.2d at 217-18. That term was in the policy from a case the *Ed Kraemer* court cited in its analysis. See 402 N.W.2d at 219 (citing and quoting *Woodrich Constr. Co. v. Indem. Ins. Co. of N. Am.*, 252 Minn. 86, 94 n.3, 89 N.W.2d 412, 418 n.3 (1958)). More importantly – and not surprisingly – the *dispute* in *Ed Kraemer* was not over the meaning of the term “caused by.” See 402 N.W.2d at 217-18. Instead, the central dispute was over the meaning of the term “use” in the context of injuries “arising out of” the “use” of an automobile. See *id.* at 217-221. ECI’s reliance on *Ed Kraemer* is misleading.

¹⁰ Such standard forms are issued by the Insurance Services Office (ISO) and, as such, are often referred to as “ISO forms.” For clarity, Travelers’ additional insured endorsement is not an ISO form, but it is similar for purposes of this discussion because it uses a “caused by” standard, not an “arising out of” standard. One significant difference in the Travelers’ form is its use of the clause “only to the extent that,” which reinforces the intent that legal fault will control the phrase “caused by.”

In addition to the change from “arising out of” to “caused by,” the 2004 ISO form changed the clauses those terms modify. Under the old form, the endorsement stated “arising out of the named insured’s operations,” while under the new form it states “caused, in whole or in part, by the acts or omissions of the named insured.” *Id.* at *5 (Reply App.5-6). As mentioned, Travelers’ additional insured endorsement is not an ISO form, but these changes show why cases like *Dillon Cos. v. Royal Indem. Co.*, 369 F.Supp.2d 1277 (D. Kan. 2005) have no value for this case. ECI lists *Dillon* among its most apposite authorities (ECI at 1), but that case not only construed the “but-for” term “arising out of,” it applied that standard to “the named insured’s . . . operations,” not its acts or omissions. *Id.* at 1281 (emphasis added). *Dillon* and other cases construing the clause “arising out of” are of no value in construing Travelers’ policy, and that is made doubly true by Travelers’ modifying clause “only to the extent that,” a clause that does not appear in standard ISO forms. Read in full and in context, the only reasonable construction of the provision for additional insured coverage “[i]f, and *only to the extent that*, the injury or damage is *caused by* acts or omissions of you or your subcontractor” is that it refers to Bolduc’s acts or omissions constituting legal fault. Because Bolduc has no legal fault, ECI is not entitled to indemnity as an additional insured.

ECI cites many other cases in support of its argument that “[c]ase law supports the Court of Appeals finding of coverage.” (ECI at 27).¹¹ Among the most prominently featured of those cases is *Huber Engineered Woods, LLC v. Canal Ins. Co.*, 690 S.E.2d 739 (N.C. App. 2010), a case ECI placed at the top of its list of apposite authority. (ECI at 1). A fact not mentioned in ECI’s brief; however, is that the North Carolina Supreme Court summarily reversed *Huber* “for the reasons stated in the [appellate courts’] dissenting opinion.” *Huber Engineered Woods, LLC v. Canal Ins. Co.*, 700 S.E.2d 220, 221 (N.C. 2010). The appellate courts’ dissent, in turn, had stated that “the concept that the Canal policy provides any liability coverage to [the putative additional insured] is patently absurd.” 690 S.E.2d at 750.

ECI also relies on a Minnesota case for its argument that “[o]ne of the functions of an additional insured endorsement is to protect the additional insured from liability due to the actions of the named insured.” (ECI at 25) (citing *Northbrook Ins. Co. v. American States Ins. Co.*, 495 N.W.2d 450, 453 (Minn. App. 1993)). ECI relies on that statement to support its construction of the term “acts” as meaning literally anything engaged in, without regard to whether the act was in breach of a legal duty. ECI later returns to the quoted statement as the broad underlying policy of Minnesota law supporting its position. (ECI at 40). But ECI’s representation of *Northbrook* omits an important qualifying word: “One of the primary functions of the additional insured

¹¹ Travelers cited and discussed supporting foreign case law in its opening brief (Travelers at 20-23), and it won’t repeat that discussion here. It notes, however, that ECI has attempted to distinguish those cases on the ground that they involved claims of “negligence,” not breach of contract. (ECI at 29-32). On that point Travelers refers the court to the discussion of duty on pp. 4-7, *supra*.

endorsement is to protect the additional insured from *vicarious* liability for acts of the named insured.” *Id.* at 453 (emphasis added) (citation omitted). A party (ECI) cannot become *vicariously* liable unless the party committing the “act” (Bolduc) is itself at fault. And one committing an “act” (Bolduc) cannot be at fault unless the act was in breach of a legal duty, something the jury has already decided it was not. In other words, *Northbrook* supports Travelers’ position and directly undermines the entire premise of ECI’s argument.

Finally, ECI’s just-insert-the-word-“negligent” solution is overly simplistic. Negligence is not the only type of actionable conduct that can fall within a person’s “acts or omissions.” Minnesota law uses the term “fault,” which includes not only negligence, but also strict liability, breach of warranty, and several other types of acts or omissions. Minn. Stat. § 604.01, subd. 1a (2010).¹² In short, adding narrowing terms like “negligent” to an already-unambiguous policy provision would likely *take away* from what the policy was intended to cover without providing a corresponding benefit in clarity. The circumstances limiting ECI’s right to claim coverage as an additional insured are unambiguous as written. So-called solutions, conceived in a vacuum, provide no basis for the court to rule otherwise.

In sum, the jury’s verdict establishes the only undisputed facts necessary to conclude as a matter of law that ECI is not entitled to indemnity as an additional

¹² Of course, for Travelers insureds in other states, a different rubric of all the permutations of actionable “acts or omissions” might well apply to on-the-job occurrences there, further demonstrating why the policy drafting standard ECI is seeking to impose would be impossible to meet.

insured under Travelers' policy: (1) Bolduc has no legal obligation to pay for the pipe repair. Therefore, ECI's legal obligation to pay for the repair, if any, was the result of its own independent acts or omissions in failing to use mouchettes and in failing to accurately mark the pipe location on the waler. Because the Traveler's policy provides that ECI "does not qualify as an additional insured with respect to the independent acts or omissions of [ECI]," additional insured coverage is inapplicable as a matter of law; and (2) Bolduc is without legal fault for the damage that occurred to the pipe. Because the clause "[i]f, and only to the extent that, the injury or damage is caused by acts or omissions of you or your subcontractor" unambiguously requires that Bolduc's (or its subcontractor's) acts or omissions must constitute legal fault for additional insured coverage to apply, such coverage is inapplicable as a matter of law. The court of appeals' decision must therefore be reversed and the order and judgment of the district court reinstated.

C. The jury's finding of \$0 as ECI's "loss resulting from damage to the pipe" precludes indemnity coverage.

No one disputes that the pipeline repairs were not free. (ECI at 43). The jury, however, concluded that ECI did not suffer *loss*. (ADD.17; A. 258). The jury so concluded after the district court instructed it that in answering this question, it should consider what sum of money would fairly compensate "a person who has been harmed." (T.405). The jury's verdict is binding, and it leaves nothing for which ECI could seek indemnity coverage from Travelers. *Orwick v. Belshan*, 304 Minn. 338, 231 N.W.2d 90, 94 (1975) (stating that jury's special verdict is binding).

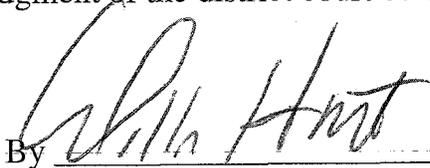
ECI argues that the jury's verdict did not decide "breach-of-contract" damages that may yet provide a basis for its claim for indemnity. (ECI at 43-44). As explained above, however, ECI had no claim for damages that was independent of its contract with Bolduc. *See Moundsview Indep. Sch. Dist. No. 621 v. Buetow & Assocs., Inc.*, 253 N.W.2d 836, 839 (Minn. 1977). Parties have one opportunity, not two, to present their damages to a jury. Having suffered no loss, ECI has nothing for which it can claim a right to indemnity coverage. Regardless of the outcome on the coverage issue itself, the district court's order and judgment must be reinstated on this basis.

CONCLUSION

Travelers Indemnity Company respectfully requests that the court of appeals decision be reversed and that the order and judgment of the district court be reinstated.

Respectfully submitted,

Dated: March 2, 2012

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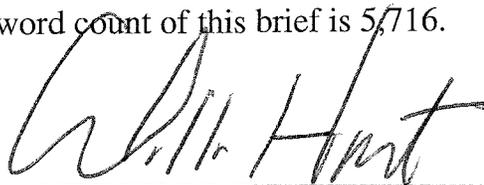
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FORM AND LENGTH CERTIFICATION

This brief was drafted using Word 2002. The font is Times New Roman, proportional 13-point font, which includes serifs. The word count of this brief is 5,716.

Dated: March 2, 2012

A handwritten signature in cursive script, appearing to read "William M. Hart". The signature is written in black ink and is positioned above a horizontal line.

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