

NO. A11-159

State of Minnesota  
In Court of Appeals

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

vs.

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

APPELLANT'S BRIEF, ADDENDUM AND APPENDIX

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

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## ISSUES

1. As a matter of law, was ECI negligent when the factual findings of the Jury Special Verdict made no such finding?

Trial Court Held: In the affirmative

Apposite Cases:

*Orwick v. Belshan*, 231 N.W.2d 90 (Minn. 1975).

*Sorlie v. Thomas*, 51 N.W.2d 592 (Minn. 1952).

*Canada by and through Landy v. McCarty*, 567 N.W.2d 496 (Minn. 1997).

*Kelly v. City of Minneapolis*, 598 N.W.2d 657 (Minn. 1999).

Apposite Secondary Authority:

Civil Jury Instruction Guide 25.55

2. Does the subcontract between Bolduc and ECI require Bolduc to reimburse and indemnify ECI for the costs ECI expended in repairing the Pipe that Bolduc damaged, despite the finding that Bolduc was not negligent in causing the damage?

Trial Court Held: In the negative

Apposite Cases:

*Lesmeister v. Dilly*, 330 N.W.2d 95 (Minn. 1983).

*Rediske v. Minnesota Valley Breeder's Ass'n.*, 374 N.W.2d 745 (Minn. App. 1985)

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

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

*Van Vickle v. C. W. Scheurer and Sons, Inc.*, 556 N.W.2d 238 (Minn. App.1996).

3. Do the Policies require Travelers to indemnify ECI for the costs ECI expended in repairing the Pipe damaged by Bolduc?

Trial Court Held: In the negative

Apposite Cases:

*Huber Engineered Woods v. Canal Ins. Co.* 690 S.E.2d 739 (NC App. 2010).

*Maryland Ins. Cas. Co. v. Regis Ins. Co.*, 1997 WL 164268 (E.D. Pa. 1997).

*Dillon Cos. Inc. v. Royal Indemnity Co.*, 369 F.Supp.2d 1277 (D. Kan. 2005).

*Minn. Min. and Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175 (Minn. 1990).

Apposite Statutes:

Minn. Stat. §337.02

Minn. Stat. §337.05

4. If the Policies do not require Travelers to indemnify ECI for the costs ECI incurred in repairing the Pipe damaged by Bolduc, has Bolduc breached its contractual obligations to ECI by failing to procure promised insurance coverage for such damage?

Trial Court Held: In the negative

Apposite Cases:

*Van Vickle v. C. W. Scheurer and Sons, Inc.*, 556 N.W.2d 238 (Minn. App.1996).

Apposite Statute:

Minn. Stat. §337.05

## STATEMENT OF THE CASE

This appeal involves two contract disputes. The first is between Engineering and Construction Innovations, Inc. (“ECI”) and its construction subcontractor L.H. Bolduc Co., Inc. (“Bolduc”) for damage that Bolduc caused to an underground sewer pipe (the “Pipe”) owned by a third-party, Frontier Pipeline (“Frontier”), during the course of Bolduc’s work driving sheetpiling into the ground on a sewer construction project (the “Project”). ECI expended \$233,365.65 in repairing Bolduc’s damage to the Pipe. The parties dispute whether Bolduc breached its contract by failing to reimburse ECI for these repair costs.

The second contract dispute is between ECI and Travelers Indemnity Company of Connecticut (“Travelers”). Travelers insured ECI as an additional insured under an Additional Insured (Contractors) Endorsement (“AIE”) of two general liability policies that Travelers had issued to Bolduc (the “Policies”). The Travelers Policies also covered “Insured Contracts”. Travelers and ECI dispute whether ECI is entitled to indemnity from Travelers for the costs incurred by ECI to repair Bolduc’s damage to the Pipe.

ECI commenced a lawsuit to recover its costs in repairing the Pipe, bringing negligence and breach of contract claims against Bolduc and breach of contract and a declaratory judgment action against Travelers. Bolduc denied liability and subsequently brought a counterclaim for amounts allegedly still owed by ECI to Bolduc for its work on the Project. Travelers denied coverage and brought a counterclaim for declaratory judgment.

The case was set for trial on March 8, 2010. On March 3, 2010, all parties stipulated that only ECI's negligence claim against Bolduc would be tried to a jury (the "Negligence Trial"). The breach of contract claims against Bolduc and Travelers and the declaratory judgment claims would be fully preserved and resolved on cross-motions for summary judgment (or, if necessary, a trial to the Court) after the Negligence Trial.

The Negligence Trial commenced on March 8, 2010. A Special Verdict was issued on March 10, 2010. The jury found, *inter alia*, that Bolduc was not negligent, and awarded no monetary damages to ECI. The jury made no finding as to ECI's negligence.

The parties brought cross-motions for summary judgment on the remaining contract and declaratory judgment claims. After the hearing on the motions for summary judgment on the contract and declaratory judgment claims, the Ramsey County District Court, Honorable Gregg E. Johnson adopted the factual findings of the Special Verdict and issued an Order on October 6, 2010, granting the Bolduc and Travelers motions, declaring that: 1) Bolduc did not breach the subcontract with ECI because the jury found that Bolduc was not negligent; and 2) Travelers had no duty to indemnify ECI under the AIE for the cost to repair the Pipe that Bolduc damaged. On January 20, 2011, the District Court issued its Notice of Entry of Judgment that Final Judgment was entered on December 10, 2010. Appellant filed its appeal from the judgment on January 27, 2011.

## STATEMENT OF THE FACTS

### A. The Project

The Metropolitan Council Environmental Services (“MCES”) hired Frontier Pipeline, LLC (“Frontier”) as the prime contractor on a construction project for the installation of a new underground sewer pipeline in Hugo and White Bear Township, Minnesota. *Trial Exhibit (“Ex.”) 2; Trial Transcript (“T”).43-4.* Frontier installed the 28-inch high density polyethylene (“HDPE”) sewer pipe (the “Pipe”) in a number of “runs” (typically several hundred feet in length) using a directional drilling process. *T.44, ll. 19-22.* Frontier subcontracted to ECI the construction of a number of Forcemain Access Structures (“FAS”), which are underground concrete vaults where individual runs of the Pipe are connected together. *Ex. 1.; T.46.* Paragraph 11 of Frontier’s subcontract with ECI provided for the assessment of liquidated damages for each day that completion of the Project was late. *Ex. 1; T.50, ll. 2-17.*

The Pipe was installed at a depth of approximately 25 feet, which required that the FAS be installed at a depth of approximately 30 feet. Because the FAS were to be installed in pits approximately thirty feet deep, ECI had to come up with a safe way to excavate those deep pits without danger of the walls collapsing. ECI decided to use “sheeted pits” and entered into a subcontract agreement with Bolduc (the “Subcontract”) to build cofferdams, a shoring system created by driving metal sheeting into the ground to act as walls for the sheeted pits during excavation and construction. *Ex. 2; T.54.* Bolduc was to drive its sheeting in an area where two runs of the existing Pipe that Frontier had already installed underground intersected. *T.384-5.*

**B. The Performance of Work Agreement**

Under the Subcontract, Bolduc agreed to be contractually obligated to ECI to:

...at all times, supply tools, equipment, workers, materials and supplies of sufficient number and quality to prosecute the work efficiently, **properly** and promptly, in accordance with the terms of the General Contract [and]... No advice, recommendations or assistance that representatives of the Owner or ECI may give to...[Bolduc] shall operate to relieve...[Bolduc] from **complete responsibility** for such work as an independent contractor.

(the "Performance of Work Agreement") (emphasis added) *Add.9, ¶4.*

**C. The Indemnity and Insurance Agreement.**

The Subcontract also contained an Indemnity and Insurance Agreement (the "IIA") wherein Bolduc agreed to be contractually obligated to ECI as follows:

[Bolduc] agrees to protect, indemnify, defend, and hold harmless ECI and Owner, to the fullest extent of the insurance requirements below, from and against (a) all claims, causes of action, liabilities, obligations, demands, costs, and expenses arising out of ...damages to property caused or alleged to have been caused by any act or omission of [Bolduc], its agents, employees or invitees, and (b) all damages, judgments, expenses, and attorney's fees caused by any act or omission of [Bolduc] or anyone who performs work or services in the prosecution of the Subcontract.

[Bolduc] shall defend any and all suits brought against ECI or Owner on account of any such liability or claims of liability.

[Bolduc] agrees to procure and carry until the completion of the Subcontract...such...insurance that specifically covers the indemnity obligations under this paragraph...**and to name ECI as an additional insured on said policies:**

General Liability, with Contractual Liability Coverage-

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

\$500,000.....Any one person or occurrence;

\*\*\*\*

**Subcontractor agrees to obtain, maintain and pay for such insurance coverage and endorsements as will insure the indemnity provisions and coverage limits above and to furnish ECI certificates of insurance evidencing the aforementioned coverage.**

*Add.10, ¶9* (emphasis original).

**D. The Insurance Coverage.**

Bolduc obtained general liability insurance coverage from Travelers under two policies, Policy Number DT-CO-9203B020-TCT-07 and Policy Number DT-CO-9203B020-TIA-06 (the "Policies") which, for all points relevant herein, contained identical language. *A.37.*<sup>1</sup>

The Policies provide all-risk coverage such that the Insuring Agreements of the Policies state: "[Travelers] will pay for those sums that the insured [Bolduc] becomes legally obligated to pay as damages because of ...'property damage' to which this insurance applies." *Add.12.* The Policies contain an exclusion for Contractual Liability, but then restore coverage by way of an Exception to the Exclusion by agreeing to cover: "Liability for damages:...(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..." *Add.13.* The Policies relevantly define "property damage" as

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<sup>1</sup> To avoid unnecessary reproduction of the record, only excerpts from Policy Number DT-CO-9203B020-TCT-07 are included in the Addendum at Add.11-15. Complete copies of the Policies are also included in the record as exhibits. 3 & 4 to the Affidavit of John Paul Gatto to Travelers' Memorandum in Support of Summary Judgment.

“Physical injury to tangible property...” *Add.15*. The Policies relevantly define “Insured Contracts” as:

f. that part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) 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.

*Add.14*.

Each Policy also contained an Additional Insured (Contractors) Endorsement (the “AIE”) under which ECI is an additional insured for the Project. *A.36, 39*. The AIE provided coverage as follows:

**BLANKET ADDITIONAL INSURED  
(CONTRACTORS)**

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.

*Add.11*.

**E. The Damage**

In performing work on the Project at one of the FAS structures (designated FAS-

1), Bolduc drove a piece of sheetpiling into a section of Frontier's Pipe and damaged the Pipe. *A.52; T.70-73; Exs. 4(b) & 4(c)*. In December 2007, after Bolduc had completed its work at FAS-1, ECI discovered the damage to the Pipe. *A.3 at ¶12; Exs. 5(b) & 5(c)*. Frontier and MCES demanded that ECI repair the Pipe without delay in order to avoid assessment of liquidated damages. *A.3; T.250; Exs. 6 & 7*. Prior to repairs being made, ECI advised Bolduc and Travelers of the damage and made a formal claim to each. *Ex. 11*. Bolduc and Travelers were onsite before repairs were made. *T.343; Exs. 5(a), 5(c) & 11*. ECI repaired Bolduc's damage to the Pipe at a cost of \$233,365.65. *A.3 at ¶¶ 13, 14 & 15; Exs. 7 & 12; T.93-4, 116*. ECI then sought reimbursement from Bolduc pursuant to the Subcontract, including the indemnity provision of the IIA. *Add.10; Ex. 11*. Bolduc refused to reimburse ECI for the cost to repair the Pipe. *T.94, 117, 382*.

As for ECI's claim with Travelers seeking reimbursement for the repair costs, Travelers denied coverage and refused to reimburse ECI, alleging that the Pipe was not damaged by any act or omission of Bolduc. *A.4 at ¶16; A.11*.

#### **F. The Lawsuit**

In August 2008, ECI brought suit against Bolduc and Travelers. *A.1*. ECI asserted two causes of action against Bolduc: 1) Negligence; and 2) Breach of Contract, based upon Bolduc's improperly performing its work by damaging the Pipe and refusing to indemnify ECI for the costs to repair the Pipe. *Id. at ¶¶ 20-26*.

ECI also brought two claims against Travelers: 1) Breach of Contract; and 2) A Declaratory Judgment Action, based upon Travelers' refusal to indemnify ECI as an additional insured for the costs incurred to repair Bolduc's damage to the Pipe. *Id. at ¶*

27. Bolduc and Travelers each answered and denied liability. *A.19; A.8.* Bolduc asserted a counterclaim for monetary damages. *A.22.* Travelers asserted a Counterclaim for declaratory judgment. *A.15.*

**G. The Stipulation**

The case was set for trial on March 8, 2010. *A.24.* On March 3, 2010, the Parties entered into a stipulation (the “Stipulation”) wherein the Parties agreed that the only issues to be tried before a jury on March 8, 2010 were:

(a) ECI's claim that Bolduc's negligence resulted in damage to the pipe at FAS-1 on the Met Council Project, (b) Bolduc's defense that it was ECI's negligence that resulted in damage to the pipe, and (c) the amount of damages, if any, to which ECI is entitled if it prevails on its negligence claim.

*A.25 at ¶1.* The parties further stipulated and agreed:

ECI's claims against Bolduc for breach of contract (including but not limited to ECI's claim that Bolduc breached its obligation to defend and indemnify ECI and obtain insurance to protect ECI), and ECI's claims against Travelers, shall not be tried starting on March 8, 2010, but shall be preserved in full for determination or resolution by the Court at a later date. The parties agree that ECI is not waiving, relinquishing, releasing or impairing its claim against Bolduc for breach of contract and its claims against Travelers.

*Id. at ¶ 2* (emphasis added). Also:

ECI's claims against Bolduc for breach of contract and ECI's claims against Travelers shall be resolved on cross-motions for summary judgment. If it is determined that there are disputed issues of material fact, these claims will be tried to the Court without a jury. The parties expressly waive their rights to have these claims tried to a jury.

\*\*\*\*

Given the narrow focus of the trial beginning on March 8, 2010, it is agreed by the parties that Travelers and its counsel shall not participate in any way in the trial.

*A.26 at ¶¶ 3 and 4.*

#### **H. The Negligence Trial**

The Negligence Trial commenced on March 8, 2010, with the jury deciding only the issue of Bolduc's negligence in accordance with the Stipulation. *A.25-6.; See T. generally and A.34-5.* There was no dispute that the Pipe was damaged. *A.52.*

Rather, the Negligence Trial involved conflicting evidence and testimony as to who was responsible for the damage. ECI presented evidence including witness testimony that Bolduc was responsible for the damage because it drove its sheetpiling into the Pipe. *T.86-92, 362-3, 366-70; Exs. 5(b) & 5(c).* ECI also presented evidence that Frontier through Frontier's surveyor provided the locations of the Pipe (*T.51-52, 60, ll. 15-25*), which was then communicated to Bolduc at an onsite meeting (*T.61- 63*) as ECI was to provide to Bolduc, through ECI's contract with Frontier, the location of the FAS and the Pipe. *T.55, ll. 1-7.* In contrast, Bolduc presented testimony that ECI was responsible for marking the location of the Pipe prior to Bolduc driving its sheetpiling and damaging it. *T.316, 319-25, 378.*

Before jury deliberations, Bolduc and ECI each submitted a Proposed Special Verdict Form. *A.29; A.31.* Bolduc's form proposed that ECI's negligence only be determined if the jury found Bolduc negligent. *A.29.* ECI's proposed form asked the jury to determine ECI's negligence independent of Bolduc's. *A.32.* The district court adopted Bolduc's special verdict form in that the jury was only asked to determine ECI's

negligence at Question 3 of the verdict form, if it found Bolduc negligent and that Bolduc's negligence was a proximate cause of damage to the Pipe. *A.34.*

On March 10, 2010, the jury properly completed the Special Verdict Form. *Id.* In response to the question, "Was [Bolduc] negligent?", the jury answered "No." *Id.* The jury made no determination as to ECI's fault. *Id.*

### **I. The Post-Trial Motions**

After the Negligence Trial, Travelers and Bolduc moved for summary judgment. *A.36; A.49.* Travelers argued that ECI was not entitled to coverage under the Additional Insured Endorsement on the basis that ECI, an additional insured, is only entitled to coverage for damage "caused by an act or omission" of Bolduc. *A.44.* Since the jury at the Negligence Trial determined that Bolduc was not negligent, Travelers argued ECI was not entitled to coverage. *Id.* Travelers further argued that the Pipe was damaged by ECI's own acts or omissions. *Id.*

ECI responded that under the plain language of the AIE, Travelers owed coverage. *A. 67; Motion Transcript of Aug. 18, 2010 ("MT.")22-3; A.67-9.* Regardless of the jury's verdict at the Negligence Trial, there was no dispute that Bolduc drove the sheetpiling into the Pipe and damaged it. *Id.* The Policy covers ECI for those "acts" of Bolduc that caused damage to the Pipe without any limitation for only "negligent" acts. *A.67-9; MT.18-23.* ECI also responded that any ambiguity must be construed in favor of coverage. *A.67-9; MT.18-27.*

Bolduc argued that the jury finding at the Negligence Trial exonerated Bolduc from all contractual obligations under the Subcontract, including its indemnity

obligations under the IIA. *A.57-60; MT.8-10*. Bolduc further argued, contrary to the Stipulation, that ECI had waived its remaining breach of contract claims for Bolduc's failure to perform its work properly and by failing to procure the insurance coverage required under the IIA, by not trying these issues at the Negligence Trial. *MT.7-8; A.90, 98-100*.

At the Motion hearing, Bolduc acknowledged that the jury did not decide the issue of ECI's negligence, admitting "In retrospect, perhaps we should have had the jury answer the questions about the fault of ECI at the time of trial," (*MT.10, ll. 19-22; MT.11*) to which the Honorable Gregg E. Johnson replied, "I thought of that as I was reading these briefs." *MT.10, ll. 23-4*.

ECI responded that Bolduc's negligence was not dispositive of the *breach of contract* claims and that ECI had "fully preserved" its contract claims against Bolduc by way of the Stipulation. *A.77; T.25-28*. Bolduc's arguments ignored the plain language of the Subcontract, including the specific obligations of the Performance of Work Agreement and the IIA obligations where Bolduc agreed to indemnify ECI for "any acts" of Bolduc that caused damage at the Project. *A.74; MT. 27, 33*. At the Motion hearing, ECI argued that the district court should either grant ECI summary judgment or set the matter on for trial on the breach of contract claims. *MT.27*.

The district court granted Bolduc and Travelers motions, dismissing ECI's breach of contract claims, declaring that the Policy did not provide coverage to ECI, and ordering final judgment be entered in favor of Bolduc and Travelers. *Add.1-8*.

In doing so, the Court first adopted the factual findings of the jury in the Special

Verdict from the Negligence Trial. *Add.3.* The Court then concluded that, because the jury had determined that Bolduc was not negligent and that the negligence damages were zero, “there was no breach of contract by Bolduc and no right to indemnification for ECI’s own negligent acts that were not expressly covered by the contract.” *Add.8.* Bolduc was not in breach of the IIA of the Subcontract because “the contract did not require Bolduc to indemnify ECI with regard to ECI’s own negligence.” *Add.7.* The district court reasoned that the anti-indemnity statute Minn. Stat. 337.02 requires that parties “remain responsible for their own negligent acts or omissions.” *Id.*

In so concluding, the district court determined that the IIA of the Subcontract could “only be interpreted one way: ECI wanted Bolduc to indemnify, and insure, ECI with respect to acts of Bolduc’s own culpable negligence.” *Id.* To read it as requiring Bolduc to indemnify and insure ECI with respect to Bolduc’s “non-negligent” acts would ask Bolduc to indemnify and insure ECI for its own negligence. *Id.*

The district court then relied on this same reasoning to conclude that ECI was not entitled to coverage from Travelers as an additional insured. *Add.8.* “ECI was only entitled to indemnity coverage for damage caused by Bolduc and not for damage caused by the independent acts or omissions of ECI.” *Id.*

The district court did not address ECI’s breach of contract claims against Bolduc with respect to Bolduc’s contractual duty to perform its work in compliance with the Performance of Work Agreement and not damage the Pipe. *See Add.2-8.*

## SUMMARY OF ARGUMENT

### **I. The Jury Never Determined that ECI Was Negligent.**

The jury's findings of fact in the Special Verdict Form did not find ECI negligent. Contrary to the Special Verdict Form, Minnesota law, Civil Jury Instruction 25.55 and the conflicting evidence presented at trial, the district court exceeded its authority by improperly changing the answer to Question 3 on the Special Verdict Form and concluding that ECI was negligent.

The negligence trial only decided Bolduc's tort liability and damages. The district court committed reversible error by substituting its judgment for that of the jury's when the conflicting evidence and witness testimony at trial supported a potential finding that neither Bolduc nor ECI was negligent for damaging the Pipe.

### **II. Bolduc Breached Its Contractual Obligations to ECI.**

The Stipulation preserved "in full" ECI's breach of contract claims (and the declaratory judgment action) including the issue of damages flowing from these preserved claims. The district court committed reversible error by disregarding the breach of contract claim as a separate and distinct cause of action and by incorrectly using the Special Verdict to exonerate Bolduc's (and Travelers') contractual obligations.

Bolduc breached the Subcontract by failing to properly perform its work and damaging the Pipe. Bolduc further breached the Subcontract by failing to indemnify ECI for "all" claims, obligations, demands, costs, and expenses arising out of the damage to the Pipe as the damage was caused by an "act" of Bolduc in building the cofferdam. The

word “negligence” or “negligent” is not in the four corners of the IIA. Bolduc must reimburse ECI’s repair costs totaling \$233,365.65.

**III. Travelers Must Honor Its Policy Coverage Obligations to ECI.**

Travelers must indemnify ECI. The Policy covers ECI as an additional insured for “any act” of Bolduc that causes damage. There is no dispute that Bolduc’s act of driving sheetpiling struck the Pipe and damaged the Pipe. The jury’s findings of fact regarding Bolduc’s negligence do not re-write the AIE to impose new exclusionary language that is not contained in the four-corners of the AIE itself and do not have any bearing on Travelers’ ultimate contractual obligation to indemnify ECI for the damage to the Pipe as a result of Bolduc’s “acts” for which Bolduc remains contractually liable.

**IV. If the Policy Does Not Provide Coverage, Then Bolduc Breached Its Contractual Agreement to Insure ECI.**

Bolduc agreed to procure and carry insurance to cover its obligations under the IIA of the Subcontract. If the Travelers Policy does not provide coverage to ECI for the repair costs, then Bolduc has breached the Subcontract and is personally liable under Minn. Stat. §337.05 to indemnify ECI.

**ARGUMENT AND AUTHORITIES**

**Standards of Review**

**A. Standard of Review for Summary Judgment**

On appeal from a grant of summary judgment, this Court must determine “whether any genuine issues of material fact exist and whether the district court erred in its application of the law.” Minn. R. Civ. P. 56.03 *at Add.20*; *Van Vickle v. C. W. Scheurer*

*and Sons, Inc.*, 556 N.W.2d 238, 241 (Minn. App. 1996)(*citation omitted*). On appeal this Court views “the evidence in the light most favorable to the party against whom the motion was granted, but need not defer to the district court’s application of the law.” *Id.* (*citation omitted*).

### **B. Standard of Review for Jury Findings of Fact**

Under very limited circumstances, the trial court has the same authority to change an answer to a question in a special verdict form as it has to grant Judgment Notwithstanding the Verdict (JNOV), “that is, where the evidence requires the change as a matter of law.” *Orwick v. Belsham*, 231 N.W.2d 90, 94 (Minn. 1975); *Hill v. Wilmington Chemical Corp.*, 156 N.W.2d 898, 902 (Minn. 1968).

On appeal, the Court reviews *de novo* a trial court's JNOV decision as it involves “a pure question of law.” *McKay's Family Dodge v. Hardrives, Inc.*, 480 N.W.2d 141, 144 (Minn. App. 1992), *pet. for rev. denied* (Minn. Mar. 26, 1992) (*citations omitted*); This *de novo* standard of review is equally applicable to a review of a trial court’s decision to change a jury’s answers in a special verdict form as it “considers the legal question of whether the evidence is ‘practically conclusive against the verdict.’” *Plate v. St. Mary Help of Christian Church*, 520 N.W.2d 17, 21 (Minn. App. 1994); *see McKay's Family Dodge*, 480 N.W.2d at 144; *Orwick*, 231 N.W.2d at 94; *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 275 (Minn. 1984); *Raleigh v. Ind. School Dist. No. 625*, 275 N.W.2d 572, 576 (Minn. 1978).

### **C. Standard of Review for Contract Interpretation.**

The construction and effect of a contract present questions of law, which the appellate court reviews *de novo*. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979). The rules governing the validity, requirements and construction of contracts apply to indemnity agreements. *Am. Druggists' Ins. Co. v. Shoppe*, 448 N.W.2d 103, 104 (Minn. App. 1989).

### **D. Standard of Review for Insurance Policy Coverage.**

Under Minnesota law, insurance policies are interpreted according to general contract principles. *Lobeck v. State Farm Mut. Auto Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998); *Secura Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 323 (Minn. App. 2008). Accordingly, a district court's interpretation of an insurance policy and its application to the facts of a particular loss are reviewed *de novo* on appeal. *Lobeck*, 582 N.W.2d at 249; *M.S.M.*, 755 N.W.2d at 323.

### **I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY CONCLUDING THAT ECI WAS NEGLIGENT UNDER THE FACTUAL FINDINGS OF THE JURY SPECIAL VERDICT WHEN THE JURY FAILED TO MAKE ANY SUCH FINDING.**

The district court erroneously granted summary judgment based upon its improper extrapolation that ECI was negligent. The Jury never found that ECI was negligent at Question 3 of the Special Verdict Form. The district court specifically acknowledged this at the Motion hearing (*MT.10, ll 23-4*) and adopted "those facts found by the jury in the Special Verdict." *Add. 3*. Then, without elaboration, the Court made a *sua sponte* change to Question 3 by effectively checking "yes" where the jury had not. In doing so, the

district court committed reversible error by altering the factual findings of the Special Verdict and concluding that ECI was negligent, warranting reversal of the summary judgment decision and final order for judgment.

**A. The District Court Erred by Changing the Jury's Findings of Fact.**

Generally, in Minnesota, “findings of a jury under a special verdict are binding on the court.” *Orwick*, 231 N.W.2d at 94; *Whelan v. Gould*, 106 N.W.2d 893, 895 (Minn. 1960) citing *Wormsbecker v. Donovan Const. Co.*, 76 N.W.2d 643, 651 (Minn. 1956); *Sorlie v. Thomas*, 51 N.W.2d 592, 594 (Minn. 1952). “A court may not disregard a jury verdict on specially submitted issues and make findings contrary to or inconsistent with the verdict.” *Employers Mut. Cas. Co. v. Chicago, St. P., M. & O. Ry. Co.*, 50 N.W.2d 689, 692 (Minn. 1951) (*citations omitted*).

Similarly, “appellate courts do not ‘sit as factfinders,’ (*Raleigh*, 275 N.W.2d at 576 ), and are generally ‘not empowered to make or modify findings of fact.’” *Lumpkin v. N. Cent. Airlines, Inc.*, 209 N.W.2d 397, 401 (Minn. 1973).

In exceptional circumstances, “the trial court has the same authority to set aside and change an answer to a question in a special verdict as it has to grant judgment notwithstanding the verdict, that is where the evidence requires the change as a matter of law.” *Orwick*, 231 N.W.2d at 94 (emphasis added); *Hill*, 156 N.W.2d at 902.

This Court, on appeal, reviews *de novo* the district court’s decision to change and disregard the answer to Question 3 of the Special Verdict. See *Orwick*, 231 N.W.2d at 94; *Hill*, 156 N.W.2d at 902; *McKay’s Family Dodge*, 480 N.W.2d at 144; *Hauenstein*, 347 N.W.2d at 275; *Raleigh*, 275 N.W.2d at 576. The appellate court’s “limited role is to

determine whether the record contains any competent evidence reasonably tending to sustain the verdict.” *Orwick*, 231 N.W.2d at 94. The appellate court considers the evidence in the light most favorable to the verdict and will affirm the jury’s verdict unless the evidence is “practically conclusive against the verdict.” *Id.* (*quotation omitted*); *Plate*, 520 N.W.2d at 21; *Hauenstein*, 347 N.W.2d 272, 275 (Minn. 1984) (special verdict).

The appellate court's responsibility upon review is to harmonize all the findings of the jury “if at all possible.” *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 662 (Minn. 1999) *citing Reese v. Henke*, 152 N.W.2d 63, 66 (Minn. 1967). To that end, the Court liberally construes a jury special verdict form to effectuate the intention of the jury. *Id.*

“The test applied, be it on the trial or appellate level, is whether or not the evidence in the case establishes as a matter of law that a jury’s answer to a question must be changed.” *Orwick*, 231 N.W.2d at 94. Put another way, the test is whether the special verdict answers “can be reconciled in any reasonable manner consistent with the evidence and its fair inferences.” *Sorlie v. Thomas*, 51 N.W.2d at 594. “If the answers to special verdict questions can be reconciled on *any* theory, the verdict will not be disturbed.” *Hauenstein*, 347 N.W.2d at 275 (emphasis original).

Accordingly, after conflicting evidence has been presented at trial, answers on a jury special verdict form are generally beyond reproach and may only be disturbed when they are “manifestly and palpably contrary to the evidence as a whole.” *Smith v. Hencir-Nichols, Inc.*, 150 N.W.2d 556, 561 (Minn. 1967) (*citation omitted*); *Sorlie*, 51 N.W.2d at 592 (verdict upheld where the record contained conflicting testimony); *Kelly*, 598 N.W.2d 657 (same). This rule acknowledges that the weighing of conflicting evidence

and the question of credibility of witnesses are for the jury to decide. *Sorlie*, 51 N.W.2d at 596; *See also* Civil Jury Instruction 12.15 -Evaluation of Testimony- Credibility of Witnesses at *A.167* (given at the Negligence Trial *T.401-2*).

With respect to the evidence, “(1) all the evidence, including that favoring the verdict, must be taken into account, (2) the evidence is to be viewed in the light most favorable to the verdict, and (3) the court may not weigh the evidence or judge the credibility of the witnesses.” *Krutsch v. Walter H. Collin, GmbH Verfahrenstechnik Und Maschinenfabric*, 495 N.W.2d at 211-12 (applying JNOV standard) (*citation omitted*).

Proper application of this law to the case at hand requires reversal of the district court’s determination that ECI was negligent. The district court’s Order and Memorandum granting summary judgment to Bolduc and Travelers Court fails to provide any explanation or support for the substitution of its judgment for the jury’s in changing the answer to Question 3 of the Special Verdict and directly conflicts with the district court’s comments at the Motion hearing that the jury did not determine this issue. The district court failed to make any indication that the jury’s verdict was inconsistent or irreconcilable and further failed to state that ECI was negligent as a matter of law. Instead, the Court simply misapplied the law and disregarded the jury’s failure to find ECI negligent.

**B. Negligence Was a Fact Question for The Jury.**

The district court exceeded its authority and invaded the purview of the jury by answering Question 3 of the Verdict Form. Negligence is a question of fact for the jury

to determine, and is generally "not susceptible to summary adjudication." *Canada, by and through Landy v. McCarthy*, 567 N.W. 2d. 496, 505 (Minn. 1997) (*citation omitted*).

In the case at hand, the jury at the Negligence Trial was properly asked to determine who, if anyone, was negligent in causing the damage to the Pipe. In crafting and submitting their proposed Special Verdict Forms, the parties each agreed that ECI's negligence was a question of fact. At the close of evidence at the Trial, the district court did not grant a directed verdict on ECI's negligence. Instead, the issue of ECI's negligence was submitted to the jury as a fact question and the jury did not find ECI negligent. Accordingly, the district court overreached its judicial authority by deciding ECI's negligence, as it was clearly a fact question ripe for the jury that the jury was simply not directed to decide.

### **C. Minnesota Law Supports the Jury's Findings.**

The jury's failure to decide that ECI was negligent is wholly reconcilable with the conflicting evidence presented at the Negligence Trial and Minnesota law.

At the Negligence Trial, each party presented conflicting evidence of who, if anyone, was at fault for the damage to the Pipe. The evidence, including witness testimony, showed a number of entities were involved with installing the Pipe, marking its location, and construction of the cofferdams by Bolduc that damaged the Pipe. These entities included Frontier, Frontier's surveyor, ECI, and Bolduc.

It was within the power of the jury to weigh this evidence and the credibility of the witness. *Sorlie*, 51 N.W.2d at 596. The court may not engage in this endeavor. *Id.* In weighing the evidence, the jury could have potentially determined that Frontier or

Frontier's surveyor was negligent, or that ECI was not negligent. Any of these determinations would have been wholly reconcilable with the conflicting evidence at Trial and Minnesota law.

Alternately, the jury could have weighed the evidence to find that no one was negligent. Simply because an accident happens, does not mean anyone is negligent. *Civil Jury Instruction Guide 25.55 ("CIVJIG 25.55")* at A.169. CIVJIG 25.55 sets forth a deep-rooted principle of Minnesota law, "The fact that an accident [or] event has happened does not by itself mean that someone was negligent [or] at fault." See Use Notes and Authorities citing *State v. Paskewitz*, 47 N.W.2d 199 (Minn. 1951) and *Lestico v. Kuehner*, 283 N.W. 122 (Minn. 1938). This instruction reflects that, there is no liability for situations involving a "pure accident"...that is, one occurring without negligence of anyone." *Lestico*, 283 N.W. at 127 (emphasis added).

At the Negligence Trial, both ECI and Bolduc proposed that JIG 25.55 be given to the jury and, in doing so, acknowledged that the damage to the Pipe was potentially caused by "pure accident" and occurred absent anyone's negligence. A.172; A.174. The district court agreed and instructed the jury prior to deliberations as follows: "The fact that an accident has happened does not by itself mean that someone was negligent." T. 403, ll. 22-24. As such, the district court erred in extrapolating that ECI was negligent simply because the jury found that Bolduc was not.

**D. The District Court Could Have Requested, But Did Not, That the Jury Answer the Question Regarding ECI's Negligence Prior to Discharging the Jury.**

Prior to the Negligence Trial, all of the Parties agreed to the Stipulation bifurcating and "preserving in full" the separate and distinct breach of contract and the declaratory judgment claims against Bolduc and Travelers. *A.25.*

All parties and the district court knew the scope of issues that would need to be addressed and determined post-trial. Had the negligence of ECI been truly pivotal to those post-trial issues, Bolduc, Travelers and the district court should have required the jury to decide ECI's negligence, independent of Bolduc's negligence, and crafted the Special Verdict Form in such a manner.

The structure of the Special Verdict Form the district court provided to the jury advised the jurors to "skip" Question 3 regarding ECI's negligence if the jury failed to find that Bolduc was negligent (Question 1). *A.35.* The district court could have submitted the issue of ECI's negligence as an unequivocal, independent question for the jury to answer; yet it did not do so, and Bolduc never requested it. Bolduc cannot be heard now to complain that ECI's negligence was not independently determined. *See e.g., Wormsbecker, 76 N.W.2d at 651.*<sup>2</sup>

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<sup>2</sup> "The parties may waive a jury trial in whole, or where a special verdict is used, they may waive submission of part of the issues to the jury. Under Rule 49.01 the parties waive their right to a jury trial as to any issue raised by the pleadings or the evidence which the court omits to submit to the jury unless, before the jury retires, either party demands its submission to the jury." *Wormsbecker, 76 N.W.2d at 651.*

Alternately, the district court could have sent the jury back for further deliberations. *See e.g., Meinke v. Lewandowski*, 237 N.W.2d 387, 411-2 (Minn. 1975). More radically, the district court could have ordered a new trial had a determination of ECI's negligence truly been a pivotal issue to the remaining breach of contract and declaratory judgment claims (which ECI contests). *Id.* Yet, the district court did none of these things.

Instead, the district court incorrectly substituted its judgment for the jury's in finding ECI negligent and used this erroneous factual finding as the lynchpin for wrongfully granting summary judgment to Bolduc and Travelers. In as much, the district court's grant of summary judgment is fatally flawed. Reversal is warranted.

## **II. THE PLAIN LANGUAGE OF THE SUBCONTRACT REQUIRES BOLDUC TO INDEMNIFY ECI FOR THE COSTS ECI EXPENDED IN REPAIRING THE PIPE THAT BOLDUC DAMAGED.**

### **A. The District Court Incorrectly Comingled Negligence and Breach of Contract.**

The jury decided the limited issue of negligence—Bolduc's negligence and any damages resulting from Bolduc's negligence. *A.34*. Contrary to the district court's flawed analysis, Bolduc's contractual obligations to properly perform its work, to indemnify ECI, and to insure ECI are independent and distinct from any tort liability. The jury's determination on Bolduc's negligence fails to extinguish Bolduc's contractual promises made to ECI.

In Minnesota, negligence and breach of contract are separate and distinct causes of action. *Lesmeister v. Dilly*, 330 N.W.2d 95 (Minn. 1983). The jury's finding that Bolduc

was not negligent **does not** preclude a breach of contract claim. In *Lesmeister v. Dilly*, the case went to the jury on contract and negligence theories. *Id.* The negligence action was based upon the theory that the contract created certain duties and that the breach of those duties was negligence. *Id.* at 102. The verdict form permitted the jury to apportion fault if it found that two or more parties breached the contract or were negligent. *Id.* The Minnesota Supreme Court rejected the idea of negligent breach of contract, explaining that the comparative fault statute was never intended to apply generally to contract cases and that contract law has never spoken in terms of fault. *Id.* at 101-2.

The *Lesmeister* Court further explained:

The gravamen of this case in our view is contractual. Any duties between the parties arose out of contracts, about which there was opportunity to bargain and allocate risks and duties. This was not a situation in which parties were fortuitously brought together, as in an automobile accident. We conclude, therefore, that it was error to submit the theory of “negligent breach” of contract to the jury, or to allow apportionment of fault either based on the pure contract or the “negligent breach” cause of action.

*Id.* at 102. The *Lesmeister* Court further explained that the measure of damages for breach of contract is those damages “which arose naturally from the breach, or could reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of the breach.” *Id.* at 103, citing *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

In another case, *Rediske v. Minnesota Valley Breeder's Ass'n.*, the issue was whether the trial court erred when it instructed the jury on both negligence and breach of contract arising from the same conduct. 374 N.W.2d 745 (Minn. App. 1985). The Court

**rejected the argument that the claimant was entitled to only one theory** and not both.

*Id.* The *Rediske* Court noted that “fault” is not applicable to breach of contract cases. *Id.* at 749-50. The Court then remanded the case and directed the district court to separate those damages attributable to breach of contract from those damages attributable to negligence and to not compare them. *Id.*

Here, the district court failed to properly apply Minnesota law by mistakenly comingling ECI’s negligence claim against Bolduc and the breach of contract claims. The jury’s findings that Bolduc was not negligent does not exonerate Bolduc (or Travelers as discussed *infra*) from all of their respective contractual obligations owed to ECI. Similarly, the jury’s failure to award ECI monetary damages on the Special Verdict for Bolduc’s negligence has no bearing on any damages potentially owed for breach of contract.

The district court’s decision must be reversed as a matter of law, or, at a minimum, should this Court find that further facts are needed to determine the breach of contract (or declaratory judgment) claims, this matter must be remanded for such findings in accordance with the Stipulation, as recommended by ECI at the Motion hearing. *MT.27.*

**B. By Hitting and Damaging the Pipe, Bolduc Breached the Contract and Is Liable to ECI, Irrespective of Its Lack of Negligence.**

The Subcontract language speaks for itself and imposes independent contractual duties upon Bolduc aside from those arising in tort. Bolduc agreed and was contractually bound to: 1) Properly perform its work in compliance with the Performance of Work Agreement and not damage other Property on the Project, which it failed to do when it

damaged the Pipe; 2) Indemnify ECI for the repairs costs caused by Bolduc's "act" of driving the sheeting into the Pipe, which Bolduc has refused to do; and 3) Procure and carry insurance coverage for all of Bolduc's indemnity obligations under the IIA, which ECI affirmatively believes Bolduc did; however, should this court disagree as a matter of law then (as discussed in Section IV, *infra*) Bolduc breached this contractual obligation as well.

1. The Rules of Contract Construction Apply and Show Bolduc's Breach.

In conducting a contract analysis, the Court first looks to the plain language of the written contract in order to determine the legal rights and obligations thereunder. *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 784 (*citations omitted*). Words in a contract are given their plain and ordinary meaning. *Turner*, 276 N.W.2d at 67 (*citation omitted*). Breach occurs where a party fails to perform an obligation set forth in the contract. *See Telex Corp. v. Data Prods. Corp.*, 135 N.W.2d 681, 686-7 (Minn. 1965); *Assoc. Cinemas of America, Inc. v. World Amusement Co.*, 276 N.W. 7, 10 (Minn. 1937).

The primary goal in contract interpretation is to ascertain and enforce the parties' intent as manifested within the contract. *Valspar Refinishing, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009) (*emphasis added*) (*citations omitted*). "Minnesota follows the objective theory of contract formation, under which the parties' outward manifestations are determinative, rather than either party's subjective intent." *Riley Bros. Constr., Inc. v. Shuck*, 704 N.W.2d 197, 202 (Minn. App. 2005) (*citation omitted*). The subjective intent of the parties fails to constitute the contractually binding terms. *See Id.* at 202; *Telex Corp.*, 135 N.W.2d, at 687-8. Instead, the Court enforces the "outward

manifestations” objectively memorialized within the four-corners of the contract and does not rewrite or otherwise modify unambiguous contract terms. *Riley Bros. Const., Inc.*, 704 N.W.2d at 202; *Valspar Refinishing, Inc.*, 764 N.W.2d at 364 (citations omitted).

Whether a contract term is ambiguous is a legal question for the court. *Blattner v. Forster*, 322 N.W.2d 319, 321 (Minn. 1982); *Williams v. Harris*, 518 N.W.2d 864, 867 (Minn. App. 1994). In determining whether a contract is ambiguous, the court must give the contract language its “plain and ordinary meaning.” *Current Tech. Concepts v. Irie Enters. Inc.*, 530 N.W.2d 539, 543 (Minn. 1995) (citation omitted). The Court cannot construe an unambiguous contract beyond its language and cannot speculate about the parties’ hidden or unexpressed intent. *Telex Corp.*, 135 N.W.2d at 686-7 (Minn. 1965); *Polk v. Mut. Life. Ins. Co.*, 344 N.W.2d 427, 430 (Minn. App. 1984).

The rules governing the requisites, validity, and construction of contracts apply to indemnity agreements. *Shoppe*, 448 N.W.2d at 104.

Applying these legal principals, Bolduc breached its contractual obligations under the Subcontract, including the Performance of Work Agreement and the IIA.

2. Bolduc Breached the Subcontract by Failing to Properly Perform Its Work and Damaging the Pipe.

As a preliminary point, the district court did not even address Bolduc’s breach of contract for failing to properly perform its work in compliance with the Performance of Work Agreement and not damage other property on the Project such as the Pipe regardless of any assistance ECI provided on the Project with respect to the Pipe locates. As such, summary judgment was wrongfully granted.

The Performance of Work Agreement, Paragraph 4 of the Subcontract, required Bolduc to “execute [its] work properly” and that “[n]o advice, recommendations or assistance” that ECI (or Frontier) was to have given to Bolduc, such as the markings of the Pipe locations, relieved Bolduc from “complete responsibility” for its work. *Add.9.* There is no dispute that Bolduc agreed to these terms, or that Bolduc drove the sheetpiling that hit and damaged the Pipe. Accordingly, Bolduc is in breach of the Subcontract and owes ECI’s repair costs at issue, \$233,365.65, as these are the damages that arose “naturally from the breach.” *See Rediske*, 374 N.W.2d at 749-50. This Court must reverse the district court’s grant of summary judgment for this component of ECI’s claim, and order judgment in ECI’s favor, or, alternatively, remand this case for further factual findings should this Court find that a material fact question exists.

3. The Plain Language of the Indemnity and Insurance Agreement Requires Bolduc to Indemnify ECI.

Bolduc agreed to indemnify and insure ECI for more than just Bolduc’s “negligent acts”. To the contrary, Bolduc agreed to “protect, indemnify,... and hold harmless” ECI from: “(a) all claims, causes of action, liabilities, obligations, demands, costs, and expenses arising out of... damages to property caused or alleged to have been caused by any act ... of [Bolduc], and (b) all damages, judgments, expenses, and attorney’s fees caused by any act.. of [Bolduc].” *Add.10.*

The ordinary meaning of the word “act” applies. *Turner*, 276 N.W.2d at 67. Per *Webster’s 9<sup>th</sup> New Collegiate Dictionary*, “act” is “the doing of a thing.” (1991) at p. 53 at A.154. Per *The American Heritage Dictionary* “act” is “the process of doing or

performing something; action”. 2d College Edition (1985) at p. 76 at *A.160*. Similarly, *Black’s Law Dictionary* defines “act” as: “carries idea of performance; ...a deed”. Revised 4<sup>th</sup> Ed. (1968) at p. 42 at *A.148*.

None of these plain English definitions are limited to negligence. Bolduc drove sheetpiling while in the process of building the cofferdam, which is an “act”, that hit and damaged the Pipe. In fact, the IIA does not simply state “act”, it states “any act” (*Add.10*) which objectively includes *more than* just a negligent act or an accidental act or a mistaken act, expanding the scope of Bolduc’s contractual indemnity obligations that may have otherwise been limited if the parties had agreed to different language – which they did not.

*Webster’s Ninth New Collegiate Dictionary* defines “any” as “...selected without restriction...ALL...unlimited in amount, number or extent.” p. 93 (1991) at *A.157*. *The American Heritage Dictionary* says that “any” means “one or another without restriction or exception.” 2d Coll. Ed., p. 117 (1985)(emphasis added) at *A.166*.

Using these plain English definitions of “any” and “act”, this Court must glean the objective intent of the parties. *Valspar Refinishing, Inc.*, 764 N.W.2d at 364. Without restriction or exception, Bolduc agreed to indemnify ECI from all liabilities, all obligations, all demands, all costs, and all expenses arising out of the damage to the Pipe by any act of Bolduc, including its act in driving the sheetpiling that struck the Pipe. *Add. 10*. Bolduc further agreed to indemnify ECI from all damages, all expenses, and all attorney’s fees caused by any act of Bolduc. *Id.* Yet Bolduc has refused to honor its contractual duty to indemnify ECI for all of its costs incurred to repair the Pipe.

“All” is also among the broadest of terms. The American Heritage Dictionary definition of “all” includes: “...4. Every: *all manner; all kinds.*” at p. 94, *A.163* (emphasis original). As such, Bolduc is contractually liable to indemnify ECI for *every* liability or obligation (including ECI’s contractual liability and obligation to MCES and Frontier to fix the Pipe that Bolduc damaged), as well as *every* cost or expense incurred by ECI to repair the damage to the Pipe. ECI requested nothing more from Bolduc, and the district court erred in denying that request.

Rather than applying the actual language in the IIA, the district court effectually re-wrote the plain, unambiguous language of the IIA to insert the word “negligent” before “acts” and speculated about the parties’ unexpressed intent, which Minnesota law forbids. *See Telex Corp.*, 135 N.W.2d at 686-7; *Valspar Refinishing, Inc.*, 764 N.W.2d at 364. This Court must not allow Bolduc to hide behind the jury’s findings that solely decided the issue of negligence, which has no bearing on Bolduc’s contractual duties owed to ECI. This Court must enforce the “outward manifestations” objectively memorialized within the four-corners of the IIA to find *de novo* that Bolduc must fully indemnify ECI.

**C. Bolduc’s Indemnity and Insurance Obligations Are Valid and Enforceable.**

1. The Indemnity Obligations Comport with Minn. Stat. § 337.02.

The district court misapplied the law regarding indemnity contracts as part of its erroneous summary judgment decision. The IIA is valid and enforceable under Minnesota law. Minn. Stat. §337.02 prohibits agreements in construction contracts that require indemnification for a party’s own negligence. *Add.17; Katzner v. Kelleher*

*Constr.*, 545 N.W.2d 378, 381 (Minn. 1996); *Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473, 475 (Minn. 1992); *Van Vickle*, 556 N.W.2d at 241. This “ensures that each party will remain responsible for its own negligent acts or omissions.” *Katzner*, 545 N.W.2d at 381 *citing Holmes*, 488 N.W.2d at 475. However, the IIA does not require Bolduc to indemnify ECI for its own negligent acts. Instead, the IIA requires Bolduc to indemnify ECI for “any act” of Bolduc that damaged the Pipe. *Add.10.*

Yet, the district court misapplied § 337.02 in erroneously granting summary judgment to Bolduc by reasoning that “to read [the IIA] as requiring Bolduc to indemnify and insure ECI with respect to Bolduc’s ‘non-negligent’ acts would ask Bolduc to indemnify and insure ECI for its own negligence,” and “...there is no breach of contract by Bolduc and no right to indemnification for ECI’s own negligent acts that were not expressly covered by the contract.” *Add.8.*

As discussed above in Section I, the jury never found that ECI was negligent, and the district court committed reversible error by changing Question 3 of the Special Verdict. Moreover, by seeking indemnity from Bolduc, ECI was not asking to be indemnified for its own negligence. ECI was merely asking Bolduc to honor its contractual indemnity obligations to reimburse ECI for the \$233,365.65 expended to repair the Pipe that Bolduc damaged.

## 2. The Insurance Obligations Comport with Minn. Stat. §337.05.

The district court further erred by failing to properly acknowledge that the IIA was valid in that Bolduc could have, theoretically, agreed to insure ECI for ECI’s own negligence.

Minn. Stat. §337.05, Subd. 1 carves out a notable exception to the general prohibitions contained in Minn. Stat. §337.02 regarding indemnification for an indemnitee's own negligence which the district court failed to properly apply. §337.05, Subd. 1 provides: "Agreements valid. Sections 337.01 to 337.05 do not affect the validity of agreements whereby a promisor agrees to provide specific insurance coverage for the benefit of others." *Add. 18.*

§337.05 allows parties to contractually agree to provide insurance coverage for another—even for the indemnitee's own negligence-- in order to cover the obligations of the construction contract. *Van Vickle*, 556 N.W.2d at 241. "Section 337.01 'do[es] not affect the validity of agreements whereby a promisor agrees to provide specific insurance coverage for the benefit of others.'" *Katzner*, 545 N.W.2d at 381.

In *Katzner v. Kelleher Construction*, the Minnesota Supreme Court discussed the application and effect of Minn. Stat. § 337.05 as applied in *Holmes v. Watson-Forsberg Co.*, a case the Court had decided 4 years earlier:

[I]n *Holmes*, the court upheld a construction contract which required the subcontractor to provide insurance coverage for all damages and injuries, including 'claims for which the Contractor may be or may be claimed to be, liable.' (*citation omitted*) In that case we considered the combined effect of sections 337.02 and 337.05 and determined that even though an indemnification provision may be unenforceable under section 337.02, a promise to purchase insurance to cover any negligent acts by the promisee is valid and enforceable.

*Id. citing Holmes*, 488 N.W.2d at 474.

In *Van Vickle v. C. W. Scheuer and Sons, Inc.* this Court confirmed that an agreement to provide insurance converts an unenforceable indemnification agreement by

Bolduc (per §337.02) “to an enforceable insurance agreement allowed under section 337.05.” 556 N.W.2d at 241 (*citation omitted*).

In light of § 337.05, *Holmes*, *Katzner*, and *Van Vickle*, any theoretical agreement to insure ECI for its negligent acts under the IIA was valid and enforceable. Minn. Stat. § 337.05 specifically authorized Bolduc to insure, and thereby indemnify ECI, for Bolduc’s acts and for any of ECI’s theoretical acts that caused damage to the Pipe (which ECI contests and no determination has ever been made that any act of ECI damaged the Pipe). As such, the district court’s reasoning in granting summary judgment to Bolduc, as well as Travelers, is fatally flawed because the district court failed to acknowledge §337.05 provides a notable exception to the anti-indemnity statute §337.02.

### **III. THE POLICY REQUIRES TRAVELERS TO INDEMNIFY ECI FOR THE COSTS ECI EXPENDED IN REPAIRING THE PIPE THAT BOLDUC DAMAGED.**

In reviewing the AIE of the Policies *de novo*, this Court must require Travelers to honor its coverage obligations to ECI. *See Wanzek Constr., Inc.*, 679 N.W.2d at 324.

#### **A. Rules of Construction for Insurance Policy Coverage.**

General principles of contract law apply to interpretation of insurance policies. *Lobeck*, 582 N.W.2d at 249; *M.S.M.*, 755 N.W.2d at 323. “An insurance policy is a contract, the terms of which determine the rights and obligations of the contracting parties...The insurer is obligated to pay when the insured suffers a loss covered by the policy.” *Pillsbury Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh, P.A.*, 425 N.W.2d 244, 248 (Minn. App. 1988) (*citations omitted*).

Unambiguous policy language must be given its plain, ordinary, and popular

meaning. *Id.*; *Wanzek Constr., Inc.*, 679 N.W.2d at 324 (policy language given “usual and accepted meaning.”); *Ostendorf v. Arrow Ins. Co.*, 182 N.W.2d 190, 192 (Minn. 1970).

The insurer is obligated to pay when the insured demonstrates coverage under an insurance policy.” *M.S.M.*, 755 N.W.2d at 323. Once a *prima facie* case of coverage is established under the policy, the burden shifts to the insurer to prove the applicability of an exclusion. *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 313-4 (Minn. 1995).<sup>3</sup>

**Insurance policy exclusions are to be construed strictly against the insurer.** *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002).

The Court interprets coverage clauses broadly to provide the greatest possible protection to the insured. *West Bend Mut. Ins. Co. v. Milwaukee Mut. Ins. Co.*, 372 N.W.2d 438, 441 (Minn. App. 1985); *See also Gen. Cas. Co. of Wisconsin v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 575 (Minn. 2009). If an insurer intends a policy term to have a narrow meaning, it is incumbent upon the insurer to make that intention clear and write the policy that way. *Minn. Min. & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 181 (Minn. 1990).

If the policy language is subject to more than one reasonable interpretation it is ambiguous. *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32, 34 (Minn. 1979). “Whether the language of an insurance policy is ambiguous is a question of law,” and thus reviewed *de novo* on appeal. *Id.* Ambiguous policy language must be

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<sup>3</sup> *Overruled on other grounds by SCSC Corp. v. Allied Mut. Ins. Co.*, 533 N.W.2d 603 (Minn. June 16, 1995) *opinion amended and superseded on denial of rehearing.*

interpreted in favor of coverage. *Id.* at 36; *Nordby v. Atlantic Mut. Ins. Co.*, 329 N.W.2d 820, 822 (Minn. 1983)<sup>4</sup>.

This rule comports with the *Doctrine of Contra Preferentum* that instructs the courts to construe an ambiguous contract against the drafter if the non-drafting party's interpretation is reasonable. *See Id.*; *Nathe Bros. Inc. v. Am. Nat'l Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000); *Warrick v. Graffiti Inc.*, 550 N.W.2d 303, 309 (Minn. App. 1996); *Canadian Univ. Ins. Co., Ltd. v. Fire Watch, Inc.* 258 N.W.2d 570, 572 (Minn. 1977) *citing* *Bobich v. Oja*, 104 N.W.2d 19 (Minn. 1960) (policy construed according to what reasonable person would have understood the words to mean rather than what the insurer intended the language to mean); *Wessman v. Mass. Mut. Life Ins. Co.*, 929 F.2d 402, 404-5 (C.A.8 (Minn.) 1991)(coverage read in insured's favor to satisfy the reasonable expectations of coverage).

With respect to Declaratory Judgment actions, Minn. Stat. §555.01 provides, in part, as follows:

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and...shall have the force and effect of a final judgment or decree.

*Add.21.*

Finally, one of the functions of an additional insured endorsement is to protect the

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<sup>4</sup> *Overruled on other grounds by Cargill, Inc. v. Ace Am. Ins.*, 784 N.W.2d 341 (Minn. June 30, 2010).

additional insured from liability due to the actions of the named insured. *Northbrook Ins. Co. v. American States Ins. Co.*, 495 N.W.2d 450, 453 (Minn. App. 1993).

Applying this law, the AIE of the Policies provides coverage to ECI for the costs it expended to repair the Pipe that Bolduc damaged, and the district court erred in finding to the contrary and disregarding ECI's reasonable expectations of coverage.

**B. The Coverage Analysis Begins and Ends with the Plain Policy Language.**

Travelers must honor its coverage obligations and indemnify ECI "with respect to liability for...property damage...caused by acts or omissions of [Bolduc]." *Add.11*.

The district court erred by unduly limiting this broad coverage provision to only include coverage for Bolduc's negligence. *Add.7*. As fully argued in Section II *supra*, "acts" includes a far broader scope of Bolduc's actions than *negligent* acts. Travelers' subjective intent of the meaning of "acts" holds **no relevance**. See *Riley Bros. Constr., Inc.*, N.W.2d at 202 (general contract principal). Had Travelers wanted to limit coverage to only negligent acts, Travelers bore the duty of drafting clearer policy language, just as other insurers have done for decades. See *Minn. Min. & Mfg. Co.*, 457 N.W.2d at 181; *Cont. Cas. Co. v. Reed*, 306 F.Supp. 1072, 1073 (D. Minn.1969)(policy language limited to "negligent" act); *Richards v. Fireman's Fund Ins. Co.*, 417 N.W.2d 663, 665 (Minn. App. 1988)(same).

The jury's determination that Bolduc was not negligent for the damage to the Pipe has no impact on ECI's contract claims against Bolduc or Travelers and in no way changes the plain language of the Additional Insured Endorsement providing coverage for those "acts" of Bolduc that caused damage to the Pipe.

Furthermore, the AIE provides broad coverage for Bolduc's "liability" for damage to the Pipe. "Liability" is far broader than mere tort liability for Bolduc's negligent acts. Per Black's Law Dictionary's definition of "liability":

The word is a broad legal term ... It has been referred to as of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely. It has been defined to mean: all character of...obligations,...; condition of being responsible for a possible or actual loss,...; every kind of legal obligation, responsibility, or duty,...

5<sup>th</sup> Ed. (1979) at p. 823, *A.150 (citations omitted)*. "Liability" encompasses legal obligations far broader than tort liability or negligence and cannot now be retroactively re-written to include the words "negligent". See *Minn. Min. & Mfg. Co.*, 457 N.W.2d at 181; *Riley Bros. Constr., Inc.*, 704 N.W.2d at 202 (contract interpretation). Instead, "liability" in terms of the AIE includes contractual obligations of the very kind to which Bolduc agreed in the Subcontract and for which Travelers promised to indemnify ECI as an additional insured.

To that point, aside from any tort liability, Bolduc was also *contractually obligated* to ECI under the IIA to indemnify and insure ECI for the repair costs flowing from Bolduc's damage to the Pipe which, in turn, ECI was contractually obligated to repair in accordance with its contract with Frontier. By honoring its contractual obligations, ECI avoided the imposition of liquidated damages by Frontier or MCES for delay of the Project, thereby mitigating the monetary amount for which Travelers (and Bolduc) are contractually obligated to pay ECI. Simply put, ECI was confronted by "liability" "caused by" an "act" of Bolduc that triggered coverage under the AIE.

Travelers must now honor its contractual coverage obligations under the AIE.

Caselaw supports this interpretation of coverage. *Maryland Casualty Company v. Regis Insurance Company* concerned similar “act or omission” policy language. 1997 WL 164268 (E.D. Pa. 1997) *A.140*. The additional insured endorsement in *Maryland Casualty* stated that the additional insured lessor of fairgrounds 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.” *Id. at \*1*. When a fairgrounds patron stepped into a pothole, sustained injuries and commenced suit against both the lessor and 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 of 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*.

In *Maryland Casualty*, the federal district court for the Eastern District of Pennsylvania rejected the decision by its sister court in the Western District of Pennsylvania in *Consolidation Coal Co. v. Liberty Mut. Ins. Co.*, 406 F. Supp. 1292 (W.D. Pa. 1976), which had held that the phrase “act or omission” limited AI coverage to only those situations where the named insured was negligent. *Id. at \*5-6*. Instead, the *Maryland Casualty* court held that “the use of the words ‘act or omission’ in the Additional Insured Endorsement does not require negligence on the part of the named insured. The plain or ordinary meaning of ‘act or omission’ only requires the named

insured to do or fail to do something. Negligence would require the named insured to do [or fail to do] something ‘which a reasonable [person] guided by those ordinary considerations which ordinarily regulate human affairs, would do [or would not do].’” *Id.* at \*5 (emphasis added).

This interpretation of insurance coverage harmonizes with Minnesota law in that coverage is broadly construed in order to afford the greatest possible protection to an insured. *West Bend Mut. Ins. Co.*, 372 N.W.2d at 441. A plain interpretation of the broad phrase “acts or omissions” clearly includes Bolduc’s “act” of hitting the Pipe, and invokes the coverage protection of the AIE.

A declaration of coverage by this Court and a finding that Travelers breached its contract will also support ECI’s reasonable expectations of coverage. One specific purpose of the IIA was for Bolduc to furnish insurance for ECI to cover ECI for those damages, costs and expenses “caused by an act or omission of Bolduc.” *Add.10*. By adding ECI as an Additional Insured to the Policies, Bolduc clearly intended and expected to comply with its agreement to insure ECI and, per the plain Policy language did satisfy this contractual requirement if this Court finds (as it should) that there is coverage for ECI.

Applying both the plain language of the AIE, *Maryland Casualty*, and Minnesota law, the AIE affords full indemnity coverage to ECI for the repair costs at issue. The district court wrongfully denied coverage to ECI based upon the jury verdict that Bolduc was not negligent. The district court also misapplied the Policy language to the facts found by the jury by impliedly invoking the AIE policy exclusion for damage caused by

ECI's "independent acts or omissions". *Id.* That exclusion is simply not relevant, as no finder of fact has ever determined that ECI's acts or omissions damaged the Pipe. Moreover, this exclusion must be construed narrowly against Travelers and in favor of coverage for ECI. *West Bend Mut. Ins. Co.*, 372 N.W.2d at 441.

**C. "Acts or Omissions" Must be Interpreted in Favor of Coverage for ECI.**

ECI believes that the phrase "acts or omissions" is clear and unambiguous and contains no express limitation for only Bolduc's negligence. If this Court disagrees, then the AIE language is ambiguous because there would be two conflicting definitions of what the term "act" incorporates. *See Columbia Heights Motors, Inc.*, 275 N.W.2d at 34-6. Ambiguities in the Policy language *must be resolved in favor of coverage for ECI*, as ECI is an insured under the Policy. *Id.* at 36; *Nordby*, 329 N.W.2d at 822.

A number of cases addressing additional insured endorsements support that coverage is owed to an additional insured for a named insured's "acts or omissions" beyond "negligent" acts. Among those cases is *Maryland Casualty Co. v. Regis Ins. Co.*, 1997 WL 164268 (at A.140) discussed *supra*, as well as *Huber Engineered Woods v. Canal Ins. Co.*, 690 S.E.2d 739 (N.C. App. 2010) and *Dillon Cos. Inc. v. Royal Indem. Co.*, 369 F.Supp.2d 1277 (D. Kan. 2005).

*Huber Engineered Woods* involved similar coverage language in an additional insured endorsement wherein the court ruled that "negligence" is not a precursor to coverage: "[the AI language] does not speak in terms of 'negligent acts or omissions,' but simply in terms of 'acts or omissions' . . . this language is susceptible to two reasonable interpretations." 690 S.E.2d at 745 (emphasis original). Thus, there was coverage, such

that Huber would be entitled to coverage for “liability because of acts or omissions of an insured.” *Id.* at 744-6.

The *Huber* Court determined that the term “act or omissions” was ambiguous because it did not clearly state that coverage would only be provided for the negligent “acts or omissions” of the named insured. *Id.* at 746. The *Huber* Court also found the term “because of” ambiguous because that term did not imply a requirement of “proximate cause” for coverage to be triggered. *Id.* at 746-47.

The sound reasoning of the *Huber* Court is applicable here. The phrase “liability” for property damage caused by “acts or omissions” of Bolduc contains no requirement of negligence as a precursor to triggering coverage. To re-write the Policy now to insert a “negligence” requirement is completely contrary to Minnesota contract and insurance law. See *Riley Bros. Constr.*, 704 N.W.2d at 202 (general contract principal); *Minn. Min. & Mfg. Co.*, 457 N.W.2d at 181.

In *Dillon Cos. Inc. v. Royal Indem. Co.*, the court again held that negligence is not a prerequisite to coverage under an additional insured endorsement. 369 F.Supp.2d 1277. In *Dillon*, the additional insured endorsement 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....” *Id.* at 1282. When a store patron was injured during the course of a robbery after the on duty security officer 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.

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].” *Id.* at 1288. Accordingly, the additional insured endorsement was triggered. *Id.*

While in the instant case, the AIE provides coverage for ECI for damage “caused by” the acts or omissions of Bolduc rather than the *Dillon* “arising out of” the acts of Bolduc, the distinction between the two phrases makes no difference because there is no dispute that Bolduc drove the sheeting that damaged the Pipe. Therefore, the damage at issue arose from and was caused by Bolduc’s act.

While the AI endorsement language in *Huber* and *Maryland Casualty* also differed slightly in terms of the causal link between the act and the damage (*Maryland Casualty* used “the result of” and *Huber* used “because of”), these linguistic differences are without significance. 1997 WL 164268; 690 S.E.2d 739. The courts in *Dillon*, *Maryland Casualty* and *Huber* all interpreted the term “acts and omissions”—the pivotal language in the instant case—and held the language was ambiguous or plainly did not require the named insured’s negligence, without reference to the policy’s causation language. 369 F.Supp 1277; 1997 WL 164268; 690 S.E.2d 739.

Finally, in *Dillon*, the court stated that . . . “[the AI endorsement] is ambiguous because it is capable of two reasonable interpretations,” and noted that, on one hand, a reasonable insured could understand it to only provide coverage where the named insured was “negligent,” whereas, on the other hand, “a reasonable person could also construe the additional insured endorsement to cover all acts or omissions, whether negligent or not.”

*Id.* 1284 (emphasis added) *citations omitted*. As such, as a matter of law, the AI endorsement covered a broader scope of acts than merely negligent acts. *Id.*

The same reasoning applies here in the event that this Court finds the AIE ambiguous. The AIE must be interpreted as providing coverage to ECI, and Travelers must be requested by this Court to honor its contractual obligation to fully indemnify ECI.

**D. If This Court Adopts the District Court’s Interpretation of the IIA, then Travelers Must Indemnify ECI under the “Insured Contracts” Coverage.**

The district court’s summary judgment decision potentially invokes another basis for coverage under the Policies. The district court held that to read the IIA as “requiring Bolduc to indemnify and insure ECI with respect to Bolduc’s ‘non-negligent’ acts would ask Bolduc to indemnify and insure ECI for its own negligence.” *Add.7*. If this Court agrees with this interpretation of the IIA, Travelers owes full indemnity to ECI under the main insuring agreement of the Policies as the IIA is an “Insured Contract”.

As discussed above in Section II, Minn. Stat. § 337.05 allows one party to agree to insure another party’s negligence. *See Holmes*, 488 N.W.2d 473; *Katzner*, 545 N.W.2d 378; *Van Vickle*, 566 N.W.2d 238.

Under the Policies procured by Bolduc, Travelers agreed to “pay for those sums that the insured [Bolduc] becomes legally obligated to pay as damages because of

...’property damage’<sup>5</sup> to which this insurance applies. *Add.11*. This broad all-risk coverage includes coverage for an “Insured Contract”. *Add.13-14*.

The Policies contain a general Exclusion for Contractual Liability but then restore coverage by way of an Exception to this Exclusion by agreeing to cover: “(L)iability for damages:... (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...” *Add.13*. The Policies relevantly define “Insured Contracts” to include:

f. that part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) 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.

*Add.14*.

In applying this policy language, this Court strictly construes any policy exclusions, including the Contractual Liability Exclusion, against Travelers as the insurer. *Thommes*, 641 N.W.2d 877 at 880. Moreover, any exception to the exclusion, such as the “Insured Contract” Exception, effectively restores insurance coverage. *Id*.

If this Court agrees with the district court that a broad reading of “any acts” in the IIA would result in Bolduc agreeing to indemnify and insure ECI for ECI’s own negligence, then Travelers must still indemnify ECI because the IIA is an “Insured Contract” and ECI’s negligence is still undetermined. The IIA of the Subcontract pertained to Bolduc’s business. If the district court’s position is accepted, Bolduc

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<sup>5</sup> The Policies relevantly define “property damage” as” “Physical injury to tangible property...” (*A.15*) which would include Bolduc’s damage to the Pipe.

assumed the tort liability of ECI in the IIA and agreed to pay for property damage, and the Property Damage, *i.e. physical injury*, to the Pipe occurred after Bolduc and ECI executed the Subcontract. As such, Travelers owes coverage under the Insured Contract provision of the Policies.

**IV. IF TRAVELERS IS NOT REQUIRED TO INDEMNIFY ECI UNDER THE POLICIES, BOLDUC BREACHED ITS CONTRACTUAL OBLIGATIONS TO ECI BY FAILING TO PROCURE PROMISED INSURANCE COVERAGE.**

If the Policies fail to provide coverage, Bolduc breached the Subcontract by failing to obtain the insurance coverage required by the IIA and is personally liable for indemnifying ECI.

Under the terms of the IIA, Bolduc agreed and was contractually obligated to obtain General Liability insurance for the benefit of ECI, with relevant limits of \$1 million for property damage, and to “obtain, maintain and pay for such insurance coverage and endorsements as will insure the indemnity provisions” of the contract including, specifically, the indemnity obligations. *Add.10*.

As discussed above, the IIA required Bolduc to name ECI as an additional insured with respect to the entire scope of “any acts or omissions” of Bolduc on the Project, without restriction or limitation. *Add.10*. It is undisputed that Bolduc obtained the Policies with Travelers, with the limits required by the IIA and that ECI was an additional insured under the AIE.

As discussed in Section III *supra*, the Policies, including the AIE (and/or the Insured Contracts Coverage exception) provide coverage to ECI. However, in the event

that this Court disagrees, then Bolduc failed to obtain the insurance coverage required by the IIA and is in breach of the Subcontract's IIA insurance requirements.

Minn. Stat. §337.05, Subdivision 2 sets forth the consequences of Bolduc's failure to obtain the promised insurance under the IIA:

**Indemnification for breach of agreement. If:**

- (a) a promisor agrees to provide specific types and limits of insurance; and
- (b) a claim arises within the scope of the specified insurance; and
- (c) the promisor did not obtain and keep in force the specified insurance;

then, as to that claim and regardless of section 337.02, **the promisee shall have indemnification from the promisor to the same extent as the specified insurance.**

(emphasis added). *Add.18.*

Applied here, Bolduc agreed to provide specific insurance coverage with specific insurance limits to cover "any" of Bolduc's "acts or omissions" that caused property damage on the Project. *Add.10.* Bolduc then damaged the pipe, triggering a claim within the insurance specified in the IIA.

If the Policies that Bolduc obtained from Travelers in purported compliance with the IIA do not provide coverage for the costs ECI incurred to repair the Pipe, then Bolduc is in breach of it's the Subcontract and, per §337.05, must directly and personally indemnify ECI.

This result comports with the case of *Van Vickle v. C. W. Scheurer and Sons, Inc.*, wherein this Court applied § 337.05 and held that a subcontractor's failure to obtain insurance as required by the subcontract allowed the contractor to recover directly from the subcontractor under the provision requiring the subcontractor to provide insurance coverage. 556 N.W.2d 238.

Under §337.05 and the plain language of the IIA, Bolduc must *personally* indemnify ECI for “all ...costs, and expenses arising out of ...the damages to ...[the Pipe] ...” as well as “all damages, judgments, expenses, and attorney’s fees...” for which Bolduc agreed to procure insurance coverage (*Add.10*) and which includes, without limitation, ECI’s costs to repair the Pipe and legal costs, expenses, and fees incurred to pursue coverage under the Travelers’ Policies. All of these costs, expenses, and fees arose from and were caused by Bolduc’s damaging the Pipe. *Add.10*.

If this Court finds that the Policies fail to provide coverage, then this Court must: 1) Reverse the district court’s grant of summary judgment to Bolduc; 2) Find *de novo* that Bolduc breached the IIA as a matter of law; and 3) Remand this case for a factual determination by the lower court of the reasonable amount of ECI’s attorney fees. *See Van Vickle*, 556 N.W.2d at 242.

### CONCLUSION

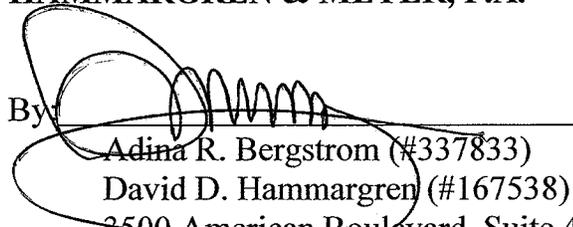
Engineering and Construction Innovations, Inc. requests that the judgment of the lower court in favor of L.H. Bolduc Co., Inc. and The Travelers Indemnity Company of Connecticut be reversed on the grounds that: 1) The lower court committed reversible error by finding that ECI negligent when the factual findings of the Jury Special Verdict

made no such finding; 2) The subcontract between Bolduc and ECI required Bolduc to reimburse and indemnify ECI for the costs expended in repairing the Pipe that Bolduc damaged; 3) The insurance coverage under the Policies requires Travelers to indemnify ECI for the costs ECI expended in repairing the Pipe damaged by Bolduc; and 4) If the Travelers' Policies do not provide coverage to ECI for the costs to repair the Pipe, then Bolduc breached its contractual obligations under the Subcontract by failing to procure promised insurance coverage.

Respectfully submitted,

**HAMMARGREN & MEYER, P.A.**

Dated: March 31, 2011

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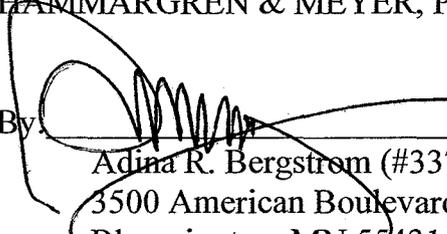
**CERTIFICATION**

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

Monospaced font – Times New Roman, font size 13. This Brief contains 1,210 lines of text, 13,135 words, and 50 pages.

HAMMARGREN & MEYER, PA

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