

A11-159

State of Minnesota
In Supreme Court

Engineering and Construction Innovations, Inc.,
Respondent,

v.

L.H. Bolduc Co., Inc.,
Petitioner,

and

The Travelers Indemnity Company of Connecticut,
Petitioner.

**REPLY BRIEF OF PETITIONER
L.H. BOLDUC CO., INC.**

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I. ECI REPAIRED THE PIPE USING ITS OWN LABOR, EQUIPMENT AND EQUIPMENT PROVIDED BY FRONTIER AND SO REPAIRED IN ACCORD WITH ITS CONTRACTUAL AGREEMENT WITH FRONTIER.

ECI states as fact that because Petitioner L.H. Bolduc Co., Inc. (Bolduc) and Petitioner The Travelers Indemnity Company of Connecticut (Travelers) “refused to act, ECI spent \$233,365.65 to repair Bolduc’s damage to the pipeline.” (Respondent ECI’s Brief, p. 2). ECI’s statement is inaccurate.

A. ECI Had a Contractual Obligation to Frontier.

ECI had a contractual obligation to Frontier Pipeline (Frontier) with regard to the damaged pipe. (Trial Exhibit 1; A. 44). ECI bound itself to indemnify Frontier from “all losses, costs, damages, liabilities, and expenses which Frontier Pipeline may sustain or incur by reason of any delays caused or contributed to by ECI . . . or sub-subcontractors. . . .” (ECI/Frontier Contract ¶ 3; A. 45). ECI agreed to insure Frontier for “costs, and expenses arising out of . . . damages to property caused or alleged to have been caused by any act or omission of ECI” (Contract ¶ 9; A. 47). ECI also agreed that the “damage provisions of the General Contract, both actual and liquidated, shall be enforceable by Frontier Pipeline against ECI” (Contract ¶ 11; A. 48).

B. ECI and Frontier Had Made Other Errors in Locating Underground Pipes.

Frontier provided ECI with information as to the location of the underground pipes. (T. 51, 60).¹ ECI, in turn, would locate the pipes for Bolduc. (T. 192-93;

¹ References to “T.” are to the March 8-10, 2010 trial transcript.

Plaintiff's Answer to Defendant Travelers' Interrogatory No. 2; A. 65). When the pipe damage was found, a discussion ensued between ECI and Frontier whether the pipe had been accurately located. (A. 61). This is reflected in the January 9, 2008 correspondence from Frontier to ECI. (Id.)

Before this incident, there had been a previous "miscommunication" between Frontier and ECI as to underground pipe location. (T. 263-64). At FAS-6, the result of such a miscommunication between ECI and Frontier was that the pipe's actual location was five feet away from the pipe information ECI provided to Bolduc. (T. 263-64, 274-75, 317). There was also a problem at FAS-1 where a water main was "mis-located." (T. 287-88).

Bolduc, as the record reflects and per the terms of the ECI/Bolduc Contract, as drafted by ECI, had no role in locating the underground pipes. (Add. 36; T. 119, 192-93, 377-78). That obligation, as far as Bolduc was concerned, rested solely with ECI. (T. 192-93). ECI quotes Paragraph 4 of the ECI/Bolduc Contract, entitled "Performance of Work." (Respondent ECI's Brief, p. 7; Add. 37). To the extent ECI insinuates that ECI had no obligation to locate the pipelines for Bolduc, such is contradicted by Paragraph 2, entitled "Scope of Work" and by ECI's testimony at trial. (Add. 36; T. 119, 192-93). ECI's owner and President, Mr. McFadden, testified:

Q. . . . And you understand that pursuant to the contract you executed with Bolduc, it was your company's responsibility to locate the underground structures, including this high - - the HDPE pipe that was ultimately damaged?

A. That is correct.

(T. 119; see also ECI Response to Request for Admission No. 4; A. 70).

C. ECI Reached an Agreement With Frontier and Then ECI Repaired the Pipe.

There is no testimony of record that “Frontier and the Met Council demanded that ECI repair Bolduc’s damage to the Pipe without delay in order to avoid liquidated damages being assessed under the terms of the General Contract,” as stated in ECI’s brief to this Court at page 9. ECI’s record cites are to ECI’s Complaint, which is not evidence. And T. 250 and Trial Exhibits 6 and 7, also cited by ECI, do not reflect such a state of affairs. The record only reflects it was important to the Met Council to have the repair done quickly. (T. 250).

At the time the damage to the pipe on the south end was discovered, ECI was dealing with its grout issue on that same pipe’s north end. Clearing out the grout delayed the completion of the project. (T. 269; see also T. 69-70, 131-32; A. 61). As ECI admits, Bolduc had nothing to do with ECI’s grout issue. (Respondent ECI’s Brief, p. 7, n.2).

Although ECI asserts it is not relevant to the issues on appeal, ECI, in its footnote at page 7 of its brief, takes issue with Bolduc’s statement that ECI “erroneously filled the north end of the pipe with grout,” contending this statement is a “violation of Rule 11.” But ECI admitted at trial it injected grout at the north end of the pipe, which grout was found in the pipe on November 19, 2007. (T. 69-70, 131-32). ECI then undertook the removal of this grout at its own expense. (T. 132). It took 79 days for ECI to complete that process. (T. 132).

ECI, in its closing argument, admitted ECI’s responsibility for the grout in the pipe. ECI’s counsel told the jury: “[ECI] discovered in November of 2007 that they had

filled one of the pipes, the pipe on the north side, with grout. And there was 120 feet of solidified, hard, concrete-like grout in this pipeline. ECI didn't run from this." (T. 439). ECI's counsel then states ECI "never tried to avoid liability or responsibility for that." (Id.) Ironically, ECI now so denies responsibility in a footnote to this Court.

ECI states in its brief that "[p]rior to any repairs ECI advised Bolduc and Travelers of the damage and submitted a formal claim," citing Trial Exhibit 11. (Respondent ECI's Brief, pp. 9-10). But Trial Exhibit 11 is a letter dated July 8, 2008. (A. 62). ECI began the pipe repair on February 6, 2008, and it was completed by March 1, 2008. (T. 97). The July 8, 2008 letter does reference a letter dated December 29, 2007 (Trial Exhibit 5(b)), where ECI states to Bolduc that "[t]hough a comprehensive investigation as to the cause of this damage must take place, this correspondence shall act a [sic] formal notice as to the damage." (A. 60). ECI informed Bolduc it was "currently defining repair options for the pipe for submittal and approval from the Owner." (A. 59).

What ECI did not state in its December 2007 letter to Bolduc was that ECI and Frontier were discussing whether "the product line was accurately located prior to [Bolduc] driving sheets." (A. 59, 61). Therefore, as ECI and Frontier both recognized, it could well be ECI and/or Frontier's conduct that was the cause of the damaged pipe. ECI, after discussions with Frontier, reached a settlement agreement with Frontier in mid-January 2008. (T. 173, 272-73, 278). As a result, ECI received money from Frontier. (T. 278).

The parameters of the Frontier/ECI settlement are ill-defined on this record.² (T. 173, 272-73, 278). What stands undisputed is that after this Frontier/ECI settlement, ECI chose to use its own equipment, its labor force and equipment from Frontier (which was provided as part of their settlement) to repair the south end of the pipe. (T. 95, 173). ECI's repair work on the south end of the pipe began on February 6, 2008. (T. 97). ECI's removal of the grout at the north end was completed shortly before February 27, 2008. (T. 255). The south end pipe repair was completed on March 1, 2008. (T. 97).

This case presents the situation where there was no lawsuit, no trial and no judgment establishing any liability of ECI to anyone because of the damaged pipe. ECI, which drafted its contract with Frontier and procured insurance coverage with Western National Mutual Insurance Company (Western National), ultimately ended up fighting Western National's denial of coverage to it in a declaratory judgment action. There ECI claimed Western National had responsibility to pay ECI for the claimed cost of pipe repair. (Ramsey County Court File No. 62-CV-09-10134; A. 38). ECI also sought to foist its claimed pipe repair expense onto Bolduc, which the jury rejected. (Add. 27; T. 471).

D. ECI Did Not Spend \$233,365.65 to Repair the Pipeline.

It is also inaccurate on this record to state ECI "spent \$233,365.65" to repair the damage to the pipeline. ECI used its workforce, its equipment and equipment of Frontier

² Frontier later asserted that money it paid ECI did not reimburse ECI for pipe repair. (T. 289-90).

to do the repairs. It then sought \$233,365.65 from Bolduc and Travelers, but this included a 62% markup for ECI's labor and a 15% markup on the materials. (T. 116, 137-38, 149).³ ECI used equipment provided by Frontier and then itemized such use as its costs of repair. (T. 143-46). It did so even though it did not pay Frontier to use its equipment. (T. 145-46).⁴

Bolduc argued at trial that ECI "clearly has not proven by a preponderance of the evidence that [ECI] incurred those expenses" and the jury agreed, finding ECI was entitled to no compensation from Bolduc. (T. 434; Add. 28). The jury found ECI sustained no loss resulting from damage to the pipe. (*Id.*)

II. ECI WAS FOUND TO HAVE SUSTAINED NO LOSS AND HAS NO CLAIM FOR INDEMNIFICATION FROM BOLDUC.

A. There Can Be No Indemnity Because ECI Sustained No Loss.

There can be no indemnity where there is no loss. See Leonard v. Dorsey & Whitney LLP, 553 F.3d 609, 622 (8th Cir. 2009), citing E.S.P., Inc. v. Midway Nat'l Bank of St. Paul, 447 N.W.2d 882, 885 (Minn. 1989) ("claim for indemnification does not ripen until [indemnitee] has sustained a loss"). ECI attempts to escape the no damage ruling by asserting the jury's verdict, adopted by the trial court, did not extinguish any obligation under the ECI/Bolduc Contract. Contrary to ECI's statement at page 46 of its brief, the Court of Appeals did not remand the case "for a factual finding on the amount

³ Bolduc was told repair costs could range between \$30,000 and \$70,000. (T. 380).

⁴ In Bolduc's closing argument, counsel details the inconsistencies in ECI's claimed costs of repair. (T. 430-35).

of contractual damages Bolduc owes for damaging the Pipe.” The Court of Appeals did reverse and remand “the matter to the district court for further proceedings not inconsistent with this opinion” (Add. 15), but no one knows what that means.⁵ Bolduc asserts this Court should affirm the grant of summary judgment to Bolduc based upon the jury’s findings adopted by the trial court, and for the reasons Bolduc asserted before the trial court.

ECI’s assertion that such arguments represent an impermissible broadening of the issues on appeal is ill-founded. Bolduc’s argument that this Court should reverse the Court of Appeals based upon the jury’s finding of no damage is within the scope of Bolduc’s Petition for Review as well as that of Travelers. In stating the issue and its resolution by the Court of Appeals, Bolduc specifically states the Court of Appeals reversed the grant of summary judgment “despite a jury finding Bolduc was not negligent and that ECI was not entitled to any damages,” and in the body of the Petition, Bolduc takes issue with that reversal. (See Bolduc Petition at p. 1). In his dissent, Judge Connolly concluded Minn. Stat. § 337.02(1) did not apply because Bolduc was found not negligent by the jury and ECI was not entitled to any recovery for the damaged pipeline. (Id. at pp. 2, 4; Add. 16). And as ECI admits, “the facts of each case are as critical as the contract language itself.” (Respondent ECI’s Brief, p. 27, emphasis in the original

⁵ Pursuant to Minn. R. Civ. App. P. 103.04, the Court ultimately must address this issue. Before the Court of Appeals, ECI asserted if the Court of Appeals concluded Travelers did not provide coverage, only then should the summary judgment be reversed as to Bolduc. (Appellant’s Brief to Court of Appeals, p. 49). The Court of Appeals found coverage, but also reversed as to Bolduc.

omitted). Resolution of this case cannot be divorced from its facts, which includes its procedural history.

B. The Jury's Conclusion That Bolduc Was Not Negligent Precludes Any Claim of ECI Against Bolduc for Breach of Contract for Faulty Workmanship.

ECI's breach of contract claim for faulty workmanship is redundant to its claim of Bolduc's negligence and the award of zero damages binds ECI's breach of contract claim as well.

1. There is no duty owed apart from contract.

ECI cannot and does not articulate any duty owed to it by Bolduc which does not arise from contract. The pipe that was damaged was not owned by ECI. Any purported "duty" Bolduc would owe ECI could only arise by way of the contract between the parties. See D & A Dev. Co. v. Butler, 357 N.W.2d 156, 158 (Minn. Ct. App. 1984) ("[t]he duties between the parties here arose out of contract"). When asked prior to trial to give a "concise statement of your version of the facts giving rise to the damage to the existing pipe at FAS-1," ECI replied that Bolduc "mistakenly and negligently drove its sheet piling into and damaged the 28" HDPE pipe" (Answer to Interrogatory No. 1; A. 64). ECI chose to try its breach of contract faulty workmanship claim against Bolduc as a negligence claim. It is bound by the jury's answers. See Bethesda Lutheran Church v. Twin City Constr. Co., 356 N.W.2d 344, 351 (Minn. Ct. App. 1984), *rev. denied*, citing Marshall v. Marvin H. Anderson Constr. Co., 283 Minn. 320, 167 N.W.2d 724, 725

(1969), for the proposition that “[t]he distinction in construction law between contract and negligence is blurred.”

2. Evidence as to breach of contract of faulty workmanship is identical to evidence of Bolduc negligence.

The evidence that would be presented as to Bolduc’s liability on a breach of contract faulty workmanship claim is exactly the same as that presented by ECI on its claim of Bolduc’s negligence. The witnesses would be the same. The exhibits would be the same. The jury was given the ECI/Frontier Contract. (Trial Exhibit 1; T. 48-51). The jury was also presented with the ECI/Bolduc Contract. (Trial Exhibit 2; T. 54). Bolduc argued, based on the terms of the ECI/Bolduc Contract, to which argument there was no ECI objection, that the jury must use the parties’ Contract to determine Bolduc’s standard of care. (T. 411-12).

3. ECI was given the broader tort measure of damages, and the jury concluded there was no damage.

ECI only asserts that a claim of breach of contract for faulty workmanship has a different measure of damages. (See Respondent ECI’s Brief at pp. 45-46). But under Minnesota law, as elsewhere, the measure of damages in tort is generally broader than in contract. Beaulieu v. Great Northern Ry. Co., 103 Minn. 47, 114 N.W. 353, 355 (1907); Delzer v. United Bank, 559 N.W.2d 531, 536 (N.D. 1997), as amended (“[t]he measure of damages in tort is broader than in contract,” citing California law); Bellemare v. Wachovia Mortgage Corp., 894 A.2d 335, 340 (Conn. 2006) (quoting W. Prosser, Torts (3d ed. 1964) at § 93, p. 634, stating “the damages recoverable for a breach of the

contract duty are limited to those reasonably within the contemplation of the defendant when the contract was made, while in a tort action a much broader measure of damages is applied”); Grams v. Milk Products, Inc., 699 N.W.2d 167, 170 (Wis. 2005) (“[t]ort law generally offers a ‘broader array’ of damages than contract”). This case was submitted to the jury and the jury found ECI sustained no loss.

ECI, citing to Van Vickle v. C.W. Scheurer & Sons, Inc., 556 N.W.2d 238 (Minn. Ct. App. 1996), *rev. denied*, asserts that “contract damages may include attorney fees, legal costs and expenses.” But ECI voluntarily repaired the pipe. There was no lawsuit brought by Frontier/Met Council against ECI to defend. There obviously was no tender by ECI of the defense of a nonexistent action to Bolduc and, therefore, no attorney’s fees, legal costs and expenses. Van Vickle is irrelevant.

Nor does the ECI-drafted Contract provide for the recovery of attorney’s fees incurred in connection with enforcing Paragraph 9. It only discusses attorney’s fees in the context of defense of the underlying claim for which indemnity is sought – i.e., a lawsuit against ECI. (Add. 38). Since there was no such lawsuit, ECI has no claim for attorney’s fees. Its claim for breach of contract damages is also redundant of its claim of tort damages. ECI is not entitled to a re-trial on a redundant breach of contract faulty workmanship claim. Based on the jury’s verdict, adopted by the trial court, Bolduc was not negligent and had committed no wrongful act. It did not breach its contract with ECI.

4. **Lesmeister v. Dilly does not support affirmance of the Court of Appeals.**

Lesmeister v. Dilly, 330 N.W.2d 95 (Minn. 1983), also does not aid ECI. In Lesmeister, the Court was faced, like here, with tangled “legal and factual issues.” As a consequence, this Court limited the Lesmeister holding to its facts and stated expressly it did not intend “this opinion to have precedential effect as to theories of relief or measures or elements of damages.” Id. at 100.

Lesmeister involved a farmer who erected a prefabricated building to store grain. The farmer brought an action for damages due to defects and lateness in the construction of that building. The defendants included the salesman and the building’s wholesaler. The wholesaler then impleaded the building’s designer and fabricator. Id. at 96-97. The contract and negligence claims were merged and the trial court allowed comparative fault to be apportioned among the parties. Id. at 99-100.

Ultimately, this Court concluded that the gravamen of the case was “contractual” and “[a]ny duties between the parties arose out of contracts.” Id. at 102. This Court explained that “[t]his was not a situation in which parties were fortuitously brought together as in an automobile accident.” Id. While it was error to submit the case, in essence, as a negligent breach of contract case, this Court did not remand but simply recalculated the damages. Id.

Here, the case was submitted as one of negligence, but, like Lesmeister, there was no duty owed by Bolduc to ECI other than by contract. This Court has allowed contract provisions to be utilized to determine the standard of care and, as stated previously, the

line between contract and negligence in this context is blurred. Moundsview Indep. Sch. Dist. No. 621 v. Buetow & Assocs., Inc., 253 N.W.2d 836, 839 (Minn. 1977). That is what occurred here.

The jury's no negligence verdict, utilizing the parties' contract as the standard, precludes any contractual claim ECI might have against Bolduc for faulty workmanship. The jury's finding of zero ends any argument for indemnification.

III. THE NARROW INDEMNITY EXCEPTION CONTAINED IN MINN. STAT. § 337.05, SUBD. 2 IS BEFORE THIS COURT, AND ON THIS RECORD BOLDUC IS ENTITLED TO SUMMARY JUDGMENT.

As set forth above, ECI suffered no loss, and that should end the matter. But if it does not, the Court must address the ECI-drafted Paragraph 9. (Add. 38). There is no evidence in this record that Bolduc had any say in the drafting of the ECI/Bolduc Contract. The evidence is to the contrary since ECI drafted its prior contract with Frontier which contains language virtually identical to that in the ECI/Bolduc Contract. (Compare Add. 38 and A. 47). The provision at issue is not a standard subcontractor agreement provision.

A. Paragraph 9 Limits Obligation to the Extent of the Insurance Requirements Set Out.

As drafted by ECI, Bolduc agreed to obtain certain specified insurance coverage.

The parties' agreement at Paragraph 9 states:

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

(Add. 38) (emphasis added). The language “to the fullest extent permitted by law and to the extent of the insurance requirements below” is language of limitation. The use of the word “and” is conjunctive. Stevens v. Minneapolis Fire Dept. Relief Ass’n, 219 Minn. 276, 17 N.W.2d 642, 647 (1945); First & Am. Nat’l Bank of Duluth v. Higgins, 208 Minn. 295, 293 N.W. 585, 591 (1940) (refusing to read word “and” in context to mean “or”).⁶ Paragraph 9 identifies the “extent of the insurance requirements below” to include “General Liability, with Contractual Liability Coverage” with \$500,000/\$1,000,000 limits, \$2,000,000 in Umbrella Coverage and under which ECI is to be added as an additional insured. (Add. 38). The insurance carrier must be one that ECI “finds financially sound and acceptable” and Bolduc agreed “to furnish ECI certificates of insurance evidencing the aforementioned coverage.” (Id.)

The record stands undisputed that Bolduc purchased insurance from Travelers with the requisite coverage and limits.⁷ ECI has not asserted otherwise.

In essence, the parties agreed that certain insurance would be provided as part of their bargain and for such coverage Bolduc would pay the premium. This case is unlike others where the contract drafter takes deliberate care to de-link insurance from

⁶ This Court has recognized that every use of “and” involves some risk of ambiguity. Am. Family Ins. Group v. Schroedl, 616 N.W.2d 273, 281 n.4 (Minn. 2000). That risk falls on ECI, as drafter.

⁷ For example, in Seward Housing Corp. v. Conroy Bros. Co., 573 N.W.2d 364 (Minn. 1998), this Court described general liability insurance as protecting the insured from claims arising out of injuries or damages caused by the insured’s negligence in the course of construction.

indemnity. Here the agreement must be construed as mutual exculpation of the parties where ECI agreed to look solely to insurance in the event of loss. Accordingly, Bolduc disagrees with ECI's statement that there was both an agreement to indemnify and to procure insurance for ECI.

B. ECI Admits That If Travelers Has Coverage, It Has No Claim Against Bolduc.

The Court of Appeals held the Travelers policies procured by Bolduc provide coverage. (Add. 3, 13). Thus, based upon the Court of Appeals' ruling, there could be no argument that Bolduc failed to procure the specified insurance as required under section 337.05, subd. 2, or under Paragraph 9.

Ironically, ECI, who argues this issue is not properly before this Court on appeal, agrees with Bolduc that the Court of Appeals' coverage determination ends any ECI claim against Bolduc. ECI asserts:

The Court of Appeals correctly determined that the Travelers' Endorsement provides coverage, and this Court should affirm. However, if this Court disagrees and reverses the Court of Appeals, then remand is still warranted for a factual finding by the trial court on the reasonable amount of costs, expenses, and fees that Bolduc directly owes ECI.

(Respondent ECI's Brief, p. 50).

It is ECI's "however" argument to which Bolduc takes issue. ECI argues that if this Court reverses as to Travelers, then a remand is "warranted for a factual finding by the trial court on the reasonable amount of costs, expenses, and fees that Bolduc directly owes ECI." (Id.) To this Bolduc vehemently disagrees.

C. Paragraph 9 Cannot Be Divorced From the Reality of Insurance Coverage.

In determining whether a contract or its terms are definite, an important consideration is whether the court can determine the contract's exact meaning and fix the legal liability of the parties. Here, Bolduc is not an insurance agent or broker. It is certainly not an expert in the field of insurance law. Lakeview Farms, Inc. v. Patten, 640 N.E.2d 1092, 1093 (Ind. Ct. App. 1994), *reh'g denied* (court refused to apply a more relaxed standard of definiteness with regard to procuring insurance where the agreement to procure insurance was not made by an insurance agent). Generally liability insurance is a contract by which the liability insurer, as indemnitor, agrees to indemnify its insured, the potential tortfeasor, against liability for certain third-party claims. As Travelers points out in its brief to this Court, liability insurance cannot be divorced from fault. Given ECI's dispute with Western National and Travelers, it is clear that any resulting problem with the insurance carriers rests with ECI, not Bolduc.

Language requiring the procurement of insurance cannot be divorced from the reality of insurance coverage. But that is essentially ECI's argument. ECI concocted the Paragraph 9 indemnification and insurance clause. (Add. 38). Contrary to ECI's assertion, such a clause is to be strictly construed against ECI. Yang v. Voyageaire Houseboats, Inc., 701 N.W.2d 783, 792 n.5 (Minn. 2005). ECI instituted that same clause (with different liability limits) in its contract with Frontier. ECI then procured insurance coverage with Western National. ECI does not assert it failed to follow the dictates of its own contract when faced with Western National's denial of coverage for ECI's pipe

repair claimed costs. Likewise, ECI cannot assert Bolduc failed to follow the dictates of Paragraph 9 in the face of Travelers' denial, but that is ECI's argument.

D. To Assert One Should Indemnify Without Regard to the Indemnitor's Fault Is to Seek Indemnity for the Indemnitee's Fault.

Here, Bolduc was not negligent and did not commit a wrongful act. To that there is no dispute. (Add. 21, 27). To indemnify "without regard to fault," as ECI asserts, really means Bolduc is being asked to indemnify for someone else's fault. ECI's argument that Paragraph 9 should be interpreted to impose broad indemnity obligations upon Bolduc based on a non-negligent act is just another way of saying Bolduc obligated itself to indemnity for the fault of another.

But ECI did not include an express negligence clause in Paragraph 9 – such as including without limitation claims for which ECI or Frontier may be or may be claimed to be liable by reason of their own negligence– so as to satisfy the clear and unequivocal requirement of Minnesota law. Katzner v. Kelleher Constr., 545 N.W.2d 378, 382 (Minn. 1996); James Duffy O'Connor, Wrestling With Reform: Indemnification Agreements, the Statutory Bars, Promises to Procure and Insurance Products for the Construction Industry, 1 No 1 Journal of the American College of Construction Lawyers 4 at II.C. (2012) (giving examples of "express negligence" clauses that satisfy the clear and unequivocal requirement).

ECI, at summary judgment, recognized the ambiguity it had created in Paragraph 9 by such omission, stating:

And [Bolduc's counsel] makes an effective argument about the possible ambiguity of language from the indemnity agreement. . . . [T]he [additional insured] endorsement language is ambiguous because it doesn't say negligent or careless, and our indemnity agreement does not contain similar limiting language. So maybe I lose on the case against Bolduc on that ambiguity issue

(T. 8/18/10, p. 19).

ECI is charged with writing a contract where the terms are clear and unequivocal so the parties understand their obligations. ECI's counsel admits this ECI did not do.

(Id.) Under Minnesota law, an agreement may not vaguely intimate an obligation to indemnify. Yang, 701 N.W.2d at 792, n.5.

E. ECI's Reliance on Holmes v. Watson-Forsberg Co. Is Misplaced.

ECI's reliance on Holmes v. Watson-Forsberg Co., 488 N.W.2d 473, 474-75 (Minn. 1992), is misplaced. Paragraph 9 does not contain the language this Court has held necessarily includes claims for the contractor or owner's fault – such as “claims for which the contractor may be or may be claimed to be liable.” Id. As set out in detail in Bolduc's initial brief to this Court, this case is not like Holmes. (See Petitioner Bolduc's Brief, pp. 49-51). Amici The American Subcontractors Association of Minnesota and The American Subcontractors Association, Inc. have charted the differences between the ECI-drafted language and that of Holmes. (Amicus Brief at pp. 6-7).

ECI does not respond to the fact that in Holmes it was Pro-Tech's insurer, after acknowledging it had coverage, which asserted the indemnity provision was not enforceable under Minn. Stat. § 337.02. (Petitioner Bolduc's Brief, p. 50). This Court

recognized that state of affairs in Holmes, stating “[h]ere, the subcontractor did in fact pay a premium and obtain the specific coverage contemplated by the agreement.” 488 N.W.2d at 475. The bottom line in Holmes was this Court’s refusal to allow an insurance carrier to escape responsibility under § 337.02 when the policy of insurance covered the personal injury.

F. Bolduc Is Entitled to Reinstatement of Summary Judgment Regardless of the Outcome of the ECI/Travelers Dispute.

ECI asserts if an insurance carrier denies coverage for a claim and the court concludes there is no coverage, that entitles the promisee to indemnity under Minn. Stat. § 337.05, subd. 2. (Respondent ECI’s Brief, p. 48). But that’s not what subdivision 2 states. A promisor assumes the liabilities of a carrier only where the promisee can establish all three requirements of section 337.05, subd. 2. Minn. Stat. § 337.05, subd. 2 provides if (a) a promisor agrees to provide specific types and limits of insurance; and (b) a claim arises within the specified insurance scope; and (c) the promisor did not obtain and keep in force that specified insurance, then “as to that claim and regardless of section 337.02, the promisee shall have indemnification from the promisor to the same extent as the specified insurance.” As previously stated, given the jury’s verdict, Bolduc owes ECI nothing. That ends the case.

Where a plaintiff seeks to recover on breach of contract to procure insurance, the general elements of the promised insurance policy are an essential part of the plaintiff’s case. That is what Minn. Stat. § 337.05, subd. 2, provides and this is in accord with the common law. Hurlburt v. Northern States Power Co., 549 N.W.2d 919, 925 (Minn. 1996)

(Anderson, J. concurring) (§ 337.05, subd. 2, requires that “such agreements to provide insurance be specific” and the parties must adhere “to section 337.05’s requirement of specificity”); Action Ads, Inc. v. Judes, 671 P.2d 309, 311 (Wyo. 1983), *reh’g denied*, citing Foster-Davis Motor Co. v. Slaterbeck, 98 P.2d 17 (Okla. 1939), and Maryland Cas. Co. v. Clean-Rite Maint. Co., 380 F.2d 166, 168-69 (9th Cir. 1967). The Wyoming Supreme Court summarized that the case law stands for the principle that in a suit on a contract to procure insurance, the plaintiff has the burden of proving the elements of the insurance policy with sufficient certainty to enable the court to establish damages in the event of breach. 671 P.2d at 311.

The issue is properly before this Court because Bolduc’s argument relates directly to its request in its Petition for Further Review that this Court harmonize the discord between §§ 337.02(1) and 337.05, as expressed in the Court of Appeals’ opinion.⁸ Also, this case is before this Court not only on Bolduc’s Petition but that of Travelers as well. The interplay of the issues cannot be divorced, as ECI appears to suggest. And ECI

⁸ All the arguments made by Bolduc are also properly considered pursuant to this Court’s inherent authority under Minn. R. Civ. App. P. 103.04 and in the interests of justice and judicial economy. In Nicollet Restoration, Inc. v. City of St. Paul, 533 N.W.2d 845, 848 n.6 (Minn. 1995), this Court recognized that although an appellant’s petition for further review was limited, it nonetheless found related issues properly before this Court. “Both parties argued the issue before the trial court and fully briefed and argued it to this court. Therefore, it is in the interests of justice and judicial economy, and pursuant to our authority under Minn. R. Civ. App. P. 103.04, we elect to consider and decide this issue on the merits” ECI has fully argued and briefed the issues raised by Bolduc. ECI obviously is not prejudiced by the Court’s review of such arguments. ECI only asserts that such issues are “extraneous” and this Court need not address them. (Respondent ECI’s Brief, p. 21). The issues are not extraneous, as ECI’s own arguments as well as those of Travelers make clear.

cannot deny that when Bolduc raised the issue specifically post-trial and in support of summary judgment, ECI did not contend that Bolduc failed to procure the requisite insurance.

In Maryland Cas. Co., 380 F.2d at 167, the oral agreement sought to be enforced was “to provide insurance protection which would have indemnified the building owners against ‘any and all claims of any kind and nature arising out of the window washing operations.’” The Ninth Circuit, applying Oregon law, concluded, based on this language, no promise of reasonable certainty existed. Id. at 168. The court found the descriptions “so vague that only speculation could support a determination of the precise terms and extent of that coverage and resolution of the question of whether or not it would afford indemnity against many different types of loss, including that which was sustained here.” Id. at 168-69. The alleged contract, “for lack of certainty in its terms,” was held unenforceable. Id.

ECI continues to advance the proposition that isolated terms in Paragraph 9 – specifically the words “any,” “act” and “all” should be extracted from their context. (ECI Respondent ECI’s Brief, p. 37). But that is not how a contract is to be read. And this overbroad language adds to its ambiguity, especially in the context here, as the Ninth Circuit held in Maryland Cas. Co., 380 F.2d at 168-69; see also 3 Bruner & O’Connor on Construction Law § 10:12 (June 2011) (stating the only “interpretive rule with universal application to express indemnity agreements is that the broader scope of the purported indemnity obligation and the less specific the language utilized, the more difficult the enforcement”).

Here, after the jury returned the no negligence verdict and no damage verdict, Bolduc and Travelers sought summary judgment. It is the resolution of those post-trial summary judgment motions which is the focus of the appeal. Travelers denied it owed any coverage obligation to ECI under the terms of the policy procured by Bolduc and under which ECI is an additional insured. Bolduc, in the face of Travelers' denial, asserted to the trial court it also was "entitled to summary judgment on ECI's claim of breach of contract because Bolduc obtained the insurance required by the contract." (Bolduc's Memo. in Supp. of Mtn. for Summ. J., pp. 12-13).

ECI offered no response to Bolduc's argument regarding insurance coverage procurement. It instead argued it was entitled to another trial, this time based on its claim that Bolduc "had a contractual obligation to perform its work in a good and workmanlike manner, and that hitting Frontier's pipe was a violation of that obligation." (ECI's Memo. in Opp. to Mtn. for Summ. J., dated 8/5/10, p. 6).

Based on ECI's non-response regarding procurement of insurance coverage, Bolduc, in its reply seeking summary judgment, stated:

In opposing Bolduc's motion, ECI makes no argument in any way intimating or suggesting that the policy Bolduc obtained from Travelers did not embody the coverage contemplated by the contract. Consequently, the court should find as a matter of law that Bolduc is not in breach of the insurance obligation, either.

(Bolduc's Reply Memo. in Supp. of Mtn. for Summ. J. on Plaintiff's Claim for Contractual Indemnity, dated 8/13/10, p. 10, n.6).

Bolduc also, in that same reply, stated:

As noted above, ECI has not argued in the context of this motion that Bolduc's breach lies in its failure to obtain the required insurance. Instead, ECI seems to agree that the coverage Bolduc obtained from Travelers was that which was required under the contract—coverage for Bolduc's "acts." Therefore, regardless of whether the court agrees with ECI's argument that such coverage extends to non-negligent acts, there is no evidence that Bolduc failed to obtain the insurance coverage contemplated by the indemnity paragraph in its contract with ECI.

(Id. at p. 11, n.8.)

This issue was addressed at the summary judgment hearing where Bolduc's counsel stated ECI conceded the above-stated point that the coverage Bolduc obtained through Travelers satisfies the terms of the contract. (T. 8/18/10 at pp. 5-6). ECI did not voice disagreement with that statement. Instead, ECI argued the "policy language from Travelers' policy extends coverage to ECI." (T. 8/18/10, p. 25). The citations that ECI provides to that hearing transcript at page 43 of its brief concern only ECI's claim that it was entitled to a second trial on Bolduc's faulty workmanship.⁹ At no time did ECI assert Bolduc did not provide the insurance coverage agreed to by the parties. It instead argued Travelers' policy does extend such coverage. (Id. at p. 25).

⁹ At MT 21, ECI asserted "there has been no adjudication that Bolduc did not breach the contract, by which I mean doing the job and doing it in a workmanlike manner" At MT 25, ECI asserts "the policy language from Travelers' policy extends coverage to ECI." At MT 33, ECI argues that ECI has not had its day in court that "Bolduc was obligated to properly perform its work"

In Van Vickle, 556 N.W.2d at 240, a case cited by ECI, the record stood undisputed that Scheurer, the indemnitor, “did not obtain the specified insurance limits and did not name Knutson [the indemnitee] as an additional insured in the policy.” Id. at 240. It was in that context that the Court of Appeals cited § 337.05, subd. 2, and stated:

We note that Scheurer’s failure to include Knutson as an additional insured as required by the subcontract does not limit Knutson’s ability to recover from Scheurer. See Minn. Stat. § 337.05, subd. 2 (1994) (providing that where indemnitor did not obtain the specified insurance, the indemnitee “shall have indemnification from the [indemnitor] to the same extent as the specified insurance”).

Id. at 241-42.

From the brief discussion by the Court of Appeals in Van Vickle, it appears the issue was resolved because the promisor did not maintain the specified insurance limits nor make the indemnitee an additional insured as promised. Such is not the record here.

ECI did not specify that Bolduc should purchase insurance other than what it did purchase from Travelers. ECI did not articulate to the trial court in the face of Bolduc’s summary judgment motion that Bolduc somehow failed to comply with the insurance procurement provision of Paragraph 9. Either Paragraph 9, given its ambiguity, is unenforceable as a matter of law, or it is limited to the insurance coverage actually procured by Bolduc from Travelers and under which ECI is an additional insured. ECI has no claim against Bolduc regardless of the outcome of ECI’s dispute with Travelers.

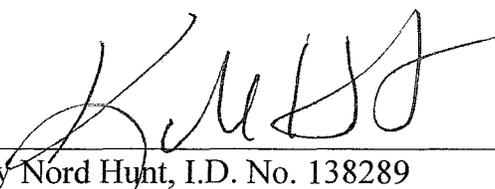
Based on the record before this Court, Bolduc was entitled to summary judgment regardless of the determination of ECI’s dispute with Travelers.

CONCLUSION

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

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,308 words. This brief was prepared using Word Perfect 10.

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