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INDEMNIFICATION AND INSURANCE: WHO IS TO BLAME?— ENGINEERING & CONSTRUCTION INNOVATIONS, INC. V. L.H. BOLDUC CO., 803 N.W.2D 916 (MINN. CT. APP. 2011)

Eric M. Carpenter*

I. Introduction

Indemnification is defined as the "action of compensating for loss or damage sustained."[1] Therefore, indemnity is the "right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty."[2] "The right of indemnity can be contractual or it can arise under common law or statute."[3]

At common law, a neutral approach to enforcing indemnification agreements was favored.[4] A contract requiring one party to indemnify the other for the other's own negligence would be upheld provided the "contract language, fairly construed, evidenced such an intent."[5] The court would then require indemnification, even if the indemnitee was 100% at fault.[6]

Minnesota followed the neutral approach until the 1970s. In 1979, the Minnesota Supreme Court adopted the "strict construction" approach.[7] In *Farmington Plumbing & Heating*, the supreme court held that "[i]ndemnity agreements are to be *strictly construed* when the indemnitee . . . seeks to be indemnified for its own negligence."[8] The court qualified that holding by stating that "[t]here must be an express provision in the contract to indemnify the indemnitee for liability occasioned by its own negligence; such an obligation will not be found by implication."[9]

In Minnesota, strict construction controlled indemnity agreements for only five years. In 1984, the

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[1] BLACK'S LAW DICTIONARY 837 (9th ed. 2009).

[2] *Id.*

[3] Paula Duggan Vraa & Steven M. Sitek, *Public Policy Considerations for Exculpatory and Indemnification Clauses:* Yang v. Voyagaire Houseboats, Inc., 32 WM. MITCHELL L. REV. 1315, 1321 (2006).

[4] 3 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 10:16 (2002).

[5] *Id.*

[6] *Id.*

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

[8] *Id.* at 842 (emphasis added).

[9] *Id.* (citing Webster v. Klug & Smith, 260 N.W.2d 686, 690 (Wis. 1978)).

Minnesota Legislature adopted an anti-indemnity statute specific to building and construction contracts.[10] Minnesota Statutes section 337.02 states that an "indemnification agreement contained in . . . a building and construction contract is unenforceable . . . [if the] damage is attributable to the negligent or otherwise wrongful act or omission [of the indemnitee]."[11] The purpose of the statute is to ensure that each party remains responsible for its own negligent acts or omissions.[12] However, the legislature also provided a narrow exception to this anti-indemnity statute. Minnesota Statutes section 337.05 makes it acceptable for a subcontractor to purchase insurance for the benefit of others without regard to fault.[13] Section 337.05 allows the subcontractor to indemnify and insure the general contractor against any damage resulting from work performed under the subcontract even if the general contractor is at fault. Therefore, the insurance contract exempts the otherwise invalid indemnity agreement.

This article first outlines the facts of *Engineering & Construction Innovations, Inc. v. L.H. Bolduc Co.*, which addressed the indemnity issues considered above.[14] *Second, the article states the issues presented in Engineering & Construction Innovations*.[15] Third, the article details the parties' claims, the Ramsey County District Court's decision, and the Minnesota Court of Appeals's decision.[16] Fourth, the article provides an analysis of the Minnesota Court of Appeals's decision.[17] Finally, the article concludes that, on review, the Minnesota Supreme Court should affirm the court of appeals's decision.[18]

II. THE *ECI V. BOLDUC* FACTS

The Metropolitan Council Environmental Services ("MCES") hired Frontier Pipeline, LLC ("Frontier") as the prime contractor of an underground sewer system in White Bear Lake, White Bear Township, and Hugo, Minnesota.[19] Frontier installed several runs of twenty-eight-inch sewer pipe.[20] Frontier subcontracted with Engineering and Construction Innovations, Inc. ("ECI") to install a lift station and several Forcemain Access Structures ("FAS") along the pipeline route.[21] ECI was required to install each FAS at a depth of approximately thirty feet in order to connect the sewer pipes Frontier installed at a depth of approximately twenty-five feet.[22] ECI decided that "sheeted pits" would be the safest way to excavate the deep pits without

[10] MINN. STAT. § 337.02 (2010).

[11] *Id.*

[12] Holmes v. Watson-Forsberg Co., 488 N.W.2d 473, 475 (Minn. 1992).

[13] MINN. STAT. § 337.05, subdiv. 1 (2010).

[14] Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co., 803 N.W.2d 916 (Minn. Ct. App. 2011); *see infra* Part II.

[15] *See infra* Part III.

[16] *See infra* Part IV.

[17] *See infra* Part V.

[18] *See infra* Parts VI & VII.

[19] *Eng'g & Constr. Innovations, Inc.*, 803 N.W.2d at 919.

[20] Appellant's Brief, Addendum and Appendix at 5, *Eng'g & Constr. Innovations*, 803 N.W.2d 916 (No. A11-159), 2011 WL 4454819 (stating that each run was typically several hundred feet in length).

[21] *Eng'g & Constr. Innovations*, 803 N.W.2d at 919.

[22] Appellant's Brief, Addendum and Appendix, *supra* note 20, at 5.

danger of the walls collapsing.[23] ECI hired L.H. Bolduc Co. ("Bolduc") to furnish, drive, and remove the sheeting cofferdams, which acted as walls for the sheeted pits during excavation and construction.[24]

ECI required Bolduc to purchase and maintain various types of insurance policies during the project.[25] ECI also required Bolduc to name ECI as an additional insured on the commercial general liability ("CGL") policy.[26] The Travelers Indemnity Company of Connecticut ("Travelers") was the insurer on the CGL policy.[27] Travelers issued an endorsement to the policy covering ECI as an additional insured.[28]

In August 2007, Bolduc drove the sheet piling according to the pipeline locations provided to it by Frontier's surveyor.[29] Unfortunately, Bolduc drove a piece of sheet piling for Forcemain Access Structure Number 1 ("FAS-1") into the pipeline, which Frontier had previously installed.[30] In December 2007, ECI discovered the damage after Bolduc completed its work at FAS-1.[31] ECI provided Bolduc and Travelers with written notice of the damage.[32] At the insistence of MCES and Frontier, ECI immediately repaired the damage to the pipeline to avoid a $5,000 per day assessment of liquidated damages.[33] Bolduc and Travelers inspected the damage before ECI repaired the pipeline.[34] The cost of repairs was $235,339.89.[35]

ECI sought reimbursement from Bolduc, but Bolduc refused to pay.[36] ECI submitted a claim to Travelers, but Travelers refused to reimburse ECI for the repair costs.[37] ECI submitted a claim to its own insurer, Western National, which also denied the claim.[38] Subsequently, ECI notified Bolduc that ECI would not

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[23] *Id.*

[24] *Eng'g & Constr. Innovations*, 803 N.W.2d at 919. Cofferdamsare temporary barriers commonly made of wood, steel, or concrete sheet piling primarily used for bridge/pier construction in shallow water. Fla. Dep't of Envtl. Prot., *Cofferdam/Sheet Piling: Best Management Practices*, http://www.dep.state.fl.us/coastal/programs/coral/documents/2007/MICCI/16Jul/Structural_BMPs.pdf (last visited Sept. 28, 2012).

[25] *Eng'g & Constr. Innovations*, 803 N.W.2d at 919.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Appellant's Brief, Addendum and Appendix, *supra* note 20, at 11.

[30] Brief and Appendix of Respondent L.H. Bolduc Co., Inc. at 4, *Eng'g & Constr. Innovations*, 803 N.W.2d 916 (No. A11-159), 2011 WL 4454824.

[31] Appellant's Brief, Addendum and Appendix, *supra* note 20, at 9.

[32] *Eng'g & Constr. Innovations*, 803 N.W.2d at 919.

[33] *Id.*

[34] Appellant's Brief, Addendum and Appendix, *supra* note 20, at 9.

[35] *Eng'g & Constr. Innovations*, 803 N.W.2d at 919.

[36] Brief and Appendix of Respondent L.H. Bolduc Co., Inc., *supra* note 30, at 4.

[37] Respondent Travelers Indemnity Company of Connecticut's Brief and Addendum at 10, *Eng'g & Constr. Innovations*, 803 N.W.2d 916 (No. A11-159), 2011 WL 4454827.

[38] *Id.* at 4.

pay the $32,513.29 contract amount for the sheet piling and that Bolduc owed ECI an additional $202,826.60.[39]

In August 2008, ECI brought suit against Bolduc and Travelers.[40]

III. THE *ECI V. BOLDUC* ISSUES

The dispute between ECI and Bolduc presented two issues. First, was Bolduc required to indemnify and insure ECI for any damages resulting from work under Bolduc's subcontract? ECI argued that Bolduc was responsible for damages it caused regardless of fault.[41] In contrast, Bolduc argued that it was obligated to indemnify and insure ECI only for damages resulting from Bolduc's own negligence.[42]

Second, did Travelers's additional insured endorsement limit coverage to damage caused by Bolduc's negligence? ECI argued that the policy contained no express limitation for only Bolduc's negligence.[43] Travelers argued that the policy limited coverage to damages caused by Bolduc's negligence.[44]

IV. THE *ECI V. BOLDUC* LEGAL FRAMEWORK

A. CLAIMS

ECI alleged breach of contract and negligence against Bolduc.[45] ECI also alleged breach of contract and brought a declaratory judgment action against Travelers.[46] Bolduc filed a counterclaim alleging breach of contract.[47] Travelers filed a counterclaim for declaratory judgment.[48]

[39] *Eng'g & Constr. Innovations*, 803 N.W.2d at 919 (noting that $32,513.29 plus $202,826.60 equals the $235,339.89 ECI paid to Frontier).

[40] Appellant's Brief, Addendum and Appendix, *supra* note 20, at 9.

[41] *Id.* at 30.

[42] *Eng'g & Constr. Innovations*, 803 N.W.2d at 923.

[43] Appellant's Brief, Addendum and Appendix, *supra* note 20, at 42.

[44] *Eng'g & Constr. Innovations*, 803 N.W.2d at 924.

[45] *Id.* at 919.

[46] *Id.*

[47] *Id.*

[48] *Id.*

B. DISTRICT COURT

In November 2009, the Ramsey County District Court bifurcated ECI's negligence claim against Bolduc from the remaining claims.[49] The parties fully preserved the breach of contract claims and the declaratory judgment actions for determination at a later date.[50] In March 2010, the parties stipulated that they would present only three issues to the jury.[51] First, whether Bolduc's negligence caused the damage to the pipeline at FAS-1.[52] Second, whether ECI's negligence caused the damage to the pipeline at FAS-1.[53] Third, how much Bolduc owed ECI in damages, if anything.[54] The jury returned a special verdict form finding that Bolduc was not negligent and ECI was not entitled to any money from Bolduc.[55] The special verdict form only required the jury to determine ECI's negligence if Bolduc was found negligent.[56] Therefore, the jury did not answer the question regarding ECI's negligence.[57]

After the jury returned its verdict, ECI and Bolduc brought cross-motions for summary judgment on their breach of contract claims.[58] Additionally, ECI and Travelers brought cross-motions for summary judgment on their breach of contract claims and their declaratory judgment actions.[59] The district court concluded that Bolduc had not breached its contract with ECI.[60] The district court reasoned that the contract only required Bolduc to indemnify and insure ECI from damages caused by Bolduc's negligence.[61] Subsequently, the district court concluded that section 337.05 was not at issue "because [the contract between Bolduc and ECI] does not require Bolduc to obtain insurance coverage extending to ECI's own negligence."[62] Therefore, Bolduc did not breach the contract because the jury determined that Bolduc was not negligent.[63] The district court used the same reasoning to determine that Travelers was not required to indemnify and insure ECI for the damage to the pipeline.[64] The district court granted Bolduc's and Travelers's motions for

[49] *Id.*

[50] *Id.*; Appellant's Brief, Addendum and Appendix, *supra* note 20, at 4.

[51] *Eng'g & Constr. Innovations*, 803 N.W.2d at 919.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] Appellant's Brief, Addendum and Appendix, *supra* note 20, at 11–12.

[57] *Id.* at 12.

[58] *Eng'g & Constr. Innovations*, 803 N.W.2d at 920.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* at 921.

[63] *Id.* at 920.

[64] *Id.*

summary judgment, denied ECI's motion for summary judgment, and awarded Bolduc $45,965.53 plus prejudgment interest on its breach of contract claim.[65]

C. COURT OF APPEALS

1. MAJORITY

ECI appealed the district court's decision to the Minnesota Court of Appeals. The court of appeals reversed and remanded the case in a 2-1 decision.

The court of appeals began its analysis with the indemnity language in the contract. The contract provided as follows:

[Bolduc] agrees to protect, indemnify, defend, and hold harmless ECI . . . to the fullest extent permitted by law and to the extent of the insurance requirements below, from and against (a) all claims, causes of action, liabilities, obligations, demands, costs, and expenses arising out of injury to any persons or damages to property caused or alleged to have been caused by any act or omission of [Bolduc], its agents, employees or invitees, and (b) all damage, 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.[66]

The court of appeals noted that the Minnesota Legislature provided that a construction contract containing an indemnification agreement is "unenforceable except to the extent that 'the underlying injury or damage is attributable to the negligent or otherwise wrongful act or omission, including breach of a specific contractual duty, of the promisor or the promisor's independent contractors, agents, employees, or delegates.'"[67] The court of appeals qualified that statutory language by stating that "section 337.02 does 'not affect the validity of agreements whereby a promisor agrees to provide specific insurance coverage for the benefit of others.'"[68] Therefore, the court of appeals concluded that the indemnification and insurance agreements were enforceable.[69]

Having concluded that the indemnification and insurance agreements were enforceable, the court of appeals next addressed Bolduc's argument that it was required to indemnify and insure ECI for actions arising only out of Bolduc's own negligence.[70] Under the contract language, Bolduc was required to indemnify ECI "from and against '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 carry insurance to cover such an obligation."[71] Bolduc's argument would have required the court of appeals to read the word "negligence" into the insurance and indemnification language of the contract. The court of appeals declined to do that. Because the contract

[65] *Id.*

[66] *Id.*

[67] *Id.* at 921 (quoting Minn. Stat. § 337.02 (2010)).

[68] *Eng'g & Constr. Innovations*, 803 N.W.2d at 921 (quoting Minn. Stat. § 337.05, subdiv. 1 (2010)).

[69] *Eng'g & Constr. Innovations*, 803 N.W.2d at 923.

[70] *Id.*

[71] *Id.*

required Bolduc to indemnify and insure ECI without regard to fault, the court of appeals reversed the district court's award of summary judgment in favor of Bolduc and remanded the matter to the district court.[72]

Next, the court of appeals addressed the district court's award of summary judgment in favor of Travelers. "Bolduc's ECI policy provided that Travelers would pay 'those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies.'"[73] The policy included an additional insured endorsement that named ECI as an insured.[74] Travelers argued that the endorsement limited coverage to situations where Bolduc was negligent.[75] However, the court of appeals declined to incorporate the word "negligent" into the policy.[76] Therefore, the court of appeals reversed the district court's award of summary judgment in favor of Travelers and remanded the matter to the district court.[77]

Finally, the court of appeals addressed ECI's argument that reversal of the district court's award of summary judgment in favor of Bolduc required reversal of the $45,965.53 breach of contract award.[78] However, the court of appeals declined to address that issue because ECI did not raise it in its principal brief.[79]

2. DISSENT

The dissent focused much of its attention on section 337.02, which "does not permit a party to a construction contract to be indemnified for its own negligence."[80] The dissent reasoned that if "Bolduc was found not negligent by the jury," then "ECI [was] the only other party that could [have been] negligent under the facts of the case."[81] In addition, the dissent did not believe that section 337.05 applied. The dissent stated that "[a]greements seeking to indemnify the indemnitee for losses occasioned by its own negligence . . . are not favored by the law and are not construed in favor of indemnification unless such intention is expressed in clear and unequivocal terms, or unless no other meaning can be ascribed to it."[82] The dissent did not find "such specific, clear, and unequivocal term[s]" in the contract that would have indemnified ECI for its own negligent acts.[83] The dissent stated that the entire purpose of section 337.02 would be defeated if "ECI could

[72] *Id.*

[73] *Id.*

[74] *Id.* at 924.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* at 924–25.

[80] *Id.* at 925 (Connolly, J., dissenting).

[81] *Id.*

[82] *Id.* (quoting Yang v. Voyagaire Houseboats, Inc., 701 N.W.2d 783, 791 (Minn. 2005)).

[83] *Eng'g & Constr. Innovations*, 803 N.W.2dat 925–26 (Connolly, J., dissenting).

immunize itself from the risk of ever having to accept responsibility for its own negligent acts."[84] Therefore, the dissent would have affirmed the district court's grant of summary judgment in favor of Bolduc and Travelers.[85]

V. ANALYSIS OF THE *ECI V. BOLDUC* DECISION

A. IMPORTANT LANGUAGE

Indemnification and insurance cases require the courts to interpret contractual language, interpret statutory language, and apply case law. Before introducing some of the relevant case law, it is important to have a firm grasp of the contractual and statutory language that is important to this case.

The indemnity language in the contract between ECI and Bolduc provided as follows:
[Bolduc] agrees to protect, indemnify, defend, and hold harmless ECI . . . to the fullest extent permitted by law and to the extent of the insurance requirements below, from and against (a) all claims, causes of action, liabilities, obligations, demands, costs, and expenses arising out of injury to any persons or damages to property caused or alleged to have been caused by any act or omission of [Bolduc], its agents, employees or invitees, and (b) all damage, 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 . . . on account of any such liability or claims of liability. [Bolduc] agrees to procure and carry until the completion of the Subcontract, workers compensation and such other insurance that specifically covers the indemnity obligations under this paragraph, from an insurance carrier which ECI finds financially sound and acceptable, and to name ECI as an additional insured on said policies.[86]

In addition, Bolduc's insurance policy provided that Travelers would pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."[87] The insurance policy included an additional insured endorsement that named ECI as an insured.[88] That endorsement limited coverage to situations where "the injury or damage is caused by acts or omissions of [Bolduc] or [its] subcontractor in the performance of [its] work to which the written contract requiring insurance applies."[89]

The relevant statutory language is found in Minnesota Statutes sections 337.02 and 337.05. Chapter 337 applies specifically to building and construction contracts.[90] Section 337.02 provides the following:
An indemnification agreement contained in, or executed in connection with, a building and construction contract *is unenforceable except to the extent that*: (1) *the* underlying injury or *damage is attributable to the negligent* or otherwise wrongful *act* or omission, including breach of a specific contractual duty, *of the*

[84] *Id.* at 926–27.

[85] *Id.* at 927.

[86] *Id.* at 920–21 (majority opinion).

[87] *Id.* at 923.

[88] *Id.* at 924.

[89] *Id.*

[90] *See* MINN. STAT. § 337.01 (2010).

promisor or the promisor's independent contractors, agents, employees, or delegatees; or (2) an owner, a responsible party, or a governmental entity agrees to indemnify a contractor directly or through another contractor with respect to strict liability under environmental laws.[91]

Section 337.02 ensures that all parties remain responsible for their own negligent acts or omissions. Section 337.05, subdivision 1, states that "[s]ections 337.01 to 337.05 do not affect the validity of agreements whereby a promisor agrees to provide specific insurance coverage for the benefit of others."[92] For practical purposes, section 337.05, subdivision 1, operates as an exception from the general prohibition under section 337.02.

B. BOLDUC ARGUED THAT SECTION 337.05 DOES NOT APPLY

Bolduc argued on appeal that "[t]he district court properly construed Minnesota law with regard to interpretation of contracts when it found that the ECI contract did not require Bolduc to indemnify ECI when Bolduc was found to be not negligent and ECI's damages were zero."[93] Bolduc recognized ECI's argument that section "337.05 permits the enforcement of agreements by which one party agrees to insure another for its own negligence" as nothing more than a "confusing alternative argument."[94] Bolduc defended the district court's conclusion "that section 337.05 was not at issue in the present case 'because [the contract between Bolduc and ECI] does not require Bolduc to obtain insurance coverage extending to ECI's own negligence.'"[95] Bolduc stated that allowing one party to insure another for its own negligence was "clearly forbidden by Minnesota law."[96] Bolduc's argument relied on the "strict construction" approach, which the Minnesota Supreme Court used in *Farmington Plumbing & Heating* five years prior to the Minnesota Legislature's adoption of Minnesota Statutes sections 337.02 and 337.05.[97] However, the adoption of section 337.05 in 1984 created a narrow exception in construction contracts. Section 337.05, subdivision 1, makes it acceptable for a subcontractor to purchase insurance to cover negligent acts of the general contractor.[98] Consequently, the insurance contract exempts the otherwise invalid indemnity agreement.

In 1992, the Minnesota Supreme Court agreed with this interpretation of section 337.05 in *Holmes v. Watson-Forsberg Co*.[99] The supreme court stated that "the legislature both anticipated and approved a long-standing practice in the construction industry by which the parties to a subcontract could agree that one

[91] MINN. STAT. § 337.02 (2010) (emphasis added).

[92] MINN. STAT. § 337.05, subdiv. 1 (2010).

[93] Brief and Appendix of Respondent L.H. Bolduc Co., Inc., *supra* note 30, at 31.

[94] *Id.* at 35 n.13 (citing Appellant's Brief, Addendum and Appendix, *supra* note 20, at 34–35).

[95] Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co., 803 N.W.2d 916, 921 (Minn. Ct. App. 2011) (alternation in original).

[96] Brief and Appendix of Respondent L.H. Bolduc, Co., Inc., *supra* note 30, at 35 n.13 (citing Farmington Plumbing & Heating Co. v. Fischer Sand & Aggregate, Inc., 281 N.W.2d 838, 842 (Minn. 1979).

[97] Brief and Appendix of Respondent L.H. Bolduc, Co., Inc., *supra* note 30, at 34 (citing *Farmington Plumbing & Heating Co.*, 281 N.W.2d at 842 (stating that "[i]ndemnity agreements are to be strictly construed when the indemnitee . . . seeks to be indemnified for its own negligence")); *see also* MINN. STAT. §§ 337.02, .05 (2010).

[98] *See* Minn. Stat. § 337.05, subdiv. 1 (2010).

[99] Holmes v. Watson-Forsberg Co., 488 N.W.2d 473, 475 (Minn. 1992).

party would purchase insurance that would protect 'others' involved in the performance of the construction project."[100]

It is important to note that Bolduc did not cite *Holmes* in its appellate brief.[101] Also noteworthy is the fact that the court of appeals opined that Bolduc's argument against incorporating section 337.05 relied on its own opinion in *Holmes*.[102] In *Holmes*, the court of appeals concluded that "[b]ecause the indemnification agreement is not enforceable, there is nothing to insure."[103] However, the supreme court reversed the court of appeals's decision in *Holmes*.[104] The supreme court concluded that "the parties are free to place the risk of loss upon an insurer by requiring one of the parties to insure against that risk."[105]

Applied together, sections 337.02 and 337.05 allow a party to indemnify for another's negligence and to insure that risk. This "narrow exception to the general prohibition of indemnification from the indemnitee's own negligence" has become "common practice in the construction industry."[106] General contractors commonly require subcontractors to insure the general contractors' indemnification obligations.[107]

C. BOLDUC ALSO ARGUED APPORTIONMENT OF FAULT

Bolduc argued that "because the jury found that Bolduc was not negligent, there can be no obligation to insure or indemnify ECI for the damage caused to the pipeline."[108] The dissent agreed with that argument: "Bolduc was found not negligent by the jury, and ECI was awarded no damages. Consequently, ECI is the only other party that could be negligent under the facts of the case. Therefore, Bolduc is being asked to indemnify ECI for its own negligence."[109] However, that argument ignores the existence of section 337.05, which is crucial to the analysis. The majority found that "[w]hile an apportionment of fault would be relevant to the analysis under section 337.02 of the permissible extent of an indemnification obligation without a coextensive agreement to insure, because the indemnification and insurance obligations coincide, section 337.05 exempts the contract from the application of section 337.02.[110] Therefore, while the jury's finding that Bolduc was not negligent would be fatal for ECI in a section 337.02 apportionment-of-fault analysis, it is irrelevant because of the section 337.05 exception. Section 337.05 permitted the contract to require Bolduc to insure and indemnify ECI without regard to fault.

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[100] *Id.*

[101] *See* Brief and Appendix of Respondent L.H. Bolduc, Co., Inc., *supra* note 30.

[102] Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co., 803 N.W.2d 916, 921 (Minn. Ct. App. 2011).

[103] Holmes v. Watson-Forsberg Co., 471 N.W.2d 109, 112 (Minn. Ct. App. 1991), *rev'd*, 488 N.W.2d 473 (Minn. 1992).

[104] *Holmes*, 488 N.W.2d at 476.

[105] *Id.* at 475.

[106] *Eng'g & Constr. Innovations*, 803 N.W.2d at 922 (citing Katzner v. Kelleher Constr., 545 N.W.2d 378, 381 (Minn. 1996)).

[107] Hurlburt v. N. States Power Co., 549 N.W.2d 919, 923 (Minn. 1996).

[108] *Eng'g & Constr. Innovations*, 803 N.W.2d at 923.

[109] *Id.* at 925 (Connolly, J., dissenting). However, ECI is not the only other party that could be negligent because Frontier's surveyor marked the locations for the sheet piling. *See supra* text accompanying note 29.

[110] *Eng'g & Constr. Innovations*, 803 N.W.2d at 923 (majority opinion).

D. THE CONTRACT LANGUAGE MATTERS

The Minnesota Supreme Court has recognized that the "specific statutory language employed will determine whether there is an enforceable agreement to indemnify and insure against another's negligence."[111] In *Holmes*, the supreme court found that the following language required the subcontractor to indemnify and insure the general contractor: "[F]or which the Contractor may be or may be claimed to be, liable."[112] The language in *Holmes* stated that the subcontractor was required to indemnify and insure the general contractor without regard to fault.[113] Similarly, in *McCarthy*, the agreement provided for indemnification "regardless of whether or not such claims, losses, damages and expenses are caused in whole or in part by [the indemnified party]."[114] Once again, the indemnitor was required to indemnify and insure the indemnitee without regard to fault. The supreme court has also recognized language that provided the opposite result. In *Hurlburt*, the contractual language stated that indemnification and insurance "shall apply only to the extent that the underlying injury or damage is attributable to the negligence or otherwise wrongful act or omission . . . of Subcontractor or [its sub-subcontractors]."[115] The language in *Hurlburt* stated that the subcontractor was required to indemnify and insure the general contractor only if the subcontractor was at fault. Unlike *Holmes* and *McCarthy*, the *Hurlburt* language did not require an indemnitor to indemnify a negligent—or at fault—indemnitee.

In *Engineering & Construction Innovations*, the dissent stated that the ECI contract language was "very different" from the language in *Holmes*.[116] "In *Holmes*, the subcontractor promised to indemnify the contractor 'for all damages or injury to all persons, whether employees or otherwise, and to all property, arising out of it, *resulting from or in any manner connected with, the execution of the work* provided for in this [contract].'"[117] The dissent opined that the "obligation to indemnify was tied to the broader nature of the *work being performed under the subcontract* and not to damages caused by the acts or omissions or alleged acts or omissions of a subcontractor."[118] Unfortunately, the dissent did not explain how the *Holmes* language was different from the ECI contract language, which stated: "[Bolduc] agrees to protect, indemnify, defend, and hold harmless ECI . . . against . . . (b) all damage . . . caused by any act or omission of [Bolduc] or anyone who performs work or services in the *prosecution of the Subcontract*."[119] The ECI contract language and the *Holmes* language are both tied to the broader nature of the work being performed under the subcontract. Bolduc's argument that it was not negligent is irrelevant. Bolduc caused the damage when it drove the sheet piling into the pipeline.[120] Bolduc performed that work under its subcontract.[121]

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[111] *Id.* at 922 (citing Holmes v. Watson-Forsberg Co., 488 N.W.2d 473, 474 (Minn. 1992)).

[112] *Holmes*, 488 N.W.2d at 474.

[113] *Id.* at 475.

[114] McCarthy v. Target Stores, No. C4-98-1297, 1999 WL 58568, at *7 (Minn. Ct. App. Feb. 3, 1999).

[115] Hurlburt v. N. States Power Co., 549 N.W.2d 919, 922 (Minn. 1996).

[116] *Eng'g & Constr. Innovations*, 803 N.W.2d at 926 (Connolly, J., dissenting).

[117] *Id.* (alteration in original) (quoting *Holmes*, 488 N.W.2d at 474).

[118] *Eng'g & Constr. Innovations*, 803 N.W.2d at 926 (Connolly, J., dissenting) (emphasis added).

[119] *Id.* at 920 (majority opinion) (alternation in original) (emphasis added); *see supra* text accompanying notes 86–89 for more complete ECI contract language.

[120] *See supra* text accompanying note 30.

[121] *See supra* text accompanying note 24.

Therefore, fault is irrelevant because Bolduc performed the work under its subcontract. Under this reasoning, the majority found that the ECI contract "employ[ed] language that [was] similar to that approved by the supreme court in *Holmes*."[122]

E. TRAVELERS INSURANCE POLICY

Travelers argued that the insurance policy excluded "coverage for damages caused by the fault of another unless the parties have entered into an 'insured contract' where the insured has agreed to indemnify the other party for damages caused by the other party's own 'tort liability.'"[123] Travelers cited *Farmington Plumbing & Heating* as authority that Minnesota courts apply a strict construction standard when a contract calls for one party to indemnify and insure another for its own negligence.[124] However, the Minnesota Legislature replaced the strict construction approach used in *Farmington Plumbing & Heating* five years after that decision. In 1984, the Minnesota Legislature adopted Minnesota Statutes sections 337.02 and 337.05, which control indemnification and insurance agreements in building and construction contracts.[125]

In its analysis of the insurance policy, the court of appeals found a 1995 decision by the Appellate Court of Illinois "particularly instructive."[126] "In *J.A. Jones*, the Illinois Appellate Court held that when an additional insured endorsement does not expressly limit coverage to a subcontractor's negligence, coverage for the general contractor under an additional insured endorsement similarly was not limited to such negligence."[127]

In *Engineering & Construction Innovations*, the insurance policy listed ECI as an additional insured. "The endorsement limit[ed the] coverage to situations where the injury or damage is caused by acts or omissions of you or your subcontractor *in the performance of your work to which the written contract requiring insurance* applies."[128] The endorsement did not limit coverage to damages caused by Bolduc's *negligent* acts. Therefore, because the additional insured endorsement did not expressly limit coverage to Bolduc's negligence, ECI's coverage under the additional insured endorsement similarly was not limited to Bolduc's negligence. As such, Travelers was required to insure ECI as an additional insured against any damages caused by Bolduc without regard to fault.

VI. THE MINNESOTA SUPREME COURT GRANTED REVIEW

On November 22, 2011, the Minnesota Supreme Court granted review. The supreme court should affirm the court of appeals's decision. The Minnesota Legislature adopted clear and unambiguous statutes regarding indemnification and insurance agreements in building and construction contracts. Section 337.02 forbids a party from requiring another party to indemnify it against its own negligent acts. However, the

[122] *Eng'g & Constr. Innovations*, 803 N.W.2d at 922.

[123] Respondent the Travelers Indemnity Company of Connecticut's Brief and Addendum, *supra* note 37, at 35.

[124] *Id.* at 36 (citing Farmington Plumbing & Heating Co. v. Fischer Sand & Aggregate, Inc., 281 N.W.2d 838, 842 (Minn. 1979)).

[125] MINN. STAT. §§ 337.02, .05 (2010).

[126] *Eng'g & Constr. Innovations*, 803 N.W.2d at 923.

[127] *Id.* (citing J.A. Jones Constr. Co. v. Hartford Fire Ins. Co., 645 N.E.2d 980, 982 (Ill. App. Ct. 1995)).

[128] *Eng'g & Constr. Innovations*, 803 N.W.2d at 924 (emphasis added).

contract between ECI and Bolduc was exempt from that general prohibition because the parties agreed that Bolduc would purchase insurance and name ECI as an additional insured. "[T]he legislature both anticipated and approved [this] long-standing practice in the construction industry" when it adopted section 337.05.[129]

The indemnification and insurance agreements provided protection for ECI from damage caused by any act or omission of Bolduc under its subcontract.[130] The facts clearly state that Bolduc damaged the pipeline when it drove its sheet piling into the pipeline.[131] It is irrelevant whether Bolduc was negligent or not. The fact remains that the pipeline was damaged as a result of work performed under Bolduc's subcontract. In addition, Bolduc agreed to indemnify and insure ECI against any damage caused as a result of work performed under its subcontract.[132] Therefore, the Minnesota Supreme Court should affirm the court of appeals's decision to reverse and remand the matter to the district court for further proceedings not inconsistent with its opinion.

VII. CONCLUSION

The majority and the dissent arrived at very different conclusions when asked to interpret the indemnification and insurance language used in the subcontract between ECI and Bolduc. The majority and dissent agreed that section 337.02 prohibits a party from requiring another party to indemnify it from its own negligent actions. However, the two opinions diverged in their application of section 337.05. The majority stated that the legislature intended for section 337.05 to operate as an exception from the general prohibitions of section 337.02. Therefore, Bolduc was required to indemnify and insure ECI against damage caused under its subcontract without regard to fault. In contrast, the dissent stated that section 337.05 did not apply because the contractual language was not identical to the language approved by the supreme court in *Holmes*.

[129] *Id.* at 921 (first alteration in original).

[130] *See supra* text accompanying note 86.

[131] *See supra* text accompanying note 30.

[132] *See supra* text accompanying note 86.