

CASE NO. A11-0159

**STATE OF MINNESOTA
IN SUPREME COURT**

Engineering & Construction Innovations, Inc.,

Respondent,

v.

L. H. Bolduc Co., Inc.,

Appellant,

The Travelers Indemnity Company of America,

Appellant.

**BRIEF OF AMICUS CURIAE THE AMERICAN SUBCONTRACTORS
ASSOCIATION OF MINNESOTA and THE AMERICAN
SUBCONTRACTORS ASSOCIATION, INC.**

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I. THE STANDING AND INTEREST OF THE AMERICAN SUBCONTRACTORS ASSOCIATION OF MINNESOTA AND THE AMERICAN SUBCONTRACTORS ASSOCIATION, INC.

The American Subcontractors Association, Inc. (“ASA”) is a non-profit corporation supported by membership dues paid by approximately 5,000 member businesses trading as construction subcontractors and suppliers through the country, including Minnesota.¹ The American Subcontractors Association of Minnesota (“ASAMN”) is the Minnesota chapter of the ASA, and is made up of approximately fifty construction subcontractors, contractors, suppliers and service companies. American Subcontractors Association, Inc. and American Subcontractors Association of Minnesota are hereafter collectively referred to as “ASA”. ASA’s primary focus is the equitable treatment of subcontractors and trade suppliers in the construction industry. ASA acts in the interest of all subcontractors by promoting legislative action, including the legislation at issue in the present appeal, and by appearing as *Amicus Curiae* in significant legal actions that affect the construction industry at large.

Subcontractors are hired to perform specific work on construction projects, and perform approximately 80-90% of the work on most projects. While subcontractors are responsible for properly performing their own work, and

¹ The American Subcontractors Association, Inc. made the only monetary contribution to the preparation of this brief. Undersigned counsel prepared this brief, and no counsel for any party to this appeal authored any portion of this brief.

providing a safe workplace for their employees, they cannot control the work of other subcontractors, nor ensure overall project safety. This is the responsibility of the general contractor. However, in the vast majority of construction projects, subcontractors are required by contract to hold harmless, defend and indemnify the owner and the general contractor from and against all claims, including claims for those parties' own negligence. As a result of this practice, subcontractors are disproportionately affected by the Court's interpretation of indemnity clauses.

To avoid the statutory prohibition on such broad form indemnity clauses, subcontractors are required, by contract, to name the owner and general contractor as an additional insured on the subcontractor's insurance policies. The practical effect of this practice is to shift the entire risk of loss for personal injuries and property damage onto the subcontractor and its insurer. However, the shift to the subcontractor's insurer is only temporary, since the insurer recovers much of its costs through increased premiums charged to the subcontractor due to its experience rating. Accordingly, the subcontractor ultimately bears the cost of the owner's or general contractor's negligence.

While subcontractors are experts in how to execute the work they agree to perform, they are not lawyers. Indemnity clauses are inherently legalistic and confusing, even to lawyers and courts. The confusing nature of indemnity clauses is evidenced by the numerous lawsuits in which courts are asked to interpret the

clauses. Since lawyers and judges struggle with interpretation of indemnity clauses, it is not surprising that subcontractors, who are trained in their trade but not the law, are confused by such clauses. Accordingly, strict construction, which requires clear and explicit language explaining the subcontractor's obligations, is necessary to avoid misleading or tricking a subcontractor into assuming another's liability.

II. ARGUMENT

A. ***THE COURT OF APPEALS FAILED TO PROPERLY AND STRICTLY CONSTRUE THE INDEMNITY CLAUSE IN THIS CASE.***

Since the enactment in 1983 of Minn. Stat. § 337.02, clauses in construction contracts that require one party (typically a subcontractor) to indemnify another (typically a general contractor) against the other's own negligence are unenforceable. *Katzner v. Kelleher Construction*, 545 N.W.2d 378, 381 (Minn. 1996). Such clauses are referred to as "broad form indemnity." However, notwithstanding the prohibition of broad form indemnity in Minn. Stat. § 337.02, this Court has interpreted Minn. Stat. § 337.05 to allow one party (typically a subcontractor) to be required by contract to purchase insurance to protect another (typically a general contractor) against the other's own negligence. The typical subcontract insurance clause, including the one involved in this case, requires the subcontractor to procure insurance and endorsements to insure the liability it has

assumed in the indemnity clause. Under Minn. Stat. § 337.05, subd. 2, if the subcontractor fails to procure the required insurance, then the subcontractor may be required to indemnify the general contractor for its own negligence or fault, notwithstanding the prohibition of Minn. Stat. § 337.02. *Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473, 475 (Minn. 1992). Accordingly, the interpretation of the indemnity clause is important to determine the scope of insurance coverage the indemnitor must procure for the indemnitee, and is the first key step in deciding a case such as this one.

It is well-established that an indemnity clause is to be strictly construed when an indemnitee (in this case ECI) seeks to be indemnified for its own negligence. Such a construction is consistent with the policy expressed in *Tolbert v. Gerber Industries, Inc.*, 255 N.W.2d 362 (Minn. 1977), that each tortfeasor should accept responsibility for damages commensurate with its own relative culpability. By making each tortfeasor responsible for its own relative culpability, each participant in a construction project has an economic and financial interest in promoting a safe workplace and carefully performing its work. *Katzner v. Kelleher Const.*, 545 N.W.2d 378, 381 (Minn. 1996); *Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc.*, 281 N.W.2d 838, 842 (Minn. 1979).

The strict construction of indemnity clauses is also consistent with the Legislature's enactment of Minn. Stat. § 337.02, which makes provisions in construction contracts that require the indemnitor to indemnify the indemnitee for the indemnitee's own negligence unenforceable. The legislative history of Minn. Stat. § 337.02 reflects the Legislature's determination that the prohibition of such broad form indemnity clauses would lead to greater safety in the workplace. The anti-indemnity statute also recognizes the imbalance in bargaining power that exists between contractors and subcontractors, which leads to unfair subcontract terms, including broad form indemnity. *See Holmes v. Watson-Forsberg Co.*, 471 N.W.2d 109, 111 (Minn. App. 1991)(quoting legislative history of Minn. Stat. § 337.02), *rev'd. on other grounds*, 488 N.W.2d 473 (Minn. 1992). Thus, there is a strong public policy, emanating from both case and statutory law, in favor of making each participant in a construction project responsible for its own negligence or fault.

In this case, the Court of Appeals held that the indemnity clause in the ECI/Bolduc subcontract was a broad form indemnity that is "similar" to the language approved by the Supreme Court in *Holmes v. Watson-Forsberg*, 488 N.W.2d 473 (Minn. 1992). In *Holmes*, this Court held that the standard AGC of Minnesota subcontract contained a broad form indemnity which required the subcontractor to indemnify the general contractor against its own negligence.

Here, the Court of Appeals interpreted the indemnity clause to be a broad form indemnity that required Bolduc to indemnify ECI for ECI’s own negligence and without regard to fault by any party. However, a careful examination of the indemnity clauses at issue here and in *Holmes* demonstrates the error in the Court of Appeal’s interpretation. For ease of comparison, the relevant language from the two clauses is set forth below:

ECI/Bolduc	Watson-Forsberg
<p>Subcontractor agrees to protect, indemnify, defend, and hold harmless ECI and the Owner, to the fullest extent permitted by law and <u>to the extent of the insurance requirements below</u>, 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 <u>caused by any act or omission of Subcontractor</u>, its agents, employees or invitees, and (b) all damage, judgments, expenses, and attorney's fees <u>caused by any act or omission of Subcontractor</u> or anyone who performs work or services in the prosecution of the Subcontract.</p> <p>Subcontractor shall defend any and all suits brought against ECI or Owner on account of any such liability or claims of liability. Subcontractor agrees to procure and carry until the completion of the Subcontract, workers compensation and such other insurance that specifically covers the indemnity</p>	<p>The Subcontractor agrees to assume entire responsibility and liability, to the fullest extent permitted by law, for all damages or injury to all persons, whether employees or otherwise, and to all property, <u>arising out of it, resulting from or in any manner connected with, the execution of the work provided for in this Subcontract</u> or occurring or resulting from the use by the Subcontractor, his agents or employees, of materials, equipment, instrumentalities or other property, whether the same be owned by the Contractor, the Subcontractor or third parties, and the Subcontractor, to the fullest extent permitted by law, agrees to indemnify and save harmless the Contractor, his agents and employees from all such claims <u>including, without limiting the generality of the foregoing, claims for which the Contractor may be or may be claimed to be, liable</u> and legal fees and disbursements paid or incurred to enforce the provisions of this paragraph</p>

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.

and the Subcontractor further agrees to obtain, maintain and pay for such general liability insurance coverage and endorsements as will insure the provisions of this paragraph.

Bolduc Addendum at p. Add.38; *Holmes v. Watson-Forsberg* at 474 - 475. (Bold and underlining added to emphasize differences).

As recognized by Judge Connolly in his dissent from the Court of Appeals opinion in this case, these two clauses are very different. In *Holmes*, the subcontractor agreed to indemnify the contractor for "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 Subcontract." 488 N.W.2d at 474 (emphasis added). This language has been repeatedly held to require only a temporal and geographical, or a causal relationship, between the subcontractor's work and the injury giving rise to the liability. See *Anstine v. Lake Darling Ranch*, 233 N.W.2d 723, 727 (Minn. 1975), *rev'd. on other grounds, Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc.*, 281 N.W.2d 838, 842, n.4 (Minn. 1979). This Court has also held that the portion of the *Holmes* broad form indemnity clause, which states that the subcontractor "agrees to indemnify and save harmless the Contractor, his agents and employees from all such claims including, without limiting the generality of the foregoing, claims for which the Contractor may be or may be

claimed to be, liable”, necessarily includes claims of the contractor's own negligence. (underlining added). *Johnson v. McGough Construction Co., Inc.*, 294 N.W.2d 286, 288 (Minn. 1980). Accordingly, in a series of cases, this Court has identified the language of a broad form indemnity that meets the strict construction requirement for indemnification against one’s own fault or negligence.

However, the indemnity language of the Bolduc/ECI subcontract does not parrot the previously approved broad form indemnity language use in *Holmes*. Rather, the instant indemnity agreement states that Bolduc agrees to indemnify ECI only for claims or damages “caused by any act or omission of [Bolduc].” Conspicuously absent is the broader language from the *Holmes* broad form indemnity clause that the subcontractor agrees to indemnify against any claim “arising out of it, resulting from or in any manner connected with, the execution of the work.” The Bolduc/ECI indemnity clause also does not contain the language that this Court has held necessarily includes claims for the contractor’s own negligence – “claims for which the Contractor may be or may be claimed to be, liable.”

These are distinctions with a difference. The Bolduc/ECI indemnity clause language cannot be reasonably, much less strictly, construed to require Bolduc to indemnify ECI for its own negligence. The indemnity clause is expressly limited to the “act or omission” of Bolduc, and does not even mention the act or omission

of ECI. The only reasonable construction is that Bolduc agreed to indemnify ECI for any damages it incurs arising out of Bolduc's negligence or fault.

Such a narrow construction is consistent with this Court's decisions in *Hurlbert v. Northern States Power Co.*, 549 N.W.2d 919 (Minn. 1996) and *Katzner v. Kelleher Construction*, 545 N.W.2d 378 (Minn. 1996). In both *Hurlbert* and *Katzner*, the Court interpreted an indemnity clause that contained language limiting its effect to acts, omissions or negligence of the subcontractor. The Court correctly determined that such express limitations did not constitute an agreement to indemnify the general contractor against its own negligence or fault. The Bolduc/ECI indemnity clause, which is limited to claims and damages "caused by any act or omission of Subcontractor," is nearly identical to the *Hurlbert* and *Katzner* clauses. The Court of Appeals erred in holding that the Bolduc/ECI indemnity clause was "similar" to the language approved by the Supreme Court in *Holmes v. Watson-Forsberg*. This Court should correct this error by holding, consistent with *Hurlbert* and *Katzner*, that the Bolduc/ECI indemnity clause did not include ECI's own fault or negligence, but only extended to the fault or negligence of Bolduc for which ECI may be liable.

The Bolduc/ECI indemnity clause also specifically limits Bolduc's indemnity obligation to "to the extent of the insurance requirements below." This language imposes an additional limitation on Bolduc's indemnity obligation that is

not present in the *Holmes* broad form indemnity clause. The addition of this language expressly makes Bolduc's indemnity obligation co-extensive with the insurance coverage it is required to procure. Based upon this express language, Bolduc cannot be required to indemnify ECI for any damages or costs that are not covered by the Travelers policy. Such a construction is consistent with how this Court in *Holmes*, and its progeny, interpreted the interaction of Minn. Stat. § § 337.02 and 337.05, subd. 1.

The Court has the opportunity in this case to clarify the law regarding the construction of indemnity clauses. Consistent with strict construction and the policy behind Minn. Stat. § 337.02, this Court should hold that any indemnity clause which purports to require one party to indemnify another for the other's own negligence or fault must explicitly, clearly, and in plain English state that "the Subcontractor will indemnify, defend and hold harmless the General Contractor from and against claims for the General Contractor's own negligence or fault." The Court should end the practice of lawyers drafting indemnity clauses using convoluted legalese that the typical tradesperson cannot understand. If a general contractor wants to be absolved from responsibility for its own negligence or fault, then it should clearly say so. In this way, a subcontractor can understand the liability it is agreeing to assume, and attempt to obtain insurance coverage to cover such risk. By adopting such a bright-line rule, litigation over indemnity clause

interpretation will be lessened, and businesspeople can understand what risk is being assumed.

B. BOLDUC MET ITS CONTRACTUAL AND STATUTORY OBLIGATION TO PROCURE INSURANCE INSURING BOLDUC'S OBLIGATION UNDER THE INDEMNITY CLAUSE.

This Court has previously held that the Legislature created a “narrow” exception to the prohibition against indemnity for one’s own negligence contained in Minn. Stat. § 337.02, by enacting Minn. Stat. § 337.05, subd. 1, which provides that § 337.02 does not “affect the validity of agreements whereby a promisor agrees to provide specific insurance coverage for the benefit of others.” *See Katzner*, 545 N.W.2d at 381. In practice, general contractors require subcontractors to add the general contractor, and sometimes others, as an additional insured on the subcontractor’s general liability insurance policy.

By making the general contractor an additional insured, the statutory prohibition against broad form indemnity for one’s own negligence is circumvented. Minn. Stat. § 337.05, subd. 2 provides that if the subcontractor fails to obtain the contractually required insurance, then the subcontractor may be liable for a claim that arises “regardless of section 337.02,” thereby allowing the general contractor to enforce the broad form indemnity which is otherwise unenforceable. *See Seward Housing Corporation v. Conroy Brothers Company*, 573 N.W.2d 364, 366 (Minn. 1998). Accordingly, it is essential for a subcontractor to understand

the exact scope of its indemnity obligation, so it can procure insurance co-extensive with that obligation, or the subcontractor effectively becomes the general contractor's insurer.

Additional insured status to the subcontractor's general liability insurance policy is typically conferred by way of endorsement. In some instances, where the named insured faces repeated demands to procure additional insured coverage, the named insured's policy is endorsed with a "blanket" endorsement. This extends additional insured status to any person or organization with whom the named insured has agreed in a written contract to name as an insured under its general liability coverage.

In this case, Bolduc provided the specific insurance required by the Bolduc/ECI subcontract. Petitioner Travelers issued an industry-standard additional insured endorsement that made ECI an insured under Bolduc's liability policy. (Bolduc Appendix p. A.88 - A.89; Traveler's Addendum p. Add.19 - Add.22). Significantly, the language of the Additional Insured Endorsement and the indemnity clause in the ECI/Bolduc subcontract are virtually identical. The indemnity clause required Bolduc to indemnify ECI for all claims "arising out of injury to any persons or damages to property caused or alleged to have been caused by any act or omission of [ECI], its agents, employees or invitees, and (b) all damage, judgments, expenses, and attorney's fees caused by any act or omission of

[ECI].” (Emphasis added). The Additional Insured Endorsement grants coverage to ECI “to the extent that, the injury or damage is cause by acts or omissions” of Bolduc.

Since Bolduc complied with contractual obligation to name ECI as an additional insured, it has satisfied its contractual duty. Travelers has admitted that ECI is an additional insured. Bolduc is not responsible for Travelers’ decision to deny coverage to ECI under the terms of the policy. Bolduc did not agree to insure that Travelers would pay ECI for any claim, regardless of cause or fault. Regardless of the outcome of the dispute between ECI and Travelers, Bolduc should be absolved of liability because it complied with its obligation to procure insurance.

As discussed above regarding the complexity of interpreting indemnity clauses, the interpretation of insurance policies and coverage is also beyond the understanding of the typical tradesperson/subcontractor. It would be the height of absurdity if Bolduc was determined to not have procured the insurance required by the ECI/Bolduc subcontract, when the language of the indemnity clause and the Additional Insured Endorsement are virtually identical. The Court should hold that Bolduc complied with its contractual indemnity and insurance procurement obligations by obtaining the Additional Insured Endorsement in the Travelers policy.

C. STRICT CONSTRUCTION OF INDEMNITY AND ADDITIONAL INSURED REQUIREMENTS SUPPORTS THE PUBLIC POLICY IN FAVOR OF MAKING TORTFEASORS RESPONSIBLE FOR THEIR OWN CONDUCT.

As recognized by this Court in *Holmes* and its progeny, there is an inextricable link between a subcontract's indemnity clause and its insurance clause. Under the Court's holding in *Holmes*, a broad form indemnity agreement, which is unenforceable under Minn. Stat. § 337.02, is indirectly enforced by requiring the subcontractor to make the general contractor an additional insured on the subcontractor's policy. In a typical relationship between an insured and an insurer, the insured is constrained in its behavior by the recognition that risky activity will result in higher insurance premiums or termination of coverage. However, "the additional insured is insulated against this prospect by the fact that it is not responsible for premium payments to the insurer and is unaffected by the raising of premiums ... there is no motivation or incentive for the additional insured to exercise a high standard of care." *Mehta, Additional Insured States in Construction Contracts and Moral Hazard*, 3 Conn. Ins. L. J. 169, 186-87 (1996). "[T]he moral hazard of insurance [is] the chance that the existence of insurance will increase the likelihood of the insured event." *Hall v. Life Insurance Company of North America*, 317 F.3d 773, 775 (7th Cir. 2003). See also, *Charter Oaks Fire Insurance Co. v. Color Converting Industries Co.*, 45 F.3d 1170, 1174 (7th Cir. 1995).

In the context of insurance, the moral hazard problem is ordinarily alleviated by “monitoring” of the named insured by the insurance carrier. *See Mehta*, 3 Conn. L. J. at 185-86. Insurance carriers can provide affirmative incentives to their named insureds to reduce the risk of loss, and they can also monitor the loss experience of their named insureds and adjust premiums accordingly. *Id.* at 186-87. In fact, insurance carriers share loss experience information with each other through rating organizations, which are explicitly exempted from federal anti-trust laws. *See* 15 U.S.C. § 1012(b). The ability to share loss experience information solves the moral hazard problem for most common forms of insurance, but losses are tracked to the named insured, and thus the additional insured is unaffected by the raising of premiums. *Mehta*, 3 Conn. L. J. at 186-87. “[W]hile the primary insured, by way of its direct contractual relationship with the insurer, has a continuing motivation to exercise high standards of care, the additional insured has no such motivation once the contract has been executed. Without this continuing motivation, the additional insured’s standard of care will expose third parties to the increased likelihood of harm.” *Id.* at 187.

Thus, narrow construction of an indemnity clause and additional insured coverage furthers the state’s policy interest in preventing construction-related accidents. *National Union Fire Insurance Co. v. Nationwide Insurance*, 82 Cal. Rpt. 2d 16, 22 (Cal. App. 4th Dist. 1999); *Lamb v. Armco, Inc.*, 518 N.E.2d 53, 55-

56 (Ohio App. 1986); *Davis v. Comm. Edison Co.*, 336 N.E.2d 881, 884 (Ill. Supr. 1975); *Jankele v. Texas Co.*, 54 P.2d 425, 427 (Utah 1936). The Minnesota Legislature recognized this strong public policy in adopting the anti-indemnity act, Minn. Stat. § 337.02. The expansive reading given to the indemnity clause in the ECI/Bolduc subcontract, and the Travelers Additional Insured Endorsement is contrary to this policy, and should be reversed.

III. CONCLUSION

The Court of Appeals erred in its interpretation of the indemnity clause in the ECI/Bolduc subcontract. Contrary to the Court of Appeals holding, the indemnity clause is not a broad form indemnity “similar” to the one in *Holmes*. Rather than being a broad form indemnity, it is a limited form indemnity which merely requires Bolduc to indemnify ECI for any damages ECI may incur “caused by any act or omission of Subcontractor.” Since Bolduc procured the insurance required by the ECI/Bolduc subcontract, Bolduc is not liable to ECI for any loss it incurred in this matter.

Amicus ASA encourages the Court to further clarify the law on indemnity clauses by requiring broad form indemnity clauses to explicitly, clearly, and in plain English state that one party is being asked to indemnify another for the other’s own negligence or fault. In this way, subcontractors and other non-lawyers

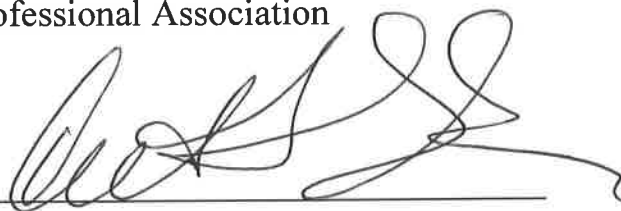
can better understand the extent and nature of the risk they are being asked to assume.

Respectfully submitted,

Dated: January 12, 2012.

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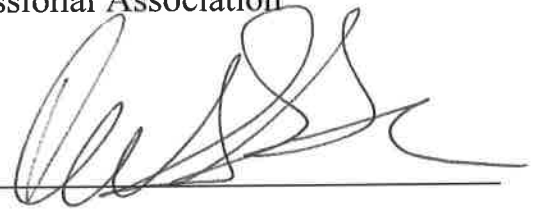
CERTIFICATION OF BRIEF LENGTH

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 3,787 words. This brief was prepared using Microsoft Word 2007.

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