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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Borsheim Builders Supply, Inc., d/b/a Borsheim Crane Service, Plaintiff/Appellant, v. Manger Insurance Inc. and Mid-Continent Casualty Company, Defendant/Appellee.	)	**Supreme Court No. 20180082** **Williams County** **Civil No. 53-2014-CV-01047**

Appeal from District Court's Order for Declaratory Judgment and Denying Summary Judgment dated March 11, 2016 and the Judgment dated December 29, 2017, dismissing all of Plaintiff's causes of action against Defendant Mid-Continent Casualty Company
District Court, Northwest Judicial District
Williams County, North Dakota
The Honorable Joshua B. Rustad

BRIEF OF APPELLEE MID-CONTINENT CASUALTY COMPANY

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[0] **STATEMENT OF THE ISSUES**

I. Whether the District Court correctly declared that the Mid-Continent GCL Policy does not provide insurance coverage to Borsheim for the *Stec* Lawsuit.

II. Whether the District Court correctly declared that Whiting and CSI are not additional insureds under Mid-Continent's CGL Policy.

III. Whether Borsheim is prohibited from raising a "bad faith" claim for the first time on appeal.

STATEMENT OF THE CASE

[1] Borsheim Builders Supply, Inc. d/b/a Borsheim Crane Service ("Borsheim") files this appeal seeking insurance coverage from Mid-Continent Casualty Company ("Mid-Continent"). (App. 191). Borsheim seeks a defense and indemnification from Mid-Continent for not only itself, but apparently for Whiting Oil & Gas Corporation ("Whiting") and Construction Service, Inc. ("CSI") as well in an underlying bodily injury lawsuit, *David Stec* et al. *v. Construction Service, Inc.* ("*Stec* Lawsuit"). In the *Stec* Lawsuit, a Borsheim employee, David Stec, and his spouse sued CSI for bodily injuries arising out of an oilfield accident. (App. 139). There were no other defendants in the *Stec* Lawsuit.

[2] On August 14, 2014, Borsheim sued Manger Insurance, Inc. ("Manger") alleging that Manger failed to procure necessary and proper insurance coverage for Borsheim in the *Stec* Lawsuit. (App. 7). Six months later, the District Court granted leave for Borsheim to serve an Amended Complaint on Manger and Mid-Continent. (App. 19). Borsheim's Amended Complaint continued to allege Manger's failure to procure necessary and proper insurance coverage. (App. 17, at ¶¶ 33–35). The Amended Complaint also alleged a new alternative theory—that Mid-Continent failed to provide

Borsheim with insurance coverage for the *Stec* Lawsuit. (App. 14–16, at ¶¶ 17–32). Specifically, Borsheim pled two causes of action against Mid-Continent: (1) breach of duty to defend; and (2) breach of duty to indemnify. (*Id.*). Mid-Continent answered and served a counterclaim on May 4, 2015 seeking a declaration that it did not have a duty to defend or indemnify Borsheim in the *Stec* Lawsuit. (App. 20–27).

[3] Borsheim moved for summary judgment against Mid-Continent on May 14, 2015. Mid-Continent filed a cross-motion for summary judgment on June 18, 2015. The District Court issued an Order for Declaratory Judgment and Denying Summary Judgment on March 11, 2016 concluding there was no coverage under the CGL Policy because: (1) the CGL Policy's "contractual liability" exclusion precluded coverage for Borsheim; and (2) Whiting and CSI were not additional insureds. (App. 174). On December 29, 2017, the District Court's Declaratory Judgment dismissed all of Borsheim's causes of action against Mid-Continent. (App. 189).

[4] Borsheim continued it claim against Manger conceding that "the Mid-Continent policy, which was renewed from 2000-2012, did not provide the proper coverage." (Docket ID# 88, at ¶ 70) An expert hired by Borsheim similarly opined that Manger failed to procure sufficient contractual liability and additional insured coverage. (Docket ID# 93). Borsheim reached a settlement agreement with Manger in January 2018. (Docket ID# 158).

STATEMENT OF THE FACTS

a. Master Service Contract ("MSC").

[5] On May 26, 2005, Borsheim and Whiting entered into an oilfield Master Service Contract ("MSC"). (App. 32–42). The MSC generally governs the parties' contractual rights and responsibilities any time Borsheim performs "Work" for Whiting subject to a

"Work Order". (*Id.*). The relevant portions of the MSC applicable to this appeal are: (1) section 2's definitions; (2) section 12's reciprocal-indemnity agreement; and (3) section 13's insurance requirements.

[6] Section 2 of the MSC contains several "Definitions" that identify certain relevant parties. (App. 32–33). In addition to Whiting, the "'Whiting Group'" is defined to include "Whiting, its Affiliates, co-owners at the Site, joint ventures, partners, contractors and subcontractors and all of their respective directors, officers, employees, representatives, and agents." (App. 33). The MSC refers to Borsheim as the "Contractor". (App. 32). "'Contractor Group'" is defined as the "Contractor, its Affiliates and Subcontractors, and all-of their respective directors, officers, employees, representatives and agents." (App. 33). "'Subcontractor'" is defined as "a party that Contractor engages to perform all or a part of the Work. References to Contractor in this Master Service Contract shall include, where appropriate, Contractor's Subcontractors." (App. 33).

[7] Section 12 of the MSC is a reciprocal-indemnity agreement. (App. 37). Borsheim agreed to defend and indemnify the Whiting Group for bodily injuries to Borsheim employees; Whiting agreed to defend and indemnify the Contractor Group for bodily injuries to Whiting Group employees. (*Id.*) Specifically, Borsheim's agreement to indemnity provides for as follows:

> 12. Indemnities.
>
> a. Contractor hereby agrees to release, defend, indemnify and hold the Whiting Group harmless from and against any and all loss, cost, damage or expenses of every kind and nature (including, without limitation, fines, penalties, remedial obligations, court costs and expenses and reasonable attorney's fees, including attorney's fees incurred in the enforcement of this indemnity

> clause (hereinafter referred to collectively as 'Indemnifiable Claims')), arising out of bodily injury (including sickness to or death or persons and losses therefrom to relatives or dependents) to the Contractor Group. . . .

(App. 37). Borsheim's defense and indemnity obligation only extends to Whiting and the Whiting Group. CSI was a "subcontractor selected and assigned to support Borsheim", which served "as a prime contractor". (App. 158). Therefore, CSI is part of the "Contractor Group".

[8] Section 13 of the MSC contains insurance requirements that Borsheim must fulfill. (App. 38–39). In relevant part, Borsheim is obligated to obtain "Comprehensive General Liability Insurance INCLUDING CONTRACTUAL LIABILITY" and that "ALL OF CONTRACTOR'S INSURANCE POLICIES SHALL NAME THE Whiting Group AS AN ADDITIONAL INSURED." (*Id.*).

b. David Stec's Bodily Injury Claim.

[9] David Stec ("Stec") made a claim for bodily injuries arising out of an August 10, 2011 oilfield accident caused by the negligence of a CSI employee. (App. 142). Stec sent a settlement demand to CSI's insurer, EMC Insurance, on November 28, 2012. (*Id.*). CSI and EMC Insurance tendered the claim to Whiting and the insurer for Whiting, Travelers Insurance, and demanded a defense and indemnification. (App. 13, at ¶ 13; 142). "Whiting accepted tender." (App. 13, at ¶ 13; 142). "Whiting and Travelers tendered the claim to Borsheim and the insurer for Borsheim, Mid-Continent Insurance, in Travelers' letter dated February 5, 2013." (App. 142–43). Acknowledging Whiting's tender in an April 1, 2013 letter, Mid-Continent advised Borsheim of its preliminary coverage opinion and ongoing investigation. (App. 144–52). On August 14, 2013, Mid-

Continent formally denied Whiting's February 5, 2013 tender and request for additional insured status. (App. 153–55).

[10] Concisely stated, Stec made a bodily injury claim against CSI. CSI tendered the claim to Whiting, and Whiting accepted tender of CSI's tort liability. Whiting tendered a claim to Borsheim, and Borsheim accepted tender of Whiting's contractual liability to defend and indemnify CSI. However, the CGL Policy does not provide insurance coverage for *Borsheim*'s assumption of *Whiting*'s contractual liability to *CSI*.

c. The *Stec* Lawsuit.

[11] Mid-Continent's discretionary investigation was conducted and completed some four months before the *Stec* Lawsuit was commenced on or after December 19, 2013. (App. 139–141, 153–55). The *Stec* Lawsuit alleged negligence solely against CSI because a CSI employee operating a CSI backhoe dropped a beam on Stec's foot. (App. 139–40, at ¶¶ 3–5). The Complaint did not allege or insinuate that any other party was at fault. (*Id.*).

d. CGL Policy.

[12] Borsheim accepted the tender of Whiting's contractual liability to defend and indemnify CSI sometime after the *Stec* Lawsuit was commenced. Upon doing so, Borsheim sought insurance coverage as the "Named Insured" under its CGL Policy with Mid-Continent. (App. 43). The CGL Policy contains "COMMERCIAL GENERAL LIABILTIY COVERAGE FORM" 01 12 07. (App. 103–117). The relevant policy language provides for as follows:

> Throughout this policy the words '***you***' and '***your***' refer to the ***Named Insured*** shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. . . .
>
> *** * ***

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will 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. We will have the right and ***duty to defend*** the insured against any '***suit***' seeking those damages. However, we will have ***no duty to defend*** the insured against any '***suit***' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. We may, ***at our discretion***, investigate any 'occurrence' and settle any claim or 'suit' that may result. . . .

b. This insurance applies to 'bodily injury' and 'property damage' only if:

(1) The 'bodily injury' or 'property damage' is caused by an '***occurrence***' that takes place in the 'coverage territory'.

*** * ***

2. Exclusions

This insurance does not apply to:

*** * ***

b. Contractual Liability

'Bodily injury' or 'property damage' for which the insured is obligated to pay damages by reason of the ***assumption of liability in a contract*** or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) ***Assumed in*** a contract or agreement that is ***an 'insured contract'***, provided the 'bodily injury' or 'property damage' occurs subsequent to the execution of the contract or agreement. . . .

(App. 103–04) (emphasis added). Section 2.b is hereinafter referred to as the "Contractual Liability Exclusion" and sub-section 2.b(2) is hereinafter referred to as the "Insured Contract Exception".

[13] Section II of CGL Policy's further identified those who are "insureds".

> **SECTION II – WHO IS AN INSURED**
>
> **1.** If you are designated in the Declarations as:
>
> *** * ***
>
> **d.** An organization other than a partnership, joint venture or limited liability company, you are an insured. . . .
>
> *** * ***
>
> **2.** Each of the following is also an insured:
>
> **a.** Your 'volunteer workers' only while performing duties related to the conduct of your business, or your 'employees' . . . .

(App. 110). The CGL Policy also contains an endorsement for "ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION", which provides for as follows:

> **Name of Person or Organization:**
>
> **Any person or organization for whom the named insured has agreed by written 'insured contract' to designate as an additional insured subject to all the provisions and limitations of this policy.**
>
> (If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)
>
> **WHO IS AN INSURED (Section II)** is amended to include the person or organization in the Schedule, but only with respect to liability caused, in whole or in part, by your performance of ongoing operation for that insured.

(App. 132).

[14] The CGL Policy further defines several terms as follows:

SECTION V – DEFINITIONS

*** * ***

13. 'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. . . .

*** * ***

18. 'Suit' means a civil proceeding in which damages because of 'bodily injury', 'property damage' or 'personal and advertising injury' to which this insurance applies are alleged. . . .

(App. 116). Although the Commercial General Liability Coverage form defines "insured contract", the term is constrained and narrowed by the "AMENDED OF INSURED CONTRACT DEFINITION" as follows:

Paragraph **9.** of the **Definitions** Section is replaced by the following:

9. 'Insured contract' means:

*** * ***

f. ***That part*** of any other contract or agreement pertaining to ***your*** business (including an indemnification of a municipality in connection with work performed for a municipality) under which ***you assume the tort liability of another party*** to pay for 'bodily injury' or 'property damage' to a ***third person*** or organization, provided the 'bodily injury' is ***caused, in whole or in party, by you*** or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

(App. 121) (emphasis added).

LAW AND ARGUMENT

I. STANDARD OF REVIEW: DECLARATORY JUDGMENTS AND THE INTERPRETATION OF INSURANCE POLICIES.

[15] "This Court reviews declaratory judgments under the same standards as other judgments." *Nodak Mut. Ins. Co. v. Koller*, 2016 ND 43, ¶ 9, 876 N.W.2d 451. With two exceptions, Mid-Continent generally agrees with Borsheim's standard for insurance

contract interpretation. *See K & L Homes, Inc. v. Am. Family Mut. Ins. Co.*, 2013 ND 57, ¶ 8, 829 N.W.2d 724. First, Borsheim's reliance on California law to broadly interpret exceptions to exclusions is misplaced. Instead "construction of the exception to the exclusion" must be done "as a whole to give meaning and effect to each clause", *McPhee v. Tufty*, 2001 ND 51, ¶ 33, 623 N.W.2d 390, as North Dakota courts "do not automatically construe every insurance exclusion provision against an insurer and in favor of coverage for the insured." *Farmers Union Mut. Ins. Co. v. Decker*, 2005 ND 173, ¶ 5, 704 N.W.2d 85. Second, Borsheim's reliance on Texas courts' liberal interpretation of additional insured endorsements is also misplaced.

II. THE DISTRICT COURT CORRECTLY DECLARED THAT THE CGL POLICY DOES NOT PROVIDE INSURANCE COVERAGE TO BORSHEIM.

[16] The gravamen of this appeal is whether the CGL Policy provides insurance coverage for Borsheim in the *Stec* Lawsuit. "It is axiomatic that the burden of proof rests upon the party claiming coverage under an insurance policy." *Forsman v. Blues, Brews & Bar-B-Ques, Inc.*, 2017 ND 266, ¶ 12, 903 N.W.2d 524.

[17] Borsheim failed to fulfill its burden on its claim for insurance coverage. There has been no "suit" alleging "bodily injury" caused by an "occurrence" for which Borsheim "becomes legally obligated to pay" damages. The CGL Policy's insuring agreement, therefore, was not triggered. Even if it was, the Contractual Liability Exclusion precludes coverage, and Borsheim has failed to prove that any exception to the Contractual Liability Exclusion brings any claim back into coverage.

A. The Insuring Agreement Was Not Triggered.

[18] The CGL Policy's insuring agreement only provides coverage for an insured's tort liability. The insuring agreement provides for, in relevant part, as follows:

> **1. Insuring Agreement**
>
> **a.** We will 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. We will have the right and ***duty to defend*** the insured against any '***suit***' seeking those damages. . . .
>
> **b.** This insurance applies to 'bodily injury' and 'property damage' only if:
>
> **(1)** The 'bodily injury' or 'property damage' is caused by an '***occurrence***' that takes place in the 'coverage territory'.

(App. 103) (emphasis added). For coverage to exist, there must be a "suit" alleging "bodily injury" caused by an "occurrence" for which Borsheim "becomes legally obligated to pay" damages. (*Id.*).

[19] Initially, there is no "suit" against Borsheim alleging "bodily injury". Stec sued CSI for bodily injuries, not Borsheim. Accordingly, Borsheim is not seeking coverage due to an "occurrence"; but rather, it is seeking coverage because it agreed to defend Whiting for Whiting's contractual assumption of CSI's tort liability. Therefore, Borsheim is not "legally obligated" to pay damages because Borsheim has no tort liability in the *Stec* Lawsuit. *See VBF, Inc. v. Chubb Group of Ins. Cos.*, 263 F. 3d 1226, 1231 (10th Cir. 2001) ("'[L]egally obligated to pay' . . . refer[s] only to tort claims and not contract claims.").

[20] To be certain, numerous "courts have definitively held that the language 'legally obligated to pay damages' in an insurance contract limits coverage to tort liability only, prohibiting coverage of contractual liability." *Blum v. State Farm Fire & Cas. Co.*, 145

F.3d 1336, 1337 (9th Cir. 1998); *Lopez & Medina Corp. v. March USA, Inc.*, 667 F.3d 58, 67 (1st Cir. 2012); *Nationwide Mut. Ins. Co. v. CPB Int'l, Inc.*, 562 F.3d 591, 597–98 (3d Cir. 2009); *Data Specialties, Inc. v. Transcon. Ins. Co.*, 125 F. 3d 909, 911 (5th Cir. 1997); *see also, e.g.*, Black's Law Dictionary 825 (7th ed. 2009) (defining "liability" as "[t]he quality or state of being legally obligated or accountable. <liability for injuries caused by negligence>. – Also termed *legal liability*.").

[21] In response, Borsheim largely ignores this issue. It first resigns itself to the opinion that this issue is "moot" based upon the belief that CSI, who has tort liability, is an additional insured under the CGL Policy. Borsheim next argues that the insuring agreement was triggered because the "suit" against CSI alleged damages because of "bodily injury". Yet again, Borsheim is the party seeking insurance coverage on appeal, not CSI. The only potential "suit" against Borsheim would have for breaching the MSC which is a suit sounding in contract, not tort.

[22] In summary, the CGL Policy's insuring agreement was not triggered; therefore, the CGL Policy does not provide coverage for Borsheim in the *Stec* Lawsuit. The coverage analysis is complete, and the District Court's order must be affirmed. "In interpreting the insurance policy, this Court first examines the policy's coverages before examining its exclusions. If and only if a coverage provision applies to the harm at issue will the court then examine the policy's exclusions and limitations of coverage." *Forsman*, 2017 ND 226, at ¶ 11. To the extent this Court finds that the coverage provision applies, the Contractual Liability Exclusion still precludes coverage.

B. The Contractual Liability Exclusion Precludes Coverage.

[23] The Contractual Liability Exclusion precludes coverage as follows:

> **2. Exclusions**
>
> This insurance does not apply to:
>
> *** * ***
>
> **b. Contractual Liability**
>
> ‘Bodily injury’ or ‘property damage’ for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.

(App. 103–04). Stec neither sued Borsheim nor alleged it was liable for his bodily injuries. There is no genuine issue of material fact that Borsheim’s liability in the *Stec* Lawsuit was assumed in a contract or agreement—the MSC. Borsheim is a contractual indemnitor in the *Stec* Lawsuit. Therefore, the Contractual Liability Exclusion further precludes coverage.

[24] Borsheim agrees but argues that two exceptions to the Contractual Liability Exclusion provide coverage. However, Borsheim’s argument neglects to consider that there is no initial coverage for Borsheim under the insuring agreement. “[A]n exception to an exclusion is incapable of initially providing coverage; rather, an exception may become applicable if, and only if, there is an initial grant of coverage under the policy and the relevant exclusion contacting the exception operates to preclude coverage.” *K & L Homes, Inc. v. Am. Family Mut. Ins. Co.*, 2013 ND 57, ¶ 9, 829 N.W.2d 724. For sake of argument, the following two sections explain that neither exception to the Contractual Liability Exclusion applies.

C. In the Absence of the MSC, Borsheim Has No Liability for Stec's Bodily Injuries.

[25] The first exception states that the Contractual Liability Exclusion "does not apply to liability for damages that the insured would have in the absence of the contract or agreement." (App. 104). "The insured still must prove he falls within an exception to the exclusion in order to benefit from coverage." *Nationwide Mut. Ins. Cos. v. Lagodinski*, 2004 ND 17, ¶ 9, 683 N.W.2d 903. Borsheim failed to prove that this exception provides coverage.

[26] "In construing insurance policies, we have interpreted policies in light of relevant statutory provisions." *W. Nat. Mut. Ins. Co. v. Univ. of N.D.*, 2002 ND 63, ¶ 20, 643 N.W.2d 4. In North Dakota, relevant statutory law includes the exclusive remedy rules, which provides that employers "shall not be liable to respond in damages . . . for injury to or death of any employee." N.D.C.C. § 65-04-28; *see also, e.g.*, N.D.C.C. § 65-01-01; N.D.C.C. § 65-01-08(1); N.D.C.C. § 65-05-06.

[27] Accordingly, this Court has repeatedly held that insurance policies must be interpreted in light of the Workers Compensation Act. *See, e.g.*, *Stuhlmiller v. Nodak Mut. Ins. Co.*, 475 N.W.2d 136 (N.D. 1991); *Cormier v. Nat'l Farmers Union Prop. & Cas. Co.*, 445 N.W.2d 644 (N.D. 1989). In *Stuhlmiller*, a plaintiff sued a co-employee and his liability insurer arising out of a work-related car accident. *See* 475 N.W.2d at 137. This Court stated that the "relevant question becomes whether [co-employee] is 'legally liable'" because the "policy requirements are fulfilled only if [plaintiff] had a legally enforceable right to recover damages from [co-employee]." *Id.* at 138–39. There was no coverage under the liability policy "because [co-employee] is statutorily immune under the exclusive remedy provisions of the Workers Compensation Act" and, therefore,

"not 'legally liable to pay' damages." *Id.* at 139. The *Stuhlmiller* Court recognized that this "question has been answered in *Cormier*." *Id.* ("declin[ing] the invitation to overrule *Cormier*"). "*Cormier* represents our acceptance of the substantial majority view of this issue." *Id.*

[28] Here, as Stec's employer, there are no set of facts under which Borsheim would have "liability for damages . . . in the absence of the contract" with Whiting. (App. 104). Nonetheless, Borsheim ignores settled precedent and cites CSI's Answer to the *Stec* Lawsuit and a report from a safety expert as evidence of Borsheim's liability. (App. 156–60, 172).[1] First, CSI's Answer is immaterial and does not raise an issue of fact. "[T]he party opposing the motion must present competent admissible evidence, not present in the pleadings, which raises an issue of material fact." *Tibert v. Slominski*, 2005 ND 34, ¶ 8, 692 N.W.2d 133. Second, the self-serving safety report simply does not state that Borsheim was negligent, at fault, or caused Stec's bodily injuries.

[29] Accordingly, the first exception does not apply as a matter of law.

D. The Insured Contract Exception Does Not Apply.

[30] Like the first exception, Borsheim also failed to prove that the Insured Contract Exception provides coverage. This Insured Contract Exception and the definition of insured contract provide for as follows:

> This exclusion does not apply to liability for damages:
>
> *** * ***

[1] CSI's Answer was drafted by Attorney Steve Storslee, who like Borsheim, was attempting to obtain coverage under the CGL Policy. (App. 172). The safety report was drafted by an expert hired by Borsheim's own attorneys *after* this lawsuit was commenced. (App. 156–60).

(2) ***Assumed in*** a contract or agreement that is ***an 'insured contract'***, provided the 'bodily injury' or 'property damage' occurs subsequent to the execution of the contract or agreement. . . .

*** * ***

9. 'Insured contract' means:

*** * ***

f. ***That part*** of any other contract or agreement pertaining to ***your*** business (including an indemnification of a municipality in connection with work performed for a municipality) under which ***you assume the tort liability of another party*** to pay for 'bodily injury' or 'property damage' to a ***third person*** or organization, provided the 'bodily injury' is ***caused, in whole or in party, by you*** or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

(App. 103–04, 121) (emphasis added).

[31] Here, the "insured contract" would be "that part" of the MSC under which Borsheim assumed another's tort liability to a third person, but only if Borsheim at least partially caused those injuries. The Insured Contract Exception does not apply for three reasons: (1) Borsheim's claim for coverage is based upon its assumption of *contractual* liability; (2) Borsheim did not "cause" Stec's bodily injury; and (3) Stec is not a "third person".

1. Assumption of *Contractual* Liability vs Assumption of *Tort* Liability.

[32] Borsheim's claim for coverage is based upon its assumption of Whiting's contractual liability to defend and indemnify CSI. "The key to understanding this exclusion, and its very important exception, is the concept of liability 'assumed' by the insured." *Fisher v. Am. Fam. Mut. Ins. Co.*, 1998 ND 109, ¶ 9, 579 N.W.2d 599. "If there is a single key factor or element on which to focus when trying to determine

whether a contract is an insured contract, it is the insured's assumption of liability under the contract at issue." *Golden Eagle Ins. Co. v. Ins. Co. of the West*, 99 Cal. App. 4th 837, 837–47 (2002). The specific reason for which a party seeks indemnification when tendering a claim determines whether the Insured Contract Exception applies.

[33] For example, a Louisiana federal court painstakingly analyzed insurance coverage arising out of multiple tenders pursuant to master service contracts in the oilfield services industry. *See Richard v. Anadarko Petroleum Corp.*, No. 11-0083, 2012 WL 4753416, at *2 (W.D. La. Oct. 2, 2012) (discussing the "import and relevance" of "what tenders and demands . . . for coverage" were made and "by whom"). In *Richard*, an injured OES employee sued three defendants—Anadarko, Dolphin, and Smith. *See* 2012 WL 4753416, at *2. Dolphin and Smith tendered claims to Anadarko under two separate master service contracts. *See id.* Under a third master service contract, Anadarko "tendered to OES the defense and indemnification of Anadarko as to the tort claims made by the plaintiff against Anadarko, as well as Anadarko's potential contractual liability for the defense and indemnification owed to Dolphin and Smith." *Id.* Insurance coverage was sought "for Anadarko's potential liability as to plaintiff and for Anadarko's assumed contractual liability now owed to Dolphin and Smith." *Id.* Due to the pass-through manner in which the claims were tendered from Dolphin and Smith to Anadarko and then from Anadarko to OES, the court highlighted the following distinction: "[o]ne must recall that OES made the demand for coverage under the Liberty Mutual Policy, for ***Anadarko***'s potential ***tort*** liability, ***as well as Anadarko***'s potential ***contractual*** obligations now owed to Dolphin and Smith." *Id.* at *3. Therefore, the court correctly held that while although the policy provides "coverage in favor of Anadarko for the

plaintiff's ***tort*** claims made against Anadarko . . . there is no coverage under the Liberty Mutual policy for ***Anadarko's potential contractual obligation to defend and indemnify Dolphin***." *Id.* at *11.

[34] Here, the liability Borsheim assumed in this case was Whiting's contractual liability to defend and indemnify CSI. Consider the following allegations in Borsheim's Amended Complaint, see (App. 12–18):

- Stec "brought a lawsuit against CSI.";
- "CSI tendered defense and indemnity of Stec's claims to Whiting.";
- "Whiting accepted tender.";
- "Whiting requested that Borsheim, through its insurer, Defendant Mid-Continent, accept tender.";
- Borsheim accepted tender.
- Borsheim's requested Mid-Continent to "defend and provide a defense for their insured; to wit, Borsheim" and to "indemnify Borsheim in the *Stec* Lawsuit.".

Therefore, Borsheim is "obligated to pay damages by reason of the assumption of" Whiting's contractual liability to defend and indemnify CSI, not under "that part" of the MSC where Borsheim assumed any tort liabilities. *See, e.g., Richard*, 2012 WL 4753416, at *11 (finding "no coverage" for the named insured's assumption of an indemnitor's "potential contractual obligation to defend and indemnify" a tortfeasor).

[35] Borsheim's assumption of Whiting's contractual liability to defend and indemnify is factually and legally distinct from any assumption of CSI's tort liability. Indeed, a "claim for indemnity is a separate and distinct cause of action from the underlying tort claim." *Borough of W. View v. N. Hills Sch. Dist.*, 418 A.2d 527, 529 (Pa. 1980); *see also Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 787 (5th Cir. 2009)

("recogniz[ing] that the claim for indemnity is a claim based in contract rather than in tort"). A "cause of action for indemnity arises when the party seeking indemnification first suffers the loss for which he claims indemnity, not when the underlying tort, upon which the indemnity is based, occurs." *Olin Corp. v. Yeargin, Inc.*, 146 F.3d 390, 406 n.9 (6th Cir. 1998)

[36] Additionally, Whiting's initial acceptance of tender from CSI necessarily precluded the application of the Insured Contract Exception. CSI's tort liability was previously assumed by Whiting. (App. 12, at ¶ 13.) Once Whiting accepted CSI's tender, it became Whiting's responsibility to defend the *Stec* Lawsuit, which it initially did. (App. 171). As a result, CSI no longer had a defense that it could tender nor was CSI in a position to seek indemnification from Borsheim. There is no contract between CSI and Borsheim. Instead, it was Whiting that tendered its contractual liability to defend and indemnify CSI over to Borsheim.

[37] In contrast, Borsheim argued to the District Court that "it makes no difference that Borsheim is indemnifying CSI through Whiting", (Docket ID# 52, at ¶ 15), while "viewing it as a 'pass through' of a duty to defend CSI's tort liability." (Docket ID# 25, at ¶ 28). That belief and interpretation "could lead to the absurd result of reading out any contractual liability exclusion if the contract at issue addresses another's tort liability." *Alea London Ltd. v. Cent. Gulf Shipyard, L.L.C.*, No. CIV. A. 04-0389, 2006 WL 845752, at *9 (W.D. La. Mar. 30, 2006). If such an "interpretation was credited, the exception would swallow the contractual liability exclusion, and transform all routine indemnification agreements into insured contracts." *APL Co. Pte. Ltd. v. Valley Forge Ins. Co.*, 541 Fed. Appx. 770, 773 (9th Cir. 2013). "The only reasonable interpretation"

of "'insured contract' is the contractual assumption by the insured of another's tort liability, which tort liability arises under law and not by the ***indemnitee's*** contractual assumption of yet another party's liability." *Harleysville Mut. Ins. Co. v. Reliance Nat. Ins. Co.*, 256 F. Supp. 2d 413, 418–19 (M.D.N.C. 2002) (emphasis in original).

[38] The *Alea* case addressed this issue. *See* 2006 WL 8455752. *Alea* analyzed whether "insured contract" included the insured's assumption of another party's contractual liability owed to yet another party. In *Alea*, a Maxtec employee sued Global for work-related injuries. *See id.* at *1. Global was the only party "exposed to that tort liability." *Id.* at *7. Global tendered a claim to Central Gulf under a master service contract. *Id.* Central Gulf then tendered a claim to Maxtec under a separate master service contract between Central Gulf and Maxtec. *Id.* The court recognized that "Maxtec's claim under the CGL Policy is not keyed to liability due to 'bodily injury' under the general insuring provisions, but to contractual liability noted under Exclusion 2." *Id.* at *6. Because Central Gulf, not Global, tendered the claim to Maxtec, the court dismissed the insured's argument to "characterize Maxtec's contractual liability to Central Gulf as 'indirect tort liability' rather than as contractual liability." *Id.* at *8. "[I]t is clear that the liability that Maxtec has assumed from Central Gulf is Central Gulf's contractual obligation to Global, *i.e.*, contract-based, not tort-based, because Central Gulf would not have incurred liability in the absence of its Marine Master Service Contract with Global." *Id.* Therefore, the insured contract exception did not provide coverage for Maxtec's contractual obligation to defend and indemnify Central Gulf's for Central Gulf's assumption of Global's tort liability. *See id.* at *8.

[39] On appeal, Borsheim avoids discussing how the claims were tendered and instead focuses upon Borsheim's agreement to indemnify the Whiting Group in the MSC. That fact is immaterial. As the *Richard* court explained:

> [i]t is of note, however, that while the Master Service Agreement between OES and Anadarko may, or may not, require OES to assume the potential contractual liability of Anadarko owed to third parties (and perhaps others), there is no coverage for any such contractual liability in the Liberty Mutual policy, per the express language of the policy itself. The noted distinction highlights the legal significance, and clear legal distinction between, claims which might have been assumed by contract, and claims actually covered by a given policy of insurance. Ones' contractual obligations entered into, are not always, as a matter of law, synonymous with ones' insurance coverage obtained.

2012 WL 4753416, at *10.

[40] Accordingly, an insured's contractual obligation to defend and indemnify under a master service agreement is not necessarily the same as the insurance carrier's obligation to defend and indemnify its insured pursuant to an insurance policy. "An 'insured contract' is one in which one of the contracting parties agrees to indemnify the other from and against that other party' own negligence." *Hankins v. Pekin Ins. Co.*, 713 N.E.2d 1244, 1248 (Ill. Ct. App. 1999). "The 'insured contract' exception applies if the insured has assumed a ***contracting party's*** tort liability against a third party. 'The insured must assume the ***other contracting party's*** tort liability to third parties in order for insured contract coverage to attach.'" *APL*, 541 Fed. Appx. at 772–73 (quoting *Golden Eagle*, 99 Cal. App. 4th at 837) (emphasis added). If the definition of insured contract extended all the way to the assumption of non-contracting parties' liability, an insurance company would be entirely unable to assess risk. An insurer would be forced to cover tort claims asserted against an endless number of parties that have not even contracted with its named insured.

[41] Here, the MSC clearly states that the contracting parties are Whiting and Borsheim. (App. 32). Borsheim did not have a master service contract with CSI. There is no genuine issue of fact that Borsheim accepted tender from Whiting,[2] who had no tort liability. Consequently, the Contractual Liability Exclusion precludes coverage because Borsheim's obligation arises from "that part" of the MSC under which it assumed Whiting's contractual liability to CSI, and courts "will not rewrite a contract to impose liability on an insurer if the policy unambiguously precludes coverage." *K & L Homes v. Am. Fam. Mut. Ins. Co.*, 2013 ND 57, ¶ 8, 829 N.W.2d 724.

2. Borsheim Did Not Cause Liability.

[42] The Insured Contract Exception only applies if the bodily injuries were caused, in whole in or part, by Borsheim. (App. 121). Borsheim did not cause Stec's bodily injuries. There are no allegations in the *Stec* Lawsuit's complaint that Borsheim caused Stec's bodily injuries. (App. 139–41). "Although [Borsheim] frames the duty-to-defend issue in terms of an obligation to investigate facts independent of the complaint, the proper inquiry under *Applegren* and *Kyllo* is whether the allegations in the complaint give rise to potential liability or a possibility of coverage under the insurance policy." *Nat'l Farmers Union Prop. & Cas. Co. v. Kovash*, 452 N.W.2d 307, 309 (N.D. 1990). Further, for the reasons set forth in Part II.C., *supra* ¶¶ 25–29, of this brief, Borsheim cannot be liable for Stec's bodily injuries under a negligence theory. Because Borsheim neither caused nor could be liable for Stec's bodily injuries, the Insured Contract Exception does not apply.

[2] Borsheim never filed the February 5, 2013 letter where "Whiting and Travelers tendered the claim to Borsheim." (App. 142). Instead, Borsheim often insinuates that CSI first tendered the claim to Borsheim.

3. Stec Is Not A Third Person Under the CGL Policy.

[43] The Insured Contract Exception only applies if Borsheim assumed Whiting's tort liability for bodily injuries to a "third person". (App. 121). Stec is an employee of Borsheim and, therefore, an insured under the CGL Policy. (App. 110). As an insured, Stec necessarily is not a "third person". Therefore, the Insured Contract Exception cannot provide Borsheim with coverage for Stec's bodily injuries.

III. THE DISTRICT COURT CORRECTLY DECLARED THAT WHITING AND CSI ARE NOT ADDITIONAL INSUREDS.

A. Whiting and CSI's Status as Additional Insureds Would Not Provide Any Relief to Borsheim.

[44] Assuming Borsheim has standing to argue Whiting's and CSI's status as additional insureds, the argument does not change the outcome. *See Rebel v. Nodak Mut. Ins. Co.*, 1998 ND 194, ¶ 13, 585 N.W.2d 811 (discussing standing to assert insurance coverage in declaratory judgment actions). The defense for the *Stec* Lawsuit would inevitably fall back into Borsheim's hands pursuant to the MSC. For example, Stec initially sent a settlement demand to CSI's insurer. (App. 142). The insurer tendered the claim to Whiting, and "Whiting accepted tender." (App. 13, at ¶ 13; 142). Whiting then tendered a claim to Borsheim. (App. 142–43). Even if CSI and Whiting are additional insureds, a claim would still be tendered to Borsheim. Therefore, the additional insured status of Whiting and CSI is of no consequence to Borsheim's claim for insurance coverage. Deciding whether Whiting or CSI are additional insureds would result in nothing more than an advisory opinion. "Courts should not, however, give advisory opinions or answer moot, abstract, theoretical, academic, hypothetical, or speculative questions." *Wilhite v. Cent. Inv. Props.*, 409 N.W.2d 348, 355 (N.D. 1987).

B. Whiting and CSI Are Not Additional Insureds Under the CGL Policy.

1. CSI Is Part of the Contractor Group.

[45] As another threshold matter, CSI's role within the "Contractor Group" prevents it from being an additional insured under the MSC and CGL Policy. Borsheim's Complaint, Amended Complaint, and motion for summary judgment never raised the issue of whether CSI was an additional insured. *See Oh. Cas. Ins. Co. v. Horner*, 1998 ND 168, ¶ 26, 583 N.W.2d 804 ("Issues not raised in the trial court cannot be raised for the first time on appeal."). After waiting until its final reply brief on the cross-motions for summary judgment, however, Borsheim inserted a conclusory one-sentence statement that CSI was also an additional insured. (Docket ID# 52, at ¶ 30).

[46] The most telling reason why Borsheim did not argue that CSI was an additional insured to the District Court is because the evidence indicates that CSI was part of the "Contractor Group". The MSC defines "'Contractor Group'" to include Borsheim, "its Affiliates and Subcontractors, and all-of their respective directors, officers, employees, representatives and agents." (App. 33). "'Subcontractor'" is defined as "a party that Contractor engages to perform all or a part of the Work." (App. 33). CSI's own safety expert in the *Stec* Lawsuit observed that "Borsheim appeared to serve as a prime contractor, with primary responsibility for the task. CSI appeared to be, essentially, a sub-contractor selected and assigned to support Borsheim." (App. 158). Subcontractors working underneath Borsheim are part of the "Contractor Group" as defined in the MSC. (App. 33).

[47] CSI's position within the "Contractor Group" is dispositive. The MSC only required Borsheim to name the "Whiting Group", not "Contractor Group", as an

additional insured. CSI is not part of the "Whiting Group"; therefore, as a matter of law, CSI cannot be an additional insured.

2. Borsheim Did Not Designate Whiting and CSI As Additional Insureds.

[48] For additional insured status, Borsheim also must have agreed by written insured contract to designate Whiting and CSI as additional insureds. (App. 132). The "insured contract" is merely "that part" of the MSC under which Borsheim assumed the liabilities of the Whiting Group. (App. 121). "[A]s defined in the policy, an 'insured contract' does not necessarily refer to an entire agreement" even if the insured assumed another's tort liability in some other "part" of that agreement. *Travelers Indem. Co. v. Am. Home. Assur. Co.*, No. 4:06-cv-824 (CEL), 2008 WL 3200817, at *6 (E.D. Mo. Aug. 6, 2008). A claim for additional insured status must be "***brought*** pursuant to '***that part***'" of the contract under which the named insured made the "assumption of another's tort liability". *VBF, Inc.*, 263 F. 3rd at 1232. Here, section 13 of the MSC required Borsheim to name the Whiting Group as an additional insured. (App. 38). Section 13 does not discuss Borsheim's assumption of any party's liability. Instead, only Section 12 of the MSC could be "that part" of the MSC under which Borsheim assumed liabilities. (App. 37). Consequently, Borheim did not agree by written *insured* contract to designate Whiting Group, Whiting, or CSI as additional insureds.

3. Borsheim Did Not Cause Liability.

[49] In order for Whiting and CSI to be additional insureds, Borsheim also must have caused liability, in whole or in part, for the events that triggered the third-party's request for coverage as an additional insured. (App. 132). For the reasons set forth in Parts II.C.

and II.D.2., *supra* ¶¶ 25–29, 42, of this brief, Borsheim neither caused nor can be held liable for Stec's bodily injuries.

[50] In response, Borsheim urges this Court to ignore North Dakota law (*Stuhlmiller* and *Cormier*) and hold that Borsheim can be liable under a negligence theory for Stec's work-related injuries. In doing so, Borsheim cites *Ramara, Inc. v. Westfield Ins. Co.*, 814 F.3d 660 (3d Cir. 2016). Notwithstanding that *Ramara* is in direct conflict with North Dakota law, relying on the case is problematic for other reasons.

[51] First, the additional insured endorsement in *Ramara* did not contain the material "liability caused" language nor did it require a written insured contract like the CGL Policy. *See id.* at 667. As a result, the *Ramara* Court narrowly addressed the issue of whether an employer can "cause" an employee's bodily injury, not whether an employer can be liable for the employee's injuries. *See id.* at 674–75. In *Ramara*, the underlying tort complaint alleged that Ramara's "agents, contractors, and subcontractors", which included the employer, were partially responsible for the employee's injuries. *See id.* at 675–76. The Third Circuit correctly recognized that the complaint "made factual allegations that potentially would support a conclusion that [employee's] injuries were 'caused, in whole or in part' by [employer's] acts or omissions." *Id.* at 676. In the *Stec* Lawsuit, however, the complaint does not allege that anyone other than CSI's employee caused Stec's bodily injuries. (App. 139–40).

[52] Second, the *Ramara* Court was forced to harmonize the additional insured endorsement with a second endorsement that provided excess coverage to additional insureds. 814 F.3d at 667–68, 676–77. The second endorsement is not present in the

CGL Policy, and Borsheim has not argued that its interpretation of the additional insured endorsement was done to harmonize other language in the CGL Policy.

[53] Third, the *Ramara* Court only considered the underlying complaint when conducting its coverage analysis. It did not consider defendants' answers or any other pleadings. Indeed, the court reiterated that "we do not intend our opinion to be read as an expansion or modification . . . of the four corners rule." *Id.* at 679. Like North Dakota, coverage is dependent up on the allegations in the complaint, not allegations in an answer. *See Kovash*, 452 N.W.2d at 309.

[54] Finally, *Ramara* is factually and procedurally inapposite for other reasons. For example, Ramara, Inc., was specifically listed as an "additional insured". *Id.* at 666. Whiting and CSI are not. Accordingly, Ramara, Inc. was the party suing for insurance coverage. Here, Whiting and CSI are not suing Mid-Continent for coverage.

C. Even if Whiting Was an Additional Insured, the Contractual Liability Exclusion Still Precludes Coverage.

[55] The Contractual Liability Exclusion precludes coverage for both the named insured and additional insureds. However, the Insured Contract Exception only brings a claim back into coverage for the named insured. Therefore, the Contractual Liability Exclusion precludes coverage for Whiting because the Insured Contract Exception does not apply to additional insureds.

[56] Indeed, "there is a legal difference between a named insured and an additional insured." *Lazarus v. Mfrs. Cas. Ins. Co.*, 267 F.2d 634, 640 (D.C. Cir. 1959). The legal difference is obvious within the structure of the Contractual Liability Exclusion and the Insured Contract Exception. "According to its plain language, the exception only applies to that liability that the ***named*** insured assumed under an insured contract." *Holden v.*

U.S. United Ocean Servs., 582 Fed. Appx. 271, 274 (5th Cir. 2014) (emphasis in original). The Fifth Circuit further clarified that there was no "coverage as an ***additional*** insured" because the "plain language of the exception states that it applies to liability that 'the ***Named*** Insured' assumes." *Holden*, 582 Fed. Appx. at 275 (emphasis added).

[57] For another example, the previously discussed *Richard* case addressed the same issue. *See* 2012 WL 4753416, at *9–10. In *Richard*, Anadarko sought coverage as an additional insured under OES' policy with Liberty Mutual for Anadarko's contractual liability to defend and indemnity Dolphin. *See id.* at *3. *Richard* held that the insured contract exception exclusively applied to named insureds, not additional insureds. *See id.* at *10. The court reasoned that "potential contractual liability coverage exists for only one relevant party" because the definition of insured contract is limited to contracts for "your business" and liabilities "you assumed". *Id.* Under the policy, the words "your" and "you" are defined as the named insured. *Id.* As a result, the insured contract exception in OES's insurance policy did not extend coverage to additional insureds like Anadarko.

[58] Here, the analysis is the same. In the CGL Policy, "the words 'you' and 'your' refer to the Named Insured shown in the Declarations", which is Borsheim. (App. 103). The Contractual Liability Exclusion precludes coverage for bodily injury "for which the insured is obligated to pay damages." (App. 104). On the other hand, the Insured Contract Exception only applies to the named insured, but not to any additional insureds. The exception only brings a claim back into coverage if there is an "insured contract" "pertaining to ***your*** business . . . under which ***you*** assume the tort liability of another." (App. 121) (emphasis added). The Insured Contract Exception does not apply to

Whiting. Therefore, even if Whiting is an additional insured, the Contractual Liability Exclusion still precludes coverage.

IV. NOT PLED IN BORSHEIM'S *AMENDED COMPLAINT*, THE ALLEGATIONS OF BAD FAITH OCCURRED BEFORE MID-CONTINENT HAD A DUTY TO DEFEND.

[59] This Court must deny Borsheim's request to remand for determination of damages due to Mid-Continent's alleged bad faith. Despite serving two complaints, Borsheim never pled a cause of action for bad faith. (App. 7–18). The Amended Complaint unequivocally set forth three distinct causes of action for: (1) breach of duty to defend; (2) breach of duty to indemnify; and (3) failure to procure necessary and proper insurance. (App. 10–18). Borsheim's decision to clearly identify only three causes of action belies its attempt to raise a fourth cause of action for bad faith on appeal.

[60] Even if bad faith was pled, all of Borsheim's allegations against Mid-Continent occurred before the duty to defend, if any, even arose. "A liability insurer's obligation to defend its insured is ordinarily measured by the terms of the insurance policy and the pleading of the claimant who sues the insured", *Tibert v. Nodak Mut. Ins. Co.*, 2012 ND 81, ¶ 30, 816 N.W.2d 31, and "a duty to defend arises only if the conditions precedent to the policy . . . are met." *Employers Reinsurance Corp. v. Landmark*, 547 N.W.2d 527, 533 (N.D. 1996). A universal "condition precedent" is that "there must be a 'suit' against the insured." *Hart Const. Co. v. Am. Family Mut. Ins. Co.*, 514 N.W.2d 384, 389 (N.D. 1994).

[61] Here, Mid-Continent's alleged duty to defend was not triggered until *after* the *Stec* Lawsuit was commenced. *See Hart Const. Co.*, 514 N.W.2d at 389. The CGL Policy provides that Mid-Continent "will have the right and ***duty to defend*** the insured

against any '***suit***' seeking those damages" for bodily injuries and that Mid-Continent "may, ***at our discretion***, investigate any 'occurrence' and settle any claim or 'suit'". (App. 103) (emphasis added). In contrast to the duty to defend suits, the CGL Policy confers upon Mid-Continent the discretion to investigate any claims. (*Id.*).

[62] Consequently, the fundamental flaw in the eleventh hour bad faith argument is that the "questionable" investigation Borsheim refers to, and the criticisms it has, relate to Mid-Continent's discretionary investigation of the claim, which was completed some four months before the *Stec* Lawsuit was commenced. Accordingly, even if there is coverage, there is no reason to remand Borsheim's new bad faith cause of action to the District Court for any consideration.

CONCLUSION

[63] For all the foregoing reasons, Mid-Continent respectfully requests that this Court affirm the District Court's Order for Declaratory Judgment and Deny Summary Judgment and Judgment in favor of Mid-Continent.

Dated this 9th day of May, 2018.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Borsheim Builders Supply, Inc., d/b/a Borsheim Crane Service, Plaintiff-Appellant, v. Manger Insurance Inc., and Mid-Continent Casualty Company, Defendant-Appellee,	)	Supreme Court No. 20180082 Williams County Civil No. 53-2014-CV-01047 **AFFIDAVIT OF SERVICE**

STATE OF NORTH DAKOTA)
:ss
COUNTY OF BURLEIGH)

[¶1] I, Shannon Barth, being first duly sworn, deposes and says that she is a legal assistant in the office of Schweigert, Klemin & McBride, Attorneys at Law, 116 North 2nd Street, P.O. Box 955, Bismarck, North Dakota 58502-0955; that on the 9th day of May, 2018, she served the attached **Check No. 002603 for $25.00** on the following person by placing a copy thereof in envelopes properly addressed as follows:

Penny L. Miller
Clerk of the Supreme Court
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

which is the last address of said party known to her, and the envelope with postage prepaid was deposited by her in the United States Mail at Bismarck, North Dakota, for delivery by the United States Post Office Department as directed by said envelope. She also served a true and correct copy of the attached **Brief of Appellee Mid-Continent Casualty Company and Affidavit of Service** via e-mail transmission from the offices of Schweigert, Klemin & McBride, PC to the

following e-mail address(es):

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Shannon Barth

Subscribed and sworn to before me this 9th day of May, 2018.

LINDSEY N. DUTTON
Notary Public
State of North Dakota
My Commission Expires July 10, 2020

Notary Public
State of North Dakota