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MAY 23, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
**NO. 20180082**

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| Borsheim Builders Supply, Inc., d/b/a Borsheim Crane Service,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>Manger Insurance, Inc. and Mid-Continent Casualty Company,<br><br>Defendant-Appellee, | Williams County Civil No.: 53-2014-CV-01047 |

Appeal from the 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-Continental Casualty Company

District Court, Northwest Judicial District
County of Williams, North Dakota
The Honorable Joshua B. Rustad

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# REPLY BRIEF OF APPELLANT BORSHEIM CRANE SERVICE

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Respectfully submitted this 23rd day of May, 2018.

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[¶1] Mid-Continent breached its duty to defend and indemnify the *Stec* Lawsuit. This forced other parties to address the financial burden of defending and settling the lawsuit without the benefit of the insurance that should have been available.

[¶2] Mid-Continent justifies its denial of coverage by advancing a series of hyper-technical arguments that do not properly apply Mid-Continent's CGL Policy language, the terms of the MSC, or the simple undisputed material facts of this case.

### I. CSI is an additional insured under the CGL Policy.

[¶3] David Stec sued CSI. If CSI is an insured under the Mid-Continent CGL Policy, then Mid-Continent had a duty to defend against the *Stec* Lawsuit and indemnify fully for all liability. After Stec was injured on August 10, 2011. knowing that his lawsuit was forthcoming, CSI gave notice to Mid-Continent and asked it to accept coverage. (App. 142-43). Mid-Continent was provided a copy of the "MASTER SERVICE CONTRACT" ("MSC"). (App. 142). Mid-Continent was specifically informed that "Construction Service was a contractor to Whiting at the time of the accident." (Id). This undisputed fact established CSI as a member of the "Whiting Group" and an insured under the CGL Policy. This was "a simple situation." (App. 143).

[¶4] Mid-Continent made the simple situation complicated. It never disputed that CSI was a contractor of Whiting, a member of the "Whiting Group," or an insured. Instead, even though no lawsuit had yet been brought, it concluded that

Borsheim was not at fault and that no coverage would be available for a "contractual" liability theory. (App. 153-55).

[¶5] Mr. Stec brought his lawsuit. Mid-Continent sat on the sidelines watching while the parties involved had to face the financial realities of the lawsuit, including defense and indemnity obligations.

[¶6] Borsheim recognized and honored its obligations under the MSC, which required it to defend, indemnify and hold harmless the "Whiting Group," which included CSI.

[¶7] Mid-Continent sidesteps the issue of whether CSI is an insured by asserting – for the first time – that CSI is a part of the "Contractor Group," not the "Whiting Group," and that "[t]he defense of the *Stec* Lawsuit would inevitably fall back into Borsheim's hands pursuant to the MSC" and therefore deciding whether CSI is an additional insured would be nothing more than an advisory opinion.

[¶8] Mid-Continent offers no support for its assertion that "CSI is not part of the 'Whiting Group'" (Appellee Brief, ¶ 47), other than merely asserting it. This assertion is simply false. And claiming that CSI was a part of the "Contractor Group" is beside the point and not supported by any evidence.

[¶9] Mr. Storslee's August 5, 2013 letter, a copy of which was sent to Mid-Continent along with the MSC, states unequivocally that "Construction Service was a contractor to Whiting at the time of the accident." The MSC defines "Whiting Group" to mean "Whiting, its … contractors and subcontractors …." (App. 33). Under the MSC, Borsheim, as "Contractor" had an obligation to

defend and indemnify the "Whiting Group," including CSI. Mid-Continent did not dispute Mr. Storslee's statement. No other party disputed this statement.

[¶10] Obviously, it would have been in Borsheim's best interest to dispute this statement, if it were false. It would have relieved Borsheim of its defense and indemnity obligation under the MSC. Borsheim's obligations of indemnity under paragraph 12.a. of the MSC and to obtain insurance coverage under paragraph 13.b. are to the Whiting Group. (App. 37, 39). Borsheim has no similar obligations to the Contractor Group.

[¶11] In addition to Mr. Storelee's letter, Borsheim's Amended Complaint specifically alleges that CSI was a contractor of Whiting. (App. 12, ¶ 11). In its Answer, Mid-Continent asserts that it can neither admit nor deny this allegation. (App. 21, ¶ 6). Thereafter, at no time did Mid-Continent dispute this allegation.

[¶12] Borsheim's Memorandum supporting its motion for summary judgment specifically asserted that CSI was one of Whiting's contractors, and that under the MSC, "Borsheim assumed the liability of the Whiting Group [when] it accepted the tort liability for Whiting's contractors, which included CSI." (Docket ID #25, at ¶ 23). Mid-Continent never disputed this statement. (Docket ID #42 and #59). Instead, it argued that CSI did not have an "insured contract" with Borsheim and that Borsheim was not liable for Stec's injuries." (Docket ID #59, ¶ 29).

[¶13] Mid-Continental refers to the Mylon Stark expert report as purportedly reflecting that CSI is a sub-contractor of Borsheim. (Appellee Brief, ¶ 47). But this report indicates the opposite. It states, in part, that "CSI appeared to be,

essentially, a sub-contractor selected and assigned to support Borsheim." (App. 158). This statement does not reflect that Borsheim selected CSI or that CSI was a sub-contractor of Borsheim. Instead, it states that CSI was "assigned to" support Borsheim. Because Whiting was the general contractor and had overall responsibility over the operation, the obvious implication is that Whiting "selected [CSI] and assigned [CSI] to support Borsheim."

[¶14] Under the ADDITIONAL INSURED endorsement in the CGL Policy, CSI is an organization that Borsheim agreed by written "insured contract" to designate as an additional insured. The term "insured contract" is defined, in part, to include that part of any contract or agreement under which Borsheim assumed the tort liability of another party to pay for bodily injury to a third person. The MSC does precisely that. Under the MSC, Borsheim also expressly agreed to provide liability coverage to protect the "Whiting Group," thus satisfying the terms of the ADDITIONAL INSURED endorsement.

[¶15] CSI is an additional insured under the CGL Policy. Mid-Continent wrongly denied coverage for CSI's defense and indemnity in the *Stec* Lawsuit.

## II. Mid-Continent's hyper-technical arguments have no support.

[¶16] Mid-Continent argues that CSI tendered defense and indemnity of the *Stec* Lawsuit to Whiting, and then Whiting tendered defense and indemnity to Borsheim. According to Mid-Continent, this two-step process allows Mid-Continent to avoid its coverage obligation. Mid-Continent is wrong.

[¶17] First, this argument ignores that before the *Stec* Lawsuit was even initiated, demand was made directly to Mid-Continent on behalf of CSI. (App. 142-43). As Mr. Storslee, who represented CSI, noted, "[w]e cannot understand why Mid-Continent has not accepted the tender for this claim." (App. 143).

[¶18] Second, nothing in the CGL Policy mandates the named insured and additional insureds jump through certain hoops in the claims process for additional insured status to apply, and nothing precludes insureds from making defense and indemnity demands to other insureds, or accepting those demands. All that is required is that notice be given. (App. 112). The Notice provisions in the CGL Policy state that "you" [Borsheim] "must see to it" that Mid-Continent is given notice. It makes no difference who gives the notice. Further, even if the notice were deficient, Mid-Continent would be required to prove "appreciable prejudice" to avoid its coverage obligation. *Finstad v. Steiger Tractor, Inc.*, 301 N.W.2d 392, 398 (N.D. 1981).

[¶19] Mid-Continent's "pass through" argument similarly is misdirected. First, it has nothing to do with CSI qualifying as an insured. Second, Borsheim had a direct defense and indemnity obligation under the MSC to CSI. Thus, the unreported Louisiana case relied upon by Mid-Continent is off-point.

[¶20] If all insurers engaged in such hyper-technical arguments to avoid their coverage obligations under similar situations, it would significantly disrupt the handling of lawsuits in the construction industry. Through master service agreements, additional insured endorsements, and exceptions to contractual

liability exclusions, the parties often can determine at the outset what party and insurer are ultimately liable. In this case, the insurer was Mid-Continent. But it failed to fulfill its obligations, leaving Borsheim to take on the financial responsibility for defense and indemnity of the *Stec* Lawsuit. Borsheim could have acted like Mid-Continent and refused to do so. Whiting also could have refused to honor its obligations. This would have resulted in CSI asserting claims against Whiting and Borsheim, complicating the lawsuit and significantly increasing litigation costs. This would be followed by coverage litigation, with all insurers asserting claims against other insurers. This undermines the obvious intent of both the construction industry and the insurance industry to provide simple and clear resolution of such situations so that claims and lawsuits can be resolved efficiently, with the defense and indemnity payments made by the parties ultimately responsible under the insurance contracts and indemnity agreements. Mid-Continent's approach, if followed by all insurers, and in turn followed by all insureds, would significantly undermine this industry-wide approach.

## III. Mid-Continent's other arguments are misdirected.

[¶21] Mid-Continent argues that the Insuring Agreement of the CGL Policy is not satisfied because Borsheim was not "legally obligated to pay" for tort liability. This secondary issue is moot if CSI is an insured. Further, Borsheim is legally obligated to pay the tort liability of CSI. Accordingly, the Insuring Agreement is satisfied.

[¶22] Mid-Continent similarly argues that the Contractual Liability exclusion applies because Borsheim is contractually liable under the MSC. However, the Contractual Liability exclusion does not apply to CSI. Further, the MSC is an "insured contract," as discussed in Borsheim's Appellant Brief, ¶¶ 26-34. Thus, the Contractual Liability exclusion does not apply.

[¶23] Mid-Continent argues that Borsheim has no liability for Stec's injuries, because of the Worker's Compensation Act. But Mid-Continent fails to recognize that a contract of indemnification is an exception to the exclusive remedy rule under the Act. *Barsness v. General Diesel and Equipment Company, Inc., et al.*, 422 N.W.2d 819 (N.D. 1988). Similarly, Mid-Continent's new argument that Stec is not a third-party is plainly baseless.

[¶24] Mid-Continent argues that the insured contract exception does not apply because Borsheim only assumed Whiting's contractual liability. This argument ignores that Borsheim also assumed CSI's tort liability and that Borsheim "caused, in whole or in part," Stec's injuries. The requirements of the "insured contract" provision are satisfied. Mid-Continent does not address the several cases cited by Borsheim that uniformly hold that an indemnity agreement is an "insured contract," where the named insured causes, "in part," the injuries, notwithstanding that there also is a contractual obligation. (*See* Borsheim Appellate Brief, ¶¶ 31-32).

[¶25] Borsheim attempts to distinguish *Ramara, Inc. v. Westfield Ins. Co.*, 814 F.3d 660 (3rd Cir. 2016). Interestingly, Mid-Continent first asserts "that *Ramara* is

in direct conflict with North Dakota law" (¶ 50), but then states that *Ramara*'s duty to defend analysis is "[l]ike North Dakota." (¶53). *Ramara* is materially indistinguishable from this case – the policy language, underlying factual circumstances, duty to defend analysis, and practical considerations are all essentially the same. Mid-Continent also fails to recognize the fundamental holding of *Ramara* and other similar cases, and fails to identify any conflicting authority.

[¶26] Mid-Continent argues – for the first time – that CSI and Whiting qualifying as additional insureds is of no consequence to Borsheim, because Borsheim would still be liable under the MSC and deciding this issue "would result in nothing more than an advisory opinion." (Appellee's Brief, ¶ 44). Mid-Continent did not make either of these arguments in the District Court, did not raise these issues as defenses to Borsheim's Amended Complaint, and did not assert these issues in its counterclaim against Borsheim. Further, to assert that CSI's status as an additional insured is of no consequence to Borsheim denies reality. It was Borsheim that provided defense and indemnity of the *Stec* Lawsuit, while Mid-Continent did nothing.

[¶27] Finally, Borsheim's Amended Complaint specifically alleges "Mid-Continent's bad-faith refusal to provide a defense and coverage." (App. 18). Further, Mid-Continent's argument that bad faith only exists after a duty to defend arises ignores that Mid-Continent failed to defend the *Stec* Lawsuit and

emphasizes the impropriety of Mid-Continent's denial of coverage before the lawsuit was brought.

[¶28] Borsheim requests that this Court reverse the District Court declaratory judgment in favor of Mid-Continent and remand to the District Court for a determination of damages for Mid-Continent's breach of its duty to defend and indemnify the *Stec* Lawsuit, and for consideration of Borsheim's bad faith claim.

Respectfully submitted this 23th day of May, 2018.

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STATE OF MINNESOTA )
)SS.
COUNTY OF HENNEPIN )

Pamela L. Carter, being first duly sworn, deposes and states that she is of legal age and that on May 23, 2018, she served via Electronic Mail, a true and correct copy of the following document(s) in the above-entitled action:

**Reply Brief of Appellant Borsheim Crane Service**

That said e-mail(s) were addressed as follows:

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To the best of affiant's knowledge, information, and belief, such address(es) as given above were the actual addresses of the parties intended to be so served. That the above document(s) were duly served in accordance with the provisions of the North Dakota Rules of Court.

Pamela L. Carter

Subscribed and sworn to before me on Wednesday, May 23, 2018 in the State of Minnesota, County of Hennepin.

Notary Public

SHELLY MARIE SCHUTTE
NOTARY PUBLIC - MINNESOTA
MY COMMISSION EXPIRES 01/31/2021