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IN THE SUPREME COURT
STATE OF NORTH DAKOTA
NO. 20180082

Borsheim Builders Supply, Inc., d/b/a Borsheim Crane Service, Plaintiff-Appellant, v. Manger Insurance, Inc. and Mid-Continent Casualty Company, 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

BRIEF OF APPELLANT BORSHEIM CRANE SERVICE

Respectfully submitted this 9th day of April, 2018.

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[¶0] STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the District Court erred in concluding that Construction Services, Inc. ("CSI") and Whiting Oil and Gas Corporation ("Whiting") are not insureds entitled to defense and indemnity under the "ADDITIONAL INSURED" endorsement included in the Commercial General Liability Policy ("CGL Policy") issued by Mid-Continent Casualty Company to Borsheim Builders Supply, Inc. ("Borsheim")?

II. Whether the District Court erred in holding that Mid-Continent has no duty to defend or indemnify CSI, Borsheim, and Whiting with respect to the *Stec* Lawsuit under the CGL Policy?

III. Whether the District Court erred in concluding that Borsheim's potential immunity from liability under North Dakota's Workers' Compensation Act allows Mid-Continent to avoid coverage for the underlying bodily injury lawsuit entitled *David Stec and Irma Stec v. Construction Service, Inc.* ("*Stec* Lawsuit") based on the "Contractual Liability" exclusion in the CGL Policy?

IV. Whether this Court should remand to the District Court for consideration of damages and Borsheim's claim of bad faith against Mid-Continent?

STATEMENT OF THE CASE

[¶1] This is a breach of contract and insurance bad faith action arising out of Mid-Continent's failure to provide a defense or indemnity coverage under its CGL Policy with respect to a bodily injury lawsuit brought against CSI by an employee of Borsheim.

[¶2] Borsheim commenced this action on August 14, 2014 and filed an amended complaint on December 29, 2014 seeking damages for Mid-Continent's failure to provide a defense and indemnity of the underlying liability lawsuit. Mid-Continent filed an Answer and a Counterclaim for Declaratory Judgment on March 4, 2015. Borsheim filed its Answer to Mid-Continent's Counterclaim on March 10, 2015.

[¶3] Borsheim filed a motion for summary judgment on May 14, 2015. Mid-Continent opposed this motion and filed its own motion for summary judgment on June 18, 2015. On March 11, 2016 the District Court, without a hearing, issued an Order for Declaratory

Judgment, concluding (1) Borsheim is statutorily immune from liability under North Dakota's Workers' Compensation Act, (2) because of this immunity, the Contractual Liability exclusion in the CGL Policy applies to preclude coverage, (3) that CSI and Whiting are not additional insureds under the CGL Policy, (4) Mid-Continent did not breach its duty to defend, and (5) otherwise denying summary judgment. On December 29, 2017, the District Court issued an order dismissing with prejudice all claims against Mid-Continent and ordering a declaratory judgment in favor of Mid-Continent. Borsheim timely filed its Notice of Appeal on February 28, 2018.

STATEMENT OF FACTS

I. Master Service Contract.[1]

[¶4] On May 26, 2005, Whiting Oil and Gas Corporation ("Whiting") and Borsheim Crane Service ("Borsheim) entered into a "MASTER SERVICE CONTRACT" ("MSC"). (See Appellant's Appendix ("App.") at 31-42). The MSC describes the responsibilities of Whiting and Borsheim. Generally, Borsheim agreed to complete certain "work" under each particular "Work Order" in exchange for payment by Whiting. (App. 33-34).

[¶5] The MSC contains various definitions that apply throughout the agreement. Borsheim is identified as the "Contractor." (App. 32). The term "Contractor Group" is defined to include Borsheim and its affiliates, subcontractors, employees, agents, and others. (App. 32). The term "Whiting Group" is defined to include Whiting and its contractors, subcontractors, employees, agents, and others specifically identified. (App.

[1] The agreement between Whiting and Borsheim is titled a "MASTER SERVICE CONTRACT." The parties in the proceeding before the District Court and otherwise have at times referred to this agreement as a "Master Service Agreement" or "MSA." Thus, the "MASTER SERVICE CONTRACT" / "MSC" and the "Master Service Agreement"/"MSA" are the same contract.

32). Construction Services, Inc. ("CSI") was one of Whiting's subcontractors, selected and assigned to work with Borsheim. (App. 157, 165).

[¶6] The MSC, as is typical under such contracts, contains indemnity obligations of the parties, under Section 12. (App. 37). Borsheim's indemnity obligation, as the "Contractor," is to defend, indemnity and hold the Whiting Group harmless from and against any and all loss, cost, damage or expense of every kind or nature arising out of bodily injury to the Contractor Group, which, as noted above, includes the employees of Borsheim:

> "12. Indemnities
>
> > a. Contractor hereby agrees to release, defend, indemnity and hold the "Whiting Group" harmless from and against any and all loss, cost, damages or expense of every kind and nature … arising out of bodily injury … to the Contractor Group, …, WHETHER OR NOT RESULTING IN WHOLE OR IN PART FROM THE SOLE, CONCURRENT, OR COMPARATIVE NEGLIGENCE, OR STRICT LIABILITY OF THE Whiting GROUP, …."

(App. 37). Significantly, this indemnity obligation of Contractor – Borsheim – is to the "Whiting Group," not only to Whiting. As such, Borsheim's indemnity obligation extends to CSI. (*Id.*)

[¶7] The MSC, under Section 13, requires Borsheim to secure and maintain insurance coverage during the terms of the MSC, and to furnish certificates of such insurance to Whiting. (App. 38-39). The insurance required to be obtained includes Comprehensive General Liability Insurance and "SHALL EXTEND TO AND PROTECT THE Whiting GROUP TO THE FULL EXTENT AND AMOUNT OF SUCH COVERAGE, …." (*Id.*) Further, this provision requires that the "CONTRACTOR'S LIABILITY INSURANCE POLICIES SHALL NAME THE Whiting GROUP AS AN ADDITIONAL INSURED

…." (*Id.*) Again, significantly, Borsheim's obligation to obtain liability insurance coverage includes naming the "Whiting Group" as an additional insured, not only Whiting. (*Id.*) Accordingly, under the MSC, Borsheim is to obtain insurance coverage that includes CSI as an additional insured.

II. Mid-Continent CGL Policy.

[¶8] Mid-Continent issued to Borsheim a Commercial General Liability Insurance Policy effective April 17, 2000. (App. 167). Thereafter, Mid-Continent renewed this insurance policy each year for an annual term for the following ten years. (App. 167). The insurance policy at issue in this lawsuit is the Commercial General Liability Policy ("CGL Policy") covering the policy period of 04/17/2011 to 04/17/2012. (App. 43-137).

[¶9] The CGL Policy includes a "Commercial General Liability Coverage Form," which is the standard ISO Properties Form. (App. 103-117). As such, it contains language commonly used throughout the industry. Relevant to this matter are the following provisions from the Commercial General Liability Coverage Form:

> **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. . . .
>
> * * *
>
> **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, 104). (Emphasis added).

[¶10] The term "insured contract" is defined in the Commercial General Liability Coverage Form, and amended by the "AMENDMENT OF INSURED CONTRACT DEFINITION" endorsement to provide 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" or "property damage" is caused, in whole or in part, 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).

[¶11] The CGL Policy also includes an "ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION" endorsement, which provides, in part, 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 provisions and limitations of this policy.**

(App. 132).

[¶12] In conjunction with the issuance of the CGL Policy, a CERTIFICATE OF LIABILITY INSURANCE was issued to Whiting. (App. 138). A separate CERTIFICATE OF LIABILITY INSURANCE was issued to CSI. (App. 170).

III. Underlying liability lawsuit – *Stec v. Construction Services, Inc.*

[¶13] On August 10, 2011, while the CGL Policy was in effect, David Stec, an employee of Borsheim, was working on an oil rig site owned by Whiting. (App. 138). Also working at the same site were employees of CSI. (*Id.*) CSI was a subcontractor of Whiting selected and assigned to work with Borsheim. (App. 157, 165). Stec alleges that he was injured when a beam held by a backhoe, which was owned by CSI and operated by a CSI employee, was released and fell on Stec, crushing his foot. (App. 135).

[¶14] Stec retained legal counsel, and, before initiating a lawsuit, made a settlement demand to CSI and its insurer. (App. 142-143). Notice of the Stec claim was given to Mid-Continent. (App. 144-152). Mid-Continent's April 3, 2013 letter states that it would be conducting an investigation and coverage analysis and was reserving its rights. (*Id.*) This letter further quoted various provisions from the CGL Policy, including the

Contractual Liability exclusion. But it did not reference or quote the definition of "insured contract" or the "ADDITIONAL INSURED" endorsement. (*Id.*)

[¶15] Attorney Steven Storslee was retained to represent CSI and Whiting to defend against Mr. Stec's liability claim. (App. 142). By letter dated August 5, 2013, Mr. Storslee made a demand to Borsheim under the MSC and a demand to Mid-Continent for insurance coverage under the CGL Policy. (*Id.*) Mr. Storslee's letter enclosed a copy of the MSC and a copy of the Certificate of Insurance issued to Whiting. (*Id.*)

[¶16] In making a demand to Borsheim and Mid-Continent for defense and indemnity against the Stec claim, Mr. Storslee explained that "Mr. Stec is likely to commence a lawsuit against Construction Services and/or Whiting Petroleum in the near future." (*Id.*) He further explained that this would generate a third-party lawsuit against Borsheim and Mid-Continent pursuant to the indemnity and insurance provisions in the MSC. Mr. Storslee then, in a clear and succinct fashion, explained the proper means for addressing this situation:

> We believe this is a simple situation. The Master Service Contract between Borsheim and Whiting requires Borsheim to indemnify the 'Whiting Group' which includes Whiting and Whiting's contractors – in this case Construction Service. The contract further provides Borsheim was required to purchase insurance for its indemnity obligations and that such insurance was to be primary over any other insurance. We cannot understand why Mid-Continent has not accepted the tender of this claim. The Contract provides Borsheim and its insurer will need to pay the attorneys' fees and costs of the Whiting Group for any litigation, not only for defending the Stec claim, but also for litigation enforcing the indemnity and insurance provisions under the Contract.

(App. 143). Mr. Storslee sent a copy of this letter to Martha Blair, the Mid-Continent claim representative handling this matter. (*Id.*)

[¶17] On August 14, 2013, less than two weeks after Mr. Storslee's letter and before Mr. Stec initiated a lawsuit, Mid-Continent sent a letter to Mr. Storslee denying coverage. (App. 153-155). The denial letter stated that Mid-Continent had completed its evaluation of the potential coverage for "Whiting" as an additional insured, and concluded that the CGL Policy "does not provide coverage, or the possibility of coverage, for indemnification and defense of 'Whiting.'" (App. 153). The letter further stated that "Borsheim was not at fault in whole or in part as required" by subsection f. of the definition of "insured dontract." It further asserted that under a contractual liability theory, there is no coverage for Borsheim. In addition, it asserted that even if coverage were available for a contractual claim, "there is no contract between 'Borsheim' and 'Whiting.'" Mid-Continent asserted that "Whiting" therefore did not qualify as an "Additional Insured" under the CGL Policy. (App. 155).

[¶18] The Mid-Continent denial letter did not address CSI's request for defense and indemnity, the requirement of the MSC that Borsheim indemnify the "Whiting Group," which, as Mr. Storlsee noted, "includes … in this case, Construction Service." (App. 153-155). Thus, the Mid-Continent denial letter did not address coverage issues related to the primary target in the Stec claims – CSI – and did not address the corresponding issues raised by Mr. Storslee's April 5, 2013 demand letter.

[¶19] Mr. Stec and his wife initiated a lawsuit against CSI on December 19, 2013 in District Court, Northwest Judicial District, Williams County. (App. 139-141). The lawsuit was removed to the United States District Court for the District of North Dakota. (App. 23). In his Complaint, Stec alleged that a CSI employee was negligent, resulting in his injuries. (App. 139). In its Answer, CSI denied liability, and alleged that other

parties may be at fault, "including, but not limited to, David Stec's employer," which was Borsheim. (App. 172). In this action, evidence also has been presented that Borsheim was, in part, at fault for Stec's injuries. (App. 156-160). This evidence is unrebutted.

ARGUMENT

I. Standard of review.

[¶20] The interpretation of an insurance policy and whether the district court properly granted summary judgment presents questions of law that are reviewed de novo. *K&L Homes, Inc. v. American Family Mutual Insurance Company*, 2013 ND 57, ¶ 8, 829 N.W.2d 724; *Schleuter v. Northern Plains Insurance Company*, 2009 ND 171, ¶ 6, 772 N.W.2d 879. This Court independently examines and construes the insurance contract to decide whether there is coverage. *Id.*

II. Standard for insurance contract interpretation.

[¶21] The goal when interpreting insurance policies is to give effect to the mutual intention of the parties as it existed at the time of contract. *K&L Homes* at ¶ 8. The Court construes the insurance contract as a whole to give meaning and effect to each clause, if possible. *Id.* Insurance policies are adhesion contracts and the Court resolves ambiguities in favor of the insured, although the Court will not rewrite a contract to impose liability on the insurer if the policy unambiguously precludes coverage. *Id.* If coverage hinges on an undefined term, the Court applies the plain, ordinary meaning of the term in interpreting the contract. *Id.* "Exclusions from coverage in an insurance contract must be clear and explicit and are strictly construed against the insurer." *Id.*, quoting *Tibert v. Nodak Mutual Insurance*, 2012 ND 81, ¶ 8, 816 N.W.2d 31. Further, while exclusions are interpreted narrowly, exceptions to exclusions are broadly construed

in favor of the insured. *E.M.M.I. Inc. v. Zurich Ins. Co.*, 32 Cal.4th 465, 471, 84 P.3d 385, 389, 9 Cal.Rptr. 3d 701, 706 (2004).

[¶22] "Insurance policies are strictly interpreted against the insurer, who is the indemnitor, because insurance policies are adhesion contracts, the insurance company drafts the policy and has greater bargaining power, the insurance company receives a premium for protecting the insured against liability, and an insurance company's duty to defend is one of the main purposes of an insurance contract." *Specialized Contracting, Inc. v. St. Paul Fire & Marine Insurance* Company, 2012 ND 259, ¶ 15, 825 N.W.2d 872. This applies to what parties qualify as additional insureds under the insurance contract. *Evanston Insurance Company v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660, n. 21 (Tex. 2008) ("Liberal interpretation of the additional insured endorsement is fast becoming the majority rule," quoting Douglas R. Richmond, *The Additional Problems of Additional Insureds*, 33 TORT & INS. L.J. 945, 956-65 (1988)).

III. The District Court erred in concluding that Mid-Continent does not have a duty to defend or indemnify the underlying *Stec* Lawsuit.

[¶23] Three reasons have been given by Mid-Continent, and were argued before the District Court, as justifying a denial of coverage under the CGL Policy for defense and indemnity of the *Stec* Lawsuit: (1) CSI and Whiting are not additional insureds under the CGL Policy; (2) the "Contractual Liability exclusion" applies to preclude coverage; and (3) Borsheim is not entitled to coverage as the named insured under the CGL Policy, because the claims in the *Stec* Lawsuit do not fall within the Insuring Agreement. The first two issues – whether CSI and Whiting qualify as insureds and whether the Contractual Liability exclusion applies – both depend upon whether the MSC is an "insured contract," as that term is defined in the CGL Policy.

[¶24] Accordingly, it is helpful to begin the analysis of these issues by first addressing whether the MSC is an "insured contract." Careful consideration of the language of the MSC and CGL Policy reflects that Mr. Storslee was correct when he characterized this matter as "a simple situation." The MSC clearly is an "insured contract." It follows, accordingly, that CSI and Whiting qualify as additional insureds under the CGL Policy. It also follows that the Contractual Liability exclusion does not apply.

[¶25] The third issue – whether Borsheim, as the named insured, is entitled to coverage – becomes moot when recognizing that CSI is an insured and the Contractual Liability exclusion does not apply. Further, even if CSI and Whiting were not insureds, Borsheim, as the named insured, obviously is, and is entitled to coverage. The claims in the *Stec* Lawsuit fall within the Insuring Agreement and the Contractual Liability exclusion does not apply.

A. The MSC is an "insured contract."

[¶26] The term "insured contract," which is included in both the ADDITIONAL INSURED endorsement and the Contractual Liability exclusion, is defined in the Commercial General Liability Coverage Form, and amended by the "AMENDMENT OF INSURED CONTRACT DEFINITION." (App. 121, 132). The amended definition of "insured contract" lists various contracts and agreements that qualify as "insured contract," including the catchall provision in subparagraph f., which provides in relevant part as follows:

> **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" or "property damage" is caused, in whole or in part, 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).

[¶27] The MSC clearly falls within the scope of subparagraph f. The MSC is a "contract … pertaining to [Borsheim's] business." Under this contract, Borsheim "assume[s] the tort liability of another party to pay for 'bodily injury' … to a third person …." Section 12.a. of the MSC expressly states that Borsheim agrees to defend, indemnify and hold harmless the "Whiting Group" against any and all loss, costs, damages or expense of every kind or nature arising out of bodily injury. This broad indemnity language clearly includes tort liability for bodily injury. Further, this provision in the MSC expressly states, in capital letters, that this indemnity obligation applies "WHETHER OR NOT RESULTING IN WHOLE OR IN PART FROM THE SOLE, CONCURRENT, OR COMPARATIVE NEGLIGENCE OR STRICT LIABILITY OF THE Whiting GROUP, …." Thus, the indemnity obligation of Borsheim in the MSC includes assuming the tort liability of another party – the Whiting Group.

[¶28] It is significant that Borscheim's indemnity obligation applies to the "Whiting Group," and not only to Whiting. The term "Whiting Group" is defined in the MSC as including Whiting's subcontractors. (App. 32). CSI is one of Whiting's subcontractors. (App. 157, 165).

[¶29] Accordingly, it cannot reasonably be questioned that Borsheim's indemnity obligation under the MSC extends to CSI for CSI's tort liability to pay for bodily injury to Stec. The MSC, therefore, is an "insured contract."

[¶30] Mid-Continent argued to the District Court that subparagraph f. did not apply, because of the language stating subparagraph f. applies, "provided the 'bodily injury' … is caused, in whole or in part, by you or those acting on your behalf." Mid-Continent appears to reason that Borsheim could not be liable, because of the North Dakota Workers' Compensation Act, and therefore Stec's bodily injury was not caused, in whole or in part, by Borsheim. The District Court appears to have accepted this reasoning. But there is a difference between *causing* injury and being *liable* for the injury. The language relied upon by Mid-Continent requires the bodily injury to be "caused," in whole or in part, by Borsheim. It does not require Borsheim to be adjudged liable. Thus, the Workers' Compensation Act does not preclude the MSC from qualifying as an "insured contract."[2]

[¶31] The Fourth Circuit has explained that the "caused in whole or in part" by the named insured has been interpreted by the courts and insurance law commentators, who have "concluded that an additional insured is covered where a named insured is at least partially negligent." *Capital City Real Estate, LLC. v. Certain Underwriters at Lloyd's,* 788 F.3d 375, 380 (4th Cir. 2015), citing *Gilbane Bldg. Co. v. Admiral Ins. Co.*, 664 F.3d 589, 598 (5th Cir. 2011) and Scott C. Turner, *Insurance Coverage of Construction Disputes*, Sec. 42:4 (2015).

[¶32] Attempting to limit subparagraph f. to apply only to liability "isolates certain parts of the language, rather than reading the policy as a whole." *Thunder Basin Coal Company, LLC. v. Zurich American Insurance Company,* 943 F.Supp.2d 1010, 1014

[2] The District Court and Mid-Continent also are incorrect that Borsheim is immune from liability under the Workers' Compensation Act under the circumstances of this matter. See discussion in Section IV.

(E.D. Mo. 2013). The key term in this provision is the word "caused." *Id.* Further, by including the phrase "in whole or in part" the insurer "specifically intended coverage for additional insureds to extend to occurrences attributable in part to acts or omissions by both the named insured *and* the additional insured." *Procon, Inc. v. Interstate Fire and Casualty Company*, 794 F.Supp.2d 242, 256 (D. Maine 2011) (Emphasis in original).

[¶33] There is no dispute that Stec's injury was "caused" in part by Borsheim. CSI specifically alleged in its Answer to the Stec Complaint that other parties were at fault, "including … David Stec's employer," Borsheim. (App. 172). Further, in this action, Borsheim has submitted evidence that Borsheim was, in part, at fault for Stec's injuries. (App. 156-160). This evidence is unrebutted; Mid-Continental has come forward with no evidence that Stec's injuries were not caused in part by Borsheim or in any way countering Borsheim's evidence that it was at fault. There is no genuine material factual dispute over whether Borsheim was in part at fault.[3]

[¶34] The "provided" language in subparagraph f. of the definition of "insured contract" is clearly satisfied. Stec's bodily injury was caused in part by Borsheim. Accordingly, the MSC is an "insured contract."

[3] Interestingly, before Stec even filed a lawsuit, and without any apparent meaningful investigation, Mid-Continent concluded that Borsheim was not at fault for Stec's injuries – "We do not find 'Borsheim' was at fault in whole or in part." (App. 155). Mid-Continent made this finding nine days after CSI and Whiting demanded coverage from Mid-Continent as additional insureds under the CGL Policy. Mid-Continent did not cite a single fact to support its finding. Stec had not initiated a lawsuit, yet still Mid-Continent made its finding of fault. And since then, Mid-Continent has refused to alter its position, while at the same time being incapable of coming forward with any evidence demonstrating Borsheim was not at fault.

B. Both CSI and Whiting are additional insureds under the CGL Policy.

[¶35] CSI and Whiting both qualify as additional insureds under the CGL Policy. The "ADDITIONAL INSURED" endorsement adds as additional insureds "[a]ny person or organization for whom the named insured has agreed by written 'insured contract' to designate as an additional insured subject to all provisions and limitations of this policy." (App. 132). Thus, under the ADDITIONAL INSURED endorsement, there are two requirements for an organization to qualify as an additional insured: (1) an "insured contract"; and (2) the organization has been designated by the named insured as an additional insured in the "insured contract."

[¶36] The named insured is Borsheim. As explained above, the MSC is an "insured contract." This satisfies the first requirement.

[¶37] The MSC states in part that "ALL LIABILITY COVERAGE … CARRIED BY CONTRACTOR WITH RESPECT TO THE WORK … SHALL EXTEND TO AND PROTECT THE Whiting GROUP TO THE FULL EXTENT AND AMOUNT OF SUCH COVERAGE …." The MSC defines "Contractor" as Borsheim. The MSC further defines "Whiting Group" as meaning Whiting and its contractors and subcontractors. (App. 132). CSI is one of Whiting's contractors (App. 157, 165), and therefore falls within the definition of "Whiting Group." Accordingly, under the MSC, Borsheim, the named insured, has agreed to designate both CSI and Whiting as additional insureds. This satisfies the second requirement of the ADDITIONAL INSURED endorsement.

[¶38] Accordingly, both CSI and Whiting qualify as an "organization for which the named insured has agreed by written 'insured contract' to designate as an additional insured." Both, therefore, qualify as additional insureds.

[¶39] Mr. Storslee was correct in characterizing this matter as involving "a simply situation":

> We believe this is a simple situation. The Master Service Contract between Borsheim and Whiting requires Borsheim to indemnify the "Whiting Group," which includes Whiting and Whiting's contractors – in this case, Construction Service. The contract further provides Borsheim was required to purchase insurance for its indemnity obligations and that such insurance was to be primary over any other insurance. We cannot understand why Mid-Continent has not accepted the tender of this claim.

(App. 143). These simple undisputed facts establish CSI and Whiting as insureds. The MSC is an "insured contract." Borsheim agreed under the MSC to designate CSI and Whiting as additional insureds. The MSC specifically states that Borsheim "SHALL NAME THE Whiting GROUP AS AN ADDITIONAL INSURED …." (App. 139). CSI and Whiting are both included within the "Whiting Group." Accordingly, both CSI and Whiting are insureds under the ADDITIONAL INSURED endorsement.[4]

[¶40] It also is noteworthy that Certificates of Insurance were issued to both CSI and Whiting confirming their status as additional insureds. (App. 138, 170.) These Certificates of Insurance specifically identify Whiting and CSI as the Certificate Holder. This was consistent with the MSC, which specifically required Borsheim to "furnish certificates of such insurance satisfactory to Whiting." (App. 38.) "A Certificate of Insurance is a document evidencing the fact that an insurance policy has been written and

[4] Even though Mr. Storslee clearly and expressly tendered to Mid-Continent the defense and indemnity of CSI, and provided Mid-Continent with a copy of the MSC (App. 142), Mid-Continent denied coverage less than two weeks later without even addressing the issue of whether CSI qualified as an insured. (App. 153-55.) Instead, Mid-Continent only addressed whether Whiting qualified as an insured. As discussed above, Mid-Continent's conclusion also was premature – before the *Stec* Lawsuit was even filed – and made findings as to the parties "at fault" for Stec's injuries without any apparent consideration of the facts and circumstances.

includes a statement of the coverage of the policy in general terms." *Blackburn, Nickels & Smith, Inc. v. National Farmers Union Property and Casualty Company,* 482 N.W.2d 600, 602 (ND 1992). While a Certificate of Insurance may not on its own bestow insured status, it does reaffirm the intent of the parties that both CSI and Whiting were additional insureds under the CGL Policy. *See, e.g., Nationwide Mutual Fire Insurance Company v. D.R. Horton, Inc.*, 2016 WL5867044, at *12 (S.D. Ala.).

[¶41] The language in the ADDITIONAL INSURED endorsement under materially identical circumstances was discussed at length by the Third Circuit in *Ramara, Inc. v. Westfield Insurance Company, et al*, 814 F.3d 660 (3rd Cir. 2016). In *Ramara*, as in this case, the additional insured was named as a defendant in the underlying liability lawsuit brought by an injured employee of the named insured, and the named insured was not named as a defendant. The insurer argued that the defendant was not an additional insured based on the Pennsylvania Workers' Compensation Act and the absence of the named insured as a defendant in the liability lawsuit. The Third Circuit rejected this argument with an extensive discussion of the insurer's duty to defend obligations. The court first noted that the duty to defend rule "does not permit an insurer to make its coverage decision with blinders on, disclaiming any knowledge of coverage-triggering facts." *Id.* at 679. The court then concluded that:

> [T]he insurer's narrow interpretation of the factual allegations of the *Axe* complaint provides an apt example of how proceeding as though the Act is irrelevant risks leaving an insured party without the coverage to which it is entitled. [The insurer's] approach would turn what is meant to be a liberal construction rule on its head; it would disfavor insured parties and permit insurers to deny coverage under the Additional Insured Endorsement in all but the most clear-cut cases in which the plaintiff pleads his underlying complaint so as to avoid attributing his injury to his employer's acts or omissions.

Id. See also, Hasting Mutual Insurance Company v. Blinderman Construction Company, Inc., et al., 91 N.E.3d 439, 418 Ill. Dec. 738, at ¶19 (2017) (Where the plaintiff is an employee of the named insured, "[t]he complaint's silence concerning [the named insured's] acts or omissions does not suffice to meet [the insurer's] burden of showing that [the named insured's] acts or omissions did not contribute to causing the injury."); *Pekin Insurance Company v. Centex Homes*, 72 N.E.3d 831, 411 Ill. Dec. 143, at ¶36 (2017) ("The allegations of the underlying complaint must be read with the understanding that the employer may be the negligent actor even where the complaint does not include allegations against that employer," citing *Ramara*).

[¶42] The same reasoning applies here. Mid-Continent should not be able to avoid its defense obligation by arguing that Borsheim was not a defendant in the *Stec* Lawsuit or by arguing that the complaint in the *Stec* Lawsuit does not specifically allege that Borsheim was at fault. Mid-Continent should not be allowed to ignore the realities of the overall factual circumstances and turn its duty to defend obligation "on its head."

[¶43] CSI clearly qualifies as an additional insured under the CGL Policy. Mid-Continent was wrong in refusing to accept the tender of the *Stec* Lawsuit against CSI.

C. The Contractual Liability exclusion does not apply.

1. The Contractual Liability exclusion does not apply to CSI.

[¶44] The Contractual Liability exclusion excludes coverage for bodily injury "for which the Insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement." This exclusion on its face obviously has no application to CSI for the bodily injury claims made against CSI in the *Stec* Lawsuit. CSI is claimed to be liable for the negligence of its employee, which allegedly caused Stec's injuries. (App.

139). The claims against CSI are direct claims of tort liability. No contractual liability claim is advanced against CSI. Thus, with respect to CSI, there is no reasonable basis for Mid-Continent to claim the Contractual Liability exclusion applies. *Federated Mutual Insurance Company v. Grapevine Excavation, Inc., et al.*, 197 F.3d 720, 726 (5th Cir. 1999) "as [the defendant] is not being sued as the contractual indemnitor of a third-party's conduct, but rather for its own conduct, the [contractual liability] exclusion is inapplicable.")

[¶45] As discussed above, CSI is an insured with respect to the *Stec* Lawsuit. The Contractual Liability exclusion does not apply. CSI, therefore, is entitled to a full defense against the *Stec* Lawsuit and full indemnity coverage.

2. The Contractual Liability exclusion does not apply to Borsheim.

[¶46] The Contractual Liability exclusion has an exception – it "does not apply to liability for damages … [a]ssumed in a contract or agreement that is an 'insured contract' …." As discussed above, the MSC is an "insured contract." Accordingly, the exception to the Contractual Liability exclusion applies, and this exclusion does not defeat coverage. *Day, et al. v. Toman, et al.*, 266 F.3d 831, 835 (8th Cir. 2001) ("The commercial policy language excludes contractual liability assumed by the insured. However, liability for damages assumed in an "insured contract" is specifically covered and is an exception to such exclusion.")

[¶47] In the MSC, Borsheim expressly agreed to defend, indemnify and hold harmless the Whiting Group, which includes CSI. This indemnity obligation extended specifically to all loss, cost, damages, or expense of every kind or nature "arising out of bodily injury" to an employee of Borsheim. As discussed above, this indemnity obligation

included indemnifying for the tort liability of CSI. The MSC – an "insured contract" – clearly satisfies the exception to the Contractual Liability exclusion, and this exclusion therefore does not apply to Borsheim.

[¶48] There is a second independent reason why the Contractual Liability exclusion does not apply to Borsheim. The Contractual Liability exclusion has an additional exception that applies to liability for damages "[t]hat the insured would have in the absence of a contract or agreement." (App. 104). Borsheim would have liability in the absence of the MSC. The unrebutted evidence establishes that Borsheim is in part at fault for Stec's injuries. Thus, Borsheim "would have" liability in the absence of the MSC. Further, where liability can be imposed based upon either a contractual indemnity provision or a generally applicable legal principle, the contractual liability exclusion does not bar coverage. *Federated*, 197 F.3d at 727; *Gilbert Texas Construction L.P. v. Underwriters at Lloyd's London*, 327 SW 3d 118, 134 (Tex. 2010) ("if the insured's liability is because of an otherwise covered basis in addition to its contractually-assumed liability, the second exception [to the contractual liability exclusion] brings the claim back into coverage"); *Amerisure Ins. Co. v. Auchter Co., et al.*, 2017 WL 4862194 at *15 (M.D. Fla.) (contractual liability exclusion does not apply to common law indemnity obligations or other liability of the insured arising by operation of law).

D. Mid-Continent has a duty to defend the *Stec* Lawsuit.

[¶49] This Court has outlined the parameters of an insurer's duty to defend:

> 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. If the allegations of the claimant's complaint could support recovery upon a risk covered by the insurer's policy, a liability insurer has a duty to defend its insured. We have formulated the duty to defend to require a

> liability insurer to defend an underlying action against its insured if the allegations in the complaint give rise to potential liability or a possibility of coverage under the policy.

Tibert v. Nodak Mutual Insurance Company, 2012 ND 81, ¶ 30, 816 N.W.2d 31 (quoting *Schultze v. Continental Insurance Company*, 2000 ND 2009, ¶ 8, 619 N.W.2d 510. Any doubt about whether a duty to defend exists must be resolved in favor of the insured. *Tibert*, 2012 ND 81, at ¶ 31. "Only if there is no possibility of coverage is the insurer relieved of its duty to defend." *Id.*

1. Mid-Continent has a duty to defend CSI.

[¶50] As explained above, the MSC is an "insured contract" and CSI qualifies as an additional insured under the ADDITIONAL INSURED endorsement included in the Mid-Continent CGL Policy. CSI was named as a defendant in the *Stec* Lawsuit, and alleged to be liable for Stec's bodily injuries. Accordingly, as to CSI, the allegations in the *Stec* Lawsuit clearly fall within the Insuring Agreement of Coverage A of the Commercial General Liability Coverage Form in the CGL Policy. As is also discussed above, the Contractual Liability exclusion does not apply to the claims against CSI. No other exclusion or policy defense has been raised by Mid-Continent.

[¶51] Mid-Continent clearly has a duty to defend CSI in the *Stec* Lawsuit. CSI qualifies as an additional insured. The allegations in the Stec complaint unquestionably fall within the Insuring Agreement of Coverage A of the CGL Policy. No exclusion applies. The allegations in the complaint fall within the scope of coverage. Mid-Continent therefore has a duty to defend CSI.

2. Mid-Continent has a duty to defend Borsheim.

[¶52] Borsheim is the named insured under the Mid-Continent CGL Policy. As such, there is no question that Borsheim is entitled to coverage, including a defense, if the allegations fall within the Insuring Agreement of Coverage A and no exclusion applies.

[¶53] The complaint in the *Stec* Lawsuit alleges "bodily injury" and damages because of bodily injury. The Insuring Agreement is therefore satisfied, to the extent it requires the insured "to pay as damages because of 'bodily injury' …."

[¶54] The Insuring Agreement further requires Mid-Continent "to defend the insured against any 'suit' seeking those damages." The *Stec* Lawsuit clearly seeks damages because of bodily injury. Accordingly, all of the requirements of the Insuring Agreement are satisfied and Mid-Continent has a duty to defend Borsheim.

[¶55] Borsheim is not named as a defendant in the *Stec* Lawsuit. This appears to be the basis upon which Mid-Continent argues that the claims in the *Stec* Lawsuit do not fall within the Insuring Agreement. Of course, as discussed above, this argument obviously has no merit with respect to CSI, because the *Stec* Lawsuit names CSI as a defendant. Accordingly, to the extent that Mid-Continent continues this argument, it only emphasizes that Mid-Continent has a duty to defend CSI in the *Stec* Lawsuit.

[¶56] Further, although not a defendant in the *Stec* Lawsuit, Borsheim nonetheless is legally obligated to pay damages because of Stec's bodily injury. The MSC imposes upon Borsheim the obligation to pay the tort liability of CSI for bodily injury to a Borsheim employee. Borsheim also is in part at fault. Accordingly, Borsheim is legally obligated to pay damages because of Stec's bodily injury and the *Stec* Lawsuit is seeking payment of those damages. The Insuring Agreement is satisfied.

[¶57] The Contractual Liability exclusion does not apply to Borsheim, as discussed above, because the MSC is an "insured contract." Under the MSC, Borsheim agrees to "assume the tort liability of another party [CSI] to pay for "bodily injury" … to a third person [Stec]." The exception to the Contractual Liability exclusion therefore applies. No other exclusion applies. Accordingly, the allegations in the *Stec* Lawsuit fall within the Insuring Agreement with respect to Borsheim, and Mid-Continent has a duty to defend.

3. Mid-Continent has a duty to defend Whiting.

[¶58] Whiting qualifies as an additional insured for the same reasons CSI qualifies as an additional insured. The Contractual Liability exclusion does not apply to Whiting, for the same reasons that it does not apply to Borsheim. No other exclusion or policy provision applies to preclude coverage for Whiting. Mid-Continent therefore has a duty to defend Whiting.

E. Mid-Continent has a duty to indemnify for all damages in the *Stec* Lawsuit.

[¶59] The *Stec* Lawsuit does not present a situation where some liability or damages are covered while other liability or damages are not covered. The allegations in the *Stec* Lawsuit are simple and straight forward. Stec alleges that negligence on the part of CSI's employee caused him bodily injury. There is no allegation of intentional wrongdoing and no allegation that could give rise to application of any other exclusion. Accordingly, a finding that Mid-Continent has a duty to defend also means that Mid-Continent has a duty to indemnify. If CSI qualifies as an additional insured under the Mid-Continent CGL Policy, then it is entitled to both defense and indemnity. Similarly, if the allegations in the *Stec* Lawsuit fall within the Insuring Agreement with respect to Borsheim and the

Contractual Liability exclusion does not apply, then Borsheim is entitled to defense and indemnity under the CGL Policy.

[¶60] Borsheim, therefore, requests that this Court hold that, in addition to its duty to defend, Mid-Continent has a duty to indemnify CSI and Borsheim in connection with the *Stec* Lawsuit.

IV. The North Dakota Workers' Compensation Act does not result in application of the Contractual Liability exclusion and does not relieve Mid-Continent of coverage.

[¶61] The District Court ordered judgment in favor of Mid-Continent on the grounds that "Borsheim is statutorily immune from liability pursuant to North Dakota's Workers' Compensation Act," and "[b]ecause Borsheim is immune from liability, Mid-Continent's CGL Policy's contractual liability exception [sic], as well as the two exclusions [sic] to this exception [sic], does not apply." (App. 175). This Declaratory Judgment followed the District Court's previous order in which the District Court focused its analysis upon the application of the Workers' Compensation Act to Stec's injuries. Mid-Continent similarly argued that Borsheim was not liable due to the Workers' Compensation Act and therefore the only basis for its liability must be contractual. As discussed above, this argument ignores the exception to the Contractual Liability exclusion for an "insured contract." This argument also confuses liability principals with the provisions of the insurance contract.

[¶62] The scope of coverage provided by the CGL Policy and application of the Contractual Liability exclusion is not determined by the Workers' Compensation Act. The Act is not referenced in the Insuring Agreement, the Contractual Liability exclusion, the ADDITIONAL INSURED endorsement, or the definition of "insured contract" in the

CGL Policy. Further, this Court has held that a contract of indemnification is an exception to the exclusive remedy rule under the Workers' Compensation Act. *Barsness v. General Diesel & Equipment Company, Inc., et al.*, 422 N.W.2d 819 (ND 1988). This Court joined the "vast majority of jurisdictions [that] have recognized that an express contract of indemnification is an exception to the exclusive remedy rule." *Id.* at 823. Accordingly, Mid-Continent's argument focusing upon the Workers' Compensation Act as immunizing Borsheim from liability is entirely misdirected, as is the District Court's Declaratory Judgment and Order. The Workers' Compensation Act does not impact whether the allegations in the *Stec* Lawsuit fall within the Insuring Agreement or mandate that the Contractual Liability exclusion applies.

[¶63] Mid-Continent's reliance on the Workers' Compensation Act is making a "coverage decision with blinders on." *Ramara*, 814 F.3d at 679. As discussed above, in *Ramara* the Third Circuit rejected the argument that the state's Workers' Compensation Act formed a basis to preclude the defendant from qualifying as an additional insured under the Additional Insured Endorsement. The court also rejected the argument that the failure to name the named insured as a defendant because of its immunity under the Act precluded application of the Additional Insured Endorsement, and held

> that where the Workers' Compensation Act is relevant to a coverage determination, insurers (and courts that review their determinations) must interpret the allegations of an underlying complaint recognizing that the plaintiff's attorney in the underlying action drafted the complaint taking the existence of the Act into account. In this way, the Act operates as an interpretive constraint, making it more difficult for insurer's to claim that the allegations of the underlying complaint fall patently outside the scope of coverage.

Id. at 679-680. The court further "reaffirmed what should be obvious: an insurer cannot bury its head in the sand and disclaim any knowledge of coverage-triggering facts." *Id.* at 680.

[¶64] Further, subparagraph f. in the definition of "insured contract," which provides an exception to the Contractual Liability exclusion, is not written so as to be determined by whether the named insured is held liable in the underlying lawsuit. Instead, subparagraph f. applies when the bodily injury "is caused, in whole or in part," by the named insured, Borsheim. Accordingly, the focus is not upon whether Borsheim could or could not be immune from liability in the *Stec* Lawsuit. Instead, the focus is upon whether Borsheim *caused* Stec's bodily injury, in whole or in part.

[¶65] Immunity under the Workers' Compensation Act does not support application of the Contractual Liability exclusion or prevent application of the "insured contract" exception to that exclusion. The District Court's reliance upon the Workers' Compensation Act was erroneous and led to the erroneous conclusion that Borsheim is not entitled to coverage based on the Contractual Liability exclusion.

V. This case should be remanded to the District Court for consideration of damages and Borsheim's bad faith claim against Mid-Continent.

[¶66] Because the District Court granted summary judgment in favor of Borsheim, the issue of Borsheim's damages as a result of Mid-Continent's wrongful denial of a defense and indemnity was never considered. Accordingly, a holding by this Court that CSI and/or Borsheim is entitled to a defense and/or indemnity with respect to the *Stec* Lawsuit requires remanding to the District Court for a determination of damages.

[¶67] Further, the District Court, upon finding no coverage, also did not address Borsheim's claim of bad faith against Mid-Continent. (App. 174-183). Borsheim

specifically alleged bad faith on the part of Mid-Continent in its Amended Complaint. (App. 18). Mid-Continent's denial of a defense and indemnity coverage before a lawsuit was even brought is, at a minimum, questionable. Further, Mid-Continent's assertion that it concluded Borsheim was not at fault without any apparent meaningful investigation, analysis, or factual support also is troubling. Mid-Continent also failed even to address the issue of whether CSI qualifies as an insured, even though Mr. Storslee, on behalf of CSI, specifically tendered the defense and indemnity of CSI to Mid-Continent. The failure of Mid-Continent to address this issue, while also denying coverage without any meaningful investigation, raises clear issues of bad faith on the part of Mid-Continent. Accordingly, Borsheim's claim of bad faith should be remanded to the District Court for further consideration.

CONCLUSION

[¶68] Borsheim requests that this Court reverse the District Court declaratory judgment in favor of Mid-Continent, declare that CSI, Borsheim and Whiting are entitled to a defense and indemnity with respect to the *Stec* Lawsuit, and remand to the District Court for a determination of damages for Mid-Continent's breach of its duty to defend and indemnify, and for consideration of Borsheim's claim of bad faith against Mid-Continent.

Respectfully submitted this 9th day of April, 2018.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA
NO. 20180082

Borsheim Builders Supply, Inc., d/b/a Borsheim Crane Service, Plaintiff-Appellant vs. Manger Insurance, Inc. and Mid-Continent Casualty Company, Defendant-Appellee.	Williams County Civil No.: 53-2014-CV-01047 **AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL**

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 April 9, 2018, she served via Electronic Mail, a true and correct copy of the following document(s) in the above-entitled action:

Brief of Appellant Borsheim Crane Service
Appendix 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 Monday, April 9, 2018 in the State of Minnesota, County of Hennepin.

Notary Public

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