reasonable attorney fees under both §§ 76-720 and 76-726(2) in accordance with the standards set forth in this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., concurring.

I concur with the decision of the court, but write separately to emphasize what this court did and did not do in its opinion.

This court concluded the district court erred by finding that it lacked the ability to issue an award under Neb. Rev. Stat. § 76-726 (Reissue 2009) for various fees incurred before the county court. This court further concluded that the district court erred in finding that it was required to award fees under Neb. Rev. Stat. § 76-720 (Reissue 2009) for a time period that ceased as of the County's settlement offer.

What this court did not do was opine in any way on the amount of fees awarded below by the district court. Upon remand, the district court should consider an award of fees under both §§ 76-720 and 76-726. And in doing so, the district court is reminded that any amount that might be awarded should be considered anew—and as such, could be in an amount equal to, or higher or lower than, the amount awarded in this case.

FEDERATED SERVICE INSURANCE COMPANY, APPELLEE, V. ALLIANCE CONSTRUCTION, LLC, APPELLANT, AND SADLER LINE CONSTRUCTION, INC., AND DANNY O'NEALL, APPELLEES.

805 N.W.2d 468

Filed October 28, 2011. No. S-10-559.

1. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy presents a question of law that an appellate court decides independently of the trial court.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the court granted the judgment and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Final Orders: Appeal and Error.** When adverse parties have each moved for summary judgment and the trial court has sustained

one of the motions, the reviewing court obtains jurisdiction over both motions. The reviewing court may determine the controversy that is the subject of those motions or make an order specifying the facts that appear without substantial controversy and direct such further proceedings as the court deems just.

4. **Insurance: Contracts.** A court construes insurance contracts like other contracts, according to the meaning of the terms that the parties have used.
5. ____: ____. When the terms of an insurance contract are clear, a court gives them their plain and ordinary meaning as a reasonable person in the insured's position would understand them.
6. **Insurance: Contracts: Liability.** Whether an insurer has a duty to indemnify and defend an insured depends upon whether the insured's claimed occurrence falls within the terms of the insurer's coverage as expressed in the policy.
7. **Insurance: Contracts: Liability: Damages.** Under a policy providing liability coverage, the insurer has a duty to indemnify an insured who becomes legally liable to pay damages for a specified occurrence.
8. **Insurance: Liability.** An insurer's duty to defend is broader than the duty to indemnify.
9. **Insurance: Pleadings.** A court must initially measure an insurer's duty to defend an action against the insured by the allegations in the complaint against the insured.
10. **Insurance: Liability.** In determining its duty to defend, an insurer must look beyond the complaint and investigate and ascertain the relevant facts from all available sources.
11. ____: ____. An insurer has a duty to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the facts by the insurer would or does disclose facts that would obligate the insurer to indemnify.
12. ____: ____. An insurer has a duty to defend its insured whenever it ascertains facts that give rise to the potential of liability under the policy.
13. ____: ____. An insurer is not bound to defend a suit if the pleadings and facts ascertained by the insurer show the insurer has no potential liability.
14. **Declaratory Judgments: Insurance: Pleadings: Evidence.** In a declaratory judgment action to determine the insurer's duty to defend, a court must also consider any relevant evidence outside the pleadings.
15. **Insurance: Contracts: Negligence: Intent.** A party to a construction contract (the promisee) may require a subordinate party (which could be a general contractor or subcontractor) to insure losses caused by the promisee's own negligence in two circumstances: if the contract contains (1) express language to that effect or (2) clear and unequivocal language shows that that is the intention of the parties.
16. **Insurance: Contracts.** Subject to restrictions in the additional insured endorsement, an additional insured has the same coverage rights and obligations as the principal insured under the policy.
17. **Insurance: Contracts: Liability: Damages.** A commercial general liability policy is intended to cover an insured's tort liability for physical injuries or property damage.
18. **Insurance: Contracts: Negligence: Intent.** A requirement in the underlying contract that the subordinate party make the promisee an additional insured on the

subordinate party's commercial general liability coverage unequivocally shows that the parties intended the subordinate party to insure against the promisee's negligence.

19. **Insurance: Contracts: Negligence: Liability: Words and Phrases.** The term "arising out of" in an insurance liability policy is very broad and comprehensive; ordinarily understood to mean originating from, growing out of, or flowing from; and requiring only a "but for" causal connection between the occurrence and the conduct or activity specified in the policy.
20. ____: ____: ____: ____: ____. The phrase "arising out of" the principal insured's operations in an additional insured endorsements to a commercial general liability policy requires only a "but for" causal connection to those operations.
21. **Insurance: Contracts: Proof.** An insurer has the burden to prove that an exclusion applies.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded for further proceedings.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellant.

Kurt D. Maahs and James C. Morrow, of Morrow, Willnauer & Klosterman, L.L.C., for appellee Federated Service Insurance Company.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

SUMMARY

In this declaratory judgment action, Federated Service Insurance Company (Federated) sought a determination that under its policy with Sadler Line Construction, Inc. (Sadler), it had no duty to defend or indemnify Alliance Construction, Inc. (Alliance). Sadler was a subcontractor of Alliance. The district court granted summary judgment to Federated. We reverse the judgment and remand the cause for further proceedings.

BACKGROUND

SADLER'S SUBCONTRACT WITH ALLIANCE

In June 2005, Sadler signed a subcontract agreement with Alliance to provide services on a construction project to widen an intersection in Omaha, Nebraska. An insurance procurement

clause required Sadler to purchase specific insurance coverages and to make Alliance an additional insured on Sadler's coverages for commercial general liability (CGL) and umbrella/excess liability. The subcontract also provided that Sadler's insurance would be primary to any other applicable insurance maintained by Alliance or the project owner. A separate indemnity clause required Sadler to indemnify and hold Alliance harmless from any liability for personal injuries or property damages, even if Alliance's active or passive negligence caused the loss. The only exception was for liability arising from Alliance's sole negligence.

Sadler's Insurance Coverage With Federated

Sadler's CGL coverage with Federated contained a "Contractual Liability" provision. It provided coverage for liability that Sadler had assumed through a contract if the contract met Federated's definition of an "'insured contract.'" The definition included Sadler's agreement to assume another party's tort liability in a business contract. But it specified that "[t]ort liability" meant liability that would be imposed by law absent the agreement. Also, the CGL coverage included an "Additional Insured by Contract Endorsement." The endorsement is at issue here.

Underlying Personal Injury Action

In 2005, Danny O'Neall was injured while working for Sadler on the jobsite. In 2007, he filed a negligence action against Alliance, Sadler, the project owner, and the Department of Roads. Federated agreed to defend Alliance in the O'Neall suit subject to a reservation of rights. O'Neall's complaint named Sadler in the action, to comply with Neb. Rev. Stat. § 48-118.01 (Reissue 2010). That section of the Nebraska Workers' Compensation Act requires an employee or employer to give notice to other potential parties before bringing an action against a third person so that the other parties have an opportunity to join the action.

Declaratory Judgment Action

In its declaratory judgment action against Alliance, Federated alleged that it had no duty to defend or indemnify Alliance

against O'Neall's personal injury action. Federated alleged that O'Neall had not sued Sadler for independent acts of negligence. It claimed that a limitation and exclusion in the additional insured endorsement precluded coverage. In addition, Federated alleged that under Neb. Rev. Stat. § 25-21,187(1) (Reissue 2008), it had no duty to defend or indemnify Alliance. Section 25-21,187(1) is Nebraska's anti-indemnity statute. It sets out the circumstances under which an agreement to indemnify another party for the promisee's own negligence is void as against public policy. But it contains an exception for insurance contracts.

District Court's Order

Alliance, Sadler, and Federated all moved for summary judgment. The court overruled Alliance's and Sadler's motions and granted Federated's motion.

Alliance argued that Federated was obligated to indemnify it under the contractual liability provision of Sadler's CGL coverage. Although § 25-21,187 rendered the indemnity clause void, Alliance argued that Sadler's agreement in the subcontract to procure insurance to cover Alliance's own liability was an insurance contract under § 25-21,187's exception. The court rejected that argument.

The court also ruled that Alliance was not entitled to additional insured coverage under the endorsement. It concluded that the limitation in the endorsement precluded that coverage. The limitation in paragraph B of the endorsement provided, "Coverage shall not exceed the terms and conditions that are required by the terms of the written agreement to add any insured, or to procure insurance." The court concluded that under the limitation, the additional insured coverage was limited by the requirements of the subcontract's insurance procurement clause.

The court determined that under this court's case law, the subcontract could only validly require Sadler to obtain insurance coverage for losses caused by Alliance's own negligence in two circumstances: (1) The subcontract contained express language to that effect, or (2) the subcontract contained clear and unequivocal language that the parties intended Sadler to obtain such insurance. The court concluded that the

subcontract did not satisfy the express language requirement. It also rejected Alliance's argument that the court should consider the indemnity clause as evidence that the parties intended Sadler to obtain insurance coverage for Alliance's own negligence. Accordingly, the court concluded that it was clear the parties intended that Sadler would indemnify Alliance for Alliance's negligence. But it ruled that the subcontract lacked unequivocal language showing that the parties intended Sadler to insure against Alliance's negligence. It therefore concluded that Federated was obligated to insure Alliance only for its vicarious liability.

ASSIGNMENTS OF ERROR

Alliance assigns that the district court erred as follows:

(1) determining that the subcontract did not require Sadler to insure Alliance for its direct acts of negligence;

(2) determining that the Federated policy did not insure Alliance for its direct acts of negligence;

(3) entering an inconsistent order by concluding that Federated had insured Alliance under the policy for its vicarious liability but that Federated had no duty to defend and indemnify Alliance in the personal injury suit; and

(4) overruling Alliance's motion for summary judgment.

STANDARD OF REVIEW

[1,2] The interpretation of an insurance policy presents a question of law that we decide independently of the trial court.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the court granted the judgment and gives such party the benefit of all reasonable inferences deducible from the evidence.[2]

[3] When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions. The reviewing court may determine the controversy that is the

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[1] See *Jones v. Shelter Mut. Ins. Cos.*, 274 Neb. 186, 738 N.W.2d 840 (2007).

[2] See *id.*

subject of those motions or make an order specifying the facts that appear without substantial controversy and direct such further proceedings as the court deems just.[3]

ANALYSIS

Alliance contends that the court erred in determining that the additional insured endorsement did not cover loss caused by its own negligence. Federated counters that it had no duty to indemnify or defend Alliance because the coverage was either precluded by a limitation in the endorsement or excluded under a "sole negligence" exclusion in the endorsement.

Insurer's Duties Under Policy

[4,5] We begin by stating some familiar principles for claims involving an insurer's duties to indemnify and to defend. We construe insurance contracts like other contracts, according to the meaning of the terms that the parties have used. When the terms of an insurance contract are clear, we give them their plain and ordinary meaning as a reasonable person in the insured's position would understand them.[4]

[6-8] Whether an insurer has a duty to indemnify and defend an insured depends upon whether the insured's claimed occurrence falls within the terms of the insurer's coverage as expressed in the policy.[5] Under a policy providing liability coverage, the insurer has a duty to indemnify an insured who becomes legally liable to pay damages for a covered occurrence.[6] But an insurer's duty to defend is broader than the duty to indemnify.[7]

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[3] See *id.*

[4] See *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 789 N.W.2d 1 (2010).

[5] See, e.g., *Mortgage Express v. Tudor Ins. Co.*, 278 Neb. 449, 771 N.W.2d 137 (2009); *City of Scottsbluff v. Employers Mut. Ins. Co.*, 265 Neb. 707, 658 N.W.2d 704 (2003); *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002).

[6] See, *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006); *City of Scottsbluff, supra* note 5.

[7] See *Mortgage Express, supra* note 5.

[9-11] A court must initially measure an insurer's duty to defend an action against the insured by the allegations in the complaint against the insured.[8] But in determining its duty to defend, an insurer must look beyond the complaint and investigate and ascertain the relevant facts from all available sources.[9] An insurer has a duty to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the facts by the insurer would or does disclose facts that would obligate the insurer to indemnify.[10]

[12-14] So an insurer has a duty to defend its insured whenever it ascertains facts that give rise to the potential of liability under the policy.[11] Conversely, an insurer is not bound to defend a suit if the pleadings and facts ascertained by the insurer show the insurer has no potential liability.[12] In a declaratory judgment action to determine the insurer's duty to defend, a court must also consider any relevant evidence outside the pleadings.[13]

Insurance Procurement Clause in Subcontract Required Sadler to Provide Coverage for Alliance's Own Negligence

As noted, paragraph B of the additional insured endorsement provided, "Coverage shall not exceed the terms and conditions that are required by the terms of the written agreement to add any insured, or to procure insurance." The court correctly concluded that this language limited the coverage available to Alliance to the coverage that Sadler had agreed to provide under the subcontract's insurance procurement clause. But it erred in concluding that the subcontract's insurance procurement clause was insufficient to show that the parties intended Sadler to insure against Alliance's negligence.

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[8] See *id.*

[9] See *id.*

[10] See *id.*

[11] See *id.*

[12] See *id.*

[13] See, *Peterson, supra* note 6; *Neff Towing Serv., supra* note 5.

As noted, the insurance procurement clause required Sadler to make Alliance an additional insured. Federated argues that the clause is like the one that we considered in *Anderson v. Nashua Corp.*[14] and insufficient to show the parties' intent that Sadler would insure against Alliance's negligence. We disagree.

[15] Citing previous case law, we held in *Anderson* that a party to a construction contract (the promisee) may require a subordinate party (which could be a general contractor or subcontractor) to insure losses caused by the promisee's own negligence in two circumstances: if the contract contains (1) express language to that effect or (2) clear and unequivocal language shows that that is the intention of the parties. In *Anderson*, a property owner sought damages from its contractor after one of the contractor's employees was injured while performing work for the contractor on the property. The property owner alleged that the contractor had failed to purchase the insurance required under the construction contract. The contract required the contractor to carry specified coverages that would protect the contractor and property owner "'from all risks and from any claims that may arise out of or pertain to the performance of such work or services . . . .'"[15]

In *Anderson*, we concluded that the clause did not contain express language requiring the contractor to provide insurance to cover loss caused by the property owner's negligence. We further concluded that the same clause did not contain clear and unequivocal language that the parties intended the contractor to insure the owner against its own negligence. So we implicitly concluded that coverage for claims that arose out of the contractor's work did not clearly require the contractor to insure against the property owner's own negligence. We did not interpret the "arise out of" language to clearly include the property owner's negligence that would not have occurred but for the contractor's work on the property.

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[14] *Anderson v. Nashua Corp.*, 251 Neb. 833, 560 N.W.2d 446 (1997).

[15] *Id.* at 835, 560 N.W.2d at 448 (emphasis omitted).

We recognize that in interpreting liability insurance policies, we have stated that the phrase "arising out of" is broad and comprehensive and requires only "but for" causation.[16] But we give insurance terms a plain and ordinary meaning as a reasonable person in the insured's position would understand them[17] because the insurer drafts the language used in the policy.

In contrast, in *Anderson*, our analysis of the construction contract was governed by case law requiring clear and unequivocal language showing the parties' intent. As the case illustrates, we apply this higher standard because if a contract clearly requires a subordinate party to insure against the promisee's negligence and the subordinate party fails to do so, the subordinate party will be liable for the promisee's damages for its own negligence. And so we declined to interpret the "arise out of" language as clearly requiring the contractor to insure against the property owner's negligence. But the provision that we considered in *Anderson* is significantly different from a requirement that a subordinate party make a promisee an additional insured on the subordinate party's CGL policy.

[16-18] Subject to restrictions in the additional insured endorsement, an additional insured has the same coverage rights and obligations as the principal insured under the policy.[18] And a CGL policy is intended to cover an insured's tort liability for physical injuries or property damage.[19] We

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[16] See *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997). Accord, *Fokken v. Steichen*, 274 Neb. 743, 744 N.W.2d 34 (2008); *Allied Mut. Ins. Co. v. Action Elec. Co.*, 256 Neb. 691, 593 N.W.2d 275 (1999); *O'Toole v. Brown*, 228 Neb. 321, 422 N.W.2d 350 (1988).

[17] *D & S Realty, supra* note 4.

[18] See, *Liberty Mut. Ins. Co. v. Travelers Indem. Co.*, 78 F.3d 639 (D.C. Cir. 1996); *Massachusetts Turnpike Authority v. Perini Corp.*, 349 Mass. 448, 208 N.E.2d 807 (1965); 4 Philip L. Bruner & Patrick J. O'Connor, Jr., Bruner and O'Connor on Construction Law § 11:151 (2010); 1 Scott C. Turner, Insurance Coverage of Construction Disputes § 42:1 (2d ed. 2002).

[19] See 9A Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 129:4 (2005).

recognize that additional insured endorsements commonly have restrictions for coverage. But those restrictions are irrelevant to interpreting the parties' intent in the underlying contract. We conclude that a requirement in the underlying contract that the subordinate party make the promisee an additional insured on the subordinate party's CGL coverage unequivocally shows that the parties intended the subordinate party to insure against the promisee's negligence. This interpretation of the subcontract is consistent with the typical practice of parties to construction contracts.

It is common practice in construction contracts for owners and general contractors to shift the risk of liability for injuries sustained by a subordinate party's employees to the subordinate party's insurer.[20] They usually accomplish this by contractually requiring the subordinate party to make the owner or general contractor an additional insured on the subordinate party's CGL coverage.[21] The main reason for including this requirement is so that the promisee of the additional insured agreement will not be limited to the coverage that the insurer owes for the subordinate party's contractual liability under an indemnity agreement in the construction contract.[22] If an indemnity agreement is invalid under an anti-indemnity statute, then the insurer will not be liable for the subordinate party's contractual liability under the indemnity agreement. But even if an indemnity agreement is invalid, its invalidity does not affect the coverage extended to another party under an additional insured endorsement.[23]

In sum, Sadler's agreement to make Alliance an additional insured on its CGL policy unequivocally showed that the parties intended for Sadler to procure tort liability coverage for Alliance's negligence. Further, the limitation in the additional insured endorsement provided that the coverage would not exceed "the terms of a written agreement to add any

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[20] See *State Auto. Mut. Ins. v. Habitat Const. Co.*, 377 Ill. App. 3d 281, 875 N.E.2d 1159, 314 Ill. Dec. 872 (2007).

[21] See 4 Bruner & O'Connor, *supra* note 18.

[22] See *id.*, § 11:164.

[23] See, *id.*; 1 Turner, *supra* note 18, § 42:4.

insured, or to procure insurance."[24] Because Sadler specifically agreed in the subcontract to add Alliance to its CGL coverage, Federated's coverage of Alliance's negligence did not exceed the terms of the written agreement. The district court erred in ruling that the endorsement's limitation precluded coverage for Alliance's negligence.

Scope of Coverage Under Endorsement's Indemnity Provision

Alliance was covered under Sadler's blanket endorsement for additional insureds, as distinguished from an endorsement that names a specific entity or person as an additional insured. In the blanket endorsement, paragraph A extended coverage to "[a]ny person or organization . . . for which you [Sadler] have agreed by written contract to procure bodily injury or property damage liability insurance, *arising out of operations* performed by you [Sadler] or on your behalf . . . ."

Alliance contends that the court erred in failing to interpret the "arising out of" language in the indemnity provision to extend coverage to Alliance for its own negligence. Federated argues that the "arising out of operations" language shows that the endorsement does not include coverage for Alliance's negligence. We disagree.

[19,20] Federated relies on a federal district court case in which the court considered an additional insured endorsement that was more restrictive. The endorsement specifically limited an additional insured's coverage to "'LIABILITY FOR THE CONDUCT OF THE NAMED INSURED.'"[25] In contrast, as previously noted, this court has interpreted the term "arising out of" in liability policies as very broad and comprehensive; ordinarily understood to mean originating from, growing out of, or flowing from; and requiring only a

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[24] See, e.g., *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6th Cir. 2000); *W.E. O'Neil Const. Co. v. General Cas. Co.*, 321 Ill. App. 3d 550, 748 N.E.2d 667, 254 Ill. Dec. 949 (2001); *Transport Intern. Pool v. Continental Ins.*, 166 S.W.3d 781 (Tex. App. 2005); 3 Steven Plitt et al., Couch on Insurance 3d § 40:29 (2011).

[25] See *Boise Cascade Corp. v. Reliance Nat. Indem. Co.*, 129 F. Supp. 2d 41, 47 (D. Me. 2001).

"but for" causal connection between the occurrence and the conduct or activity specified in the policy.[26] Even if under *Anderson*[27] the "arising out of" phrase could be interpreted as not clearly covering the promisee's own negligence, the argument would only create an ambiguity, which we would construe in favor of coverage.[28] And when considering additional insured endorsements to CGL policies, the majority of courts have broadly interpreted the phrase "arising out of" the principal insured's operations to require only a "but for" causal connection to those operations:

> "The majority view of these cases is that for liability to 'arise out of the operations' of a named insured it is not necessary for the named insured's acts to have 'caused' the accident; rather, it is sufficient that the named insured's employee was injured while present at the scene in connection with performing the named insured's business, even if the cause of the injury was the negligence of the additional insured."[29]

We agree with these courts. O'Neill would not have been injured but for performing work for Sadler's operations. Interpreting the "arising out of" language in the additional insured endorsement to require only a simple causal relationship to the principal insured's operations is consistent with our

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[26] See *Farmers Union Co-op Ins. Co., supra* note 16.

[27] *Anderson, supra* note 14.

[28] See, *Jensen v. Board of Regents*, 268 Neb. 512, 684 N.W.2d 537 (2004); *Federal Ins. v. Am. Hardware Mut. Ins.*, 124 Nev. 319, 184 P.3d 390 (2008).

[29] *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487, 498 (5th Cir. 2000), quoting *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex. App. 1999), and citing *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251 (10th Cir. 1993); *Merchants Ins. Co. of New Hampshire, Inc. v. USF&G*, 143 F.3d 5 (1st Cir. 1998); and Douglas R. Richmond, *The Additional Problems of Additional Insureds*, 33 Tort & Ins. L.J. 945 (1998). See, also, *American v. General Star Indemn. Co.*, 125 Cal. App. 4th 1510, 24 Cal. Rptr. 3d 34 (2005); *Shell Oil Co. v. AC & S, Inc.*, 271 Ill. App. 3d 898, 649 N.E.2d 946, 208 Ill. Dec. 586 (1995); *Federal Ins., supra* note 28; 2 Philip L. Bruner & Patrick J. O'Connor, Jr., Bruner and O'Connor on Construction Law § 5:219 (2002); 1 Turner, *supra* note 18, § 42:4.

reasoning in interpreting other liability policies. We also note that the insurance industry issued a new additional insured endorsement in 2004 in response to courts' interpreting the "arising out of" language to require only "but for" causation.[30] Finally, a reasonable person would not conclude that the endorsement contains the restrictions for which Federated argues. It neither explicitly requires the principal insured's negligence to have caused the loss nor states that an additional insured is covered only for its vicarious liability. If this is the only coverage that Federated intended to provide, it could have clearly stated its coverage.

We conclude that because Sadler's employee was injured while performing work for Sadler, the accident arose out of Sadler's operations even if Sadler was not negligent. Accordingly, paragraph A of the additional insured endorsement provides direct primary coverage for Alliance's own negligence, not just its vicarious liability. Federated's interpretation of the coverage provision is without merit.

Sole Negligence Exclusion

[21] Federated argues that the "sole negligence" exclusion in the endorsement bars coverage to Alliance for a loss caused by its own negligence. Paragraph D of the endorsement excluded coverage for bodily injury or property damage "arising out of the sole negligence of" the additional insured. This exclusion is relevant both to Federated's duty to indemnify and its duty to defend. But the insurer has the burden to prove that an exclusion applies,[31] and the court did not rule on this claim, which potentially raises questions of fact. So we decline to decide the issue on appeal. Instead, we remand the cause to the district court for further proceedings on this issue.

CONCLUSION

We conclude that the parties, by requiring Sadler to name Alliance as an additional insured on its CGL policy, intended that Sadler would insure against loss caused by Alliance's

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[30] See 4 Bruner & O'Connor, *supra* note 18, § 11:167.

[31] See *Fokken, supra* note 16.

negligence. We also determine that Sadler's additional insured endorsement, which provided coverage for liability arising out of Sadler's operations, was broad enough to include coverage for Alliance's negligence even if Sadler was not negligent. We reverse the judgment and remand the cause for further proceedings on the application of the "sole negligence" exclusion in the endorsement.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
DONALD M. LEE, APPELLANT.
807 N.W.2d 96

Filed October 28, 2011. No. S-10-1098.

1. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations that, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
2. ____: ____: ____. When a movant for postconviction relief makes an allegation of an infringement of constitutional rights, a court may deny an evidentiary hearing only when the records and files affirmatively show that the defendant is entitled to no relief.
3. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
4. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. Determinations regarding whether counsel was deficient and whether this deficiency prejudiced the defendant are questions of law that an appellate court reviews independently of the lower court's decision. An appellate court reviews factual findings for clear error.
5. **Pleas: Waiver.** A voluntary guilty or no contest plea generally waives all defenses to the charge.
6. **Postconviction: Pleas: Effectiveness of Counsel.** In a postconviction proceeding brought by a defendant convicted on a plea of guilty or no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When lawyers employed by the same office represent a defendant both at trial and on direct