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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Larry Pavlicek, Plaintiff and Appellee, vs. American Steel Systems, Inc., Gabriel Construction Services, LLC, Door Pro, Inc.,and Dickinson Ready-Mix, Co., and JRC Construction, LLC, Defendants, and Grinnell Mutual Reinsurance Company, Garnishee and Appellant.	)	Supreme Court Case No. 20210116 Stark County Case No. 45-2015-CV-00541

Appeal of December 21, 2020 *Order*, February 17, 2021 *Findings of Fact, Conclusions of Law and Order for Judgment*, and February 17, 2021 *Judgment*

Stark County, North Dakota
Southwest Judicial District
Honorable William A. Herauf, Presiding

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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[¶ 3] STATEMENT OF JURISDICTION

[¶ 4] The North Dakota Supreme Court has jurisdiction under N.D.C.C. §§ 27-27-01 and 28-27-02.

[¶ 5] STATEMENT OF THE ISSUES

[¶ 6] I. Whether the District Court erred in finding "future damage" to the in-floor heat system caused by tearing out the defective concrete floor constitutes "property damage" caused by an "occurrence" taking place during Grinnell Mutual's policy period.

[¶ 7] II. Whether the District Court erred when it found damage to the floor drain system and in-floor heating system were not excluded from coverage under the applicable "business risk" exclusions of the Grinnell Mutual Policy.

[¶ 8] STATEMENT OF ORAL ARGUMENT

[¶ 9] Appellant respectfully requests oral argument on the merits of Appellant's issues to better apprise the Court of the nature and circumstances of the issues before the Court.

[¶ 10] STATEMENT OF THE CASE

[¶ 11] Garnishee/Appellant Grinnell Mutual Reinsurance Company ("Grinnell Mutual") appeals from the District Court's December 21, 2020 *Order* (App. 191 – 215; Doc. ID# 383), February 17, 2021 *Findings of Fact, Conclusions of Law and Order for Judgment* (App. 220 – 222; Doc. ID# 400), and February 17, 2021 *Judgment* (App. 223; Doc. ID# 401) in the above-entitled action.

[¶ 12] Creditor/Appellee Larry Pavlicek ("Pavlicek") brought this garnishment action against Grinnell Mutual through a *Supplemental Complaint* dated March 31, 2020 ("the *Supplemental Complaint*"). (App. 46 – 48). The *Supplemental Complaint* requested the District Court issue a declaratory judgment finding coverage exists under a commercial general liability policy ("CGL") issued by Grinnell Mutual for the *Judgment* rendered

against Grinnell Mutual's insured, JRC Construction, LLC ("JRC"), in this matter.[1] (App. 44 – 45).

[¶ 13] Pavlicek sought to recover damages from multiple defendants including American Steel Systems, Inc. JRC, Gabriel Construction Services, LLC, Door Pro, Inc. and Dickinson Ready-Mix, Co. (App. 16-22). The *Complaint* in the underlying action alleges breach of contract, breach of express and implied warranties, and negligence. *Id.*

[¶ 14] A jury trial on Pavlicek's claims against JRC took place from December 5 – 7, 2017. (App. 39 – 41; Doc. ID# 243). The jury returned a verdict in favor of Pavlicek in the amount of $217,244.55. (App. 39 – 41; Doc. ID# 243). The District Court entered *Judgment* against JRC in the amount of $225,545.63. (App. 44 – 45; Doc. ID# 250).

[¶ 15] On February 7, 2020, Pavlicek filed a *Motion for Leave to File Supplemental Complaint*, seeking to initiate this garnishment action against Grinnell Mutual based on its position that no coverage existed for the damages awarded Pavlicek. (Doc. ID#s 297–311). Grinnell Mutual filed its *Answer* to Pavlicek's *Supplemental Complaint* denying it owed any obligation to indemnify JRC with respect to the *Judgment* obtained by Pavlicek under the terms of the Policy (App. 49 – 51; Doc. ID# 323).

[¶ 16] After consideration of cross-motions for summary judgement, the Court entered its *Order Denying Cross Motions for Summary Judgment* on October 8, 2020. (App. 190; Doc. ID# 371). The parties waived their right to a court trial and elected to proceed on the facts adduced at trial on the underlying claim. On November 6, 2020 the parties submitted their respective briefs for the Court's consideration. *See Garnishee's Trial Brief* (Doc. ID# 373); *Creditor's Trial Memorandum* (Doc. ID# 375). Upon submission of the parties'

[1] The *Judgment* in the underlying action was affirmed on appeal. *See Pavlicek v. American Steel Systems, Inc., et al.*, 2019 ND 97, 925 N.W.2d 737.

respective trial briefs, the Court permitted the parties to submit reply briefs, which were submitted on November 13, 2020. *See Creditor's Trial Reply Brief* (Doc. ID# 378); *Garnishee's Reply to Creditor's Trial Memorandum* (Doc. ID# 380). On December 21, 2020, the Court entered its *Order* determining coverage existed under the Grinnell Mutual policy for the damages awarded against Pavlicek. (Doc. ID# 383). As part of the Court's *Order*, the Court requested the parties submit additional briefing regarding covered damages. (App. 214, ¶ 45).

[¶ 17] On December 31, 2020, Appellant submitted *Garnishee's Trial Memorandum Regarding Covered Damages* (Doc. ID# 384), which Pavlicek responded to on January 7, 2021. *See Creditor's Reply Brief Regarding Damages* (Doc. ID# 386). On January 8, 2021, the Court entered an *Order on Damages* (Doc. ID# 391). Based upon the Court's *Order on Damages*, Pavlicek submitted *Proposed Findings of Fact, Conclusions of Law, and Order for Judgment* on January 20, 2021. (Doc. ID# 392). Appellant subsequently filed *Garnishee's Response to Creditor's Proposed Findings of Fact, Conclusions of Law, and Order for Judgment, and Request for Reconsideration* ("*Request for Reconsideration*") (Doc. ID# 395). After the Court's review of Appellant's *Request for Reconsideration*, on February 3, 2021, the District Court submitted a letter to counsel regarding the calculation of damages and instructed Pavlicek to revise the closing documents. (App. 219; Doc. ID# 397). On February 17, 2021, the Court entered its *Findings of Fact, Conclusions of Law, and Order for Judgment*. (App. 220 – 222; Doc. ID# 400). *Judgment* was entered against Grinnell Mutual on February 17, 2021 (App. 223; Doc. ID# 401).

[¶ 18] On April 22, 2021, Grinnell Mutual filed its *Notice of Appeal*, appealing the Court's December 21, 2020 *Order* (App. 191 – 215; Doc. ID# 383) and the Court's

February 17, 2021 *Findings of Fact, Conclusions of Law, and Order for Judgment*, (App. 220 – 222; Doc. ID# 400), and February 17, 2021 *Judgment* (App. 223; Doc. ID# 401).

[¶ 19] **STATEMENT OF FACTS**

[¶ 20] This case arises out of the construction of a steel building on Pavlicek's property in June of 2013. (App. 16, *Complaint*, ¶ 10). At that time, Pavlicek hired JRC to excavate a 100' x 175' foundation, pour footing walls, install a six-inch concrete floor, and install insulation and heat tubing for the concrete floor. *See* Doc. ID# 261. (*Partial Transcript, Direct Exam of Larry Pavlicek*); 22: 1 – 4 (hereinafter "*Pavlicek Direct*"). Joseph Naylor ("Naylor") the owner of JRC, included the installation of in-floor heating system for the concrete floor in JRC"s original bid on the project. *Pavlicek Direct*; 22: 19 – 21. However, Pavlicek decided to hire Plumber's, Inc. to install the in-floor heat system. *Pavlicek Direct*; 22: 25; 23: 1 – 3. JRC installed the floor drain system for the building in conjunction with pouring the concrete floor. *See* Doc. ID# 251 (*Partial Transcript – day 1 jury trial 12-5-17*) (hereinafter "*Pavlicek Cross*"); 30: 11.

[¶ 21] On July 10, 2013, Plumber's, Inc. installed the insulation and heat tubes for the in-floor heat system for $19,250.00. *Pavlicek Direct*; 32: 6 – 12. After Plumber's, Inc. completed its work, JRC began constructing the forms, setting the rebar and pouring concrete. *Pavlicek Direct*, 33, 16 – 25. JRC completed its work and poured the concrete for the north half of the building. *Pavlicek Direct*; 33: 16 – 25; 34: 9 – 21. On July 11, 2013, after pouring the concrete for the north half, JRC began constructing forms and setting rebar for the south half of the building. *Pavlicek Direct*; 33: 23 – 34: 3. However, JRC did not pour the concrete for the south half that day. *Id.* That evening, a wind storm passed through the area. *Pavlicek Direct*; 34: 5-14.

[¶ 22] The next morning, Pavlicek noticed the heat tubes and insulation installed by Plumber's, Inc., had been dislodged in the windstorm the night before. *Pavlicek Direct*; 34: 18 – 21. Although Plumber's, Inc. initially installed the heating tubes and insulation, it did not return to do the repairs. *Pavlicek Cross*; 28: 22 – 25. When Pavlicek observed insulation and heat tubes in disarray, he personally called Naylor about the situation. *Pavlicek Direct*; 34: 14 – 25. Naylor told Pavlicek and his on-site foreman to begin gathering up the materials that had blown out of place and drove to Pavlicek's residence. *Pavlicek Direct*; 34: 21 – 23. Naylor also purchased insulation to replace any that couldn't be reused. *Pavlicek Cross*; 29: 6 – 9. After Naylor arrived, JRC disassembled the rebar and in-floor heat system. *Pavlicek Direct*; 35: 1 – 24. JRC then put the insulation back in, installed the heat tubes, and set the rebar back in place. *Pavlicek Direct*; 35: 1 – 24. The work took part of two days. *Pavlicek Direct*; p. 36: 1. When the heat tubes were reinstalled by JRC, some of the heat tubes were touching each other and spaced differently than when installed by Plumber's, Inc. *Pavlicek Direct*; 35: 12 – 13. Pavlicek testified some of the tubes were kinked. *Pavlicek Direct*; 34: 18 – 21. Pavlicek was present during while JRC reinstalled the insulation and heat tubes. He spoke with both a JRC representative and representatives of Plumber's Inc. *Pavlicek Direct*; 35: 21 – 36: 13.

[¶ 23] On July 13, 2013, after JRC reinstalled the heat tubes, JRC poured the concrete for the floor in the south half of the building. *Pavlicek Direct*; 39: 14 – 23. Pavlicek was present throughout the pour. *Id*. Almost immediately after the floor was poured, Pavlicek noticed peeling and delamination of the concrete in the southwest corner of the building. *Id*. Naylor had difficulty troweling in the southwest corner. *Id*. Naylor thought it was setting up to fast, so he poured water on the concrete. *Pavlicek Direct*; 39: 10 – 11. Naylor returned

to Pavlicek's property days later to attempt to repair the concrete. *Pavlicek Direct*; 41: 20 – 22. He first tried to trowel on an adhesive but the concrete began delaminating right away. *Pavlicek Direct*; 39: 14 – 25. Naylor informed Pavlicek he needed to consult a concrete expert and left. *Id*. Naylor returned approximately one-week later to perform additional repairs. *Pavlicek Direct*; 40: 8 – 12. Eventually, Naylor attempted to grind the top layer of the concrete. Naylor poured water on the concrete as he ground it. *Pavlicek Direct*; 45: 9 – 12. The water and the concrete dust turned to a liquid concrete. *Id*. Naylor suggested pouring the liquid down the floor drain, causing it to plug. *Pavlicek Direct*; 45: 12 – 19. While grinding the concrete, Naylor nicked the side of the drain which caused the concrete around the drain to start peeling off. *Pavlicek Direct*; 44: 22 – 25. JRC rented a Roto Rooter machine to unplug the floor drain. *Pavlicek Cross*; 30: 21 – 24. Although he testified it drains slowly, Pavlicek admitted he does not have any issues with the floor drain. *Pavlicek Direct*; 46: 8 – 13, *Pavlicek Cross*; 31: 6 – 14.

[¶ 24] Pavlicek retained Dr. Kevin McDonald ("Dr. McDonald") to review and analyze the concrete floor installed by JRC. *See* Doc. ID# 287 (*Transcript of Jury Trial dated December 5 – 7, 2017*) ("*Trial Transcript*") 74: 10 – 11. Dr. McDonald testified he had taken core samples of Pavlicek's concrete floor to examine. *Trial Transcript*; 75: 15 – 17. Upon examination of the core samples of the concrete, Dr. McDonald observed the concrete was air entrained. *Trial Transcript*; 19 – 21. Dr. McDonald indicated air entrained concrete is concrete installed to make the concrete resisted to the effects of freezing and thawing. *Trial Transcript*; 75: 21 – 23. Dr. McDonald further observed failure planes or delaminations, which are essentially fractures in the concrete. *Trial Transcript*; 76: 11 – 13. Dr. McDonald testified the failure planes occur when a surface is being finished and

there are still particulates settling out which causes a gap due to air entrainment. *Trial Transcript*; 76: 13 – 17. Dr. McDonald opined the delamination was the result of JRC over-finishing the air entrained concrete. *Trial Transcript*; 94: 15 – 18.

[¶ 25] At trial, Pavlicek offered a proposal by Giovanni Construction ("the Giovanni Proposal") in order to repair JRC's defective work. (App. 34 – 38; Doc. ID# 191). The Giovanni Proposal estimated it would cost $217,244.55 to repair JRC's work, which included removing and replacing the existing heating tubes in the floor. *Pavlicek Cross*; 38: 17 – 19. Roughly $45,000.00 of the Giovanni Proposal was for the cost of tearing out and reinstalling the in-floor heating. *Pavlicek Cross*; 38: 20 – 23.

[¶ 26] JRC was insured by Grinnell Mutual under a commercial liability policy ("CGL"), Policy No. 610645 (hereinafter "the Policy"), at the time it performed the work on Pavlicek's building. (App. 52 – 180; Doc. ID# 352) (Certified Policy Issued by Grinnell Mutual to JRC Construction, LLC). The Policy issued to JRC was effective from July 30, 2012 through July 30, 2013. (App. 52).

[¶ 27] STANDARD OF REVIEW

[¶ 28] Interpretation of an insurance contract is a question of law fully reviewable on appeal. *Tibert v. Nodak Mut. Ins.*, 2012 ND 81, ¶ 9, 816 N.W.2d 31. The appellate court independently examines and construes the insurance contract to determine whether there is coverage. *Id.* When interpreting the provisions of an insurance policy, this Court has held:

> Our goal when interpreting insurance policies, as when construing other contracts, is to give effect to the mutual intention of the parties as it existed at the time of contracting. We look first to the language of the insurance contract, and if the policy language is clear on its face, there is no room for construction. If coverage hinges on an undefined term, we apply the plain, ordinary meaning of the term in interpreting the contract. While we regard

> insurance policies as adhesion contracts and resolve ambiguities in favor of the insured, we will not rewrite a contract to impose liability on an insurer if the policy is unambiguously precludes coverage. We will not strain the definition of an undefined term to provide coverage for the insured. We construe insurance contracts as a whole to give meaning and effect to each clause, if possible. The whole of a contract is to be taken together to give effect to every part, and each clause is to help interpret the others.

State v. N.D. State Univ., 2005 ND 75, ¶ 12, 694 N.W.2d 225 (quoting *Ziegelmann v. TMG Life Ins.*, 2000 ND 55, ¶ 6, 607 N.W.2d 898).

[¶ 29] **ARGUMENT**

[¶ 30] As noted above, this case arises out of JRC's work for Pavlicek preparing and pouring the 100' x 175' concrete floor of a building Pavlicek had constructed on his farm. See Doc. ID# 261. (*Partial Transcript, Direct Exam of Larry Pavlicek*); 22: 1 – 4 (hereinafter "*Pavlicek Direct*"). Due to, among other things, the over-finishing of what is known as "air-entrained" concrete by JRC, the concrete began delaminating almost immediately. *Trial Transcript*; 76: 11 – 13. The District Court correctly determined the damage to the concrete floor poured by JRC was the result of faulty workmanship JRC's own work and, therefore, did not constitute either "property damage" or an "occurrence" under the Policy. That issue is not before the Court. Recently, after an exhaustive review of national case law on faulty workmanship, a plurality of this Court held a defective work product by a subcontractor causing damage to the contractor's work can be an accidental occurrence as defined by a CGL policy. *See K & L Homes v. Am. Family Mut. Ins. Co*., 2013 ND 57, ¶41, 829 N.W.2d 724 (*Justice Crothers concurring*). However, this case does not involve the work of a subcontractor. Therefore, the Court's holding therein does not apply to the facts of this case. This case focuses primarily on two issues: (1) whether the work of JRC caused "property damage" to the property of Pavlicek or another third-party

during the applicable policy period; and (2) whether the "business-risk" exclusions of the policy issued by Grinnell Mutual to JRC apply to exclude any initial grant of coverage.

[¶ 31] After determining the damage to the concrete floor itself was not covered by the policy, the District Court determined that the majority of the damages awarded Pavlicek in the underlying trial were covered because it was necessary to tear up the concrete floor to make repairs, which would damage the drain and in-floor heating systems. For the reasons cited below, the District Court's holding in its *Order* of December 21, 2020 and its subsequent *Findings of Fact, Conclusions of Law* and *Order* were in error and must be reversed.

[¶ 32] **I. The District Court erred in finding "future damage" to the in-floor heat system caused by tearing out the defective concrete constitutes "property damage" caused by an "occurrence" taking place during Grinnell Mutual's policy period.**

[¶ 33] **a. It is well-established law in North Dakota that an "occurrence" under a liability policy takes place when the insured is actually damaged.**

[¶ 34] At the time JRC performed work on Pavlicek's building, JRC was insured by Grinnell Mutual under the Policy, which was effective from July 30, 2012 through July 30, 2013. (App. 52). The Grinnell Mutual Policy provided the following coverage:

> **SECTION II – COVERAGES**
>
> **A. Coverages**
>
> **1. Business Liability**
>
> **a.** "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury', 'property damage' or 'personal and advertising injury' to which this insurance applies. . .
>
> **b.** This insurance applies:
>
> **(1)** To 'bodily injury' and 'property damage' only if:
>
> (a) The 'bodily injury' or 'property damage' is caused by an 'occurrence'

> that takes place in the 'coverage territory';
>
> (b) The 'bodily injury' or 'property damage' occurs during the policy period…"

(App. 90). Under the Grinnell Mutual Policy, "property damage" is defined as: (a) "[p]hysical injury to tangible property, including all resulting loss of use of that property. . .; or (b) [l]oss of use of tangible property that is not physically injured." (App. 103). In general terms, the Grinnell Mutual Policy provides coverage for claims alleging an "insured" is legally liable for damages caused by "property damage" only if the "property damage" is caused by an "occurrence" which occurs during the policy period.

[¶ 35] In the District Court's December 21, 2020 *Order*, the Court concluded the following:

> Grinnell also has raised the fact that there is no damage to the in-floor heating and that in fact such actually works as planned. The problem is that once the concrete sets, there is no practical way to remove the concrete absent destroying the heat tubes. In order to fully compensate and give to Pavlicek what he is entitled to have under his contract with JRC, the entire concrete floor must be ripped out and replaced. In having to remove the concrete floor due to the poor workmanship of JRC, there will be damage to the in-floor heat tubes and the work product of Plumbers, Inc. will be basically destroyed.
>
> What is certain is that in order to give Pavlicek what he bargained for, there will be a complete loss of the heating system that had been installed by Plumbers, Inc. The reason that the heating tubes will be lost is due to the poor workmanship in pouring and finishing the concrete floor as was done by JRC. While the hearing system at the time of trial currently functioned, it is clear that it will be destroyed upon replacing the concrete floor that was poured by JRC. *The future damage is certain and qualifies as property damage and occurrence under the terms of the policy. Further, since the damage is certain, it also qualifies for an occurrence during the policy period.*

(App. 203 - 204) (Emphasis Added). In other words, the District Court determined that unknown damage which may happen at some indeterminate point in the future constitutes

"property damage" taking place within the policy period under a liability policy effective from July 30, 2012 through July 30, 2013. (App. 53).

[¶ 36] The loss suffered by Pavlicek to the in-floor heat does not result from the "physical injury" to the heat tubes caused by JRC's defective work is necessary for the loss to constitute "property damage" under the Policy. Rather, the loss is a part of the cost of repairing the damage to JRC's defective work, which necessarily includes the tear out and reinstallation of the heat tubes. Given the fact that the heat tubes are embedded in the concrete, it was entirely foreseeable to JRC that, should its work be defective, the cost of repair would include the reinstallation of the in-floor heat.

[¶ 37] The District Court's *Order* of December 21, 2020 makes clear that that the basis of his decision is not that the heat tubes were physically damaged by JRC's defective work. Instead, the Court found:

> What is certain is that in order to give Pavlicek what he bargained for, there will be a complete loss of the heating system that had been installed by Plumber's, Inc., The reason that the heating tubes will be lost is due to the poor workmanship in pouring and finishing the concrete floor as was done by JRC. (App. 204)

The District Court expressly found coverage for heating system existed to give Pavlicek the benefit of the bargain he made when he contracted with JRC for a defect-free floor. In doing so, the District Court converted the Policy from liability insurance to a warranty or performance bond against the weight of North Dakota. As such, the judgment of the District Court must be reversed.

[¶ 38] This Court has never addressed whether coverage exists under a liability policy for so-called "get to" or "rip and tear" damage to otherwise undamaged property during the repair of an insured's defective work. Other courts addressing the issue have found

coverage does not exist. In *Desert Mountain Props. Ltd, P'ship v Liberty Mut. Fire Ins. Co.*, 225 Ariz. 194, 236 P.3d 421 (Ariz. Ct. App. 2010), the Arizona Court of appeals faced with a similar issue. Desert Mountain contracted for the construction of hillside homes in two subdivisions. *Id*. at 425. The general contractor, The Weitz Company, competed the homes in 1995. *Id*. Some of the homes experienced settlement and drainage problems from the outset. *Id*. Desert Mountain subsequently hired a consultant to examine the property. *Id*. The consultant determined there was a "very substantial soils issue involving the poor compaction of fill material" on which the homes were built. *Id*. Desert Mountain then tendered the cost of repairing damages to 50 homes to its insurer, Liberty Mutual. *Id*. After a complex claim investigation, Desert Mountain sued Liberty Mutual alleging breach of contract and bad faith. *Id*. at 426. The superior court held Desert Mountain could not recover the cost of repairing the poorly compacted soil but could recover amounts it spent to repair property damage that resulted from the soil settlement. *Id*. After a 12-day trial, a jury awarded Desert Mountain $500,000 in damages. *Id*. Both Liberty Mutual and Desert Mountain appealed. *Id*.

[¶ 39] One issue on appeal was whether coverage existed under the Liberty Mutual policy for damages that were caused by repair of the defectively compacted soil. *Id*. at 441. The Court noted that under Arizona law, faulty workmanship does not constitute an "occurrence" within the meaning of the standard CGL policy. *Id*. Notwithstanding this general principle, the Court held damage to other property caused by or resulting from the defect may be covered. *Id*. The superior court held the "repair of the defective workmanship [i.e., defectively compacted soil] is not covered by the Liberty Mutual policies." *Id*. Desert Mountain argued coverage existed for expenses incurred repairing

damage to non-defective property that occurred during the repair of defective property. *Id*. Some of the items that were damaged during repairs included walls, floors, slabs and other portions of the homes that had not been affected by the poorly compacted soil. *Id.* Desert Mountain argued the damage that would be done to the non-defective property incurred to repair the defective property was "property damage." (citing *Dewitt Construction, Inc. v. Charter Oak Fire Ins. Co.,* 307 F.3d 1127 (9th Cir. 2002)).

[¶ 40] The Court determined there was no coverage for non-defective property damaged in the course of repairs, holding:

> In our view, however, the expense of removing or repairing non-defective property under the circumstances presented here more properly is characterized as a cost of repairing the defect. The removal of destruction of non-defective property required to repair poorly compacted soil is not damage caused by the poorly compacted soil. Rather, it is damage caused by the repair of the poorly compacted soil. Therefore, because the cost of repairing the defect is not recoverable under a CGL policy in Arizona. Therefore, because the cost of repairing the defect is not recoverable under a CGL policy in Arizona, *Advance Roofing*, 163 Ariz. At 482, 788 P.2d at 1233, the superior court did not err by ruling that costs incurred in "getting to" the defect were not covered under the policies at issue.
> Authorities from other jurisdictions support this conclusion. *See OneBeacon Ins. Co. v. Metro Ready-Mix, Inc.*, 427 F. Supp. 2d 574, 576-77 (D. Md. 2006). (demolotion and reconstruction of pilings and columns necessitated by repair of defective grout work not covered as an "occurrence" under CGL policy); *Nas Sur. Group v. Precision Wood Prods., Inc.*, 271 F. Supp. 2d 776, 783 (M.D.N.C. 2003). ("costs incurred . . . to repair drywall, repaint walls and reinstall sinks, wiring and plumbing incident to the replacement of . . . defective workmanship" were not an "occurrence" under CGL policy because they were foreseeable costs associated with the repair of faulty workmanship"; *H.E. Davis & Sons v. North Pac. Inc. Co.*, 248 F. Supp. 2d 1079, 1085 (D. Utah 2002) (costs incurred in removing undamaged concrete footings in order to remedy defectively compacted soil not covered as "property damage" under CGL policy); *Woodfin Equities Corp. v. Harford Mut. Ins. Co.*, 110 Md. App. 616, 678 A.2d 116, 131-32 n.8 (Md. App. 1996). ("Voluntarily pulling up carpeting or breaking through dry-wall to access the [defective] HVAC units is not [covered as] property damage [under CGL policy]; it is the cost incurred in replacing and repairing the HVAC systems."), aff'd in part and rev'd in part on other grounds *Harford Mut. Ins. Co. v. Woodfin Equities*

Corp., 344 Md. 399, 687 A.2d 652 (Md. 1997); *Gen. Accident Ins. Co. of Am. v. Am. Nat'l Fireproofing, Inc.*, 716 A.2d 751, 758-59 (R.I. 1998).

Id. at 441-442, *but see Colo. Pool Sys. v. Scottsdale Ins. Co.*, 317 P.3d 1262, 1269 – 70 (Colo. App. 2012).

[¶ 41] The Arizona Court of Appeals decision in *Desert Mountain* gives force and effect to each provision of the CGL policy. In addition, it gives carries out the purpose of a CGL policy, namely that a CGL policy not act as a performance bond or warranty for the insured's work. Therefore, its rationale is persuasive and should be followed in this case. Accordingly, any damage done to the in-floor heat system done in the course of repairing the defective concrete installed in Pavlicek's building by JRC is not "property damage" under the Grinnell Mutual Policy and no coverage exists.

[¶ 42] To be covered, "property damage" must be caused by an "occurrence" resulting in damage that takes place during the policy period. (App. 90). Even if it could be argued that damage to non-defective property occurring during tear out of defective property could constitute "property damage", that property damage cannot be caused by an "occurrence" taking place within Grinnell Mutual's policy period. Such a result runs counter to not only the express terms of the Policy but the well-established case law of this Court.

[¶ 43] In *Grinnell Mutual Reinsurance Co. v. Thies*, 2008 ND 164, 755 N.W.2d 852, this Court determined an insurer was not obligated to provide coverage for a third-party claim under a homeowner's insurance policy when the third-party claim did not result in a bodily injury or property damage caused by an occurrence during the policy period. *Id.* at ¶ 1. In *Thies*, the Geigers owned a home in West Fargo. *Id.* at ¶¶ 1-2. They were insured under a "Home-Guard 2" insurance policy issued by Hartland Mutual Insurance through Grinnell Mutual. *Id*. The policy was in effect from September 5, 2005 through July 20,

2006 when the Geigers sold the home to Lisa Thies ("Thies") and cancelled the policy. *Id.* at ¶ 2. Shortly after moving in, Theis began to feel sick. *Id.* at ¶ 3. Thies subsequently hired a consultant who discovered wetness and mold inside the home. *Id.* The expert concluded "the amount of decay and dry rot of the wood framing inside the walls indicates the windows and/or wall system have been leaking for years." *Id.* Theis brought suit against the Geigers seeking to rescind the sale or, in the alternative, for damage associated with repairing and restoring the house. *Id.*

[¶ 44] The Geigers denied all knowledge of the mold and requested coverage from Grinnell Mutual for Thies' claims. *Id.* at ¶ 4. Grinnell Mutual defended the Geigers in Thies' action under a reservation of rights and subsequently brought a declaratory judgment action seeking a determination it was not obligated to provide coverage to the Geigers for Thies' claims. *Id.*

[¶ 45] On appeal, this Court affirmed the district court's grant of summary judgment to Grinnell Mutual. *Id.* at ¶ 20. In affirming the district court's ruling, this Court relied upon its prior holding in *Friendship Homes, Inc. v. American States Ins. Co.*, 450 N.W.2d 778 (N.D. 1990), in which this Court applied "the well-settled rule that the time of the occurrence of an accident, within the meaning of a liability indemnity policy, is not the time when the wrongful act was committed, but the time when the complaining party was actually damaged." *Thies*, 2008 ND 164, ¶ 11.

[¶ 46] Based upon rationale this Court established in *Theis*, the District Court erred when it concluded Pavlicek's "future damage [was] certain" and thus constituted an "occurrence" within the policy period, for which the Policy provided coverage. (App. 204).

[¶ 47] By the time trial was held in December 2017, four years after the termination of the Policy. (App. 53). At trial, Pavlicek provided the following testimony:

> Q: Okay. Now, your shop floor currently has heat throughout the entire shop; correct?
>
> Pavlicek: Correct.
>
> Q: As we sit here today, your entire floor is heated?
>
> Pavlicek: Correct.
>
> Q: Okay. And you've never had any issues with the floor heat after JRC poured the floor; correct?
>
> Pavlicek: Correct.

Pavlicek Cross; 30: 3 – 10. Pavlicek's testimony not only confirmed the entire floor had been heated and he did not have any issues with the function of the in-floor heat tubes, but more importantly Pavlicek failed to allege the in-floor heat tubes had been any less useful or had been physically injured since they were installed by JRC. Because the in-floor heat tubes were neither physically injured nor useful, they did not sustain "property damage" as defined under the Policy. Despite the District Court's conclusion that because the "future damage [to the in-floor heat tubes] was certain" this constituted "property damage" as the result of an "occurrence," the heat tubes were not damaged at the time of trial. It is unknown when or if such the repairs will actually take place. Therefore, the in-floor heat tubes did not sustain "property damage" as the result of an "occurrence" within the policy period. Accordingly, the District Court erred when it concluded the Policy provided coverage for "future damage" to the in-floor heat tubes.

[¶ 48] **b. Any damage caused to the in-floor heat in the windstorm was not an issue presented to the jury in awarding the underlying judgment and, therefore, does not impact coverage.**

[¶ 49] The District Court's basis for finding coverage related to the in-floor heat based on future damage that would be done due to the tear out of the defective concrete at some time in the future. However, there was testimony in the underlying trial regarding cosmetic damage done to the heat tubes for the in-floor heat during a windstorm on July 11, 2013. However, the damage done in the windstorm was not before the jury. The windstorm was not referred to in Pavlicek's *Complaint* (App. 16-22). It was not argued to the jury by Pavlicek's counsel during his closing argument. *See Trial Transcript*; 256 – 272. Instead, counsel argued JRC was liable to his client based on the defective nature of the concrete, and JRC's breach of contract. *Id.* Thus, the issue of any potential property damage to the heat tubes from the windstorm was not before the jury and cannot form the basis for finding coverage under the Policy.

[¶ 50] There is a good reason why Pavlicek made no argument to the jury concerning damage in the windstorm. Any damage caused by the windstorm was subject to an agreement to discharge any obligation JRC may have had to Pavlicek through an "accord and satisfaction". "An accord is an agreement to accept in extinction of an obligation something different from or less than that to which the person agreeing to accept is entitled. *Sande v. Sande*, 2020 ND 125, ¶ 14, 943. N.W.2d 826 (citing N.D.C.C. § 9-13-04). Satisfaction is defined as "[a]cceptance by the creditor of the consideration of an accord extinguishes the obligation[.]" *Id.* (citing N.D.C.C. § 9-13-05). This Court has explained "accord and satisfaction" is:

> "[A] method of discharging a contract or cause of action by which the parties agree to give and accept something in settlement of a claim or demand of one against the other, where they thereafter perform such agreement." *Campbell v. Beaton*, 117 N.W.2d 849, 850 (N.D. 1962). The "accord" is the agreement and the "satisfaction" is its execution or performance. *Id. See supra*; N.D.C.C. §§ 9-13-04, 9-13-05.

[¶ 51] After the windstorm, Plumber's, Inc. did not return to repair the heat tubes. *Pavlicek Cross*; 28: 22 – 25. Pavlicek called Naylor, who drove to Pavlicek's residence to reinstall the insulation, heat tubes, and rebar. *Pavlicek Direct*; 34: 21 – 23. When Naylor returned to Pavlicek's property, he brought insulation, which Naylor purchased, in order to replace any insulation that could not be reused. *Pavlicek Cross*; 29: 6 – 9. When the heat tubes were reinstalled by JRC, some of the heat tubes were touching each other and spaced differently than when installed by Plumber's, Inc. *Pavlicek Direct*; 35: 12 – 13. JRC further reinstalled the dislodged rebar, but did not reinstall chairs under the in-floor heat tubes to support the tubes above the rebar. *Pavlicek Direct*; 21 – 23. Pavlicek was present during this work. He even confronted JRC regarding the obvious errors with the reinstalled heat tubes, he received no response from JRC. *Pavlicek Direct*; 1 – 3. Despite the defective reinstallation of the in-floor heat tubes, JRC then poured the second half of the concrete floor. *Id.*

[¶ 52] Pavlicek personally observed the defective nature of JRC's reinstallation of the in-floor heat tubes. Pavlicek allowed JRC to pour the remainder of the concrete floor. Pavlicek's acceptance of JRC's reinstallation of the deficient in-floor heat tubes constitutes an accord which was subsequently satisfied by JRC's performance of the reinstallation of the in-floor heat and the pouring of the remainder of the concrete floor. Due to the accord and satisfaction between Pavlicek and JRC was for the installation of the in-floor heat tubes with obvious defects, Pavlicek cannot now contend the in-floor heat tubes incurred "property damage" for which the Policy provides coverage. Because the in-floor heat tubes did not incur property damage, as defined by the Policy, the District Court erred when it

concluded the Policy provides coverage for the "property damage" to the in-floor heat tubes.

[¶ 53] **II. <u>The Damages Awarded to Pavlicek are Excluded from Coverage by the Applicable "Business Risk" Exclusions of the Grinnell Mutual Policy.</u>**

[¶ 54] Even if the Court determines coverage exists under the insuring agreement of Coverage A discussed above, that is only the first part of the coverage analysis. The Policy contains several "business risk" exclusions which apply to preclude coverage. This Court has long held that, when an insuring agreement provides a general grant of coverage for a loss, the policy exclusions and limitations of coverage must be examined to determine whether the specific loss is excluded. *Wisness v. Noddk Mut. Ins.*, 2011 ND 195, ¶ 5, 806 N.W.2d 31. Although a policy's exclusionary clauses are strictly construed, the Court will not rewrite a contract to impose liability on the insurer when the policy unambiguously precludes coverage. *Tibert,* at ¶ 9; *Schleuter v. Northern Plains Ins.*, 2009 ND 171, ¶ 8, 772 N.W.2d 879.

[¶ 55] As noted above, the Policy contains several of what are known as "business risk" exclusions. In *Grinnell Mut. Reinsurance Co. v. Lynne,* 2004 ND 166, 686 N.W.2d 118, this Court analyzed the application of "business risk" exclusions under a CGL policy by differentiating between damages which occurred to the insured's work product and to damage to property other than the insured's work:

> "The exclusions from coverage for property damage… are generally referred to as 'business risk' exclusions, and are designed to exclude coverage for defective workmanship by the insured causing damage to the project itself. The principle behind such exclusions is based on the distinction made between the two kinds of risk incurred by a contractor… **The first is the business risk borne by the contractor to replace or repair defective work to make the building project confirm to the agreed contractual requirements. This type of risk is not covered by the CGL policy, and the 'business risk' exclusions in the policy make this**

> **clear.** The second is the risk that the defective or faulty workmanship will cause injury to people or damage to other property. Because of the potentially limitless liability associated with this risk, it is the type for which CGL coverage is implicated.

Id. at ¶ 18. (emphasis added) (internal citations omitted) (quoting *Glens Falls Ins. Co. v. Donmac Golf Shaping Co., Inc.* 203 Ga.App. 508, 417 S.E.2d 197, 200 (Ga.Ct.App. 1992)). A CGL policy is not intended to insure business risks that are normal, frequent, or predictable consequences of doing business and which businesses can control and manage. *See* 2 Rowland H. Long, *The Law of Liability Insurance* § 10.01[1] (2006). A CGL policy does not insure the insured's work itself; rather it insures consequential damages that stem from the work. *Id.* In this case, the damages awarded Pavlicek in the underlying trial are excluded by one or more of the applicable "business risk" exclusions, most significantly the "Your Work" exclusion.

[¶ 56] **a. The District Court erred in finding damage to the floor drain system installed by JRC is not excluded by the "your work" exclusion of the Grinnell Mutual Policy.**

[¶ 57] The Grinnell Mutual Policy further provides the following exclusion commonly referred to as the "your work" exclusion:

> This insurance does not apply to:
> ...
> **m. Damage to Your Work**
>
> 'Property Damage' to 'your work' arising out of it or any part of it and included in the 'products – completed operations hazard.'
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor."

(App. 95 – 96). The Policy defines "your work" as:

> (1) Work or operations performed by you or on your behalf; and

(2) Materials, parts, or equipment furnished in connection with such work or operations.

and includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance, or use of 'your work'; and
(2) The providing or failure to provide warnings or instructions."

(App. 104). Further, the Policy defines "products-completed operations hazard" as:

a. "Includes all 'bodily injury' and 'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work' except:

(1) Products that are still in your physical possession; or
(2) Work that has not yet been completed or abandoned. However, 'your work' will be deemed completed at the earliest of the following times:

a) When all of the work called for in your contract has been completed.

b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

(App. 103). Under the clear and unambiguous provision so "your work" exclusion, there is no coverage for damage to the floor drain system installed by JRC.

[¶ 58] At trial, Pavlicek confirmed JRC installed the floor drain. *Pavlicek Cross*; 30: 11 – 13. Despite that fact, the District Court held:

> At the time of the pouring of the floor, JRC's work on the drain system was complete and had been fully performed. The damage to the completed floor drain came only as a result of JRC's subsequent efforts to correct its faulty

> floor. The drain system is a completely separate piece of property not associated with te faulty workmanship on the floor. It was complete, properly placed, and fully functioning. Thus, the subsequent efforts by JRC to fix the floor resulted in damage to property that was no longer JRC's. It is the finding of this Court that the damage to the drain system is damage to property other than the insured's work product.

(App. 205).

[¶ 59] The District Court's interpretation disregards the express terms of the "your work" exclusion and the purpose for which it is included in the Policy. As the "products-completed operations hazard" definition provides, the "your work" exclusion applies to all work performed by JRC except: (1) products still in JRC's possession; or (2) work that has not yet been completed or abandoned. The District Court found the drain was complete, there is no doubt that it was work done by JRC. It makes no difference that the work had been completed and turned over to Pavlicek, the floor drain remained JRC's work. In fact, the "products-completed operations hazard" definition specifically contemplates the fact that work completed by the insured and turned over to the customer will still be considered the work of the insured for purposes of the exclusion. Therefore, the District Court erred in holding the floor drain was not JRC's work because it was completed and turned over to Pavlicek.

[¶ 60] This interpretation of the "your work" exclusion is further supported by other exclusions contained in the Policy. The Policy also provides an exclusion for "property damage," which is commonly referred to as an "ongoing operations exclusion". It provides, in part:

> This insurance does not apply to:
> ...
> **k. Damage to Property**
> 'Property damage' to:
> …

> (5) That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the 'property damage' arises out of those operations; or
> (6) That particular part of any property that must be restored, repaired or replaced because your 'work' was incorrectly performed on it.
>
> Paragraph (6) of this exclusion does not apply to 'property damage' included in the 'products-completed operations hazard'."

(App. 95). Exclusion k applies to exclude coverage for damage to any real property the insured is currently performing operations on. It does not include any work included in the "products-completed operations hazard".

[¶ 61] In *Fisher v. American Family Mut. Ins. Co.*, 1999 ND 109, 579 N.W.2d 599, this Court analyzed the application of "damage to property" of exclusion k and "damage to your work" exclusion m. The Fishers hired Delaney Construction ("Delaney") to install hardwood flooring in their home. *Id.* at ¶ 1 – 2. The flooring was supplied D & J Hardwoods and Milling ("D & J"). *Id.* at ¶ 2. After the flooring was installed, the Fishers hired Kensok's Hardwood & Seamless Floors, Inc. ("Kensok's") to sand the flooring and apply a polyurethane finish. *Id.* Within a few months, gaps began to appear between sections of flooring and individual boards began splitting. *Id.* at ¶ 3.

[¶ 62] The Fishers sued Delaney for $7,626, alleging Delaney negligently installed the hardwood flooring. *Id.* Delaney filed a third-party complaint against Kensok's and D & J. *Id.* Kensok tendered the defense of the claim to its liability insurer, American Family Mutual Insurance Company ("American Family"), which denied coverage and declined to defend the claim against Kensok's. *Id.* The parties ultimately entered into a *Miller-Schugart* agreement in the amount of $7,626 with an assignment of Kensok's rights against

American Family to the Fishers. *Id.* After the Fishers brought suit, the trial court granted American Family's motion for summary judgment concluding American Family "owes no coverage to Kensok's for all or part of the claims made against it by reason of the exclusions in the policy," rendering the *Miller-Schugart* agreement unenforceable. *Id.*

[¶ 63] In overturning the district court's grant of summary judgment to American Family, this Court analyzed exclusion j.(5) and j.(6) of the American Family policy, which is identical to exclusion k.(5) of the Grinnell Mutual Policy. *See supra,* at ¶ 60. After analysis of exclusion j.(5) of the American Family policy this Court determined exclusion j.(5) excluded coverage only for property damage taken place during the time Kensok worked on the property. *Id.* at ¶ 10. This Court further held exclusion (j) did not exclude coverage for damage to the flooring installed in the Fishers' home. *Id.* at ¶ 14. In concluding exclusion j.(6) did not exclude coverage for the flooring, this Court reasoned:

> "The [American Family] policy defines the products-completed operations hazard as including 'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work' except: (1) Products that are still in your physical possession; or (2) work that has not yet been completed or abandoned.[2] The damage to the flooring installed in Fishers' house falls within this definition. (internal quotations omitted.) The damage occurred in a home away from premises owned or rented by Kensok's, it arose out of Kensok's work on the flooring, the product was no longer in Kensok's possession, and Kensok's work in the home had been completed. Thus, damage to the flooring arising out of Kensok's product or work was not excluded by exclusion j(6) and was covered by the policy because of the exception or exclusion of property damage included in the products-completed operations hazard from exclusion j(6)." *Id.* at ¶ 13.

[¶ 64] This Court further reasoned:

> "The injury to products or work exclusion is intended to exclude insurance for damage to the insured's product or work, but not for damage caused by the insured's product or work. Thus, the exclusion does not apply where the

[2] The definition of "products-completed operations hazard" contained within the American Family policy is identical to the definition of "products-completed operations hazard" contained within the Grinnell Mutual Policy at issue in this case. *See* ¶ 46, *supra*.

> product or work causes damages to other persons or property. In such a situation, while there would not be coverage for damage to the work or product itself, damages caused by the product to other work or products would be covered." *Id.* (citing 3 Rowland H. Long, *The Law of Liability Insurance* § 11.09 [2] (1998)).

[¶ 65] As identified by this Court in *Fisher*, 1998 ND 109, exclusion k.(5) of the Grinnell Mutual Policy, would exclude coverage for any damage caused by JRC during JRC's installation of the floor drain system. *Fisher,* at ¶ 10. Conversely, exclusion m of the Grinnell Mutual Policy applies to exclude coverage for operations that have been completed, or a loss which occurs after the work is put to its intended use or when all of the work under an insured's contract is complete. *Id.* at ¶ 13.

[¶ 66] The District Court's interpretation of the Policy as it applies to the floor drain essentially converts both exclusion m and exclusion k.(5) into "ongoing operations" exclusions in direct conflict with the express intent of the exclusions to apply at two separate times of JRC's operations; exclusion k.(5) when the insured has not yet finished its work and exclusion m when JRC's work has been completed. It also directly contradicts this Court's interpretation of these exclusions in *Fisher, supra*. Though the District Court held the drain system was completed at the time of damage, it must be noted that if JRC's grinding of the concrete floor could be considered an "ongoing operation", it would be excluded by exclusion k.(5). Therefore, the District Court's holding on this issue must be reversed. The District Court's interpretation of the Policy also frustrates the purpose exclusion m serves. As this Court explained in *Fisher*:

> "The injury to work or products exclusion is consistent with the goal of the CGL, which is to protect the insured from the claims of injury or damage to others, but not to insure against economic loss sustained by the insured due to repairing or replacing its own defective work or products. *Fisher,* at ¶ 15. (citing 3 Long, at § 11.09[2]).

[¶ 67] In this case, the damage to the floor drain system is the exact type of loss which is excluded from coverage under exclusion (m) of the Grinnell Mutual Policy. It is undisputed JRC installed the floor drain system into Pavlicek's floor. *Pavlicek Cross*; 30: 11 – 13. Thus, the installation of the floor drain system constitutes JRC's "work" under the Policy. Exclusion (m) of the Grinnell Mutual Policy excludes coverage for "property damage" to JRC's "work" which includes "property damage" to work which has already been put to its intended use, or no longer within JRC's control. The damage to the floor drain occurred as a result of JRC's subsequent effort to repair the defective concrete floor. The District Court's assertion that because the floor drain had been installed and put to its intended use, and thus no longer JRC's "work," directly contradicts to this Court's holding in *Fisher*, as well as the clear and unambiguous language of exclusion (m) of the Grinnell Mutual Policy. Because JRC's subsequent efforts to repair the defective concrete floor caused damage solely to JRC's own work product, the District Court erred when it concluded the Policy provided coverage for this loss.

[¶ 68] **b. The District Court erred in finding damage to the in-floor heating system is not excluded by the "your work" exclusion of the Grinnell Mutual Policy.**

[¶ 69] Even if this Court determines the District Court did not err when it concluded future damage to the in-floor heat tubes incurred "property damage" as a result of an "occurrence" during the policy period, triggering coverage under the liability insuring agreement, the District Court erred in finding damage to the in-floor heating system is not excluded by exclusion (m) or the "damage to your work" exclusion of the Grinnell Mutual Policy.

[¶ 70] The Grinnell Mutual Policy provides several "business risk" exclusions, including the "damage to your work" exclusion. *See supra,* ¶ 57. In the District Court's December 21, 2020 *Order,* the Court made the following findings regarding the reinstallation of the in-floor heat tubes:

> "Grinnell [Mutual] has suggested that because JRC reinstalled the heating tubes on the south half of the concrete floor after the windstorm, it then qualifies as JRC's work product. The Court rejects this argument and finds different. First, the north half had already been poured and will have to be destroyed due to the poor workmanship once the concrete floor is replaced. Secondly, JRC took no steps to properly protect the exposed south half part of the floor that was not poured at the time of the windstorm. Thus, heating tubes which were imbedded in the north half after the first pour are clearly the product of Plumbers, Inc. Although JRC had to reinstall Styrofoam and heating tubes on the south half after the windstorm, the heating system is still the product of Plumbers, Inc. The fact that there is a reinstall does not make it JRC's work product; it still remains that of Plumbers, Inc."

(App. 203).

[¶ 71] As discussed above, the Grinnell Mutual Policy defines "your work" as "work or operations performed by you or on your behalf." *See supra,* ¶ 57. Plumber's, Inc. did not return to repair the heat tubes. *Pavlicek Cross*; 28: 22 – 25. Instead, after Pavlicek observed the damage to the heating tubes he called Naylor, who drove to Pavlicek's residence to try to repair the damage. *Pavlicek Direct*; 34: 21 – 23. When Naylor returned to Pavlicek's property, he brought Styrofoam, which Naylor purchased, in order to replace the Styrofoam that had been damaged by the wind. *Pavlicek Cross*; 29: 6 – 9. When the heat tubes were reinstalled by JRC, some of the heat tubes were touching each other and spaced differently than when installed by Plumber's, Inc. *Pavlicek Direct*; 35: 12 – 13.

[¶ 72] Although Plumbers, Inc. initially installed the heat tubes for the entire floor, after they became dislodged, Pavlicek sought help from JRC to reinstall and repair the in-floor heat tubes, as well as insulation. Despite the District Court's conclusion, the installation of

the south half of the heat tubes was work or operations completed by JRC. Because the installation of the south half of the in-floor heat tubes constitutes work or operations performed on behalf of JRC, the District Court erred when it concluded the property damage incurred to the in-floor heat tubes was not excluded under exclusion (m) or the "your work" exclusion of the Grinnell Mutual Policy.

[¶ 73] CONCLUSION

[¶ 74] Based upon the foregoing, the District Court's *Judgment* should be reversed and judgment should be entered in favor of Grinnell Mutual based upon the determination that the Grinnell Mutual policy does not provide coverage for the damages sought by Pavlicek.

[¶ 75] Dated this 17th day of August, 2021.

By:

/s/ Chris A. Edison

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[¶ 77] **CERTIFICATE OF SERVICE**

[¶ 78] The undersigned certifies that the foregoing ***Appendix of Appellant Grinnell Mutual Reinsurance Company*** and ***Brief of Appellant*** was served on the following at the last known electronic mail address on the 11th day of August, 2021:

Craig E. Johnson
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and by placing a true and correct copy thereof in an envelope addressed as follows:

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By: */s/ Chris A. Edison*
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[¶ 76] **CERTIFICATE OF COMPLIANCE**

In accordance with N.D.R.App.P. 32(a)(8)(A), the undersigned attorney hereby certifies that the brief above contains 33 pages, which is within the limit of 38 pages.

By:

/s/ Chris A. Edison

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[¶ 78] The undersigned certifies that the foregoing ***Appendix of Appellant Grinnell Mutual Reinsurance Company*** and ***Brief of Appellant*** was served on the following at the last known electronic mail address on the 17th day of August, 2021:

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