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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

GENERAL CASUALTY COMPANY OF WISCONSIN,

Plaintiff and Appellee,

v.

DAVIS COMPANIES, LLC, LEXSTAR CONSTRUCTION, LLC,

Defendants and Appellees,

BULLINGER ENTERPRISES, LLLP, and NDIT, LLC,

Defendants and Appellants.

Supreme Court No. 20210226

ORAL ARGUMENT REQUESTED

APPELLANTS BULLINGER ENTERPRISES, LLLP AND NDIT, LLC'S PRINCIPAL BRIEF

APPEAL FROM SUMMARY JUDGMENT ISSUED BY THE DISTRICT COURT, BURLEIGH COUNTY, NORTH DAKOTA THE HONORABLE JAMES S. HILL PRESIDING

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STATEMENT OF THE ISSUES

I. Whether the district court erred in finding there was no occurrence under the commercial general liability insurance policy arising out of work performed by Davis Companies on the parking lot at the project.

II. Whether the district court erred in finding the "Your Work," "Impaired Property," and "Recall" Exclusions in the commercial general liability insurance policy preclude coverage with respect to damages to the parking lot at the project.

III. Whether the district court erred in rejecting the factual assertion by Bullinger Enterprises, LLLP and NDIT, LLC that the subgrade work to the parking lot required remediation due to moisture intrusion from unsealed joints.

IV. Whether the district court erred in ruling that General Casualty Company of Wisconsin has no duty to defend or indemnify Davis Companies, Lexstar Construction, LLC, Bullinger Enterprises, LLLP, NDIT, LLC or any other party for the claims and damages alleged in the underlying arbitration, *Lexstar Construction LLC v. Bullinger, LLLP/NDIT, LLC et al.*, American Arbitration Association Case No. 02-17-0000-9591, pursuant to the Judgment on General Casualty Company of Wisconsin's Summary Judgment Motion.

STATEMENT OF THE CASE

[¶ 1] Appellants Bullinger Enterprises LLLP and NDIT, LLC (collectively, "NDIT") appeal the Burleigh County District Court's Order Granting Summary Judgment to General Casualty Company of Wisconsin ("General Casualty").

[¶ 2] General Casualty commenced this action on May 28, 2020 against NDIT, Davis Companies ("Davis"), and Lexstar Construction, LLC ("Lexstar"). (App. at 13-26.)

General Casualty brought a single claim for declaratory relief pursuant to NDCC Ch. 32-23 seeking a determination that it has no duty to defend or indemnify Davis, Lexstar, or any other party in the underlying arbitration captioned *Lexstar Construction, LLC v. Bullinger Enterprises, LLLP / NDIT, LLC et al.*, American Arbitration Association Case No. 02-17-0000-9591 (the "Underlying Arbitration").

[¶ 3] Lexstar answered the Complaint, denying that General Casualty was entitled to the relief it requested. (App. at 27-30.) NDIT moved to dismiss General Casualty's Complaint. (Doc ID #30.) Following denial of NDIT's Motion to Dismiss, NDIT answered the Complaint, denying that General Casualty was entitled to the relief it requested. (App. at 31-36.) NDIT also alleged a counterclaim against General Casualty seeking a finding of bad faith by General Casualty.

[¶ 4] Davis failed to answer the Complaint. General Casualty moved for default judgment seeking an order that it had no duty to defend or indemnify Davis in the Underlying Arbitration. (Doc ID #57.) The district court granted General Casualty's Motion for Default Judgment against Davis on October 1, 2020. (Doc ID #78.)

[¶ 5] Thereafter, General Casualty moved to dismiss NDIT's counterclaim. (Doc ID #96.) The district court granted General casualty's Motion to Dismiss on December 17, 2020. (Doc. ID #139.) In the Order granting General Casualty's Motion to Dismiss NDIT's Counterclaim, the district court completed a choice of law analysis and found that Wisconsin law governed the dispute. (App. at 38-40, ¶¶ 32-36.)

[¶ 6] General Casualty ultimately moved for summary judgment arguing it was entitled to judgment as a matter of law that it was not required to defend or indemnify Lexstar and NDIT in the Underlying Arbitration. (Doc. ID #171; *see also* Doc. ID #172.)

In response to General Casualty's Motion, NDIT argued that there were genuine issues of material fact regarding General Casualty's obligation to defend and indemnify NDIT and Lexstar in the Underlying Arbitration, therefore making summary judgment improper. (Doc. ID #220.) Lexstar similarly opposed General Casualty's Motion for Summary Judgment. (Doc. ID #240.)

[¶ 7] General Casualty's Motion for Summary Judgment was heard by the district court on June 4, 2021. The district court granted General Casualty's Motion for Summary judgment via Order dated June 24, 2021. (App. at 166-183.) The judgment was originally entered on June 28, 2021 (App. at 184), with a final judgment entered on September 7, 2021. (App. at 187-189.)

[¶ 8] In its Motion for Summary Judgment, General Casualty argued that the insurance policies did not provide coverage for the claims in the Underlying Arbitration because the alleged defects in the parking lot were not caused by an occurrence. (Doc. ID. #172.) General Casualty further argued that the policy exclusions – specifically the "your work," "impaired property," and "recall" exclusions – barred coverage. (*Id.*)

[¶ 9] The district court concluded the alleged defects in the parking lot were not caused by an occurrence. (App. at 182, ¶¶ 52-55.) The district court also concluded that the "your work," "impaired property," and "recall" exclusions barred coverage. (*Id.* at 183, ¶¶ 59-60.) The district court further rejected NDIT's factual assertions regarding moisture intrusion and remediation of the subgrade. (*Id.* at 183, ¶¶ 61-62.) This appeal is submitted on the basis of the district court's decision granting General Casualty's Motion for Summary Judgment. Oral argument is requested to address the numerous fact issues and nuances with the policy. Oral argument will assist in the analysis of these complex issues.

STATEMENT OF FACTS

I. Project Background

[¶ 10] NDIT is the owner of a project (the "Project") in Bismarck, North Dakota commonly known as the ITD Building. Lexstar was the general contractor to NDIT on the Project. Davis was a foundation, flatwork, and sitework subcontractor to Lexstar on the Project.

[¶ 11] Davis's March 27, 2013 subcontract with Lexstar (the "Subcontract") required it to complete the pavement work for the project in accordance with the Project's plans and specifications. (*See* App. at 60, § 2.1.) Those plans required pavement materials and installation to meet the requirements of the North Dakota Department of Transportation Standard Specifications. (*See* App. at 124, Paving, Grading, & Drainage Note 7.) The North Dakota Department of Transportation Standard Specifications require sealing of all concrete joints. (*See* App. at 126-127, § 550.04.M.)

[¶ 12] Davis' scope of work on the Project included foundation, flatwork, and sitework on both the parking lot and building. (*See* App. at 60-65.) The earthwork for the Project, including the subgrade for the parking lot, was subcontracted by Lexstar to JEM Construction ("JEM"). (*See* App. at 128-132.)

[¶ 13] Rick Engebretson, an architect retained as an expert by NDIT in this matter, opined in his initial expert disclosure, dated April 13, 2018, that Davis's failure to seal the joints in the parking lot concrete allowed water to seep into the subgrade. (*See* App. at 67.) That water seepage damaged the subgrade work performed by JEM, creating an unstable base for the concrete. (*See id*.) He opined that the seepage had been occurring for two years. (*See id*.)

[¶ 14] Mr. Engebretson's opinions were confirmed in June 2018, when several concrete panels in the parking lot at the Project were lifted to allow observation of the subgrade. Terracon, a geotechnical firm, had a representative present who observed that the aggregate base was in a "rather loose and saturated condition" and the clay material under that was in a "somewhat soft and moist condition." (*See* App. at 133-135.) Mr. Engebretson amended his opinions after Terracon's report to recommend complete removal and replacement of the parking lot, including JEM's damaged subgrade work, which greatly increased the cost. (*See* App. at 80-86; *see also* App. at 106-109 (Engebretson Report Dated Feb. 27, 2020, disclosing repair costs exceeding $2 million).) The size and scope of the parking lot earthwork remediation work is shown in the photographs in the daily reports of Kraus Anderson, NDIT's remediation contractor. (*See* App. at 136-144; 145-155.)

II. The Policy

[¶ 15] General Casualty provided coverage to Davis pursuant to commercial general liability ("CGL") policy number CCI1251845 from September 20, 2015 to September 20, 2019. General Casualty further provided policy number BPK0006395-00, with a policy period of September 29, 2019 to October 8, 2019. These policies are collectively referred to herein as the "Policy."[1]

[¶ 16] NDIT is an additional insured under the Policy and is entitled to the same coverage that the Policy provides to Davis. The Policy includes a Contractors Blanket Additional Insured Endorsement. (*See* App. at 58-59.) Under that endorsement, the Policy

[1] General Casualty also issued umbrella policies to Davis. The umbrella polices are not at issue on appeal.

provides additional insured coverage to "any person or organization whom you are required to add as an additional insured on this policy under a written contract…" provided that the agreement is in effect during the policy term and it was executed before the property damage. (*See id*. at 58.) The Subcontract requires Davis' commercial general liability policy to name both the contractor (Lexstar) and the project owner (NDIT) as additional insureds. (*See* App. at 62, § 11.1.) The general contract for the Project names NDIT as the project owner. (*See* App. at 112.) The Subcontract dated March 27, 2013 (*see* App. at 60-65) was in effect when the Policy became effective in 2015. Thus, NDIT is entitled to coverage under the Policy.

[¶ 17] The Policy provides coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (*See* App. at 42.) The Policy requires that the "bodily injury" or "property damage" be caused by an "occurrence" and occur within the policy period to be covered. (*See id.*) The Policy defines an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (App. at 56.)

[¶ 18] Similarly, the Policy defines property damage as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

(*Id.*)

[¶ 19] The Policy provides a number of exclusions for which it does not provide coverage, commonly and collectively known as the business risk exclusions. These include the "your work," "impaired property," and "recall" exclusions. (App. at 43-47.)

[¶ 20] The "your work" exclusion states the Policy does not provide coverage for:

> "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.

(*See* App. at 46.) The term "your work" is defined in the policy 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." (App. at 57.)

[¶ 21] The "impaired property" exclusion eliminates coverage for:

> "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
> (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.
>
> This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

(App. at 46.)

[¶ 22] Impaired property is defined in the Policy as:

> [T]angible property, other than "your product" or "your work", that cannot be used or is less useful because:
>
> a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
> b. You have failed to fulfill the terms of a contract or agreement;
>
> if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

(App. at 54.)

[¶ 23] Finally, the "recall" exclusion omits coverage for:

> Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment removal or disposal of:
> (1) "Your project";
> (2) "Your work"; or
> (3) "Impaired property";
> if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defects, deficiency, inadequacy or dangerous condition in it.

(App. at 46.)

[¶ 24] Thus, the Policy provides coverage for property damage caused by an occurrence arising during the Policy period, so long as one of the exclusions does not apply to bar coverage.

ARGUMENT

I. Standard of Review

[¶ 25] Summary judgment is a procedural device used for "promptly disposing of a lawsuit without a trial." *Hovland v. City of Grand Forks*, 1997 ND 95, ¶ 5, 563 N.W.2d 384. Summary judgment is governed by North Dakota Rule of Civil Procedure 56, which provides that summary judgment is only proper "if the pleadings, the discovery and disclosures on file, and any declarations, show that there is no genuine issue as to any material fact." N.D. R. Civ. P. 56(c)(3).

[¶ 26] "The party moving for summary judgment bears the burden of establishing that there is no genuine issue of material fact and that, under applicable principles of substantive law, he is entitled to judgment as a matter of law." *Skjervem v. Minot State University*, 2003 ND 52, ¶ 4, 658 N.W.2d 750. When reviewing the motion, the court must

view the evidence presented in the light most favorable to the non-moving party. *See id.* The non-moving party "will be given the benefit of all favorable inferences which can reasonably be drawn from the record." *Anderson v Zimbelman*, 2014 ND 34, ¶ 7, 842 N.W.2d 852 (quoting *Arndt v. Maki*, 2012 ND 55, ¶ 10, 813 N.W.2d 564).

[¶ 27] "A de novo standard of review is used to determine whether a district court erred in granting summary judgment." *Gratech Co., Ltd. v. Wold Engineering, P.C.*, 2003 ND 200, ¶ 8, 672 N.W.2d 672. Evidence is viewed "in the light most favorable to the non-moving party" on appeal. *Id.*; *see also Hovland v. City of Grand Forks*, 1997 ND 95, ¶ 5, 563 N.W.2d 384 ("In reviewing an appeal from a summary judgment, we view the evidence in the light most favorable to the non-moving party and then determine if the trial court properly granted summary judgment as a matter of law.").

II. Insurance Policy Interpretation

[¶ 28] Wisconsin courts review whether an insurance policy provides coverage using a three-step analysis. First, a court "'examine[s] the facts of the insured's claim to decide whether the policy makes an initial grant of coverage.'" *Wisconsin Pharmacal Co., LLC v. Nebraska Cultures of California, Inc.*, 876 N.W.2d 72, 79 (Wis. 2016) (quoting *Preisler v. General Cas. Ins. Co.*, 857 N.W.2d 136, 143 (Wis. 2014)). The analysis ends at this point "[i]f the policy terms clearly do not cover the claim." *Id.* However, if the claims potentially trigger coverage, a court examines the policy's exclusions to identify if any preclude coverage. *See id.* Finally, if an exclusion precludes coverage, a court reviews the exceptions to the exclusions to determine whether any reinstate coverage. *Id.*

[¶ 29] Courts reviewing an insurance policy "seek[] to ascertain and give effect to the intent of the contracting parties." *Vogel v. Russo*, 613 N.W.2d 177, 181 (Wis.

2000), *abrogated on other grounds by Ins. Co. of N. Am. v. Cease Elec. Inc.*, 688 N.W.2d 462 (Wis. 2004). "The language in an insurance contract should be given its ordinary meaning—the meaning a reasonable person in the position of the insured would give the terms." *Kalchthaler v. Keller Constr. Co.*, 591 N.W.2d 169, 171-72 (Wis. Ct. App. 1999). Any terms that are ambiguous – or susceptible to more than one meaning – are construed against the insured and in favor of coverage. *Id.*

[¶ 30] "A basic canon of construction in Wisconsin is that exclusions in an insurance policy are narrowly construed against the insurer." *Day v. Allstate Indem. Co.*, 798 N.W.2d 199, 206 (Wis. 2011). Exclusions are enforced if clear on the face of the policy, but construed in favor of coverage if there is any ambiguity. *See id.*

[¶ 31] Insurers have both a duty to defend and indemnify. The duty to defend arises when there is arguably a covered loss under the policy. *See Newhouse by Skow v. Citizens Sec. Mut. Ins. Co.*, 501 N.W.2d 1, 5 (Wis. 1993). "[A]n insurer has the obligation to defend its insured against a lawsuit if the complaint 'alleges facts which, if proven, would give rise to liability covered under the terms and conditions of the policy.'" *Professional Office Bldgs., Inc. v. Royal Indem. Co.*, 427 N.W.2d 427, 429 (Wis. Ct. App. 1988) (quoting *Sola Basic Ind. v. U.S. Fidelity & Guaranty Co.*, 280 N.W.2d 211, 213 (Wis. 1979)). "The duty of defense depends on the nature of the claim and has nothing to do with the merits of the claim." *Elliott v. Donahue*, 485 N.W.2d 403, 407 (Wis. 1992).

[¶ 32] Only the question of the duty to defend is determined at the outset of litigation – the duty to indemnify is not ripe for determination until after resolution of the underlying lawsuit. *See General Cas. Co. of Wisconsin v. Hills*, 561 N.W.2d 718, 722 n. 11 (Wis. 1997) ("[T]he duty to indemnify issue must await resolution of the claim brought

by Arrowhead against Hills."). The underlying arbitration in which liability will be determined is scheduled to occur January 31 through February 7, 2022.

III. The District Court Erred in Finding there was No Occurrence Under the Policy

[¶ 33] The district court found as a matter of law that there was no occurrence under the Policy. The district court's analysis was sparse.

> In arbitration Bullinger seeks to recover the costs of repairing and replacing the work that Davis Companies actually completed as opposed to damage to other property that was caused by Davis Companies and its work. Therefore the Court finds there is no "occurrence" and correspondingly no initial grant of coverage under the CGL and applicable umbrella policies.

(App. at 169-170, ¶ 15.) The district court, however, undercut its own reasoning in the next paragraph of its memorandum by acknowledging NDIT's argument that the occurrence that triggered coverage was moisture damage to the subgrade caused by Davis's failure to seal the joints in the concrete.

> There is an additional argument raised in the context of briefing relating to the parking lot damages. Lexstar and NDIT now asserts that Davis Companies had an obligation to apply sealant to the parking lots which it failed to do. The alleged failure, in turn, allowed moisture to intrude into the subgrade which necessitated the subgrade's repair and replacement. Because a different contractor completed the subgrade work, Lexstar and NDIT assert that General Casualty's policies provide an initial grant of coverage to, and do not exclude, costs related to the subgrade's remediation.

(App. at 170, ¶ 16.) The district court understood NDIT's argument, but it dismissed it with the conclusory statement that, "The Court finds the argument fails upon uncontroverted facts and clear language in the applicable policies." (*Id.*) The district court did not state what those facts or policy provisions were that caused NDIT's argument to fail. (*See id.*)

[¶ 34] The district court erred in finding there was no genuine issue of material fact of whether the alleged defects were caused by an occurrence. The evidence in the record, viewed in the light most favorable to NDIT, creates a genuine issue of material fact whether the alleged defects were caused by an occurrence. Summary judgment was, therefore, improper.

[¶ 35] The Policy provides coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (*See* App. at 42.) The Policy defines an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (App. at 56.) Although not defined by the Policy, Wisconsin courts have looked to the dictionary definition of "accident" as "'an event or condition occurring by chance or arising from unknown or remote causes.'" *American Family Mut. Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65, 76 (Wis. 2004) (quoting Webster's Third New International Dictionary of the English Language 11 (2002)).

[¶ 36] Similarly, the Policy defines property damage as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

(*See* App. at 56.)

[¶ 37] What constitutes an occurrence has been addressed on numerous occasions by Wisconsin courts. The seminal case on this issue is *American Family Mutual Insurance Co. v. American Girl, Inc.* That case addressed the construction of a distribution warehouse

known as the 94DC. *American Girl, Inc.*, 673 N.W.2d at 71. Prior to the start of construction of the 94DC, the soils engineer concluded the soils were poor and recommended certain soil preparations occur to help support the building. *Id.* This soil work was performed, and construction was substantially complete in August 1994. *Id.* The 94DC, however, began to sink almost immediately and settled by as much as eight inches in one location by the spring of 1995. *Id.* The stress on the structural components of the 94DC was so severe that it was dismantled by early 2000. *Id.* at 72. American Girl subsequently brought a declaratory relief action against American Family, the general contractor's general liability carrier, seeking coverage for the resulting damages. *Id.*

[¶ 38] Whether there was an occurrence giving rise to coverage took center stage in the action. The court initially noted that the distinction between an occurrence and the business risk exclusions is often overlooked, leading to some overbroad generalizations regarding CGL policies. *Id.* at 76. The court stated that "the faulty workmanship of a subcontractor can give rise to property damage caused by an 'occurrence' within the meaning of a CGL policy." *Id.* at 78.

[¶ 39] The court found that the soil settlement was an occurrence caused by the improper work of the soils engineer, which resulted in property damage: the sinking, cracking, and buckling of the 94DC. *Id.* at 75-76 ("The damage to the 94DC occurred as a result of the continuous, substantial, and harmful settlement of the soil underneath the building. Lawson's inadequate site-preparation advice was a cause of this exposure to harm."); *see also Glendenning's Limestone & Ready-Mix Company, Inc. v. Reimer*, 721 N.W.2d 704, 712 (Wis. Ct. App. 2006) ("[T]he court in *American Girl* considered the 'occurrence' to be the soil settlement under the completed building."). The court concluded

"that the property damage to the 94DC was the result of an 'occurrence' within the meaning of the insuring agreement." *American Girl, Inc.*, 673 N.W.2d at 78.

[¶ 40] The result in *American Girl* has been applied in numerous other cases, all of which find a situation arising from defective work to be an occurrence. *See, e.g.*, *Henshue Constr., Inc. v. Terra Engineering & Constr. Corp.*, 833 N.W.2d 873 (Table), 2013 WL 1908653, at *13 (Wis. Ct. App. May 9, 2013)[2] (finding flooding and the resulting damage to be an occurrence and accident under the policy, where the flooding arose from the contractor's failure to install a temporary storm sewer diversion pipe); *Glendenning's Limestone & Ready-Mix Company, Inc.*, 721 N.W.2d at 714 (finding improperly installed rubber mats that were damaged by a scraper to be an occurrence and resulting physical damage to property).

[¶ 41] Pursuant to the *American Girl* framework, there was an occurrence giving rise to coverage in this case. The work Davis performed on the parking lot concrete was defective for various reasons, including a failure to seal the parking lot expansion joints as required by the Subcontract. As a result of the failure to seal the expansion joints, water seeped into the underlying subgrade, causing damage to and necessitating a complete replacement of the subgrade work performed by JEM. The seepage into the underlying subgrade resulting from the omitted seals in the concrete joints is an occurrence, which resulted in property damage to the underlying subgrade. Those disputed facts were in the record before the district court through Mr. Engebretson's April 13, 2018 expert witness disclosure. (*See* App. at 66-71.)

[2] Cited for persuasive value only pursuant to Wis. Stat. § 809.23(3)(b). (Doc ID #223.)

[¶ 42] Viewed in the light most favorable to NDIT as required on appeal from summary judgment in favor of General Casualty, Davis' faulty workmanship gave rise to an occurrence that caused property damage. The district court's grant of summary judgment should therefore be reversed, and the case remanded for further proceedings.

IV. The District Court Erred in Finding the "Your Work," "Impaired Property," and "Recall" Exclusions in the Policy Preclude Coverage

[¶ 43] The district court erred in finding the business risk exclusions apply to bar coverage in this case. The district court performed no analysis of any of the business risk exclusions, instead simply stating that they applied to preclude coverage. (*See* App. at 181, ¶¶ 59-60.) The district court's failure to include any analysis in its opinion is an error. *See In re Spicer*, 2006 ND 79, ¶ 8, 712 N.W.2d 640 ("We have consistently held that the district court must provide an adequate explanation for us to understand the basis of its decision.").

[¶ 44] Each business risk exclusion is unique and must be reviewed separately. Upon doing so, there is a genuine issue of material fact whether the damages arising out of Davis' work on the parking lot are covered under the Policy. As a result, the district court erred in finding as a matter of law that the business risk exclusions preclude a duty by General Casualty to provide defense or indemnity with respect to damages arising out of Davis' work on the parking lot at the Project. The district court's entry of summary judgment in favor of General Casualty must be reversed, and the business risk exclusions evaluated on remand.

A. The Your Work Exclusion is Inapplicable

[¶ 45] The "your work" exclusion does not apply to bar coverage in this case. The exclusion states the Policy does not apply to:

> "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.

(*See* App. at 46.) The term "your work" is defined in the policy 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." (App. at 57.)

[¶ 46] The "your work exclusion" was discussed in *Jacob v. Russo Builders*, 592 N.W.2d 271 (Wis. Ct. App. 1999). The *Jacob* court distinguished between costs resulting from "accessing, repairing and replacing" the defective work itself, which is not covered, and other covered costs resulting from the defective work. *Id.* at 277. The court stated,

> other categories of the Jacobs' damages such as relocation costs, temporary repairs, loss of use and enjoyment of the residence, and repair of the interior of the residence are not directly the consequence of repairing or replacing Limbach's defective work. Rather, they represent collateral damage to the Jacobs' "other property" (the interior of the residence) and the costs associated with addressing and correcting that situation. As we have noted, these represent economic losses which can be recovered in tort, and, as such, they are covered by West Bend's CGL policy.

Id.

[¶ 47] The distinction by the court in *Jacob* is key and has been analyzed on other occasions by Wisconsin courts. *See, e.g.*, *Pamperin Rentals II, LLC v. R.G. Hendricks & Sons Constr., Inc.*, 822 N.W.2d 736 (Table), 2012 WL 3834206, at *8 (Wis. Ct. App. Sept. 5, 2012)[3] ("However, in addition to alleging damage to the concrete and 'incidental and consequential damages' caused by the repair of the concrete, the plaintiffs' complaint also alleges damage to other property—namely, the asphalt. Damage to the asphalt does

[3] Cited for persuasive value only pursuant to Wis. Stat. § 809.23(3)(b). (Doc ID #236.)

not fall within exclusions k and l. Accordingly, exclusions k and l do not bar coverage of the plaintiffs' claim that Red–D–Mix's concrete damaged the asphalt.").

[¶ 48] On its face, the "your work" exclusion does not bar coverage in this case. There is no question that Davis's work was egregiously poor in many ways. But the occurrence that triggered coverage was the moisture intrusion through the unsealed parking lot concrete joints. That omission by Davis damaged the subgrade under the parking lot, which was the work of another subcontractor, JEM. (*See* App. at 67 (Rick Engebretson's April 13, 2018, expert disclosure).) The property damage was not to Davis's work, but to that of another subcontractor, so the "your work" exclusion does not bar coverage.

[¶ 49] The present case is not a situation where the claimed costs are solely associated with investigating the defects or repairing or replacing Davis' work. Davis' work caused damage to the work of other subcontractors, specifically the work of JEM. The claimed damages are costs associated with correcting this work, rather than costs associated only with investigating, accessing, or repairing Davis' work. Thus, as both a matter of law and of disputed fact, the "your work" exclusion does not apply to preclude coverage. Entry of summary judgment in favor of General Casualty must therefore be reversed.

B. The Impaired Property Exclusion is Inapplicable

[¶ 50] The impaired property exclusion does not apply to preclude coverage. Under the terms of the Policy, there is no "impaired property" that can be restored to use by repair of Davis' work. Similarly, there is no "property that has not been physically injured" due to Davis' defective work. Therefore, the impaired property exclusion does not apply.

[¶ 51] The impaired property exclusion precludes coverage for:

> "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> (3) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
> (4) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.
>
> This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

(App. at 46.)

[¶ 52] Impaired property is defined in the Policy as:

> [T]angible property, other than "your product" or "your work", that cannot be used or is less useful because:
>
> c. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
> d. You have failed to fulfill the terms of a contract or agreement;
>
> if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

(App. at 54.)

[¶ 53] The impaired property exclusion "addresses situations where a defective product, afer [sic] being incorporated into the property of another, must be replaced or removed at great expense, thereby causing loss of use of the property." *Tweet/Garot-August Winter, LLC v. Liberty Mut. Fire Ins. Co.*, No. 06-C-800, 2007 WL 445988, at *8 (E.D. Wis. Feb. 7, 2007). Property that cannot be restored or is rendered unusable as a result of the insured's work is not impaired property. *Mullins' Whey, Inc. v. McShares, Inc.*, No. 04-C-0130, 2005 WL 1154281, at *3 (E.D. Wis. May 10, 2005) ("Next's property was ruined and unusable as a result of the contaminated Mullins whey protein concentrate.

Next's property is therefore not impaired property, and the exclusion is inapplicable.") (internal quotations and citation omitted). That distinction is key because otherwise all property damage would be excluded by the impaired property exclusion. That absurd result would render nearly all coverage under a CGL policy illusory.

[¶ 54] Courts from other jurisdictions have similarly found that the impaired property exclusion does not preclude coverage where the property at issue cannot be restored to use via repair of the insured's property. For example, the court in *Federated Mut. Ins. Co. v. Grapevine Excavation Inc.*, 197 F.3d 720 (5th Cir. 1999) found the impaired property exclusion inapplicable where removal and destruction of a paving subcontractor's work was necessary to remedy defects in a parking lot. *Id.* at 728 ("Indeed, it is inconceivable that any remedial or supplemental work could be done to GEI's portion of the project, all of which lies underneath the surface, without removing and destroying the paving subcontractor's work. Therefore, while 'property damage' has been alleged, none of the allegations, either alone or in combination, can be construed as a claim that damage was done to "impaired property" as that term is defined in Maryland's policy. Consequently, we conclude that the impaired property exclusion is inapplicable."). The result was the same in *Action Auto Stores, Inc. v. United Capitol Ins. Co.*, 845 F.Supp. 417 (W.D. Mich. 1993). *Id.* at 426 ("The Court finds that no evidence has been presented that any damage done to property surrounding the containment system can be remedied by the repair, replacement, or adjustment of defendant's work product. Furthermore, such a result is illogical as any pollution done to surrounding property could not possibly be remedied or rectified by the removal of the defective work product. Garnishee's motion for summary judgment must therefore be denied on this issue.").

[¶ 55] The impaired property exclusion does not apply in this case. There is no impaired property because the damages to other property – the subgrade – arising out of Davis' work cannot be restored to use by repairing Davis' work. In fact, substantial portions of other work throughout the parking lot have been damaged beyond repair and were torn out because of Davis' defective work. (App. at 136-144; 145-155.) Put another way, replacing just Davis's concrete in the parking lot would not remedy the problem. The subgrade under the parking lot would still be unstable and unusable. Therefore, there is no "impaired property" or "property that has not been physically injured" under the definitions set forth in the Policy, and the impaired property exclusion does not apply as a matter of law. Summary judgment in favor of General Casualty was therefore improper.

C. The Recall Exclusion does not Apply to Preclude Coverage

[¶ 56] Exclusion (n) – also known as the recall or sistership exclusion – does not apply to preclude coverage. This exclusion applies when inclusion of a product or component causes a loss because that product or component must be inspected or replaced because the product or component is found to have a defect on other projects. Put another way, the exclusion applies if a loss occurs because there is a defect found somewhere other than on the covered project. There is no product recall or broader replacement of more than just the defective work in this case. Thus, the recall exclusion does not bar coverage.

[¶ 57] The recall exclusion precludes coverage for:

> Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment removal or disposal of:
> (4) "Your project";
> (5) "Your work"; or
> (6) "Impaired property";

> if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defects, deficiency, inadequacy or dangerous condition in it.

(App. at 46.)

[¶ 58] The recall exclusion does not apply to preclude coverage where work is only repaired or replaced when an issue arises. For example, the court in *Paper Machinery Corp. v. Nelson Foundry Co., Inc.*, 323 N.W.2d 614 (Wis. Ct. App. 1982) addressed the issue of replacement of mandrels "only if and when they broke." *Id.* at 620. The court found, "Paper Machinery merely replaced mandrels when informed of breakage in the field. This does not constitute a withdrawal from the market by it, but a mere honoring of warranty obligations if and when defects became known." *Id.*

[¶ 59] The Court's holding in *Paper Machinery Corp.* that the recall exclusion does not apply to the repair or replacement of a defective product is shared by multiple other jurisdictions. *See, e.g., International Environmental Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 843 F.Supp. 1218, 1229 (N.D. Ill. 1993) ("Significantly, however, this exclusion does not apply to repair or replacement of products which have *already failed.* In those cases, the cost of replacement and repair is simply a measure of the property damage incurred."); *Atlantic Mut. Ins. Co. v. Judd Co.*, 367 N.W.2d 604, 607 (Minn. Ct. App. 1985) (noting the recall exclusion only applies to withdrawal of a product due to known or suspected defects in other products).

[¶ 60] This case is analogous to the situation in *Paper Machinery Corp.* Here, NDIT only repaired the defective or damaged work. NDIT did not replace work without defects, or broadly repair work based on an assumption that it would fail. The recall

exclusion, therefore, does not apply and does not bar coverage. Summary judgment in favor of General Casualty was therefore improper.

V. The District Court Erred in Rejecting the Factual Assertion by NDIT that the Subgrade Work to the Parking Lot Required Remediation due to Moisture Intrusion from Unsealed Joints

[¶ 61] The district court erred in holding as a matter of law that the subgrade work did not require remediation due to moisture intrusion from the unsealed joints. There is a genuine issue of material fact whether Davis was responsible for sealing the pavement joints in the parking lot and whether Davis' failure to do so caused damage to the subgrade that required remediation. The district court, therefore, improperly granted summary judgment in favor of General Casualty.

[¶ 62] The Expert Reports issued by Rick Engebretson are central to the joint sealant issue. Mr. Engebretson authored multiple reports in the Underlying Arbitration. Three reports are at issue here: the April 13, 2018 report (the "April 2018 Report"), the May 16, 2019 report (the "May 2019 Report"), and the February 27, 2020 report (the "February 2020 Report"). (App. at 66-71, 156-165, and 106-109.)

[¶ 63] NDIT relied upon the April 2018 Report, the Subcontract, the plans, and North Dakota Department of Transportation Standard Specifications to establish that it was Davis' responsibility to install the joint sealant. In contrast, General Casualty relied upon the May 2019 Report and deposition testimony from Thomas Davis – Davis' manager – to argue it was Lexstar's responsibility to install joint sealant in the parking lot.

[¶ 64] In the April 2018 Report, Mr. Engebretson opined that Davis' failure to seal the joints in the parking lot concrete allowed water to seep into the subgrade. (*See* App. at 67.) Mr. Engebretson further stated that the water seepage damaged the subgrade work

performed by JEM, creating an unstable base for the concrete. (*See id*.) He opined that the seepage had been occurring for two years. (*See id*.)

[¶ 65] Mr. Engebretson's opinions were confirmed in June 2018, when several concrete panels in the parking were lifted to allow observation of the subgrade. Terracon, a geotechnical firm, had a representative present who observed that the aggregate base was in a "rather loose and saturated condition" and the clay material under that was in a "somewhat soft and moist condition." (*See* App. at 133-135.) Mr. Engebretson subsequently recommended complete removal and replacement of the parking lot, including JEM's damaged subgrade work. (*See* App. at 80-86; *see also* App. at 106-109 (Engebretson Report Dated Feb. 27, 2020, disclosing repair costs exceeding $2 million).)

[¶ 66] Mr. Engebretson authored multiple other reports, including the May 2019 Report. The district court cited the May 2019 Report in the Order Granting General Casualty's Motion for Summary Judgment, finding that this opinion disputed NDIT's "theory" regarding the joint sealant. (Add. at 181, ¶ 62.) In the May 2019 Report, Mr. Engebretson wandered into the territory of providing legal opinions when he opined that it was Lexstar's responsibility to provide joint sealants in the parking lot. Notably, Mr. Engebretson is an architect, not a lawyer. As such, any legal opinions provided by Mr. Engebretson have to be viewed in light of his expertise as an architect.

[¶ 67] Without losing sight of the fact that the district court was not permitted to weigh competing evidence at the summary judgment stage, the best evidence of what was contractually required of Davis is the Subcontract. The Subcontract required Davis to complete the pavement work for the Project in accordance with the plans and specifications. (*See* App. at 60, § 2.1 ("The Subcontractor shall perform the Work, all in

accordance with the Contract Documents by: Furnish all labor, materials and equipment to install Foundation, Flatwork and Sitework as per estimate, specs and plans").) Those plans required pavement materials and installation to meet the requirements of the North Dakota Department of Transportation Standard Specifications. (*See* App. at 124, Paving, Grading, & Drainage Note 7 ("All pavement section materials & installation shall meet the requirements of the Department of Transportation Standard Specifications (Latest Edition).").) The North Dakota Department of Transportation Standard Specifications require sealing of all concrete joints. (*See* App. at 126-127, § 550.04.M.)

[¶ 68] Viewing the evidence in the light most favorable to NDIT as required, there is at the very least a genuine issue of material fact regarding whether Davis was responsible for sealing the joints in the parking lot.

[¶ 69] Similarly, there is a genuine issue of material fact whether Davis' failure to seal the joints in the parking lot required the subgrade work performed by JEM to be remediated. The April 2018 Report states that "The absence of these sealed joints allowed water intrusion into the granular base and sub-base below the pavement for a period of 2 years, creating an unstable condition." (App. at 67.)

[¶ 70] Water renders the granular base unsuitable and subject to remediation, as shown in the photographs and daily reports from Kraus Anderson, NDIT's remediation contractor. (*See* App. at 136-144; 145-155.) Additionally, the description of soils as saturated, loose, or unstable in the construction industry – as referenced throughout the Engebretson and Terracon reports – is commonly known to mean the soils are unsuitable. Unsuitable soils either need to be removed and replaced with suitable soils or dried on site. Either option is timely and costly. Either option means the soils require remediation.

[¶ 71] Moreover, as noted in the oral argument on General Casualty's Motion for Summary Judgment on June 4, 2021, the resulting damage and remediation to the subgrade is a fact dispute that will be resolved in the Underlying Arbitration. (Transcript at 19:14-25.)

[¶ 72] Given the multitude of fact issues with the remediation of the subgrade work performed by JEM and the lack of joint sealants in the parking lot, it was improper for the district court to rule as a matter of law on these issues and grant General Casualty's Motion for Summary Judgment. The district court, therefore, erred in concluding as a matter of law that Davis was not responsible for sealing the concrete joints and the failure to seal the joints did not cause the remediation work of the subgrade.

VI. The District Court Erred in Ruling that General Casualty Company of Wisconsin has No Duty to Defend or Indemnify Davis, Lexstar, or NDIT in the Underlying Arbitration

[¶ 73] The district court concluded as a matter of law that there was not an occurrence, that the business risk exclusions applied to bar coverage, and that the failure to seal the parking lot joints did not cause moisture intrusion that required remediation of the subgrade. As a result of the foregoing conclusions, the district court held as a matter of law that General Casualty did not have a duty to defend or indemnify NDIT or any other party in the Underlying Arbitration.

[¶ 74] As set forth above and incorporated by reference herein, the district court erred in finding as a matter of law that there was no occurrence giving rise to coverage. This is an analogous situation to the *American Girl* case. Here, the faulty workmanship on the parking lot caused damage to the subgrade. NDIT does not contend the work on the parking lot is itself the occurrence. Rather, the resulting damage to the subgrade caused

by Davis' faulty workmanship on the parking lot is what NDIT seeks coverage for under the Policy.

[¶ 75] Similarly, as set forth above and incorporated by reference herein, none of the business risk exclusions apply to bar coverage. The district court did not analyze any of the business risk exclusions, and instead concluded as a matter of law that they applied to bar coverage. The district court approached NDIT's factual assertions regarding the remediation to the subgrade work in a similar manner. The combined four-sentence analysis by the district court on the business risk exclusions and factual dispute on the joint sealant and subgrade issues provides no insight on how the district court reached its opinion that there is no coverage.

[¶ 76] The factual disputes, particularly viewed in the light most favorable to NDIT, lead to one conclusion – the district court erred in finding as a matter of law that General Casualty was entitled to summary judgment. To conclude otherwise requires disregarding all facts that are favorable to NDIT.

[¶ 77] Finally, as discussed during oral arguments on General Casualty's Motion for Summary Judgment, the district court erred in issuing any opinion on General Casualty's duty to indemnify NDIT and others in the Underlying Arbitration. The Underlying Arbitration has yet to commence. The factual disputes that are born out in the record below will be analyzed in the Underlying Arbitration. It is premature to issue a decision on the duty to indemnify prior to the resolution of the underlying action, as that issue is not ripe for determination until after resolution of the underlying action. *See General Cas. Co. of Wisconsin v. Hills*, 561 N.W.2d 718, 722 n. 11 (Wis. 1997) ("[T]he

duty to indemnify issue must await resolution of the claim brought by Arrowhead against Hills.").

[¶ 78] Thus, the district court erred in granting summary judgment to General Casualty. This case should be reversed and remanded to the district court.

CONCLUSION

[¶ 79] For the foregoing reasons, Appellants Bullinger Enterprises, LLLP and NDIT, LLC respectfully request that the Court reverse the trial court's Order Granting Summary Judgment to General Casualty Company of Wisconsin and remand this matter for further proceedings.

MOSS & BARNETT

Dated: November 17, 2021

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

GENERAL CASUALTY COMPANY OF WISCONSIN,

Plaintiff/Appellee,

v.

DAVIS COMPANIES, LLC, LEXSTAR CONSTRUCTION, LLC, BULLINGER ENTERPRISES, LLLP, and NDIT, LLC,

Defendants/Appellants.

Supreme Court No. 20210226

CERTIFICATION OF LENGTH FOR APPELLANTS BULLINGER ENTERPRISES, LLLP AND NDIT, LLC'S PRINCIPAL BRIEF

[¶ 1] Jeffrey A. Wieland hereby certifies that Appellants Bullinger Enterprises, LLLP and NDIT, LLC's Principal Brief contains 31 pages, inclusive of footnotes and endnotes, in compliance with N.D. R. Civ. App. P. 32(a)(8)(A).

Dated: November 17, 2021

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Plaintiff,

v.

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Defendants.

Supreme Court No. 20210226

CERTIFICATE OF SERVICE

[¶ 1] I hereby certify that on November 17, 2021, the following documents:

- Appellants Bullinger Enterprises, LLLP and NDIT, LLC's Principal Brief;
- Appellants Bullinger Enterprises, LLLP and NDIT, LLC's Appendix; and
- Certification of Length for Appellants Bullinger Enterprises, LLLP and NDIT, LLC's Principal Brief

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

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and

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- Appellants Bullinger Enterprises, LLLP and NDIT, LLC's Appendix; and
- Certification of Length for Appellants Bullinger Enterprises, LLLP and NDIT, LLC's Principal Brief

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