20210226

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 30, 2021
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 and LEXSTAR CONSTRUCTION, LLC,

Defendants and Appellees,

and

BULLINGER ENTERPRISES, LLLP, and NDIT, LLC,

Defendants and Appellants.

Supreme Court No. 20210226

ORAL ARGUMENT REQUESTED

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

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

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ARGUMENT

I. The District Court Erred in Finding as a Matter of Law That There was No Occurrence Under the Policy Because NDIT Submitted Evidence of Property Damage Caused by an Occurrence.[1]

[¶ 1] There is an occurrence under the commercial general liability ("CGL") policy (the "Policy") issued by General Casualty Company of Wisconsin ("General Casualty") that gives rise to coverage. The circumstances giving rise to the occurrence are discussed in detail in paragraphs 33 – 42 and 61 – 72 of Bullinger Enterprises, LLLP and NDIT, LLC's (collectively, "NDIT") principal brief, and incorporated by reference herein.

[¶ 2] While the parties generally agree on the framework for determining whether there is an occurrence under the Policy, their respective analyses diverge with respect to the facts of this coverage dispute.[2] Notably, General Casualty largely ignores the *American Family Mut. Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65 (Wis. 2004) case, even though this case "is central to a resolution of a dispute over the meaning of 'occurrence.'" *Glendenning's Limestone & Ready-Mix Co., Inc. v. Reimer*, 721 N.W.2d 704, 711 (Wis. Ct. App. 2006). This is, perhaps, because the *American Girl* case supports NDIT's coverage argument, as discussed in paragraphs 37 – 42 of NDIT's principal brief.

[¶ 3] In its response, General Casualty argues that there was no occurrence because (1) Davis Companies, LLC ("Davis") was not responsible for applying the joint

[1] To the extent General Casualty attempts to argue that the Policy does not provide coverage to NDIT because of the scope of additional insured coverage in the Policy, that argument was not raised before the district court and is not properly before this Court. *See Bilger v. Bilger*, 2021 ND 144, ¶ 5, 963 N.W.2d 269 ("It is well established that arguments not raised before the district court cannot be raised for the first time on appeal.").

[2] The parties' focus on the factual arguments, rather than the legal framework for coverage analysis, highlights that a genuine issue of material fact exists, making the district court's order granting summary judgment in favor of General Casualty improper.

sealant at the project, and (2) there was no evidence showing the subgrade had to be remediated due to Davis' faulty work. (General Casualty Response Brief at ¶¶ 44 – 58.) Both of these arguments ignore multiple factual disputes identified in NDIT's principal brief and at the district court. As a result, summary judgment was improper at the district court and this case must be reversed and remanded for further proceedings.

A. There is a Genuine Issue of Material Fact Whether Davis was Responsible for Installing the Joint Sealant.

[¶ 4] There is a genuine issue of material fact whether Davis was responsible for the joint sealant. The failure to apply the joint sealant, in turn, caused damage to the subgrade work performed by JEM Construction ("JEM") – the occurrence and property damage giving rise to coverage under the Policy. *See Wisconsin Pharmacal Co., LLC v. Nebraska Cultures of California, Inc.*, 876 N.W.2d 72, 80 (Wis. 2016) (noting "the insured risk (i.e., physical injury to tangible property) applies to physical injury to tangible property other than, but which is caused by, a defect in the product or work the insured supplied"). The district court, therefore, erred in granting summary judgment to General Casualty.

[¶ 5] General Casualty focuses heavily on the reports issued by NDIT's expert, Rick Engebretson. 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.)

[¶ 6] The Engebretson Reports alone create a genuine issue of material fact regarding the joint sealant dispute. For example, Mr. Engebretson opined in the April 2018 Report that the failure to place sealants in the parking lot joints allowed water intrusion into the subgrade for two years and created an unstable condition. (App. at 66-67.) General

Casualty largely ignores the April 2018 Report, instead only focusing on Mr. Engebretson's opinions in the May 2019 Report. (General Casualty Brief at ¶ 45.)

[¶ 7] A portion of the May 2019 Report, specifically Mr. Engebretson's legal conclusions regarding the responsibility to provide joint sealants, is still subject to a factual dispute. General Casualty argues that Davis was not responsible for the joint sealant. However, there is a genuine issue of material fact regarding Davis' responsibility for installing the joint sealant – and therefore, whether there is an occurrence under the Policy.

[¶ 8] The issue regarding Davis' responsibility to install the joint sealant ties to one of the most common disputes in construction: the scope of each contractor and subcontractor's work as set forth in the contract documents. Construction contracts are complex and often involve multiple documents, many of which are incorporated by reference into the base contract document. That is how the subcontract worked in this case. The best evidence of what was contractually required of Davis is the subcontract itself.

[¶ 9] Here, the subcontract (the "Subcontract") between Davis and Lexstar Construction, LLC ("Lexstar") required Davis to "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." (App. at 60, § 2.1.) The plans, in turn, required Davis to "meet the requirements of the Department of Transportation Standard Specifications (Latest Edition)" for all pavement materials and installation. (App. at 124, Paving, Grading, & Drainage Note 7.) Taking this one step further, the North Dakota Department of Transportation Standard Specifications require sealing of all concrete joints. (*See* App. at 126-127, § 550.04.M.)

[¶ 10] Thus, under the Subcontract, Davis was responsible for sealing the concrete joints. Mr. Davis' deposition testimony cannot refute the contract documents. All Mr. Davis' deposition testimony demonstrates is that Davis failed to read and understand the entire scope of the Subcontract when bidding the Project and left a portion of the scope out of the bid. When this happens, subcontractors are incentivized to argue that the item of scope omitted from the bid is not part of their scope because the cost of this work is not compensable without a change order.

[¶ 11] Similarly, the Cass County Complaint discussed, within paragraphs 49 and 50 of General Casualty's Response Brief, again highlights this fact issue. The failure to identify a contract gap is not equivalent to a conclusive factual determination that a particular scope of work is not included in a contract. This is particularly true where the scope of work is incorporated by reference into the contract at issue.

[¶ 12] Thus, this Court should disregard General Casualty's argument that NDIT's "eleventh hour theory" on the subgrade remediation is without evidentiary support. NDIT submitted factual support for the subgrade remediation at the district court level. Viewing the evidence in the light most favorable to NDIT, this creates a fact issue and should have prevented the district court from granting Summary Judgment in favor of General Casualty. This matter must therefore be reversed and remanded for further consideration.

B. There is a Genuine Issue of Material Fact Whether Davis' Failure to Seal the Joints Necessitated the Remediation to the Subgrade.

[¶ 13] A genuine issue of material fact similarly exists regarding whether Davis' failure to install the joint sealants necessitated the remediation of the subgrade. This, again, shows the district court's grant of summary judgment was improper.

[¶ 14] Analyzing the Engebretson and Terracon reports together shows the remediation of the subgrade work performed by JEM was necessitated by Davis' failure to install joint sealant. There are multiple references to unsuitable soils within these reports. Unsuitable soils require remediation.

[¶ 15] For example, the April 2018 Report states the "pavement defects are directly related to the failure to place sealants in the construction joints of the pavement. 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.) The reference to "an unstable condition" in the soils directly contradicts General Casualty's contention that no report submitted in the record indicates the moisture content is atypical. (*See* General Casualty Brief at ¶ 54.) Unstable and unsuitable soils require remediation. To proceed with construction on unstable soils is the equivalent of putting a Band-Aid on a sinking ship to try to stop the water from rushing in. Both will fail.

[¶ 16] The June 2018 Terracon report similarly describes the aggregate base material as being "in a rather loose and saturated condition." (App. at 88.) The June 24, 2019 Kraus Anderson Daily Report again references the moisture testing of the subgrade. (App. at 137.) The February 2020 Report puts a cost on the remediation of the earthwork, including the parking lot base material, to be in excess of $1 million. (App. at 110.)

[¶ 17] Taken as a whole and considering the industry standard construction language used throughout the reports, the only plausible conclusion is that the soil remediation resulted from the "water intrusion into the granular base and sub-base below the pavement." (App. at 67.) Thus, at the very least, there is a genuine issue of material fact regarding the remediation of the subgrade and summary judgment was improper.

II. The District Court Erred in Finding the "Your Work" and "Recall" Exclusions in the Policy Preclude Coverage.

[¶ 18] General Casualty argues that the business risk exclusions bar coverage in this matter. There are two business risk exclusions at issue – the "your work" and "recall" exclusions, neither of which bar coverage in this case.[3]

[¶ 19] In arguing that the business risk exclusions bar coverage, General Casualty contends the district court "adopt[ed] its analysis" of issues at the summary judgment stage. (*See* General Casualty Brief at ¶ 60.) This is insufficient to determine how the district court actually reached its opinion or what analysis it considered for these exclusions and is in 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."); *see also VND, LLC v. Leevers Foods, Inc.*, 2003 ND 198, ¶ 27, 672 N.W.2d 445 (noting "the district court's findings of fact and conclusions of law should be stated to afford us a clear understanding of the court's decision").

[¶ 20] The district court's reversible error in failing to provide any analysis in its opinion is clear when the business risk exclusions are analyzed. Neither are applicable and neither bar coverage. Thus, 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.

[¶ 21] Both NDIT and General Casualty cite *Jacob v. Russo Builders*, 592 N.W.2d 271 (Wis. Ct. App. 1999) in support of their arguments on the "your work" exclusion.

[3] General Casualty conceded in its Response Brief that the "impaired property" exclusion is inapplicable in this case. Thus, NDIT does not address that exclusion here.

[¶ 22] General Casualty paints with too broad of a brush when discussing the court's opinion in *Jacob*. The *Jacob* court made clear at the outset that the appeal concerned "other categories of the Jacobs' damage, all of which stem either directly or indirectly from Limbach's defective work." *Id.* at 274. As discussed in NDIT's opening memorandum and incorporated by referenced herein, *Jacob* stands for the position that damage to other property caused by the insured's defective work is covered under CGL policies. *See id.* at 276. The *Jacob* court further noted that things such as "expert fees relating to the investigation of the cause and extent of the damage and the refinancing costs" fell into a gray area of covered versus non-covered losses and directed these be reviewed again on remand. *Id.*

[¶ 23] The instant case is analogous to *Jacob*. Davis' work caused damage to the work of others – specifically, the subgrade work by JEM. (*See* App. at 67.) As a result, JEM's work had to be corrected. These are the covered costs under the Policy for which NDIT seeks coverage, not the costs associated only with investigating, accessing, or replacing Davis' work. As a result, the "your work" exclusion does not bar coverage and the district court's entry of summary judgment to General Casualty must be reversed.

B. The "Recall" Exclusion Does Not Apply to Preclude Coverage.

[¶ 24] General Casualty asserts that the recall exclusion applies to bar coverage. General Casualty is mistaken for multiple reasons.

[¶ 25] First, General Casualty asserts that portions of the parking lot were removed that had not already failed. In doing so, General Casualty cites the July 19, 2018 Engebretson Report. (General Casualty Response Brief at ¶ 64.) The language of the July 2018 Report cited by General Casualty, however, supports that the entire parking lot had

failed when Mr. Engebretson recommended removal and replacement of the entire parking lot. As quoted by General Casualty, Mr. Engebretson stated that additional "testing discovered that the entire parking lot did not meet the requirements of the construction documents" and that complete "[r]emoval and replacement of the concrete pavement" was recommended. (General Casualty Response Brief at ¶ 64.) These opinions show that NDIT addressed the parking lot because of its failure to meeting the construction documents, not because of a precautionary measure based on finding faults elsewhere.

[¶ 26] Moreover, the parking lot is part of a single construction project, not a product withdrawn from the larger market. The origin of the recall exclusion does not contemplate its application to a single project:

> "It denies coverage for claims based upon the cost of withdrawing a product from the market, replacing a product or the loss of use of a product which is temporarily or permanently withdrawn from the market because of occurrences involving the same or a similar product. The name derives from an occurrence in the aircraft industry where all airplanes of a certain make and type were grounded by an order of the Civil Aeronautics Administration because one crashed and others were suspected of having a common structural defect. The damages arising out of the loss of use of all the sister ships were enormous."

Ohio Cas. Ins. Co. v. Terrace Enterprises, Inc., 260 N.W.2d 450, 455 (Minn. 1977) (quoting *Gulf Ins. Co. v. Parker Products, Inc.*, 298 S.W.2d 676, 678 (Tex. 1973)). The recall exclusion simply does not apply to bar coverage when it is a single project at issue, rather than a reaction to a failure elsewhere. *See id.* ("The apartment building in question was not withdrawn from the market because of a suspected defect or a defect in another building. It was withdrawn because it was damaged by defective construction.").

[¶ 27] Finally, even if it were found that portions of the parking lot had not yet failed, the recall exclusion would still not apply. General Casualty acknowledges that

NDIT "replaced parking lot slabs that it contends were sinking and cracking." (General Casualty Response Brief at ¶ 63.) At the very least, any repair associated with this work would not be excluded from coverage by the recall exclusion. And, because coverage is triggered if there is any potentially covered claim, the recall exclusion does not apply to bar coverage in this case. *See Newhouse by Skow v. Citizens Sec. Mut. Ins. Co.*, 501 N.W.2d 1, 5 (Wis. 1993) (noting the duty to defend arises when there is arguably a covered loss under the policy). The district court, therefore, erred in finding the recall exclusion applied and in granting summary judgment to General Casualty.

CONCLUSION

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

[¶ 29] This 12-page brief complies with N.D.R.App.P. 32(a)(8)(a).

MOSS & BARNETT

Dated: December 30, 2021

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Supreme Court No. 20210226

CERTIFICATE OF SERVICE

[¶ 1] I hereby certify that on December 30, 2021, Appellants Bullinger Enterprises, LLLP and NDIT, LLC's Reply Brief was filed electronically via the North Dakota Supreme Court E-Filing Portal and electronically served of the same on the following:

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