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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Midwest Family Mutual Insurance Company, Plaintiff and Appellee, vs. Superior Manufacturing, LLC and Superior, Inc., Defendants and Appellees, And James & David Cooper Farms, Inc., Philip Cooper, and Michael D. Cooper, Intervenors, Defendants and Appellants.	Supreme Court No.: 20220308 Cass County Case No.: 09-2021-CV-03028 **BRIEF OF APPELLE E**

Appeal from *Order for Summary Judgment* of the District Court, dated August 3, 2022, *Amended Order for Summary Judgment* of the District Court, dated August 16, 2022, and *Judgment* of the District Court, dated August 17, 2022

Cass County, North Dakota
East Central Judicial District
The Honorable John C. Irby, Presiding

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

[1] The North Dakota Supreme Court has jurisdiction under N.D.C.C. §28-27-02.

STATEMENT OF THE ISSUES

[2] I. Whether the District Court properly concluded that the Missouri Judgment is not covered under the Businessowner's Policy nor the Commercial Umbrella Policy issued to Superior, with the exception of $296,000.00 for damage to other property.

[3] II. Whether the District Court properly concluded that Cooper Farms and Superior have not met their burden of proof that the performance of defective or faulty work by Superior is an "occurrence" covered by the Midwest Family policies.

[4] III. Whether the District Court properly concluded that Cooper Farms and Superior have not met their burden of proof that the physical injury to Superior's grain bin structures and any loss of use is "property damage" covered by the Midwest Family policies.

[5] IV. Whether the District Court properly concluded that even if Superior and Cooper Farms were able to meet their burden of proving "property damage" caused by an "occurrence", coverage is excluded by the "business risk" exclusions, specifically the Damage to Your Product exclusion and the Damage to Your Work exclusion.

[6] V. Whether the District Court properly concluded that there is not separate coverage under the Midwest Family policies for "products-completed operations".

STATEMENT OF ORAL ARGUMENT

[7] Appellee requests oral argument to clarify the issues raised in the Briefs.

STATEMENT OF THE CASE

[8] Cooper Farms commenced a lawsuit against Superior Manufacturing, LLC and others in the State of Missouri by service of Petition dated March 26, 2018. *(Petition for Damages, R33).* A First Amended Petition for Damages dated August 26, 2019 includes claims based upon Negligence and Negligent Representation. *(First Amended Petition for Damages, R18).* Midwest Family first received notice of the lawsuit on February 25,

2020. *(R53)*. Midwest Family issued a Businessowner's Policy to Superior Manufacturing and a Commercial Umbrella Policy to Superior, Inc. with a policy period of January 1, 2016 to January 1, 2017. *(Affidavit of Jon Ness, R53)*. On March 26, 2020, reservation of rights letters were sent to Superior Manufacturing and Superior, Inc. *(R53 and R20)*. After their reservation of rights letters were sent, and throughout the underlying lawsuit in Missouri, Midwest Family retained defense counsel to represent Superior and paid all of Superior's defense costs. *(R53).*

[9] On March 17, 2021, Midwest Family commenced a Declaratory Judgment action against Superior Manufacturing and Superior, Inc. (*R1 and R2)*. Superior Manufacturing and Superior, Inc. are collectively referred to as "Superior" because Superior, Inc. was voluntarily dismissed from the underlying lawsuit and was no longer a necessary party to the declaratory judgment action. Midwest Family continued to provide a defense to Superior and paid for all the defense fees and costs incurred by counsel obtained to defend Superior in the underlying lawsuit. On April 15, 2021, counsel for Superior served an Answer to Complaint and Counterclaim *(R9).* Superior's counsel made several requests that Midwest Family forego the declaratory judgment lawsuit and threatened to enter into a *Miller-Shugart* Agreement with the attorneys for Cooper Farms in the underlying lawsuit. *(R54-R61).* On August 3, 2021, a follow-up reservation of rights letter was sent by counsel for Midwest Family to Superior's counsel which not only continued with the reservation of rights, but specifically requested an allocation of damages between covered and uncovered amounts as a result of any judgment. *(R54 and R61).* On August 6, 2021, Cooper Farms and Superior entered into a Stipulation of Settlement or *Miller-Shugart* Agreement stipulating to $3,500,000.00 in damages, to be

paid only through any applicable insurance coverage. *(Stipulation of Settlement, R19).* Notice of the Stipulation of Settlement/*Miller-Shugart* Agreement was not provided to Midwest Family or its counsel prior to entering into the Agreement. *(R53).* On August 26, 2021, the executed settlement documents were provided to Midwest Family's undersigned counsel by Superior's counsel. *(R54).* On September 8, 2021, counsel for Cooper Farms provided notice to Superior that an arbitration proceeding would occur on September 29, 2021 in Missouri. *(Intervenor's Brief in Support of Motion to Dismiss or Stay, R40).* It is undisputed that this notice was not provided to Midwest Family or its counsel. *(R53).* The case was uncontested and "heard" by an arbitrator on September 29, 2021 and the arbitrator entered an Award in Arbitration on November 23, 2021. *(Award in Arbitration, R115).* A similar case brought by Cooper Farms against Tomkinson Bin Sales & Services, Inc. ("TBSS") was heard by the arbitrator on September 21, 2021 and the arbitrator entered an Award in Arbitration on November 23, 2021 which provides identical damages to the award against Superior in the amount of $6,001,084.00. The award was reduced to judgment by the Circuit Court of Atchison County, Missouri on January 4, 2022 *(R114)*.

[10] The Stipulation of Settlement dated August 6, 2021 and the Award in Arbitration dated November 23, 2021 occurred *after* Midwest Family commenced its declaratory judgment action. Midwest Family moved for summary judgment on March 9, 2022. *(R15).* Cooper Farms moved to intervene and to stay the summary judgment proceedings. The District Court granted Cooper Farms' motion to intervene (*R71)* but denied Cooper Farms' motion to dismiss or stay proceedings *(R97)*.

[11] The District Court entered an Order for Summary Judgment on August 3, 2022,

an Amended Order for Summary Judgment on August 16, 2022, and a Judgment on August 17, 2022 *(R131, R132, R133).* The Orders and Judgment granted summary judgment to Midwest Family with the exception of $296,000.00 for damage to other property. *(R132).* The District Court granted Midwest Family's Motion for Summary Judgment on the following grounds: (1) the Missouri Judgment is not covered under the Businessowner's Policy and Commercial Umbrella Policy that Midwest Family issued to Superior, with the exception of the amount of $296,000.00 set forth in the Stipulation of Settlement dated August 6, 2021 for damage to other property; (2) Superior and Cooper Farms have not met their burden of proof that the performance of defective or faulty work by Superior is an "occurrence" covered by the policies; (3) Superior and Cooper Farms have not met their burden of proof that the physical injury to Superior's grain bin structures and any loss of use is "property damage" covered by the policies; and (4) even if Superior and Cooper Farms were able to meet their burden of proving "property damage" caused by an "occurrence," coverage is excluded by the "business risk" exclusions, specifically the Damage to Your Product and the Damage to Your Work exclusions. *(R132).*

[12] Cooper Farms filed its Notice of Appeal on October 17, 2022. *(R136).* Superior did not file a Notice of Appeal.

STATEMENT OF FACTS

[13] Cooper Farms commenced a lawsuit against Superior by service of a Summons and Petition dated March 26, 2018. *(Stipulation of Settlement, R19:¶3).* Midwest Family insured Superior under two separate North Dakota policies, a Businessowner's Policy and a Commercial Umbrella Policy. *(R53, R2, R3, R4).* The Businessowner's Policy

provides liability limits of $1,000,000.00 per Occurrence/$2,000,000.00 Aggregate. *(Businessowner's Policy, R3).* The Commercial Umbrella Policy provides a limit of liability of $5,000,000.00 *(Commercial Umbrella Policy, R4).* Midwest Family sent a Reservation of Rights Letter to Superior on March 26, 2020 *(R20),* but continued to provide a defense to Superior throughout the underlying lawsuit in Missouri and paid all of Superior's defense costs. *(R53:¶8).*

[14] The facts are set forth in the Stipulation of Settlement and the Award in Arbitration. Cooper Farms relies upon the Award in Arbitration for the Statement of Facts. Even if the Arbitration Award's statement of facts are considered and accepted as true by this Court, they reinforce that no coverage is available under the Midwest Family policies. Cooper Farms does omit some relevant facts in its Statement of Facts.

[15] On July 7, 2016, 26 grain bins and other grain storage equipment owned by Cooper Farms were destroyed by a windstorm. *(Award in Arbitration, R115:2:¶5).* The Petition alleges that Frank Tomkinson was an employee and/or agent of Superior and acted within the course and scope of his employment and/or agency for Superior. *(First Amended Petition for Damages, R5:¶14).* As part of his job with Superior, Tomkinson was involved in the design and construction of grain bin projects. *(Award in Arbitration, R115:2:¶11).* In the process of selling the Project to Cooper Farms, Tomkinson represented to Cooper Farms that Tomkinson Bin Sales (TBS) was an authorized Superior dealer who could erect the Project in a proper and timely manner. *(Id. at 3:¶19).* The Petition alleges that Tomkinson, on behalf of Superior and TBS, made a number of assurances regarding replacing the damaged grain bins and that the Project included the design lay-out for the Project, which included 7 grain bins, a grain dryer, a

grain conveyor system, and other equipment. *(Petition, R5:¶23).*

[16] Tomkinson selected the site for the Project. *(Award in Arbitration, R115:5:¶¶36, 37).* Tomkinson represented that soil tests at the site would be unnecessary. *(Id. ¶39).* The site would have been suitable if the grain bin foundations had been properly designed. *(Id. 6:¶42).* Tomkinson designed the concrete bin foundations and site lay-out. *(Id. at 8:¶¶67, 71).* The grain bins foundations designed by Tomkinson were inadequate to prevent excessive settlement of the steel grain bins. *(Id. at 9:¶78).* The excessive settlement has caused physical injury to each of the 7 grain bins, rendering them unusable. *(Id. at 11:¶100).* Cooper Farms alleges that the design, materials, and workmanship provided by Superior on the Project were defective. *(Petition, R5:¶35).*

[17] On August 6, 2021, Cooper Farms and Superior entered into a $3,500,000.00 *Miller-Shugart* settlement. *(Stipulation of Settlement, R19:¶6).* Exhibit A to the Stipulation of Settlement sets forth the total estimated damages, and attempts to categorize the damages. The overwhelming majority of the $3,500,000.00 settlement that Superior seeks to enforce against Midwest Family is for the damages incurred to repair or replace Superior's own self-performed work. Exhibit A provides:

From Additional Supplemental Interrogatory Answers:		
Cost of corrections and repairs to date		$ 587.796
Payments to Bruce Supply	$192,000	
Payments to Pinnacle Electric	$299,796	
Payments to Contractors – leaning bins	$ 96,000	
Cost of Cooper Farms personnel & equipment		
Labor and equipment		$ 200,000
Additional hauling expense (truck and trailer)		$ 49,000
Loss of use of the facility 2016-2018		$ 349,000
Loss of use of the facility in 2020		$1,047,528
Costs associated with replacement of the grain bins and other structures		
Engineering expense to determine usability of bin system (Bryant Consulting)		$ 150,000
Cost of demolition of bins and concrete removal*		$1,500,000

Cost of rebuilding project	$1,930,000
Loss of use during rebuild	$ 140,000
Total Estimated Damages	**$5,953,324**
General categorization of damages:	
Cost of demolition of grains bins	**$1,500,000**
Cost of Rebuilding Grain Bins and grain handling equipment	**$2,380,000**
Loss of use of grain bins and grain handling equipment (through January 2021)	**$1,546,528**
Damage to other property other than grain bins and component parts (includes concrete and other equipment)	**$296,000**
Cost to haul or move grain to another facility	**$249,000**
Cost to repair grain bins and grain handling equipment	**$192,000**

The above damages are supported by expert testimony and other evidence adduced during the litigation.

(Stipulation of Settlement, Exhibit A, R19).

[18] Cooper Farms and Superior chose not to allocate what, if any, of the $3,500,000.00 settlement was attributable to damages to property other than Superior's own work, except $296,000.00 for "damage to other property other than grain bins and component parts (includes concrete and other equipment)." On its face, all of the $3,500,000.00 settlement, with the possible exception of the amount of $296,000.00, is excluded as damage to Superior's own work or own product.

[19] Cooper Farms argues that the concrete bin foundations were poured by J&E Concrete, not Superior, which does not make any difference because the arbitrator determined that as part of his job with Superior, Tomkinson was involved in the design and construction of grain bin projects and designed the Project, including the grain bin foundations for the Project. *(Award in Arbitration, R115:¶¶11, 22, 28, 67, 71).* The arbitrator's Conclusions of Law also note that "Frank Tomkinson, as an employee and agent of Superior, acted as a subcontractor to TBS in providing the design of the Project, included the design of the site layout and the grain bin foundations." *(Id. at 13:¶2).* Thus, since the arbitrator specifically determined that Tomkinson was working for

Superior when he designed and constructed the bins, it is irrelevant whether the concrete grain bin foundations were poured by someone other than Superior.

[20] It is interesting to compare the damages in the Award in Arbitration to those set forth in Exhibit A to the Stipulation of Settlement. Cooper Farms fails to address how Cooper Farms and Superior entered into a $3,500,000.00 *Miller v. Shugart* Stipulation of Settlement, but the Arbitration Award is for $6,001,084.00. The same category of damages are contained in the Award in Arbitration. *(Award in Arbitration, R34:12).* However, unlike the Stipulation of Settlement, Exhibit A, the Award in Arbitration does not include a category of $296,000.00 for "damage to other property other than grain bins and component parts (includes concrete and other equipment.)" On its face, the entire amount of the $6,001,084.00 Arbitration Award is excluded as damage to Superior's own work or own product.

STANDARD OF REVIEW

[21] Interpretation of an insurance contract is a question of law fully reviewable on appeal. *Pavlicek v. American Steel Systems, Inc.*, 2022 ND 35, ¶8, 970 N.W.2d 171. This Court has summarized the standards for construing an insurance contract:

> Our goal in interpreting insurance policies, as when constructing 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 fact, there is no room for construction. If coverage hinges on the 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 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.

Id. (Quoting *ACUITY v. Burd & Smith Constr., Inc.*, 2006 N.D. 187, ¶7, 721 N.W.2d 33).

[22] 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 v. Nodak Mut. Ins.*, 2012 ND 81, ¶9, 816 N.W.2d 31. *See also Schleuter v. Northern Plains Ins.*, 2009 ND 171, ¶8, 772 N.W.2d 879.

[23] Cooper Farms has the initial burden of proving that its claimed loss falls within the policy's general coverage provisions. *Modern Equip. Co. v. Continental Western Ins. Co., Inc.*, 355 F.3d 1125, 1128 (8th Cir. 2004). "It is axiomatic that the burden of proof rests upon the party claiming coverage under an insurance policy." *Forsman v. Blues, Brews & Bar-B-Ques, Inc.*, 2017 ND 266, ¶11, 903 N.W.2d 524 (quoting *Grzadzielewski v. Walsh Cty. Mut. Ins. Co.*, 297 N.W.2d 780, 784 (N.D. 1980)). For coverage to apply under the CGL policy, there must be "property damage" caused by an "occurrence." *K&L Homes, Inc. v. American Fam. Mut. Ins. Co.*, 2013 ND 57, ¶10, 829 N.W.2d 724, 728-29. Thus, if Cooper Farms cannot meet this initial burden of proof, then summary judgment must be granted as a matter of law irrespective of the applicability of exclusions. If the insured meets its initial burden of demonstrating coverage, the insurer carries the burden of establishing the applicability of exclusions. *Forsman*, at ¶11.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE MISSOURI JUDGMENT IS NOT COVERED UNDER THE MIDWEST FAMILY POLICIES ISSUED TO SUPERIOR, WITH THE EXCEPTION OF $296,000.00 FOR DAMAGE TO OTHER PROERTY.

[24] The District Court granted summary judgment to Midwest Family with the exception of $296,000.00 for damage to other property. *(R132).* Although Midwest

Family disagreed with the District Court's ruling allowing recovery of $296,000.00 for damage to other property, this amount was separately set forth in the Stipulation of Settlement as "damage to other property other than grain bins and component parts (includes concrete and other equipment)." *(Stipulation of Settlement, Exhibit A, R19).* Thus, this appears to be the grain bin foundations and the District Court's conclusion allowing coverage in the amount of $296,000.00 for damage to other property makes logical sense.

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT COOPER FARMS AND SUPERIOR HAVE NOT MET THEIR BURDEN OF PROOF THAT THE PERFORMANCE OF FAULTY WORK BY SUPERIOR IS AN "OCCURRENCE".

A. The performance of defective or faulty work by Superior is not an "occurrence".

[25] The Midwest Family Businessowner's Policy provides coverage for bodily injury and property damage only if the bodily injury or property damage is caused by an occurrence. *(Businessowner's Policy, R22:31).* "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *(R22:58:¶13).*

[26] The Amended Petition alleges theories based upon breach of contract, breach of warranty, negligence and negligent misrepresentation. Regardless of the theory of liability, property damage caused by faulty or defective workmanship, standing alone, is not an accidental occurrence. *ACUITY v. Burd & Smith Construction, Inc.*, 2006 ND 187, ¶16, 721 N.W.2d 33. However, "property damage caused by faulty workmanship is a covered occurrence to the extent the faulty workmanship causes bodily injury or property damage ***to property other than the insured's work product***." *Id.* (emphasis added).

[27] In *ACUITY*, the insured was a construction company that had contracted with the apartment building owners to replace the building's roof. *Id. at* ¶*2.* The building owners claimed that the insured had failed to protect the apartment building from rainstorms while replacing the roof, which caused damage to the interior of the building. *Id.* Acuity commenced an action seeking a declaration that the CGL policy did not provide coverage for the damages in the underlying action. *Id. at* ¶*4*. This Court held that the water damage to the interior of the apartment building constituted an occurrence, to the extent of damage to other property, but that the damage for repair or replacement for the defective roof was not covered. *Id. at* ¶*16*. The Court in *ACUITY* further held that a CGL policy is not intended to insure business risks that are the normal, frequent, or predictable consequences of doing business and which businesses can control and manage. *Id. at* ¶*12*.

[28] This Court recently reaffirmed the holding in *ACUITY* as follows:

> [A] CGL policy is not a performance bond and is not intended to protect a contractor's business risk to replace or repair defective work that does not conform to the agreed contractual requirements; rather, the policy is intended to protect the insured from liability because the insured's goods, products, or work caused bodily injury or damage to property other than the insured's work product.

Pavlicek v. American Steel Systems, Inc., 2022 ND 35, ¶23, 970 N.W.2d 171 (quoting *ACUITY*, 2006 ND 187, ¶23, 721 N.W.2d 33).

[29] In this case, it is undisputed that Superior has alleged and was awarded damages only for the grain bins and component parts, and for repairing and replacing the defectively designed bins. It is clear under North Dakota law that damage to the insured's own product or work is not covered as an occurrence under a CGL policy. It is equally clear that "a CGL policy does not cover an insured's economic loss due to repairing or replacing its own

defective work." *Pavlicek*, 2022 ND 35, ¶23, 970 N.W.2d at 177.

[30] The damages alleged in the Cooper Farms lawsuit, that were part of the *Miller-Shugart* Stipulation of Settlement, and part of the Award in Arbitration, were for damages to the grain bins and component parts which is not an "occurrence" covered by Midwest Family's Businessowner's Policy. Therefore, Cooper Farms cannot meet its burden of proving that any damages caused by the grain bins settling, including the component parts, constitute an "occurrence" covered under the policy.

[31] Cooper Farms argues that "the accident or occurrence which resulted in property damage was the excessive settlement of unstable soil." *(Appellant's Opening Brief, 12:¶21).* Even if the bins were subjected to unstable soils, the arbitrator concluded that this was caused by the inadequate design of the project by Tomkinson and misrepresentations made by Tomkinson who was working in the course and scope of his employment with Superior. This constitutes Superior's "work" or "work product", which are not covered as an occurrence under the CGL policy.

B. Cooper Farms' claims of negligent misrepresentations against Superior do not satisfy the "occurrence' requirement.

[32] Cooper Farms argues that Superior's negligent misrepresentations satisfy the "occurrence requirement". This argument should be rejected for several reasons.

[33] First, the issue of a negligent misrepresentation causing an occurrence was never raised by Cooper Farms before the district court on Midwest Family's summary judgment motion. This Court should decline to address it in the context of this appeal. This Court has repeatedly held that issues not raised in the district court may not be raised for the first time on appeal. This Court has stated that "the purpose of an appeal is to review the actions of the trial court, not to grant the appellant an opportunity to develop and expound

upon new strategies or theories." *Paulson v. Paulson*, 2005 ND 72, ¶9, 694 N.W.2d 681 (citations omitted). Accordingly, "issues or contentions not raised … in the district court cannot be raised for the first time on appeal." *Beeter v. Sawyer Disposal LLC*, 2009 ND 153, ¶20, 771 N.W.2d 282 (citation omitted).

[34] Second, even if this Court decides to address the argument that Superior's negligent misrepresentations satisfy the "occurrence" requirement, Cooper Farms reliance upon *Reinsurance Ass'n of Minn. v. Timmer*, 641 N.W.2d 302 (Minn. Ct. App. 2002) is misplaced because the holding is not in accord with Minnesota law. In *Murrer v. Prudential Prop. & Cas. Ins. Co.*, 2003 WL 1875514 (Minn. Ct. App. 2003), the Court held that "the rule that a negligent misrepresentation does not constitute an occurrence for general liability purposes is applicable only when a negligent misrepresentation is the direct cause of the injury suffered." *Murrer*, 2003 WL 1875514, at *2. Similarly, in *Metropolitan Prop. & Cas. Ins. Co. v. Flakne*, 2010 WL 3033729 (D. Minn. 2010), a dispute arose out of the sale of a loft in condominium projects. Gresser brought suit against the developer and a real estate agent, alleging fraud/intentional representation, negligent misrepresentation, and violation of the Minnesota Consumer Fraud Act. The court concluded, much like the court in *Tschimperle v. Aetna Cas. & Surety Co.*, 529 N.W.2d 421 (Minn. Ct. App. 1995), that the allegations of the underlying case supported MetLife's position that there was no accident. Thus, the court in *Flakne* concluded that the misrepresentations were not occurrences and granted summary judgment for MetLife. *Id. *5.*

[35] Finally, Cooper Farms relies upon *American Fam. Mut. Ins. Co. v. American Girl, Inc.*, 2004 WI 2, 673 N.W.2d 65 (Wis. 2004) for the proposition that excessive soil

settlement which damages a structure built on that soil satisfies the "occurrence" requirement. In *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, 753 N.W.2d 448, the Wisconsin Supreme Court distinguished *American Girl*, noting that it did not address misrepresentations. *Id.* ¶43. In *Stuart*, the Wisconsin Supreme Court held that damages stemming from a contractor's misrepresentations were not covered under a CGL policy. *Id.* at ¶45. The Court found that resolution of this issue was governed by *Everson v. Lorenz*, 2005 WI 51, 695 N.W.2d 298. The Court in *Everson* ruled that a volitional misrepresentation-whether viewed under the guise of strict liability or negligence – is not an "accident" for purposes of CGL coverage. *Everson*, ¶¶18-20. Therefore, this Court should reject Cooper Farms' argument that Superior's negligent misrepresentations satisfy the "occurrence" requirement. The opposite conclusion is compelled by *Stuart* and *Everson.*

C. Cooper Farms' negligent supervision claims against Superior do not satisfy the "occurrence" requirement.

[36] Cooper Farms also argues that Superior's negligent supervision of Tomkinson satisfies the "occurrence" requirement. This argument should be rejected for several reasons.

[37] First, Cooper Farms never made this argument or raised this issue to the trial court. Thus, even if the argument had any merit, it has not been preserved for appeal and is not properly before this Court. Second, not only was the issue not raised or argued to the District Court, but there are no allegations of negligent hiring or supervision raised in the First Amended Petition for Damages *(R118).* Moreover, the Award in Arbitration contains no findings of fact nor conclusions of law that there was negligent hiring or supervision on the part of Superior. *(R115).* Therefore, the arguments based upon

negligent supervision or negligent hiring should be summarily rejected by this Court.

D. Cooper Farms' claims against Superior of other negligent acts and omissions do not satisfy the "occurrence" requirement.

[38] Cooper Farms also argues that Superior's other negligent acts and omissions satisfy the "occurrence" requirement. Cooper Farms relies upon *American Fam. Mut. Ins. Co. v. Teamcorp, Inc.*, 659 F.Supp.2d 1115 (D. Colo. 2009), but this was based upon a duty to *defend*, which is broader than the duty to indemnify. Cooper Farms also argues that even if Superior's negligence in providing the concrete foundation designs and in failing to involve an engineer constitutes faulty workmanship, it damaged non-defective property that others constructed. Therefore, Cooper Farms argues that this should be covered the same as the floor drain damage found to be covered in *Pavlicek*, the home in *K&L Homes,* and the apartment building in *ACUITY*. The problem with this argument is that with the possible exception of the foundations, this was not the property or work of others. Rather, the grain bin system and its component parts was the product of Superior, and the faulty design of that product was the work of Superior. The District Court did allow recovery of $296,000.00 damage to other property, which was the grain bin foundations.

III. THE DISTRICT COURT PROPERLY CONCLUDED THAT COOPER FARMS AND SUPERIOR HAVE NOT MET THEIR BURDEN OF PROOF THAT THE PHYSICAL INJURY TO SUPERIOR'S GRAIN BIN STRUCTURES AND ANY LOSS OF USE IS "PROPERTY DAMAGE".

[39] Superior ***conceded*** that the ***only*** damages awarded were physical injury to the bins themselves and loss of use of that damaged property. *(Superior Manufacturing, LLC and Superior, Inc.'s Brief in Opposition to Plaintiff's Motion for Summary Judgment, R45:4:¶9-11).* Similarly, Cooper Farms ***conceded*** that the ***only*** damages awarded were physical

injury to the grain bins themselves and loss of use of that damaged property. *(R112:2:¶5; 24:¶107).* This was also a conclusion of law in the Award in Arbitration as follows:

> 6. This property damage included:
> a) physical injury, in the form of excessive settlement and tilting, to seven separate grain bin structures rendering the Project unsafe and unstable; and
> b) the loss of use of those grain bins.

(R34:14:¶6).

[40] Cooper Farms has not identified ***any*** damage to "other property", and thus, has not met its burden of proof by showing that other property was damaged by collapse of the grain bins.

[41] This Court recently reaffirmed that "a CGL policy does not cover an insured's economic loss due to repairing or replacing its own defective work." *Pavlicek*, 2022 ND 35, ¶23, 970 N.W.2d at 177. The nearly universal rule is that an allegation of defective or faulty workmanship in the insured's products does not implicate "property damage" under a commercial general liability policy. *Amerisure Mut. Ins. Co. v. Microplastics, Inc.*, 622 F.3d 806, 811 (7th Cir. 2010). *See also Travelers Indem. Co. of America v. Moore & Associates, Inc.,* 216 S.W.3d 302, 310 (Tenn. 2007) (a claim "in which the sole damages are for replacement of a defective component or correction of a faulty installation" is not within the policy's definition of property damage). CGL policies "are intended to protect the insured from liability for injury or damage to the persons or property of others; they are not intended to pay the costs associated with repairing or replacing the insured's defective work and products, which are purely economic losses." *West Bend Mut. Ins. Co. v. People of Illinois*, 401 Ill. App.3d 857, 929 N.E.2d 606, 614-15 (2010).

[42] Cooper Farms relies upon *K&L Homes, Inc. v. American Fam. Mut. Ins. Co.*, 2013 ND 57, 829 N.W.2d 724 to support its argument that there was "property damage" because

the concrete foundations and steel bins are "tangible property." *K&L Homes* is distinguishable because the damage to the home from the shifting of subsoil was caused by the work of a subcontractor. Thus, the court's holding that there was "property damage" is consistent with this Court's holding in *Pavlicek* that "a CGL policy does not cover an insured's economic loss due to repairing or replacing its own defective work." *Pavlicek*, 2022 ND 35, at ¶23. The holding in *K&L Homes* was because the subcontractor's work damaged other property, not its own property.

[43] In this case, the only property damage alleged in the underlying case and awarded in the Award in Arbitration was damage to Superior's own work or own product (the grain bins) as well as economic losses for demolishing, rebuilding and repairing the grain bins as well as loss of use of the grain bins. Therefore, Cooper Farms has not met its burden of proof by showing that "other property" was damaged by the collapse of the grain bins.

IV. THE DISTRICT COURT PROPERLY CONCLUDED THAT EVEN IF SUPERIOR AND COOPER FARMS WERE ABLE TO MEET THEIR BURDEN OF PROVING "PROPERTY DAMAGE" COVERED BY AN "OCCURRENCE", COVERAGE IS EXCLUDED BY THE "BUSINESS RISK" EXCLUSIONS.

[44] Even if Cooper Farms can meet its burden of proving that there was an "occurrence" caused by "property damage", coverage is excluded by the "business risk" exclusions, specifically, Damage to Your Product under Exclusion *l*, and Damage to Your Work under Exclusion *m.*

A. The District Court properly concluded that coverage is excluded by the "damage to your product" exclusion.

[45] It is *undisputed* that the grain bin structures that failed were Superior grain bin structures. The arbitrator concluded that Cooper Farms sustained property damage to its grain bins and grain storage facility, specifically, physical injury in the form of excessive

settlement and tilting to seven separate grain bin structures and the loss of use of those grain bins. *(Award in Arbitration, R115:14:¶6).* The arbitrator found that "as part of his job with Superior, Frank Tomkinson, was involved in the design and construction of grain bin projects." *(Id.*:2:*¶11)*. The arbitrator also found that the grain bin foundations began to settle and tilted because they had been inadequately designed to compensate for the unstable soils at the Project site. *(Id.*:9:*¶81; 11:¶18).* The arbitrator also concluded that Superior was negligent "in constructing the Project without first obtaining soil tests at the site." *(Id.:13:¶4(c)).*

[46] These findings make clear that it was Superior's own product, the grain bin structures, that failed, and that the only damage was to Superior's own "product" and the loss of use resulting from damage to that project. This is clearly what is contemplated by the Damage to Your Product exclusion. This exclusion provides that this insurance does not apply to:

> **l. Damage to Your Product**
> "Property damage" to "your product" arising out of it or any part of it.

(Businessowner's Policy, R22:50:¶l; Umbrella Policy, R23:8:¶n).

[47] The policies define "your product" as follows:

> **21.** "Your product":
> **a.** Means:
> **(1)** Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed by:
> **(a)** You;
> **(b)** Others trading under your name; or
> **(c)** A person or organization whose business or assets you have acquired; and
> **(2)** Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.
> **b.** Includes:

> **(1)** Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
>
> **(2)** The providing of or failure to provide warnings or instructions.
>
> **c.** Does not include vending machines or other property rented to or located for the use of others but not sold.

(R22:59:¶21); (R23:21:¶27).

[48] The ***only*** argument that Cooper Farms made to the District Court was that the Damage to Your Product exclusion is not applicable because "there is no evidence or finding that the bin materials or other products were defective. This exclusion would not apply to negligent design of the bin foundations or negligent site lay-out as such would not be considered a 'product'." *(Intervenor's Brief in Opposition to Plaintiff's Motion for Summary Judgment, R112:31:¶125).* Cooper Farms did not provide any caselaw supporting this argument. The exclusion does not require that the "product" be defective, only that there was "property damage" to "your product", which is the grain bin structures. It is undisputed that the grain bin structures that failed were Superior grain bin structures.

[49] Cooper Farms now raises four ***new*** arguments why the "damage to your work" exclusion does not preclude coverage, none of which were raised below. Cooper Farms should be deemed to have waived these arguments for failing to raise them below. Even if they are considered by this Court, they should be rejected.

[50] First, Cooper Farms argues that the exclusion does not apply because the concrete foundations and steel bins constitute real property as a matter of law and the policies' definition of "your product" expressly excepts real property. When the grain bins and structures were sold by Superior to Cooper Farms, they were clearly "goods or products, other than real property" manufactured and sold by Superior. Cooper Farms relies upon

Scottsdale Ins. Co. v. Tri-State Ins. Co., 302 F.Supp.2d 1100, 1104 (D.N.D. 2004) to support the argument that the bins constitute real property. *Scottsdale* and other cases were distinguished in *Colorado Cas. Ins. Co. v. Brock USA LLC*, 2013 WL 4550416*5 (D. Colo. 2013) in which the Court noted that "these cases collectively stand for the proposition that once materials that were once 'your product' had been incorporated into real property, damage *to the resultant real property* does not constitute damage to 'your product.'" Unlike the damages in that case, the alleged defects in the Superior bins and foundations existed because of the defective design of the site and bin foundations and the misrepresentations by Superior. Thus, the damages alleged by Cooper Farms "arose out of" Superior's "product."

[51] Furthermore, in *Robertsons Companies, Inc. v. Kenner*, 311 N.W.2d 194 (N.D. 1981), this Court concluded that a contract for the sale and installation of a grain storage building was predominantly for the sale of goods. Therefore, this Court should reject Cooper Farms' argument that the concrete foundations and steel bins constitute real property.

[52] Second, Cooper Farms argues that the "your product" exclusion does not exclude coverage because the seven concrete foundations are not Superior's product. Cooper Farms cites no evidentiary or legal support for this argument. The arbitrator concluded that Superior designed the grain bin foundations. *(R115:4:¶22; 6:¶42; 13:¶2).* Moreover, the District Court did award $296,000.00 for damage to other property which appears to be the concrete foundations. The Stipulation of Settlement, Exhibit A, itemizes $296,000.00 for "damage to other property other than grain bins and component parts (includes concrete and other equipment)." *(Stipulation of Settlement, R19:Exhibit A).*

[53] Third, Cooper Farms argues that the your product exclusion does not apply because

the damage to the concrete foundations and the steel bins did not "arise out of" the foundations and bins. This unduly restrictive reading of "arising out of it or any part of it" should be rejected based upon this Court's holding in *Grinnell Mut. Reins. Co. v. Lynne*, 2004 ND 166, 686 N.W.2d 118.

[54] In *Lynne*, a homeowner hired a contractor to raise his house off its foundation, remove the old foundation, and construct a new foundation under the house. *Id.*¶*2.* While the house was lifted, it fell and dropped approximately 3 feet into the basement. The homeowner sued the contractor for damages to the house, and the contractor's insurer, Grinnell, denied coverage based upon the business risk exclusions. *Id.*¶*3.*

[55] In concluding that the business risk exclusions precluded coverage for damage to the house, this Court in *Lynne* noted that the purpose of such exclusions "is to prevent policy holders from converting liability insurance into protection from foreseeable business risk" and that "a commercial liability insurance policy is not meant to act as a warranty of the insured's work." *Lynne*, 2004 ND 166, ¶¶16, 18, 686 N.W.2d at 123-124. The insured contractor argued that the damage to the house did not "arise out of" his work. *Id.*¶*26.* In rejecting this argument, this Court noted that the contractor's act of raising the house was sufficient to meet the causal connection test because the damage to the house could not have occurred without the contractor's act of raising the house. *Id.*¶*29.* Much like the contractor in *Lynne*, the damage to the grain bins could not have occurred absent the work performed by Superior in designing the site layout and grain bin foundations, and in representing to Cooper Farms that soil tests were not needed at the project site and that the bin foundations would be over built in its design to prevent excessive settlement. Thus, the property damage to the bins and foundations clearly arose out of Superior's product, which was the grain bins

and the design of the grain bins, foundations and site layout.

[56] Finally, Cooper Farms argues that the your product exclusion does not apply to damages caused by negligent misrepresentations and negligent supervision. Cooper Farms does not cite any legal authority supporting this argument. The damages arose out of not only the negligent design of the site layout and the grain bin foundations, but also "representations," which would be Superior's "product." "Your product" is defined to include "warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your product.'" *(R22:59:¶21).*

[57] The facts of the case mostly closely resemble the facts in *Peterson v. Dakota Molding, Inc.*, 2007 ND 144, 738 N.W.2d 501. In that case, the Plaintiffs Peterson and E-Z UZ Products hired Dakota Molding to manufacture a 2-gallon polyethylene funnel. Although the Plaintiffs and Dakota Molding attempted to fix the manufacturing problem, the Plaintiffs continued receiving complaints, resulting in their inability to sell the funnels and termination of various distribution contracts. The Plaintiffs brought an action against Dakota Molding seeking in part their economic loss as a result of the terminated distribution contracts based upon Dakota Molding's defective manufacturing. The Plaintiffs subsequently amended their Complaint to allege damage to their property, asserting in part they had supplied certain component parts of the funnel which, as a result of their inability to sell the funnels, could not be repaired, restored, or reused. *Id.* ¶5. The insurer for Dakota Molding, National Fire, alleged that there was no coverage under the CGL policy because the defective manufacturing and economic losses were not "occurrences" under the policy.

[58] The District Court concluded that there was no coverage by virtue of the "your

product" and "your work" exclusions. The District Court concluded that Dakota Molding's product and work is the manufacturing of the whole funnel, such that damage to any of the various component parts would not fall outside of the exclusion. *Id.* ¶*23*. This Court agreed, concluding:

> Dakota Molding's product and work involved not only providing the plastic portion of the funnel, but also involved the manufacturing of the completed funnel product, and consequently included any material, parts or equipment furnished in connection with its goods or products or with its work or operations. Based upon the policy's definitions, Dakota Molding's product and work included all of the various parts and assembly of the funnel. As such, we conclude exclusions (k) and (l) apply, precluding coverage by Dakota Molding's CGL polity to the Petersons' alleged damages. To otherwise hold would effectively convert Dakota Molding's CGL policy into a performance bond or guarantee of contractual performance, resulting in coverage for the repair or replacement of Dakota Molding's own faulty workmanship.

Peterson, 2007 ND 144, ¶26, 738 N.W.2d at 508. This Court also made clear that any damage to components would fall under the "your work" and "your product" exclusions. *Id.*¶*23.*

[59] In this case, we have precisely the same situation. The alleged damages are either damage to the "product" or "work," which are economic damages to the insured's own work or product, and not damage to other property.

B. The District Court properly concluded that coverage is excluded by the "damage to your work" exclusion.

[60] It is undisputed that the grain bin structures that failed were Superior grain bin structures. It is also undisputed that the arbitrator found that Tomkinson, as part of his job with Superior, was involved in the design and construction of the grain bin project. The arbitrator specifically found that the grain bin foundations began to settle and tilt because they had been inadequately designed to compensate for the unstable soils at the Project site.

Contrary to Cooper Farms' contentions, this is very clearly the "work" of Superior.

[61] The Midwest Family policies provide that 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 damages arises was performed on your behalf or by a subcontractor.

(Businessowner's Policy, R22:50:¶m; Umbrella Policy, R23:8:¶o). "Your work" is defined to include "warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your work'". *(R22:59:¶22).*

[62] Cooper Farms contends that the Damage to Your Work exclusion is not applicable because even if there was "work" that might apply, it caused damage to the "work" of TBSS and others. The Award of Arbitration does not indicate that any "work" of TBSS or others was damaged. Rather, it is undisputed that the grain bin structures were damaged but there are no facts or evidence that there was damage to any "other property" which is required by a CGL policy. Moreover, this directly contradicts the finding of the arbitrator which found that Tomkinson, as an employee and agent of Superior, acted as a subcontractor to TBS in providing the design of the Project. *(Award in Arbitration, R115:13:¶2).* It was this design of the grain bin structures, along with misrepresentations, that the arbitrator found caused the alleged property damage. *(Id.:13-14).*

[63] Cooper Farms raises additional arguments why the "your work" exclusion does not apply that were not raised below. First, Cooper Farms argues that the exclusion did not "arise out of" the foundations and bins, even if the foundations and bins can be classified as Superior's work. This Court has already addressed the "arising out of" language in the

context of the "your work" exclusion in *Grinnell Mut. Reins. Co. v. Lynne*, 2004 ND 166, ¶¶26-30, 686 N.W.2d 118, 127. Clearly, any damage to the bins arose out of the work performed by Superior, including the design of the site layout and the grain bin foundations.

[64] Second, Cooper Farms argues that "the property damage in this case arose out of the excessive settlement of unstable soil, not the bins and the foundations." *(Appellants' Opening Brief, 30:¶55).* Thus, Cooper Farms argues that the "damage to your work" exclusion is not applicable when the source of property damage is external to the insured's work." *(Id.)*. A similar argument was rejected by the Wisconsin Supreme Court in *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, 753 N.W.2d 448. The holding in *Stuart* is significant because Cooper Farms relies heavily upon a previous Wisconsin Supreme Court decision in *American Fam. Mut. Ins. Co. v. American Girl, Inc.*, 2004 WI 2, 673 N.W.2d 65.

[65] In *Stuart*, homeowners hired WSGI to remodel and build an addition to their home. *Id. ¶1*. WSGI was insured by a CGL policy issued by American Family. A jury found that WSGI made several misrepresentations to induce the homeowners to enter into the contract and that WSGI was negligent in the design of the remodeling project. *Id. ¶10.* The Court held that the "your work" exclusion was applicable because the property damage arose out of WSGI's negligence and misrepresentations, and was included in the "products-completed operations hazard" because the damage did not occur on WSGI's own property, and the work was completed at the time the damages arose. *Id. ¶62. Stuart* is persuasive authority because, much like this case, involves negligent misrepresentations and negligence in the design of the project.

[66] In this case, Cooper Farms did not argue to the District Court that the "subcontractor exception" applies and has not made that argument on appeal. Thus, this argument is

waived. Even if Cooper Farms had made this argument, the subcontractor exception is not applicable in this case for at least two reasons.

[67] First, Cooper Farms does not contend that any subcontractors committed any misrepresentations, nor were they involved with the initial design other than to implement the design by doing the construction. In *Stuart*, the Court held that the subcontractor exception did not apply because the issue was nongermane, as no subcontractors committed the misrepresentations, nor were they involved with the initial design other than to implement the design by doing the construction. *Stuart*, 2008 WI 86, ¶64. Cooper Farms has conceded that there was no negligence on the part of any subcontractors. The Court in *Stuart* held that "absent a showing of independent subcontractor negligence, a subcontractor exception to the 'your work' exclusion is simply not applicable here." *Id. ¶65.*

[68] Second, the Commercial Umbrella Policy issued to Superior contains an endorsement entitled WORK PERFORMED EXCLUSION which eliminates the subcontractor exception to the "your work" exclusion. *(Umbrella Policy, R23:50).* Therefore, the entire damage to the grain bins and their components, whether built by Superior or any subcontractors, would be excluded by the "your work" exclusion.

[69] Third, Cooper Farms argues that the "your work" exclusion does not exclude coverage because it does not apply to damages caused by negligent misrepresentations and negligent supervision. In addition to not being raised below by Cooper Farms, this argument fails by virtue of the holding in *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, 753 N.W.2d 448.

[70] Finally, Cooper Farms argues that the "your work" exclusion is not applicable because Superior's work was not capable of property damage and therefore there can be no

"'property damage' <u>to</u> 'your work' arising out of it or any part of it." Cooper Farms does not cite any legal authority supporting this argument, but it was rejected in *Stuart*.

[71] Therefore, the "your work" exclusion, in accordance with North Dakota case law, clearly excludes coverage for Superior's work, which was the design and layout of the project, including the design of the grain bin foundations, and the misrepresentations made by Superior with respect to the project foundation and the design of the project foundation.

C. The concurrent cause doctrine does not effect the operation of the "business risk" exclusions.

[72] Cooper Farms argues that the District Court erred by holding that the total amount of the Missouri judgment is not covered because there is coverage under the concurrent cause doctrine even if part of Superior's liability is not covered. This argument should be summarily rejected by this Court for several reasons.

[73] First, like many of Cooper Farms arguments, this was not raised below to the District Court and has been waived.

[74] Second, the concurrent cause doctrine was raised in the analogous case of *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, 753 N.W.2d 448. The Court assumed that coverage could exist under the rule of concurrent risks, *Id.* ¶*51*, but still concluded that the "damage to your work" exclusion operated to preclude coverage. *Id.* ¶¶*66, 67*.

[75] Third, Cooper Farms, by its newfound concurrent cause argument is asking this Court to read the "damage to your work" exclusion out of the liability policy, which this Court should not do. That exclusion explicitly excludes property damage to Superior's work "arising out of it or any part of it." Arising out of it means causally connected with. *Lynne*, 2004 ND 166, ¶29; *Meadowbrook, Inc. v. Tower Ins. Co., Inc.*, 559 N.W.2d 411, 419 (Minn. 1997). Cooper Farms' damages are alleged to be due to the faulty design of the site

and the foundations, as well as misrepresentations regarding soil testing, both of which are Superior's "work." In *Sparta Ins. Co. v. Colareta*, 990 F.Supp.2d 1357 (S.D. Fla. 2014), the court noted that the words "arising out of" in a CGL policy requires only some level of causation greater than coincidence. *Id. at 1368.* The court also rejected a similar argument regarding the concurrent cause doctrine, but noted that doctrine only applies when the multiple causes of injury are not related and dependent, and involve a separate and distinct risk. *Id. at 1366.* That is clearly not the situation in this case where all of the alleged concurrent causes are related to the same alleged negligent acts of Superior in designing the site and the foundations for the grain bins, as well as misrepresentations regarding soil tests. Therefore, the concurrent cause doctrine clearly does not affect application of the "your work" exclusion.

D. The professional services exclusion operates to deny coverage.

[76] Cooper Farms argues that no other exclusions are applicable. Midwest Family did argue that the professional services exclusion operated to deny coverage, but the District Court did not reach this issue. *(Reply Brief in Support of Motion for Summary Judgment, R64:¶33; Reply Brief in Support of Motion for Summary Judgment and in Response to Intervenor's Brief in Opposition to Motion for Summary Judgment, R123:¶38; Transcript of Summary Judgment Hearing, R146).*

[77] Cooper Farms argued that the failure of Tomkinson to obtain a soil analysis and his design of the site layout of the grain bin foundation is what caused the damage to the grain bin structures. Ironically, Superior relies upon *American Fam. Mut. Ins. Co. v. American Girl, Inc.*, 2004 WI 2, 673 N.W.2d 65 as support for the position that there was an "occurrence". Even if this Court considers *American Girl*, the Wisconsin Court held that

the professional services exclusion applied because "it is undisputed that [subcontractor's] inadequate soil engineering advise was a substantial factor in causing the excessive soil settlement and resulting property damage." *Id.* at ¶79 & 80.

[78] Exclusion *j* of the Midwest Family policy provides:

> **j. Professional Services**
> "Bodily injury", "property damage" or "personal and advertising injury" caused by the rendering or failure to render any professional service.

(R22:49:¶j).

[79] Therefore, since this was a design issue and/or that the liability of Superior was based upon the failure to obtain a soil analysis, it is excluded by the Professional Services exclusion.

IV. THE DISTRICT COURT PROPERLY CONCLUDED THAT THERE IS NOT SEPARATE COVERAGE UNDER THE POLICIES FOR "PRODUCTS-COMPLETED OPERATIONS".

[80] Cooper Farms attempts to muddy the waters by raising the "products-completed operations hazard" (PCOH). PCOH is a red herring and does not create any additional coverage. Cooper Farms relies upon *Pavlicek v. American Steel Systems, Inc.*, 2022 ND 35, 970 N.W.2d 171, but misreads this Court's holding in *Pavlicek* and misconstrues the meaning of PCOH.

[81] In *Pavlicek*, this Court noted that the CGL policy included an ***endorsement*** that provided aggregate coverage for damage resulting from an accident or occurrence, including during products-completed operations. *Pavlicek*, 2022 ND 35, ¶15. Therefore, this Court concluded that although the CGL policy excluded from coverage "products-completed operations hazard" within the damage to your work exclusion, there was a conflict between that provision and the endorsement, and the provisions of the endorsement prevail. *Id.* The

Midwest Family policies do ***not*** contain an endorsement that provide separate aggregate coverage for damage resulting from an accident or occurrence, including during products-completed operations. Cooper Farms has not referenced any such endorsement in the policy.

[82] PCOH coverage was discussed in detail in *King's Cove Marina, LLC v. Lambert Commercial Constr., LLC*, 958 N.W.2d 310 (Minn. 2021). King's Cove Marina brought an action against a construction contractor, Lambert, for breach of contract and negligence alleging that the concrete floors on the first and second levels of the marina's building were not constructed in accordance with industry standards or with project plans and specifications, resulting in excessive movement and cracking of the new concrete floors. *King's Cove* also alleged defects with Lambert's metal building products and metal roof and claimed that the in-floor heating systems were not installed properly, causing the concrete floors to move, crack, and expand. Lambert tendered the defense of the lawsuit to its insurer, United Fire, which defended Lambert under a reservation of rights.

[83] The Minnesota Supreme Court held that the your work exclusion explicitly eliminates coverage for property damage to an insured's work arising out of the insured's work "and *included in* the 'products-completed operations hazard.'" *King's Cove Marina, LLC v. Lambert Commercial Constr. LLC*, 958 N.W.2d 310, 318 (Minn. 2021). Therefore, the Court concluded that the plain language of the "your work" exclusion barred coverage for the claimed property damage to Lambert's own work, notwithstanding the products-completed operation hazard. *Id.*

[84] More importantly, the Court in *King's Cove* also rejected the argument "that the products-completed operations hazard is a distinct category of coverage." *Id. at 319.* The

Court noted that "the declaration page merely shows that the products-completed operations hazard has 'a different applicable *limit*' not that it is 'a separate form of coverage.'" *Id.* In other words, "the fact that a policy's declarations page sets forth a special policy limit for products-completed operations does not mean that the coverage for products-completed operations exists independently of the exclusions and conditions set forth in the policy." *Id.* at 319-320.

[85] Similarly, in *Pursell Construction Co., Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67 (Iowa 1999) the Court held that "the PCOH provision is simply a category of losses that are covered even though those losses might otherwise be excluded. Viewed in this light, the PCOH provision does not create a separate category of coverage. Rather, any loss falling within the PCOH provision must still meet all the requirements of the policy, like any other loss, except the exclusion from which the losses are excepted." *Pursell*, 596 at 69.

[86] Cooper Farms argues that the declarations page of the Businessowner's policy describes "Products and Completed Operations Liability" as an "Optional Liability Coverage" that Superior purchased for an additional premium of $16,920.00. Cooper Farms argues that this demonstrates that PCOH is an additional coverage which is different from and more expansive than the ordinary liability coverage provided by the policy. Similar arguments have been almost uniformly rejected by the other courts. *Sparta Ins. Co. v. Colareta*, 990 F.Supp.2d 1357, 1364-1366 (S.D. Fla. 2014); *Burdette v. Bell*, 2019 Ohio 5035, 137 N.E.3d 1236, 1241-1242 (Ohio Ct. App. 2019).

[87] In *Burdette*, the court noted that the PCOH was simply listed in the definitions provision and was not designated as a distinct type of coverage. *Id. at 1241.* The court also

noted that there is no separate coverage for PCOH because there is no independent provision in the policy defining and providing coverage under PCOH. *Id.* That is precisely the situation in this case where the policy defines PCOH but PCOH is not designated as a distinct type of coverage in the Midwest Family policy. The court in *Burdette* concluded that "the fact that the declarations page and the limits of insurance provision both designate a separate limit of liability for PCOH does not lead to the conclusion that PCOH provides a separate coverage. A different limit of liability for PCOH is just that, a different applicable limit, not a separate form of coverage." *Id. at 1242.*

[88] The fact that a separate premium has been charged is because Superior is a manufacturer, and thus, an endorsement to the policy limits coverage to the designated premises or project shown in the Schedule. *(Businessowner's Policy, R22:82).* The policy then provides coverage for bodily injury or property damage occurring away from the described premises if it is a completed operation for an additional premium, but subject to all of the exclusions in the policy. Thus, it is not a separate coverage but a sub-part of the entire CGL policy. *Hawkeye-Security Ins. Co. v. Davis,* 6 S.W.3d 419, 425 (Mo. Ct. App. 1999).

[89] The Minnesota Supreme Court in *King's Cove* also held that there was no ambiguity between the "Damage to Your Work" exclusion and the products-completed operations hazard. *King's Cove,* 958 N.W.2d at 319. *See also Davis,* 6 S.W.3d at 426-427. The Court stated that "a federal district court recently observed that courts 'generally reach the same conclusion---that there is no ambiguity' between [the "Your Work"] exclusion and the products-completed operations hazard and that insureds 'are not entitled to coverage for their own faulty work.'" *King's Cove,* 958 N.W.2d at 319 (citations omitted). Thus, this

Court should reject Cooper Farms' argument that there is an ambiguity between the "your work" exclusion and the PCOH.

[90] The situation in this case most closely resembles the situation in *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, 753 N.W.2d 448. The Court in *Stuart* held that the "your work" exclusion applied, and was included in the "products-completed operations hazard" because: (1) the property damage arose out of the contractor's negligence and misrepresentations; (2) the damages did not occur on the contractor's own property; and (3) the work was completed at the time the damages arose. *Id.* ¶*62*. That is precisely the situation in this case.

[91] Therefore, this Court should reject Cooper Farms' argument that the PCOH provisions provide coverage despite the policies' "damage to your work" exclusion.

CONCLUSION

[92] For the reasons stated above, the District Court's Orders and Judgment granting summary judgment to Midwest Family should be affirmed in all respects.

Dated this 21st day of March, 2023.

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CERTIFICATE OF COMPLIANCE

[93] The undersigned, as attorney for the Appellee, Midwest Family Mutual Insurance Company, in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellate Procedure, that the Brief of Appellee was prepared with proportional typeface and the total number of pages in the above Brief totals 38.

Dated this 21st day of March, 2023.

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CERTIFICATE OF SERVICE

[94] The undersigned certifies that the foregoing **Brief of Appellee** was served on the following at the last known electronic mail address on the 21st day of March, 2023.

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