IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Selective Way Insurance Company, a New Jersey corporation, Plaintiff, vs. The Glosson Group, LLC, a Georgia limited liability corporation; CSC General Contractors, Inc., a Georgia corporation; and CSC General Contractors, ND LLP, a North Dakota limited liability partnership, Defendants, and CSC General Contractors, Inc., a Georgia Corporation; CSC General Contractors, ND LLP, a North Dakota limited liability partnership, Counter Claimant, vs. Selective Way Insurance Company, a New Jersey corporation, Counter Defendant.	)	**MEMORANDUM AND ORDER** Case No. 1:17-cv-230

Before the Court are cross motions for summary judgment and partial summary judgment, filed by Plaintiff and Counter Defendant Selective Way Insurance Company ("Selective") and Defendant and Counter Claimant CSC General Contractors, Inc. ("CSC"), respectively. Doc. Nos. 77, 78, and 79. Selective filed its summary judgment motions against CSC and Defendant The Glosson Group, LLC ("Glosson") on August 22, 2019. Doc. Nos. 77 and 78. CSC cross moved for partial summary judgment the same day (Doc. No. 79) and filed a response to Selective's

motions on September 12, 2019. Doc. No. 80. Selective filed a response to CSC's motion on September 12, 2019. Doc. No. 81. Selective and CSC filed their respective reply briefs on September 26, 2019. Doc. Nos. 82 and 83.

The dispute at the heart of these motions concerns insurance coverage under a commercial general liability insurance policy issued by Selective to Glosson. Selective seeks declaratory relief and asks for a declaration that CSC is not an insured or additional insured under the policy and that coverage is precluded for CSC under the policy. Selective further seeks summary judgment on CSC's Amended Counterclaim (Doc. No. 66) for breach of the duty of fairness and good faith (Count II). CSC asks for essentially the reverse – a declaration that it is an additional insured, no exclusions are applicable, and that CSC's counterclaim for bad faith and Selective's breach of the duty to defend should be allowed to proceed. CSC also asserts that Selective should be estopped from raising certain defenses it claims were not initially raised as grounds for denying coverage. For the reasons below, (1) Selective's motion for summary judgment against CSC is granted, (2) Selective's motion for summary judgment against Glosson is found as moot,[1] and (3) CSC's motion for partial summary judgment is denied.

[1] Glosson was previously found in default in this action for failing to answer Selective's complaint. See Doc. Nos. 31 and 32. The Court then vacated the default (Doc. No. 58) in order to avoid the risk of inconsistent judgments between Glosson and CSC. The Court ultimately deferred entry of default judgment against Glosson until the merits of the case were resolved. Because the Court grants Selective's motion for summary judgment as to CSC, the Court finds Selective's motion for summary judgment against Glosson moot and will reinstate the default judgment against Glosson.

I. FACTUAL BACKGROUND

A. The Project and the Glosson Subcontract.

In late 2012, CSC contracted with Acme Electric Tools, Inc. ("Acme") to build a retail store in Williston, North Dakota (the "Project"). Doc. No. 1, ¶ 7. The Project included, among other things, construction of a concrete parking lot. Doc. No. 77-4.

In the spring of 2013, CSC, as the general contractor for the Project, began subcontracting with various other subcontractors to complete the Project. Doc. Nos. 77-3 and 77-8. CSC subcontracted with Strata Corporation ("Strata") to supply 3,000-psi concrete for the parking lot. Id. On or about April 9, 2013, CSC also subcontracted to Glosson the Project's site concrete work, which included the construction of the concrete parking lot (the "Glosson Subcontract"). Doc. No. 66-1. The Glosson Subcontract stated, in part, that Glosson would perform construction work for the Project pursuant to an attached scope of work. Id. Importantly, the Glosson Subcontract also contained the following insurance and indemnification provisions:

> 4. INSURANCE REQUIREMENTS & INDEMNIFICATION
>
> ***
>
> B). Commercial General Liability Insurance[.] Contractor and Owner, as well as its directors, officers, and employees shall be named as an additional insured on such Commercial General Liability policy regarding liability arising out of operations performed under this Agreement.
>
> ***
>
> 17. Indemnification. Contractor [Glosson] shall and hereby does indemnify and hold harmless GC [CSC] . . . from and against any and all losses, damages, injuries, causes of action, claims, demands and expenses, including reasonable legal fees and expenses sustained by any person or property in consequence of any defects or deficiencies in the services[.]
>
> ***

> 19. Indemnification as to Liabilities. Sub [Glosson] expressly agrees to protect, indemnify, and save GC [CSC] harmless from any and all claims, suits, damages, and actions of any kind or description, resulting from an act or omission of the Sub [Glosson] or any of his subcontractors . . . without regard to the party or parties who may suffer, receive or sustain any such damages, and regardless of whether such damages are to property or persons[.]

Id. Although section 4(B) of the Glosson Subcontract states CSC will be added as an additional insured to Glosson's CGL policy, CSC was not, in fact, ever added by Glosson as an additional insured. Doc. No. 77-13.

B. The Selective Insurance Policy.

Selective issued Glosson a General Commercial Policy (Policy Number S 205979901) (the "Policy"), which included, among other things, Commercial General Liability ("CGL") coverage. Doc. No. 66-2. The Policy had an effective term of February 26, 2014 to February 26, 2015. Id. The lengthy Policy contains the following provisions on blanket additional insureds and CGL coverage:

> **Blanket Additional Insureds – As Required By Contract**
>
> Subject to the **Primary and Non-Contributory** provision set forth in this endorsement, **SECTION II – WHO IS AN INSURED** is amended to include as an additional insured any person or organization whom you have agreed in a written contract, written agreement or written permit that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury" or "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> **1.** Your ongoing operations, "your product", or premises owned or used by you[.]
>
> ***
>
> **COMMERCIAL GENERAL LIABILITY COVERAGE FORM**
>
> **SECTION I – COVERAGES**
>
> **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

***

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence[.]"

Id. The Policy also contains several important exclusions and definitions:

2. Exclusions

This insurance does not apply to:

a. Expected to Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured.

***

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

. . .

(2) Assumed in a contract or agreement that is an "insured contract," provided the "bodily injury or "property damage" occurs subsequent to the execution of the contract or agreement.

***

j. Damage To Property

"Property damage to"

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

. . .

Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard."

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. 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."

SECTION V – DEFINITIONS

***

9. "Insured contract" means:

f. That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

***

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

***

16. "Products-completed operations hazard":

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

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed[.]

***

21. "Your Product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by: **(A)** You[.]

***

22. "Your work":

a. Means:

(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.

C. The Project's Completion and Subsequent Concrete Deterioration.

The Project, including the concrete parking lot, was eventually completed. However, in the spring of 2014, Acme noticed that the parking lot showed signs of scaling, cracking, and pop-outs throughout the surface of the concrete. Doc. No. 77-3. After testing was performed by Strata and another independent company, American Engineering Testing, Inc. ("AET"), it was determined that the concrete defects were a result of the use and selection of unsuitable concrete (namely, the 3,000-psi concrete) for the concrete parking lot. Id.

D. The Acme Litigation and This Subsequent Litigation.

What followed was a lawsuit by Acme against CSC.[2] See Doc No. 1., Case No. 4:15-cv-152 (D.N.D. 2015). On October 29, 2015, Acme sued CSC in connection with the construction of the Project and specifically the concrete parking lot (the "Acme Litigation"). Id. The complaint

[2] The complaint was filed against CSC in the United States District Court for the District of North Dakota in Acme Electric Motor, Inc. v. CSC General Contractors, Inc., Case No. 4:15-cv-152.

in the Acme Litigation alleged that CSC breached its contract, breached implied warranties, and acted negligently in constructing the concrete parking lot for the Project. Id. More precisely, Acme alleged CSC "deliberately disregarded the construction industry's standard specifications necessary for concrete to withstand North Dakota's climate, and the corresponding recommendations of its own concrete materials supplier [Strata]." Id. The allegations largely centered on CSC's selection and use of 3,000-psi concrete, rather than 4,000-psi concrete, though at times the complaint also alleges that CSC, or its subcontractor, added excess water to the concrete mix at the time of placement. Id. Glosson was not a named party in the Acme Litigation. Id.

CSC, through its insurance agent, Founders Insurance Group, then tendered the Acme Litigation to Selective on December 4, 2015. Doc. No. 77-11. CSC included with the tender the Acme Litigation complaint, the Glosson Subcontract, and Glosson's certificate of insurance from Selective. Doc. No. 77-14. The same day, Selective opened a claim and began its internal review. Id. On December 9, 2015, Selective assigned a claims adjuster, Andrew Russell, to investigate the claim. Id. Selective reviewed the Policy, the Acme Litigation complaint, the Glosson Subcontract, the testing results of AET, and the concrete specifications related to the Project and the parking lot. Id. Ultimately, on December 11, 2015, Selective issued a denial of coverage letter to CSC (the "Declination Letter") stating CSC was not an additional insured under the Policy and that Glosson had no contractual duty to defend or indemnify CSC. Doc. No. 77-16. On December 30, 2015, CSC sent a demand letter to Selective to reconsider the Declination Letter, but Selective declined to do so. Doc. No. 79-12.

Based on the allegations in the Acme Litigation complaint, CSC filed a third-party complaint against Glosson on or about December 15, 2015. Doc. No. 79-15. In the third-party

complaint, CSC alleged that if CSC were found liable to Acme for any damages as a result of the Project, then CSC would be entitled to recover from Glosson all sums adjudged against it due to the indemnification clauses in the Glosson Subcontract. Id. The Glosson Subcontract required arbitration, so the third-party complaint was dismissed in favor of arbitration. Doc. No. 66-1. Selective assumed Glosson's defense of the third-party complaint and subsequent arbitration. Doc. No. 79-14.

On October 16, 2017, the arbitrator determined that, pursuant to the terms of the Glosson Subcontract, Glosson owed CSC indemnification in connection with the pending Acme Litigation (the "Arbitration Award").[3] Doc. No. 66-5.

Nine days after the issuance of the Arbitration Award, Selective commenced this action, seeking declaratory relief that the Policy does not provide coverage to CSC and that Selective has no duty to defend or indemnify CSC. Doc. No. 1. CSC filed its answer and counterclaim against Selective on December 6, 2017, alleging the Policy does, in fact, provide coverage to CSC as an additional insured and that, as a result, Selective breached its duty to defend to CSC. Doc. No. 20. CSC later amended its counterclaim on January 1, 2019. Doc. No. 66. Thus, the Court must resolve (1) whether CSC is an additional insured under the Policy; (2) if so, whether the Policy provides insurance coverage to CSC for the claims and losses incurred in the Acme Litigation; and, (3) whether Selective acted in bad faith and breached its duty to defend CSC.

[3] Notably, the arbitration did not involve a dispute concerning coverage under the Policy; rather, the arbitration focused on whether Glosson agreed to indemnify CSC for certain losses pursuant to the terms of the Glosson Subcontract, which is a separate, contractual agreement between the parties.

II. DISCUSSION

Summary judgment is required "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "An issue is 'genuine' if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party." Schilf v. Eli Lilly & Co., 687 F.3d 947, 948 (8th Cir. 2012) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "A fact is material if it 'might affect the outcome of the suit.'" Dick v. Dickinson State Univ., 826 F.3d 1054, 1061 (8th Cir. 2016) (quoting Anderson, 477 U.S. at 248). Courts must afford "the nonmoving party the benefit of all reasonable inferences which may be drawn without resorting to speculation." TCF Nat'l Bank v. Mkt. Intelligence, Inc., 812 F.3d 701, 707 (8th Cir. 2016) (quoting Johnson v. Securitas Sec. Servs. USA, Inc., 769 F.3d 605, 611 (8th Cir. 2014)). "At summary judgment, the court's function is not to weigh the evidence and determine the truth of the matter itself, but to determine whether there is a genuine issue for trial." Nunn v. Noodles & Co., 674 F.3d 910, 914 (8th Cir. 2012) (citing Anderson, 477 U.S. at 249).

The primary issue before the Court on these motions for summary judgment and partial summary judgment is principally a question of insurance policy interpretation; the Court must determine CSC's interest, if any, under the Policy; then determine what coverage, if any, CSC is entitled to under the Policy and whether any exclusions apply. The parties agree that North Dakota law governs this question. Accordingly, the Court will apply North Dakota Supreme Court precedent and attempt to predict how that court would decide any state-law questions it has yet to resolve. See Stuart C. Irby Co., Inc. v. Tipton, 796 F.3d 918, 922 (8th Cir. 2015).

"Insurance policy interpretation is a question of law." Forsman v. Blues, Brews & Bar-B-Ques, Inc., 2017 ND 266, ¶ 10, 903 N.W.2d 524 (citing K & L Homes, Inc. v. Am. Family Mut.

Ins. Co., 2013 ND 57, ¶ 8, 829 N.W.2d 724). The North Dakota Supreme Court has consistently explained its approach to interpreting insurance policies this way:

> We look first to the language of the insurance contract, and if the policy language is clear on its face, there is no room for construction. If coverage hinges on an undefined term, we apply the plain, ordinary meaning of the term in interpreting the contract. While we regard insurance policies as adhesion contracts and resolve ambiguities in favor of the insured, we will not rewrite a contract to impose liability on an insurer if the policy 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.

Borsheim Builders Supply, Inc. v. Manger Ins., Inc., 2018 ND 218, ¶ 8, 917 N.W.2d 504 (citation omitted).

A. Additional Insured.

The first issue the Court must resolve is whether CSC is an additional insured under the terms of the Policy. Selective argues that CSC is not an additional insured under the Policy, as the Glosson Subcontract required Glosson to actually add CSC as an additional insured and Glosson never did so. CSC, on the other hand, contends that the plain language of the Policy, and the plain language of the Glosson Subcontract, makes it an additional insured under the Policy, regardless of whether Glosson actually added CSC an additional insured. The Court agrees with CSC.

The plain language of the Policy expands additional insured coverage for certain liabilities to include those with whom Glosson contractually agreed to add as an additional insured. Specifically, the Policy contains the following endorsement, which states:

> **Blanket Additional Insureds – As Required By Contract**
>
> Subject to the **Primary and Non-Contributory** provision set forth in this endorsement, **SECTION II – WHO IS AN INSURED** is amended to include as an additional insured any person or organization whom you have agreed in a written contract, written agreement or written permit that such person or organization be added as an additional insured on your policy. Such person or organization is an

> additional insured only with respect to liability for "bodily injury" or "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> **1.** Your ongoing operations, "your product", or premises owned or used by you[.]

Doc. No. 66-2 (emphasis added). And Section 4(B) of the Glosson Subcontract expressly states:

> Contractor [CSC] and Owner, as well as its directors, officers, and employees shall be named as an additional insured on such Commercial General Liability policy regarding liability arising out of operations performed under this Agreement.

Doc. No. 66-1 (emphasis added).

Reading the Policy language and the Glosson Subcontract together, Glosson expressly agreed to name CSC as an additional insured to its Policy, and the Policy includes as an additional insured organizations, like CSC, "whom you [Glosson] have agreed in a written contract . . . be added as an additional insured on your policy." Doc. No. 66-2. Selective argues that CSC is not an additional insured because Glosson never took the step to add CSC as an additional insured to the Policy. However, the plain language of the Policy does not require such action. The Policy plainly extends additional insured status to those organizations, including CSC, with whom Glosson agreed in a written contract be added as an additional insured. Put simply, Glosson agreed in a written contract with CSC to add CSC as an additional insured. That is all the Policy requires for CSC to be an additional insured.

Selective also attempts to limit the language of the Blanket Additional Insureds provision to "ongoing operations" only. Again, this is inconsistent with the plain language of the Policy, which provides coverage to certain additional insureds for certain injuries caused by ongoing operations, or "your product," or "premises owned or used by you[.]" Doc. No. 66-2. The additional insured coverage is not exclusively limited to "ongoing operations." Consistent with the Policy language, CSC is an additional insured under the Policy.

B. Coverage and Exclusions.

Having concluded CSC qualifies as an additional insured, the next question is what coverage, if any, is available to CSC, and whether any applicable coverage is excluded by certain exclusions under the Policy.

Selective initially argues that there was no "occurrence," as that term is defined by the Policy, and as such, the Policy's coverage does not apply to the claimed losses. An "occurrence" is defined as an "accident[.]" But the term "accident" is not defined in the Policy. The North Dakota Supreme Court has defined "accident" for purposes of a CGL policy as "happening by chance, unexpectedly taking place, not according to the usual course of things." K&L Homes, Inc. v. American Family Ins. Co., 2013 ND 57, ¶ 11, 829 N.W.2d 724 (citing Wall v. Pennsylvania Life Ins., 274 N.W.2d 208, 216 (N.D. 1979)).

Selective's position is that CSC knew that its purchase and use of 3,000-psi concrete from Strata was unsuitable for the Project and harsh North Dakota winters. Selective contends CSC purchased 3,000-psi concrete for the Project because it was cheaper, even though Strata questioned whether 3,000-psi was appropriate for the Project. On the other hand, CSC contends that its use of 3,000-psi concrete was entirely suitable for the Project, as it had used the same 3,000-psi concrete for other North Dakota construction projects. Much of the parties briefing focuses on whether CSC's actions were intentional and/or expected for the purpose of determining if there was an accidental occurrence to trigger coverage.

However, although the parties argue extensively over whether CSC knew the 3,000-psi concrete was unsuitable for the project, they both fail to apply the fundamental legal principle that several courts, including the North Dakota Supreme Court, have recognized – that is, "defective workmanship, standing alone, which results in damages only to the work product itself [(i.e., the

concrete parking lot)] is not an accidental occurrence under a CGL policy." Acuity v. Burd & Smith Const., Inc., 2006 ND 187, ¶¶ 15-16, 721 N.W.2d 33 (collecting cases) (internal citations omitted). Here, all that is alleged is defective workmanship. There are no allegations that CSC's or Glosson's work on the Project caused any damages to any other person or any other property beyond the parking lot itself. Thus, consistent with North Dakota law, where the only allegations of damages are to the work product itself, there is no accidental "occurrence" under a CGL policy. Such is the case here. And accordingly, there is no "occurrence" to trigger Policy coverage for CSC.

However, even assuming *arguendo* there was an "occurrence" as defined under the Policy, several exclusions bar coverage. The first exclusion that bars coverage is Exclusion 2(b) (the "Contractual Liability Exclusion"):

> **2. Exclusions**
>
> This insurance does not apply to:
>
> **b. Contractual Liability**
>
> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> . . .
>
> **(2)** Assumed in a contract or agreement that is an "insured contract," provided the "bodily injury or "property damage" occurs subsequent to the execution of the contract or agreement.

This exclusion necessarily implicates the Policy's definition of an "insured contract":

> **9.** "Insured contract" means:
>
> **f.** That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or

> organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Reading the two provisions together, the Policy generally excludes coverage for bodily injury or property damage which Glosson is obligated to pay damages for under the terms of a contract or agreement. However, the Contractual Liability Exclusion does not exclude coverage if the contract or agreement is an "insured contract."

CSC's position is that the Glosson Subcontract is an "insured contract" because Glosson agreed to assume CSC's tort liability under the indemnification clauses. Selective counters by citing the definition of the exclusion – specifically, that an insured contract must assume the "tort liability of another party." Here, according to Selective, Glosson only agreed to indemnify CSC for Glosson's own tort liability, not the tort liability of another party.

The Glosson Subcontract with CSC contains two indemnification provisions:

> 17. Indemnification. Contractor [Glosson] shall and hereby does indemnify and hold harmless GC [CSC] . . . from and against any and all losses, damages, injuries, causes of action, claims, demands and expenses, including reasonable legal fees and expenses sustained by any person or property in consequence of any defects or deficiencies in the services[.]
>
> ***
>
> 19. Indemnification as to Liabilities. Sub [Glosson] expressly agrees to protect, indemnify, and save GC [CSC] harmless from any and all claims, suits, damages, and actions of any kind or description, resulting from an act or omission of the Sub [Glosson] or any of his subcontractors . . . without regard to the party or parties who may suffer, receive or sustain any such damages, and regardless of whether such damages are to property or persons[.]

Doc. No. 66-1 (emphasis added). Both indemnification provisions essentially provide that Glosson must indemnify CSC for any claims, damages, losses, and/or actions of any kind that result from any act, defect, or omission by Glosson or any of its subcontractors. This is consistent with the Arbitration Award, which concluded that Glosson owed CSC indemnification for the defects in

the Project's concrete parking lot which were a result of Glosson's own acts, defects, or omissions. However, for the purposes of determining Policy coverage under this exclusion, Glosson did not "assume the tort liability of another party"; rather, Glosson only assumed its own tort liability and agreed to indemnify CSC for any damages resulting from Glosson's own tort liability, including negligence or deficiencies in its services and/or products.

As a result, the Court finds that the Glosson Subcontract is not an "insured contract" as defined by the Policy,[4] and thus, coverage is excluded under the Contractual Liability Exclusion.[5]

Even if the Contractual Liability Exclusion did not apply, there are three work product related exclusions relevant to the Court's analysis – Exclusion 2(j)(6) (the "Damage to Property Exclusion"), Exclusion 2(k) (the "Damage to Your Product Exclusion"), and Exclusion 2(l) (the "Damage to Your Work" Exclusion"):

> **j. Damage To Property**
>
> "Property damage to"
>
> > **(6)** That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.
>
> . . .

[4] CSC also contends that Selective admitted the Glosson Subcontract was an "insured contract," particularly during Selective's investigation of the claim. Indeed, Selective's investigative notes indicate that "it appears the contract in question would apply as an 'insured contract.'" These notes, however, are not an admission or concession that the Glosson Subcontract is, as a matter of law, an "insured contract."

[5] The Court also notes that, contrary to CSC's position, this conclusion is not inconsistent with the Arbitration Award. The Arbitration Award stands for the unremarkable conclusion that Glosson was responsible to indemnify CSC for any actions brought against CSC for work performed by Glosson. That finding is entirely consistent with the language of the Glosson Subcontract and the Court's analysis on whether the Glosson Subcontract is an "insured contract." Glosson agreed to indemnify CSC for claims and losses that were a result of Glosson's own acts, defects, or omissions, which is what the Arbitration Award confirmed. The question before this Court, however, is whether Glosson's agreement to indemnify CSC encompassed Glosson assuming the tort liability of "another party," which it does not.

> Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard."
>
> **k. Damage To Your Product**
>
> "Property damage" to "your product" arising out of it or any part of it.
>
> **l. 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."

Doc. No. 66-2.

These exclusions, exclusions from coverage for property damage, "are generally referred to as 'business risk exclusions.'" Grinnell Mut. Reinsurance Co. v. Lynne, 2004 ND 166, ¶ 18, 686 N.W.2d 118. In Grinnell, the North Dakota Supreme Court explained:

> The [business risk exclusions] are designed to exclude coverage for defective workmanship by the insured causing damage to the project itself. The principle behind such exclusions is based on the distinction made between two kinds of risk incurred by a contractor[.] The first is the business risk borne by the contractor to replace or repair defective work to make the building project conform to the agreed contractual requirements. This type of risk is not covered by the CGL policy, and the "business risk" exclusions in the policy make this clear. The second is the risk that the defective or faulty workmanship will cause injury to people or damage to other property. Because of the potentially limitless liability associated with this risk, it is the type for which CGL coverage is contemplated. While it may be true that the same neglectful craftsmanship can be the cause of both a business expense of repair and a loss represented by damage to persons and property, the two consequences are vastly different in relation to sharing the cost of such risks as a matter of insurance underwriting[.] The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage [applicable under the CGL policy] is for tort liability for ... [injury to persons and damage to other property] and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained.

Id. (emphasis added).

With that background in mind, the Court turns to each of the business risk exclusions. First, the Damage to Property Exclusion generally excludes from coverage property damage to that particular part of any property that must be restored, repaired, or replaced because of essentially faulty workmanship. At first blush, this exclusion appears to plainly exclude coverage for CSC. However, the exclusion does not apply to property damage included in the "products-completed operations hazard," which is defined as:

> **16.** "Products-completed operations hazard":
>
> > **a.** Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
> >
> > > **(1)** Products that are still in your physical possession; or
> > >
> > > **(2)** Work that has not yet been completed[.]

Doc. No. 66-2.

In Fisher v. American Family Mutual Insurance Company, 1998 ND 109, 579 N.W.2d 599, the North Dakota Supreme Court addressed the same Damage to Property Exclusion and the "products-completed operations hazard" limitation to that exclusion. In Fisher, the plaintiffs were homeowners who hired a general contractor to install approximately 500 square feet of hardwood flooring in their home. Id. The flooring was supplied by another subcontractor, and another company, Kensok's Hardwood and Seamless Floors, Inc., was hired to sand the flooring and apply a polyurethane finish. Id. Ultimately, the flooring began to show wide gaps and splitting. Id. The Fishers sued the general contractor, who when brought a third-party complaint against Kensok's. Id. After extensive litigation, the Fishers brought an action against American Family, who was

Kensok's insurer. Id. American Family had denied coverage and declined to defend the claim against Kensok's.

In determining coverage under the similar American Family policy, the North Dakota Supreme Court analyzed exclusion(j)(6) – the same Damage to Property Exclusion at issue here. In reviewing the exclusion, the North Dakota Supreme Court noted explained that, "by itself, that language might exclude damage to the flooring caused by Kensok's work in sanding and sealing the flooring. However, a sentence following exclusion (j)(6) provides the exclusion 'does not apply to 'property damage' included in the 'products-completed operations hazard.'" Id. ¶ 12. The Court concluded the damage to the flooring in the Fisher's house fell within the "product-completed operations hazard" definition.

Like in Fisher, here, the property damage is included in the "products-completed operations hazard" because the "property damage" occurred away from CSC's or Glosson's premises and arises out of CSC's and Glosson's product or work. The exceptions are inapplicable as the products are not still in CSC's or Glosson's physical possession and the work was completed. Thus, the Damage to Property Exclusion does not provide a basis to exclude coverage.

A different result, however, is warranted under the Damage to Your Product Exclusion and the Damage to Your Work Exclusion. And again, Fisher is instructive. In Fisher, the North Dakota Supreme Court synthesized the same three exclusions at issue here and noted:

> American Family contends: "Reading these exclusions [j(6), k, and l] together, coverage would be available for damage to the property upon which the insured was working, but there would be no coverage for the insured's work or the insured's product. Applying these exclusions to this case, if one were to look at no other exclusions in the policy, the policy would provide coverage for repair and replacement of the flooring, but would not provide coverage for replacement of the finish or the labor in applying the finish, which was the insured's work and product." We agree.

Id. The Court when on to explain:

> "The injury to products or work exclusion is intended to exclude insurance for damage to the insured's product or work, but not for damage caused by the insured's product or work. Thus, the exclusion does not apply where the product or work causes damages to other persons or property. In such a situation, while there would not be coverage for damage to the work or product itself, damages caused by the product to other work or products would be covered." 3 Rowland H. Long, The Law of Liability Insurance § 11.09[2] (1998). "The injury to work or products exclusion is consistent with the goal of the CGL, which is to protect the insured from the claims of injury or damage to others, but not to insure against economic loss sustained by the insured due to repairing or replacing its own defective work or products." 3 Long, at § 11.09[2].

Id. ¶¶ 15-16 (emphasis added). Ultimately, the North Dakota Supreme Court concluded exclusions (k) and (l) (here, the Damage to Your Product Exclusion and Damage to Your Work Exclusion), excluded from coverage the cost of the finish and the sanding and finishing, which was the work performed by Kensok's. Id.

Applying Fisher to this case, the allegations of property damage at issue in this case are specifically, and exclusively, to the work or product itself – namely, that the concrete parking lot was negligently installed and prematurely deteriorated. Crucially, the allegations are not that the work or product caused any damage to any other persons or property. Rather, the claim is that the work and product itself was done defectively or improperly. As noted above, the purpose of CGL coverage is to protect the insured from claims of injury or damage to others, not to provide the insured coverage for the cost of repairing or replacing its own defective work or products.

Therefore, consistent with Fisher and the general purpose of CGL coverage, the Court concludes that coverage is excluded as a matter of law under the Damage to Your Product Exclusion and the Damage to Your Work Exclusion.[6] Because there was no "occurrence" to

[6] The Court notes that CSC also argues that the additional insured endorsement expressly states it covers "property damage" and that where a conflict arises between the policy and an endorsement, the endorsement controls. While CSC correctly cites the legal rule for this proposition, there is no conflict between the endorsement, which extends coverage to certain additional insureds, and the

trigger coverage under the Policy, and because coverage is also excluded under these exclusions and the Contractual Liability Exclusion, Selective's motion for summary judgment as to CSC is granted.

On a final note, CSC contends this conclusion creates an illusory promise, because the Blanket Additional Insured provision extends coverage to certain additional insureds for certain liabilities, including "property damage . . . caused, in whole or in part by . . . 'your [Glosson's] product[,]'" (Doc. No. 66-2) and to deny coverage would render that provision illusory and meaningless. However, the Court's holding here does not create an illusory promise nor does it render the provision meaningless because coverage would still potentially exist for CSC as an additional insured under a different set of facts. The Blanket Additional Insured provision qualifies CSC as an additional insured, which opens the door for the possibility of coverage under the Policy, subject to the limitations identified in the endorsement and in the Policy. Additionally, adopting CSC's position would essentially render meaningless all definitions and exclusions in the Policy by requiring coverage for all property damage caused by Glosson's product. That is inconsistent with the plain language of the Policy and that is inconsistent with the intent and purpose of CGL coverage.

C. Bad Faith, Duty to Defend, and Estoppel.

The final questions before the Court arise from CSC's Amended Counterclaim and motion for partial summary judgment. Selective moved for summary judgment on CSC's counterclaim for bad faith, on the grounds that Selective reasonably denied CSC's tender of a claim under the Policy. As a part of its motion, CSC posits that (1) Selective breached its duty to defend CSC

---

exclusions. The endorsement simply extends coverage for certain liabilities to certain additional insureds, subject to the Policy's exclusions.

under the Policy in connection with the claims made against CSC in the Acme Litigation, and (2) Selective is estopped from raising additional coverage defenses since it failed to raise them in the Declination Letter. Selective responds by primarily arguing that CSC is not an additional insured, which the Court has determined is not consistent with the plain language of the Policy.

The duty to defend and claims of bad faith are separate yet related concepts. In Tibert v. Nodak Mutual Insurance Company, 2012 ND 81, ¶ 30, 816 N.W.2d 31, the North Dakota Supreme Court articulated the standard for the duty to defend:

> An insurer's duty to defend is broader than the duty to indemnify, and is generally determined by the allegations of the injured claimant. We have outlined the parameters of an insurer's duty to defend:
>
> > A liability insurer's obligation to defend its insured is ordinarily measured by the terms of the insurance policy and the pleading of the claimant who sues the insured. If the allegations of the claimant's complaint could support recovery upon a risk covered under the insurer's policy, a liability insurer has a duty to defend its insured. We have formulated the duty to defend to require a liability insurer to defend an underlying action against its insured if the allegations in the complaint give rise to potential liability or a possibility of coverage under the insurance policy.
>
> When several claims are made against the insured in the underlying action, the insurer has a duty to defend the entire lawsuit if there is potential liability or a possibility of coverage for any one of the claims.
>
> Any doubt about whether a duty to defend exists must be resolved in favor of the insured. Thus, when there is doubt whether the injured party's complaint states facts sufficient to bring the injury within the coverage of the insurance policy, and the claim "may or may not be covered by the policy," the insurer has a duty to defend. Only if there is no possibility of coverage is the insurer relieved of its duty to defend.

Id. (internal citations omitted). Additionally, and critically here, "[a]n insurer does not have a duty to defend an insured if there is no possibility of coverage under the policy." Farmers Union Mut. Ins. Co. v. Decker, 2005 ND 173, ¶ 14, 704 N.W.2d 857.

Relatedly, "The gravamen of the test for bad faith is whether the insurer acts unreasonably in handling an insured's claim." Fetch v. Quam, 623 N.W.2d 357, 362 (N.D. 2001). In the refusal to defend context, an insurer acts unreasonably if it refuses to defend an insured, unless it has good cause for refusing to defend. Id.

In reviewing the Acme Litigation complaint, which is the key document in deciding the duty to defend, Acme primarily alleged that CSC's selection of the 3,000-psi concrete, which was solely CSC's decision and selection, and subsequent installation of the concrete parking lot, was negligent. Doc. No. 77-3. Acme also alleged damage to the parking lot due to the selection of the 3,000-psi concrete and its installation. Id.

Again, as discussed in detail above, the allegations in the complaint are exclusively that the concrete parking lot was designed and completed negligently. Wholly absent are any allegations of other damages to any other person or property. The loss that CSC seeks Selective insure under the Policy is simply not a loss that is covered or insured under a CGL policy, as the loss exclusively involved faulty or defective workmanship. And it is axiomatic that there is no duty to defend if there is no coverage under the Policy. Because the allegations in the Acme Litigation complaint cannot support any possibility of coverage under the Policy, there is no duty to defend under these facts. See Nat'l Farmers Union Prop. and Cas. Co. v. Kovash, 452 N.W2d 307 (N.D. 1990) (concluding no duty to defend where the complaint does not allege facts which give rise to a possibility of coverage under the plain language of the policy). Similarly, Selective did not act unreasonably in denying coverage to CSC, and in fact, had good cause to deny coverage, as there is no possibility of coverage under the Policy. Therefore, the Court finds that Selective did not owe CSC a duty to defend or indemnify, denies CSC's motion for summary judgment, and grants Selective summary judgment on CSC's bad faith claim (Count II).

Finally, CSC argues that Selective must be estopped from asserting any additional defenses against coverage beyond what Selective asserted in the Declination Letter pursuant to D.E.M. v. Allickson, 555 N.W.2d 596, 601 (N.D. 1996). In D.E.M., the North Dakota Supreme Court considered an estoppel argument when an insurance company denied coverage on a non-existent policy exclusion and then subsequently changed its position in litigation to reliance on a lack of notice under a bodily injury provision. Id. at 601. The primary concern for the North Dakota Supreme Court was that had the insured known immediately about the insurance company's reliance on the lack of notice provision as a basis for denying coverage, the insured could have cured the lack of notice issue. Id. Thus, the North Dakota Supreme Court held that the insurance company was estopped from later raising the lack of notice of a bodily injury claim as a defense to coverage or to escape its duty to defend. Id.

Generally, courts are not so quick to use theories of estoppel and waiver to negate exclusions and expand coverage beyond the policy's plain language and terms. See Topp's Mechanical, Inc. v. Kinsale Ins. Co., 374 F. Supp. 3d 813 (D. Neb. 2019). Here, the plain language of the Policy precludes coverage. Selective's Declination Letter, while admittedly brief for a denial of coverage letter, identified that coverage was precluded and Selective owed CSC no duty to defend or indemnify. This case is distinguishable from D.E.M., where the insurance company initially relied on a non-existent policy exclusion, and then attempted to rely on an exclusion and related lack of notice provision that the insured could have clearly cured under the terms of the policy. Such facts are not present here.

To allow CSC to rely on waiver and estoppel to prohibit Selective from arguing the plain language and exclusions of the Policy would materially change the scope of coverage, would be contrary to the plain language of the Policy, and would circumvent the objective intent of the

parties to the contract. See FDIC v. U.S. Fire Ins. Co., 956 F.Supp. 701, 706 (N.D. Tex. 1996). Based on the above, the Court finds Selective is not estopped from raising the exclusions discussed in its motion and in this Order. As a result, the Court denies CSC's motion for summary judgment on this issue.

D. Breach of Contract.

The Court notes that neither party moved for summary judgment on Count I of CSC's Amended Counterclaim as to breach of contract. However, the breach of contract claim is squarely related to the issue of coverage under the Policy and involves the same arguments made by both parties. The claim alleges that CSC is entitled to coverage under the Policy and that Selective breach the Policy by refusing to provide coverage to CSC. As explained in detail above, there is no possibility of coverage under the Policy. Thus, there can be no breach of the Policy by Selective. Thus, for all of the reasons articulated above, the Court will likewise dismiss CSC's breach of contract claim (Count I).

III. CONCLUSION

Although CSC is an additional insured under the Policy, there are no allegations in the Acme Litigation complaint beyond defective workmanship. Put simply, the undisputed facts support that the concrete parking lot that CSC, and through its subcontract, Glosson, were hired to design and construct was faulty and defective, and now CSC attempts to recover its losses for the defective workmanship from Selective. Consistent with North Dakota law, such losses for defective workmanship, when accompanied by no other allegations of damages to any other person or property, are not covered under a CGL policy, including this Policy.

The Court has carefully reviewed the entire record, the parties' filings, and the relevant case law. For the reasons above, Selective's motion for summary judgment as to CSC (Doc. No.

77) is **GRANTED** in its entirety. The Court **FINDS AS MOOT** Selective's motion for summary judgment against Glosson (Doc. No. 78) and directs the Clerk's Office to reinstate the default judgment against Glosson. Finally, CSC's motion for partial summary judgment against Selective (Doc. No. 79) is **DENIED** and CSC's Amended Counterclaim (Doc. No. 66) is **DISMISSED WITH PREJUDICE**. The Court further **ORDERS** and **DECLARES** as follows:

1. CSC is an additional insured under the Policy which Selective issued to Glosson.

2. There was no "occurrence," consistent with North Dakota law, to trigger coverage under the Policy for CSC.

3. The Contractual Liability Exclusion, Damage to Your Product Exclusion, and the Damage to Your Work Exclusion preclude all coverage for CSC to recover damages from the Acme Litigation.

4. Selective owes CSC no duty to defend and no duty to indemnify, as the facts alleged in the underlying Acme Litigation complaint cannot establish any possibility of coverage under the Policy.

5. Selective did not act in bad faith in denying CSC's tender of a claim, as it did not unreasonably deny CSC's claim.

IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 25th day of March, 2020.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court