UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO. 23-13662-J

DEPOSITORS INSURANCE COMPANY,

Appellant,

v.

KAWA ORTHODONTICS, LLC,

Appellee.

APPELLANT DEPOSITORS INSURANCE COMPANY'S OPENING BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 9:21-cv-81884-RS

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28(a)(1), and 11th Circuit Rules 26.1-1, 26.1-2, and 26.1-3, Appellant, Depositors Insurance Company, files this Certificate of Interested Persons & Corporate Disclosure Statement.

The following is a full and complete list of the trial judges and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal.

1. Butler Weihmuller Katz Craig LLP, Counsel for Appellant
2. Cabulea, Mihaela, Esq., Counsel for Appellant
3. Depositors Insurance Company, Appellant
4. Harold B. Klite Truppman, P.A., Counsel for Appellee
5. Kawa Orthodontics, LLP, Appellee
6. Kawa, Larry B., Sole Owner of the Members of Appellee
7. Kawa, Larry B., D.D.S., Member of Appellee
8. Keller, Thomas A., Esq., Counsel for Appellant
9. Larry B. Kawa, D.D.S., P.A, Member of Appellee
10. Matthewman, Judge William, United States District Court Magistrate Judge, Southern District of Florida
11. Northern Inc. Public Adjusters & Appraisers, Public Adjuster for Appellee

12. Smith, Judge Rodney, United States District Court Judge, Southern District of Florida

13. Truppman, Harold B. Klite, Esq., Counsel for Appellee

CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Circuit Rule 26.1-1, Depositors Insurance Company hereby makes the following corporate disclosure:

Depositors Insurance Company is a part of the Allied Group, Inc., whose parent company is Nationwide Mutual Insurance Company. There exists no publicly held corporation which owns 10% or more of Depositors Insurance Company's stock.

STATEMENT REGARDING ORAL ARGUMENT

Appellant, Depositors Insurance Company ("Depositors"), respectfully submits that oral argument would be beneficial as it would assist the Court in resolving the coverage issues raised in this appeal, and the issue whether the lack of industry standards insulates a contractor of liability as the district court found when it concluded that Appellee, Kawa Orthodontics, LLP's ("Kawa") repair contractor was not negligent in its attempts to repair an aquarium system located in Kawa's orthodontics office. Thus, Depositors requests the opportunity to present oral argument in this case.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The United States District Court for the Southern District of Florida had subject-matter jurisdiction over this case under 28 U.S.C. § 1332, as there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000, exclusive of interest, fees, and costs. (ECF 1 at 3-5.) Depositors is a citizen of Iowa, where it is incorporated and has its principal place of business in Des Moines, Iowa. (ECF 1 at 3.) Kawa, a limited liability partnership, is incorporated in Florida and has its principal place of business in Palm Beach County, Florida. (ECF 1 at 3.) Kawa has two members: Larry B. Kawa, D.D.S. and Associates, LLC and Larry B. Kawa, D.D.S., P.A. (ECF 1 at 3-4.)

The first member of the limited liability partnership, Larry B. Kawa, D.D.S. and Associates, LLC, is a Florida Limited Liability Company with one member, Larry Kawa. (ECF 1 at 4.) The latter owns the property located at 19189 Natures View Court, Boca Raton, Florida 33498 for which he has claimed homestead exemption. (ECF 1 at 4.) Thus, he is a citizen of Florida. The second member of the limited liability partnership, Larry B. Kawa, D.D.S., P.A., is a Florida citizen, where it is incorporated and has its principal place of business. (ECF 1 at 4.)

The amount in controversy is at least $569,371.52 but could potentially be up to 770,371.52, which far exceeds the $75,000 amount in controversy required for diversity jurisdiction, exclusive of interest, fees, and costs. (ECF 1 at 5.)

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, as the district court issued a final judgment in favor of Kawa. (ECF 105.) The appeal is timely, as the judgment was entered on October 2, 2023, (ECF 105), and Depositors filed a notice of appeal on November 2, 2023. (ECF 115.) The appeal was stayed pending resolution of a motion for reconsideration in the district court. On August 24, 2024, the district court denied Depositors' motion for reconsideration (ECF 124) and issued an amended final judgment awarding prejudgment interest to Kawa (ECF 126). Depositors filed an amended notice of appeal on August 30, 2024. (ECF 127.)

STATEMENT OF THE ISSUES

I. Whether the district court reversibly erred in finding coverage for a first loss to a bridge of an aquarium system in Kawa's orthodontics office, where Kawa never made a claim for that loss and never pled a breach of contract based on that first loss that consisted of a crack in the bridge.

II. Whether the district court reversibly erred in denying summary judgment for Depositors and granting summary judgment for Kawa on the second loss—to a larger tank connected through the cracked bridge to another tank—which was the only loss claimed and pled in the complaint, because in doing so the district court:

(i) erroneously determined that the policy's Negligent Work exclusion did not apply, as Depositors could not prove the repair company that was attempting to remove the bridge when the second loss occurred, was negligent due to an absence of industry standards; at the minimum, there was an issue of material fact precluding summary judgment for Kawa;

(ii) improperly relied on the first unpled loss to the bridge for which Kawa never made a claim, to find coverage for the second loss under the policy's Equipment Breakdown Additional Coverage, by determining that the first loss was an "accident" under the policy's definition of the term, in that the aquarium system was subject to a

"mechanical breakdown," suffering a rupture; at the minimum, there was an issue of material fact precluding summary judgment for Kawa;

(iii) erroneously disregarded Depositors' reliance on the Wear and Tear, Deterioration, Hidden or Latent Defect, and Cracking exclusions to deny coverage, based on the clearly erroneous finding that Depositors only excluded coverage based on the Negligent Work Exclusion.

III. Whether the district court abused its discretion in denying Depositors' motion for reconsideration, because Depositors' arguments in support of reconsiderations did not merely express its disagreement with the court's reasoning and rehashed arguments already considered and rejected by the court, but brought to the court's attention clear errors that had to be corrected to prevent manifest injustice.

STATEMENT OF THE CASE AND FACTS

I. Nature of the case

Depositors appeals a final summary judgment entered by the district court in favor of its insured, Kawa, in a breach of contract action brought by Kawa against Depositors following the denial of an insurance claim for a second loss to a larger tank of an aquarium system, located in Kawa's orthodontics office. The aquarium system was made of acrylic glass and consisted of two large tanks connected by a bridge. The initial loss consisted of a singular crack in the bridge portion of the aquarium system. Kawa did not make a claim to Depositors for that loss, nor did it allege in her complaint a breach of contract based on that initial loss to the bridge. Following the initial loss to the bridge of the aquarium system, Kawa hired a contractor to perform repairs. While attempting to fix the aquarium and remove the cracked bridge, the repair company caused two additional cracks in the larger tank connected to the bridge. This second loss was the only loss for which Kawa submitted a claim to Depositors and the only one on which the breach of contract action was premised.

On appeal, Depositors challenges the district court's erroneous finding of coverage for the first loss to the bridge of the aquarium system for which Kawa never submitted a claim and never pled a corresponding breach of contract in her complaint. In addition, Depositors challenges the district court's finding that

the second loss was covered because that determination was based on clearly erroneous findings and incorrect conclusions of law.

For example, the district court wrongly determined that Depositors' denial of coverage based on the negligent repairs of the repair company hired following the initial crack to the connecting bridge was not warranted. The district court based that determination on the fact that Depositors could not prove negligence because the lack of an industry-approved methodology to repair acrylic glass compelled a finding of no negligence on the part of the repair company. This flawed reasoning led the district court to conclude that there was no basis for denying Kawa's insurance claim.

The district court also incorrectly determined that there was coverage for the second loss to the larger tank based on the Equipment Breakdown Additional Coverage provision of the policy. That determination was premised on the erroneous finding that the first unpled loss to the connecting bridge for which Kawa never made a claim was an "accident" under the policy's definition of the term, in that the aquarium system was subject to a "mechanical breakdown," suffering a rupture.

The district court also improperly rejected Depositors' reliance on the Wear and Tear, Deterioration, Hidden/Latent Defect, and Cracking exclusions. Depositors' denial letter clearly listed these exclusions as a reason for denial.

Furthermore, the record evidence supports a denial of coverage based on those exclusions.

Finally, Depositors challenges the district court's denial of its motion for reconsideration as an abuse of the court's discretion, because Depositors raised meritorious grounds for reconsideration.

II. Statement of the facts

Depositors issues a businessowners insurance policy for Kawa's orthodontics office. (ECF 1-9 at 26-151.) Kawa's office had one large aquarium system consisting of two tanks connected by a bridge and fourteen smaller tanks, that were part of a marine-life theme used as a marketing tool. (ECF 36 at 11:9-23, 48:20-25, 52:2-12; ECF 36-2.) The aquarium was operated by a reverse osmosis system with plumbing. (ECF 36 at 11:24-12:8.)

The policy was in effect from June 23, 2020 through June 23, 2021, and provided coverage for personal and business property located at 20423 State Road 7, Suite # F15-18 in Boca Raton. (ECF 1-9 at 40.) The policy only covers "direct physical loss of or damage to Covered Property at the described premises in the Declarations caused by or resulting from any Covered Cause of Loss." (ECF 1-9 at 45.)

The policy further specifies what constitutes Covered Causes of Loss:

A. 3. COVERED CAUSES OF LOSS

This Coverage Form insures against Risks of Direct Physical Loss unless the loss is:

a. Excluded in Section B. EXCLUSIONS:
b. Limited in Paragrapg A.4. LIMITATIONS in this section; or
c. Limited or excluded in Section E. PROPERTY LOSS CONDITIONS or Section F. PROPERTY GENERAL CONDITIONS; that follow.

(ECF 1-9 at 46.)

The policy's Additional Coverages provision provides in relevant part:

A. 5. ADDITIONAL COVERAGES

…

n. Equipment Breakdown

(1) We will pay for direct physical loss of or damage to Covered Property caused by or resulting fro, an "accident" to "covered equipment." If an initial "accident" causes other accidents," all will be considered one "accident." All "accidents" that are the result of the same event will be considered one "accident."

(ECF 1-9 at 53.)

The policy also sets forth the following relevant exclusions:

B. EXCLUSIONS

…

2. We will not pay for loss or damage caused by or resulting from any of the following:

…

l. Other Types of Loss

(1) Wear and tear;
(2) Rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;

…

(4) Settling, cracking, shrinking or expansion;

(6) Mechanical breakdown, including rupture or bursting caused by centrifugal force, except as provided under the Equipment Breakdown Additional Coverages;

…

But if an excluded cause of loss that is listed in paragraphs (1) through (7) above results in a "specified cause of loss," "accident" or building glass breakage, we will pay for the loss or damage caused by that "specified cause of loss," "accident" or building glass breakage.

(ECF 1-9 at 64, 66, 68.)

3. We will not pay for loss or damage caused by or resulting from any of the following B.3.a. through B.3.c. But if an excluded cause of loss that is listed in B.3.a. through B.3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

c. Negligent Work

Faulty, inadequate or defective:

(1) Planning, zoning, development, surveying, siting;
(2) Design, specifications, workmanship, work methods, repair, construction, renovation, remodeling, grading, compaction, failure to protect the property;
(3) Materials used in repair, cosntruction, renovation or remodeling; or
(4) Maintenance;

of part or all of any property on or off the described premises.

(ECF 1-9 at 64, 68,69.)

The policy defines "accident" and "covered equipment" as follows:

H. Property Definitions

… The following words or phrases, which appear in quotation marks throughout this Coverage Form and any of its endorsements, are defined as follows:

1. **"Accident"** means a fortuitous event that causes direct physical damage to "covered equipment." The event must be one of the following:

a. Mechanical breakdown, including rupture or bursting caused by centrifugal force.

…

6. **"Covered equipment"** means, Covered Property:

a. That generates, transmits or utilizes energy, including electronic communciations and data processing equipment; or

b. which, during normal usage, operates under vacuum or pressure, other than the weight of its contents.

(ECF 1-9 at 81.)

Kawa's aquarium system sustains an initial loss and Kawa hires a contractor who further damages the aquarium in the process of attempting to fix it. On March 1, 2021, the contractor tasked with the maintenance of the aquariums and aquatic life at Kawa's orthodontics office noticed a crack in the bridge area of the aquarium. The decision was made to drain the two tanks connected by the bridge to a level that would dry the bridge and render it unoperational. (ECF 34 at 11:18-14:1, 16:16-17:1; ECF 34-1; ECF 36 at 5:22-25, 6:22-8:3, 9:1-19, 13:3-11, 24:13-26:5; ECF 36-1.) Thereafter, Kawa contacted its maintenance company to provide temporary shoring. (ECF 36 at 28:13-29:11, 35:12-36:19.)

Kawa then obtained an estimate from Erisa Improvements Corp. ("Erisa"), for the removal of the damaged bridge. (ECF 36 at 29:23-31:23, 32:20-35:11, 37:2-15.) Prior to Erisa beginning its work, Kawa's maintenance company drained all

the water out of the tanks and redistributed the fish to other tanks in the office or offsite. (ECF 34 at 18:3-19:17.) On April 24, 2021, during Erisa's work removing the bridge, two cracks appeared in the larger tank, which were captured on surveillance video.[1]

Kawa makes a claim solely for the loss that occurred during Erisa's repair work and Depositors denies coverage following a thorough investigation of the loss. On April 29, 2021, Kawa's public adjuster reported the loss to Depositors after Erisa further damaged the aquarium system. (ECF 36 at 42:15-43:14.) The letter lists the date of loss as April 24, 2021. (ECF 43-4 at 3.) Shortly after the loss was reported, Depositors's independent adjuster inspected the property but by that time the bridge had been fully removed and discarded. (ECF 33 at 25:16-27:15; ECF 32 at 12:11-13:16.)

On May 18, 2021, Depositors notified Kawa that: it was proceeding under a reservation of rights; no actions taken during the investigation would constitute waiver of any rights or defenses; there were questions concerning compliance with post-loss duties; there was no coverage for damage directly or indirectly caused by wear and tear, deterioration, hidden or latent defect, cracking or negligent work; there was an anti-concurrent causation clause in the policy. (ECF 43-6 at 1-2.)

[1] The video is available at https://vimeo.com/541823979/b7523e03df. The first crack occurred between the 2-minute 30 second and 3-minute mark, and the second crack occurred around the 14-minute mark.

Kawa's public adjuster provided an estimate for the removal and replacement of the two tanks and the bridge in the amount of $569,371.52 with no deductible or depreciation applied. (ECF 43-7.) Kawa's maintenance company also provided an estimate for the replacement replacement of coral, fish, and mechanical parts totaling $40,496.80. (ECF 43-7.)

Depositors retained EFI Global to investigate the cause of the cracks in the aquarium. (ECF 32 at 13:17-14:2; ECF 38-7; ECF 38-25.) Dr. Harold Ornstein, P.E. with EFI Global issued a report in June 2021, finding based upon his inspection, discussion with Kawa's representative, and his review of the video of the damage while it was occuring, that: Erisa was at fault for the cracking which occurred during their repairs to the bridge; although the bridge crack could not be examined due to its unavailability, creep was suspected. (ECF 38 at 23:17-25:3; ECF 38-7). Dr. Ornstein hypothesized that the second crack in the tank occurred because of additional weight exerted on the acrylic wall by one of Erisa's workers who was on a supported scaffold. (ECF 38 at 169:4-14.) That made Dr. Ornstein conclude that the support was not effectived because it increased the overstressed conditon of the crack and propagated it. (ECF 38 at 169:13-19.) He explained that "putting weight on the thing and if the supports are not done right, you could be actually putting the stress on the acrylic. But the thing is, if nobody did anything, if

left by itself, that second crack would not have occurred, I think." (ECF 38 at 170:16-21.)

Kawa's expert, Sonny Gulati, P.E., opined that: Erisa was not at fault and that the cracking damage was foreseeable as part of the repair process; the damage to the bridge could have been caused by vandalism or latent defect/stresses in the materials; and the aquarium equipment should be replaced (although he admitted he did not test the equipment and did not know if it still worked). (ECF 37 at 18:17-20:21, 31:23-41:3, 43:4-20, 44:14-45:19; ECF 37-1.)

Both experts agreed the aquarium system was made of polymethyl methacrylate (PMMA), a synthetic lightweight insulating thermoplastic often used as an alterative to glass, particularly in aquarium applications. (ECF 37-1; ECF 38-7 at 25.)

Dr. Ornstein issued a rebuttal report to Kawa's expert, providing additional information and clarification about his opinions and findings including the presence of wear and tear, aging, deterioration, scratching, imperfections in materials and specific critisisms of the work and methods used by Erisa, such as violations of OSHA regulations §1926.450 and §1926.451 concerning scaffolding. (ECF 38 at 87:3-10, 150:11-151:20; ECF 38-25.)

Folowing the investigation, Depositors denied Kawa's claim in a letter dated June 7, 2021. (ECF 43-11.) The letter specifically references the date of loss as

April 24, 2021, which is the date when the second loss to the larger tank occurred while Erisa was attempting to remove the connecting bridge. (ECF 43-11 at 1.) The reasons for the denial were that the damage was caused by Erisa in the process of repairing the aquarium system, and was due to wear, tear, deterioration, hidden/latent defect, and/or cracking. (ECF 43-11 at 1-2.) Depositors also notified Kawa that its reasons for denial were not exhaustive and Depositors was not waiving any other coverage defenses. (ECF 43-11 at 2.) Depositors' corporate representative testified that there were no other reasons for the denial of the claim than those stated in the denial letter. (ECF 33 at 108:21-109:8.)

III. The course of proceedings and dispositions in the court below

Kawa sues Depositors for breach of contract in state court claiming solely that Depositors breached the policy by failing to fully indemnify Kawa for the loss to the larger tank; Depositors removes the case to federal court. (ECF 1; ECF 1-9 at 6-9.) Kawa alleged that Depositors breached the insurance contract by failing to fully indemnify Kawa for a loss suffered by a large aquarium inside its insured orthodontic practice on April 24, 2021, the date when Erisa was attempting to remove the previously cracked bridge, causing two additional cracks in the larger tank. (ECF 1-9 at 8). Depositors filed an answer and raised nine (9) affirmative defenses. (ECF 1-9 at 13-24.) Thereafter, Depositors removed the case to federal court based on diversity jurisdiction. (ECF 1.) Kawa never amended its

complaint to reflect its breach of contract claim encompassed the initial bridge crack.

The parties file cross-motions for summary judgment. (ECF 39; ECF 40; ECF 43; ECF 44; ECF 47; ECF 48; ECF 50; ECF 52; ECF 57.)

Depositors' motion for summary judgment and Kawa's opposition.

In its motion for summary judgment, Depositors argued that it was entitled to summary judgment as a matter of law because the subject policy did not provide coverage for Kawa's claimed loss for the following relevant reasons:

- The policy excludes coverage for damage caused by wear and tear, deterioration, hidden or latent defect, and cracking;
- The policy excludes coverage for faulty, inadequate or defective construction, maintenance, repair and materials;
- The policy provides no coverage for the negligent actions of Kawa's contractors;
- The cause of Kawa's loss does not meet the definition for "Equipment Breakdown" coverage.

(ECF 44 at 4-14.)

Kawa opposed the motion, arguing that Depositors improperly denied its claim because the subject policy provides coverage for equipment breakdown caused by an accident and for the glass breakage caused by wear, tear, and

cracking. (ECF 50 at 8-9, 14-16.) Kawa further contended that Depositors improperly denied the claim for the second crack because the policy provides coverage for an equipment breakdown accident (here, the initial crack) that causes another accident (the second crack), or is the result of the same event. (ECF 50 at 9, 17-18.) Furthermore, the exclusion for negligent work did not apply either to the Additional Coverages for Equipment Breakdown, or to the initial crack in the bridge of the aquarium system, which was not caused by repair work but by an accident, as that term was defined in the policy. (ECF 50 at 14-16.) Kawa also contended that Depositors was unable to prove the negligent work exclusion applied because there was no way to prove a breach of a duty for a standard of care, since there is no uniform standard of care for the type of repair needed here. (ECF 50 at 18.) Depositors filed a reply in further support of its summary judgment motion. (ECF 57.)

Kawa's motion for summary judgment and Depositors' opposition. Consistent with its opposition to Depositors' motion for summary judgment, Kawa argued in its summary judgment motion that:

- the damages to the aquarium system caused by the initial crack were covered under the policy's Additional Coverages for Equipment Breakdown, to which the negligent work exclusion did not apply (ECF 39 at 14);

- the initial crack to the bridge was the result of an "accident" (which includes a mechanical breakdown or rupture caused by centrifugal force to equipment operating under vacuum or pressure) to "covered equipment" (ECF 39 at 15);
- it was "clear that the bridge, which operated under vacuum and pressure, suffered a mechanical breakdown or rupture caused by centrifugal force" (ECF 39 at 15).

Kawa then argued that the damage to the aquarium system from the second set of cracks that occurred during the removal of the bridge was also covered under the same policy provision, because the policy provided that if an initial "accident" caused other "accident" all will be considered one "accident." (ECF 39 at 16.) Kawa contended that since there was no standard of care for the repair of the bridge Depositors would not be able to establish a breach of a standard of care to show the Negligent Work exception applied. (ECF 39 at 17-18.)

Depositors opposed Kawa's summary judgment motion arguing in relevant part that the initial crack in the bridge of the aquarium system was not included in the claim made by Kawa, nor was it pled in the complaint, and, therefore, it could not be used to find coverage under the policy's Equipment Breakdown Additional Coverage provision. (ECF 47 at 4-7.) The reported date of loss was April 24, 2021, which coincided with the two additional cracks in the larger tank caused during the

repairs performed by Erisa in the process of attempting to remove the bridge. (ECF 47 at 4.) Thus, the March 1, 2021, damage to the bridge of the aquarium system was not part of Kawa's claim and was not pled in the complaint and therefore, it could not be raised for the first time at the summary judgment stage. (ECF 47 at 4.)

Depositors further explained why the aquarium tank did not meet the definition of covered equipment in the policy (ECF 47 at 7-9), and why no accident occurred under the policy's definition of that term, to establish that the policy did not afford coverage under the Equipment Breakdown Additional Coverage provision (ECF 47 at 9-12)

The district court denies Depositor's summary judgment motion, grants summary judgment for Kawa, and enters final judgment. The district court rejected Depositors' argument that the denial of coverage was appropriate because of the negligent repair work performed by Erisa. (ECF 104 at 7.) The court found that Depositors did not demonstrate how the repair work was negligent or how Plaintiff's damage was caused by faulty, inadequate, or defective workmanship, repair, or maintenance. (ECF 104 at 7.) The court credited Kawa's account that its damages were caused by an accident to covered equipment not by the negligent repair work performed by Erisa, explaining its conclusion by reliance on the following information:

- the parties agreed there is no industry-approved methodology to repair acrylic glass of the type found in Kawa's aquarium system (ECF 104 at 8); and
- due to the lack of such methodology, there is no identifiable standard of care applicable to the repair work performed by Erisa (ECF 104 at 8).

The district court determined that because there is no identifiable standard of care applicable to acrylic glass, it could not find that Erisa breached its duty of care or that it was negligent when it was trying to repair the aquarium system. (ECF 104 at 8.) The court concluded that since the parties agreed that the only reason for the denial was Erisa's repair work and "because the Court held that [Erisa's] work was not the cause of Plaintiff's loss, there remains no basis for Defendant to deny Plaintiff's insurance claim." (ECF 104 at 8.)

The court then nevertheless rejected Depositors' argument that Kawa's loss did not meet the definition for "Equipment Breakdown" under the policy because there was "no accident to covered equipment." (ECF 104 at 8.) The court found that:

- Kawa established that its loss was covered under the policy's additional coverage for Equipment Breakdown, because there was an "accident to covered equipment" (ECF 104 at 8);

- the aquarium system was covered equipment, "which, during normal usage, operates under vacuum or pressure, other that the weight of its contents" because "the aquarium system operated in part via a submersible filtration pump and under pressure during its normal usage" (ECF 104 at 8);
- there was an accident because the aquarium system was subject to a "mechanical breakdown" (ECF 104 at 9);
- the relevant policy phrase "mechanical breakdown, including rupture or bursting caused by centrifugal force" was susceptible to more than one reasonable interpretation, to the point it became ambiguous (ECF 104 at 9);
- interpreting the phrase "caused by centrifugal force" as modifying "rupture" would limit coverage for Kawa's loss (ECF 104 at 9), whereas construing it as modifying only the immediately preceding noun—"bursting"—would extend coverage for the loss. (ECF 104 at 9);
- it was required to adopt the interpretation affording coverage which was that the rupture in the aquarium system did not have to be caused by centrifugal force to qualify as an accident, rather, Kawa only had to show that its aquarium system suffered a rupture to meet the

definition of mechanical breakdown and, therefore, qualify as an accident under the insurance policy (ECF 104 at 9);

- there was coverage for the direct physical loss or damage to the aquarium under the Additional Coverage for Equipment Breakdown provision (ECF 104 at 10);

The court determined Kawa was only entitled to recover the actual cash value for its loss, which amounted to $326,004.33. (ECF 104 at 12.) Thereafter, the court entered final judgment in favor of Kawa for that amount and Depositors appealed. (ECF 105; ECF 114.) The judgment was later amended to add prejudgment interest. (ECF 126.)

Depositors unsuccessfully moves for reconsideration and files an amended notice of appeal. Depositors raised three grounds for reconsideration. First, it argued that the district court's determination that the repair company was not negligent merely due to the absence of industry standards was clear error. At the minimum, the issue should have been submitted to the jury because there were disputes of fact pertaining to the negligent repair that caused the additional cracks, which ruptured the larger tank. (ECF 113 at 5-6.) Depositors relied on *Pascual v. Florida Power & Light Company*, 911 So. 2d 152 (Fla. 3rd DCA 2005) and *Orlando Executive Park v. Robbins,* 433 So. 2d 491 (Fla.1983), *receded from on other grounds, Mobil Oil Corp. v. Bransford,* 648 So. 2d 119 (Fla.1995) to argue

that the absence of industry standards does not mean there is no duty, but rather that the repair company assumed "a specific, legally recognized duty to act with reasonable care." *Id.* (ECF 113 at 5.) Depositors also relied on this Court's decision in *Tesoriero v. Carnival Corporation*, 965 F.3d 1170, 1180 (11th Cir. 2020) to argue that the res ipsa loquitur doctrine allows "the trier of fact to infer a defendant's negligence from unexplained circumstances," by recourse to circumstantial evidence. (ECF 113 at 6.) Because breach of a legal duty under res ipsa loquitur is a question of fact, it was clear error for the district court to grant summary judgment for Kawa. (ECF 113 at 6.)

Second, Depositors argued that the court's determination that the crack in the bridge of the aquarium system was an "accident" under the policy's definition of the term was clearly erroneous because there was no record evidence to support the occurrence of an "accident" that was caused pursuant to the terms and conditions of the policy. (ECF 113 at 6-7.) At the minimum, the record evidence and the experts' testimony demonstrated there was an issue of material fact for the jury to determine whether the direct physical loss of, or damage to, the aquarium was an "accident." (ECF 113 at 7-8.)

Third, Depositors argued that the court's determination that there was a rupture in the aquarium was clear error, because the record evidence did not support the existence of a rupture where there was no leaking associated with the

initial crack in the bridge of the aquarium system and no evidence that the acrylic panel was broken apart. (ECF 113 at 8.)

The district court denies Depositors' motion for reconsideration. (ECF 124.) The court distinguished the cases relied on by Depositors in support of its contention that the lack of industry standards does not equate with no negligence, merely because "those cases involved the lack of industry standards for adequate public safety measure and the applicable duty of care, whereas here the case turns on an interpretation of a narrowly construed insurance policy related to coverage for the repair of a damaged aquarium." (ECF 124 at 4.) The court pointed out that its ruling was not based solely on the lack of industry standards but also on the finding that Depositors' own expert testified that "the aquarium was damaged beyond repair to the extent that a new aquarium was necessary." This, in turn, led the court to conclude that the repair company's work was not the cause of Kawa's loss. (ECF 124 at 4.)

The trial court dismissed the remainder of Depositors' arguments for reconsideration by deeming them mere points of disagreement with the court's reasoning and rearguing points already considered by the court, and as such, not proper grounds for reconsideration. (ECF 124 at 5.)

IV. Statement of the standard or scope of review

This Court reviews a district court's decision to grant summary judgment under a de novo standard of review. *In re Deepwater Horizon BELO Cases*, 119 F.4th 937, 944 (11th Cir. 2024).

The interpretation of a contract is also reviewed de novo as a pure question of law. *Tims v. LGE Cmty. Credit Union*, 935 F.3d 1228, 1237 (11th Cir. 2019). Under Florida law, an insurance policy must "be construed according to the entirety of its terms and conditions as set forth in the policy." Fla. Stat. § 627.419(1); *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.*, 845 So.2d 161, 166 (Fla. 2003) ("[W]e have consistently held that in construing insurance policies, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect." (quotation marks omitted)).

A district court's factual findings are reviewed for clear error. *United States v. Williams*, 340 F.3d 1231, 1234 (11th Cir. 2003).

This court reviews the denial of a motion for reconsideration, whether brought under Rule 59(e) or Rule 60(b), for an abuse of discretion. *Williams v. Geithner*, 327 Fed. Appx. 175, 176 (11th Cir. 2009) (citations omitted).

SUMMARY OF THE ARGUMENT

The district court committed several reversible errors when it granted summary judgment in favor of Kawa and denied Depositors' motion for final summary judgment. First, it erroneously found coverage and awarded insurance proceeds based on the first loss to the bridge of the aquarium system for which Kawa never submitted a claim and for which it never claimed a breach of contract in its complaint. In essence, by doing that, the district court permitted Kawa to permitted Kawa to circumvent its post-loss duties under the insurance policy and the pleading requirements under the Federal Rules of Civil Procedure, and obtain relief at the summary judgment stage based upon an unpled cause of action. *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1314 (11th Cir. 2004) (new claims may not be raised at the summary judgment case). This is contrary to well-established Florida law that the rights of a plaintiff to recover are measured by the facts as they existed when plaintiff filed its complaint. *Voges v. Ward*, 123 So. 785, 793 (Fla. 1929).

Second, the district court erroneously found that Depositors' denial of coverage based on the Negligent Work exclusion was not warranted. The court based that conclusion on the absence of an industry-approved methodology to repair acrylic glass of the type found in Kawa's aquarium system. It reasoned that since there was no such methodology, it could not find Erisa negligent. This

reasoning is flawed and unsupported by cases that have previously addressed this issue and have explained that the lack of industry-accepted standards does not insulate a negligent actor from liability. *Orlando Executive Park v. Robbins,* 433 So. 2d 491 (Fla.1983), *receded from on other grounds, Mobil Oil Corp. v. Bransford,* 648 So. 2d 119 (Fla.1995).

Third, the district court erroneously interpreted the policy to afford coverage under the Equipment Breakdown Additional Coverage. In doing so, the district court determined that the initial crack in the bridge of the aquarium system, for which Kawa never made a claim and never alleged coverage in its complaint, qualified as an "accident" to "covered equipment" because the acquarium system was subject to a "mechanical breakdown" such as a rupture to its component parts. The court then concluded that the whole incident involving the aquarium system was one "accident" under the Equipment Breakdown Additional Coverage provision based on a purported addmission by Depositors' corporate representative that "the entire incident involving the aquarium system was an accident, and that Kawa had experienced direct physical loss to covered property." (ECF 104 at 10.) This finding, however, cannot stand as it is blatantly contradicted by the record.

The record establishes that the crack in the bridge of the aquarium was first noticed on March 1, 2021, and that Kawa's corporate representative was unaware of any leaking associated with the crack or whether the crack went all the way

through the acrylic panel. (ECF 36 at 28:20-23.) While Depositors was not able to inspect the initial bridge crack because the acrylic panel was disposed of by Kawa, Kawa's own expert indicated that the damage to the bridge could have resulted from vandalism or latent defect or stresses in the materials. Thus, at the minimum there is an issue of material fact as to whether damage to the aquarium system was, in fact, an accident.

Fourth, denial of coverage was warranted under the policy's Wear and Tear, Hidden/Latent Defect, and Cracking exclusions. Defendant's expert explained how the material from which the aquarium system was built deteriorates, what factors influence deterioration, how cracks manifest and how the subject tank was impacted by wear and tear, aging, deterioration, scratching, and imperfections leading to the cracking. He opined that there were pre-existing issues with the acrylic used in the tanks and that overtime deterioration, degredation and stresses contributed to the failures, in conjunction with the negligent work by Erisa. Thus, Depositors was entitled to summary judgment on this basis.

Finally, the district court abused its discretion in denying Depositors' motion for reconsideration because Depositors brought to the court's attention clear errors in its ruling, which is a proper basis for reconsideration.

ARGUMENT

I. The district court erroneously found coverage for the initial loss sustained by the bridge of the aquarium system, because Kawa never submitted a claim for that loss and never amended its complaint to plead a breach of contract count for failure to pay money owed for that loss.

It is well-established under Florida law that the rights of a "plaintiff to recover in actions at law must be measured by facts as they exist when the suit is instituted." *Voges v. Ward*, 123 So. 785, 793 (Fla. 1929). Federal courts in this circuit observe and apply this principle in diversity actions like this. *See Southern Cooperative Dev. Fund. v. Driggers*, 527 F.Supp. 927, 928 (M.D. Fla. 1981) (observing that under Florida law, "the right of a plaintiff to recover must be measured by the facts as they exist when the suit was instituted") (citing *City of Coral Gables v. Sakolsky*, 215 So. 2d 328 (Fla. 3d DCA 1968)).

In addition, this Court has long held that a plaintiff may not "raise new claims at the summary judgment stage." *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1314 (11th Cir. 2004). Instead, the "proper procedure for [a plaintiff] to assert a new claim is to amend the complaint in accordance with Fed.R.Civ.P. 15(a)." *Id.* at 1315.

As Depositors argued below, Kawa could not raise for the first time at the summary judgment stage a new breach of contract claim for the initial loss to the bridge of the aquarium system, when Kawa never even submitted a claim to

Depositors for that loss and never amended its complaint to seek recovery on that basis. (ECF 47 at 4-7.) Yet the district court permitted Kawa to circumvent the pleading requirements and the policy's post-loss obligations and granted relief on that basis, finding that the initial loss to the bridge was a covered loss and then premising its finding of coverage for the second loss to the larger tank on that determination.

In the letter reporting the loss, Kawa's public adjuster only referenced April 24, 2021 as the date of loss, which is the date when the second loss to the larger tank occurred while Erisa was attempting to remove the cracked bridge. (ECF 43-4 at 3, listing April 24, 2021 as the date of loss.) It is undisputed that the crack in the bridge of the aquarium was observed on March 1, 2021. At no time during the investigation of the claim or thereafter did Kawa or its public adjuster indicate that the original bridge crack was being claimed as covered damage. Thus, Depositors operated from the representation that the original bridge crack was not claimed as covered and that coverage was claimed only for the second loss that occurred on April 24, 2021, when Erisa was removing the bridge of the aquarium system. (ECF 48 at 9; ECF 32 at 42:20-45:2.)

Because the bridge crack was not part of the claim, the cause of the bridge crack was not determined by either party or their experts. Furthermore, Depositors never had the opportunity to determine the cause of the bridge crack because the

bridge was already removed and discarded prior to Depositors and its independent adjuster and engineer being able to inspect the property or conduct an investigation concerning the original crack in the bridge of the aquarium system. (ECF 33 at 25:16-30:1, 34:10-35:21; ECF 38 at 52:3-6; ECF 43-5.) Kawa's expert also did not have the opportunity to inspect the bridge during his inspection of the property on April 25, 2022, although he speculated that the bridge crack could have been caused by latent stress or vandalism. (ECF 37 at 4:15-6:19, 13:13-16:15, 17:1-20:21, 26:9-27:14.)

Thus, at the time Kawa filed its complaint, it had no breach of contract claim based on the initial loss to the bridge, as it never made a claim for that loss and Depositors never denied coverage for that loss. Because Kawa's right to recover under the policy was measured by the facts as they existed at the time the complaint was filed, the district court committed a reversible error in granting relief beyond what was requested in the pleadings and determining there was coverage for a loss for which Kawa never made a claim to Depositors. *See Voges*, 123 So. at 793.

The error was compounded by the fact that the district court's ruling allowed Kawa to circumvent the requirements of Federal Rule of Civil Procedure 15(a) and raise an entirely new theory of recovery at the summary judgment stage. *Gilmour*, 382 F.3d at 1314; *see also Valpak Direct Mktg. Sys., Inc. v. Maschino*, 349 Fed.

Appx. 368, 370-71 (11th Cir. 2009) (not improper to deny leave to amend after summary judgment motions were filed as "the facts underlying the proposed amendment were actually known or could have been discovered with the exercise of due diligence in advance of the amendment deadline"); *Hartford Steam Boiler Inspection and Ins. Co. v. Menada, Inc.*, 2018 WL 3913663, at *8 (S.D. Fla. Apr. 6, 2018) (breakdown of a second chiller which occurred prior to the filing of a counterclaim and which claimant never sought to amend its counterclaim to reflect an alleged "accident" occurring for mechanical breakdown coverage purposes could not be considered at summary judgment stage, as it was outside the scope of the pleadings and not properly before the court). On this basis alone, the judgment must be reversed and remanded for further proceedings.

II. The district court reversibly erred in finding coverage for the second loss to the larger tank because the policy's Negligent Work, Wear and Tear, Deterioration, Hidden/Latent Defect, and Cracking exclusions preclude coverage for that loss and the Equipment Breakdown Additional Coverage does not apply.

The district court made several erroneous findings and conclusions that require reversal and remand of the summary judgment in favor of Kawa, for the district court to either grant final summary judgment for Depositors, or alternatively, submit the case to a jury. Each of these bases for reversal will be addressed in turn.

A. The district court clearly erred by finding that the Negligent Work exclusion did not apply to preclude coverage because Erisa could not be negligent due to the absence of industry standards; issues of material fact precluded summary judgment on this issue.

The policy's Negligent Work exclusion states as follows:

> 3. We will not pay for loss or damage caused by or resulting from any of the following B.3.a. through B.3.c. But if an excluded cause of loss that is listed in B.3.a. through B.3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.
>
> **Negligent Work**
>
> Faulty, inadequate or defective:
> …
> (2) Design, specifications, workmanship, work methods, repair, construction, renovation, remodeling, grading, compaction, failure to protect the property.

(ECF 1-9 at 68-69.)

The district court found that this exclusion was not applicable because Depositors did not demonstrate "how the repair work was negligent, or how Plaintiff's damage was caused by faulty, inadequate, or defective workmanship, repair, or maintenance." (ECF 104 at 7.) The court concluded that because there is no industry-approved methodology to repair the type of acrylic glass found in the aquarium system, there is no identifiable standard of care applicable to the repair work performed by Erisa. (ECF 104 at 8.) Then the court determined that Erisa could not have breached its duty of care since there was no applicable standard of care, and thus, Erisa could not have been negligent. (ECF 104 at 8.) This reasoning

is obviously flawed. As Florida courts have explained, even absent an industry-approved methodology, a company performing repairs assumes a duty to do so in a non-negligent fashion. *Pascual v. Florida Power & Light Company*, 911 So. 2d 152, 154 (Fla. 3rd DCA 2005). In other words, a repair company assumes "a specific, legally recognized duty to act with reasonable care." *Id.*

The Supreme Court of Florida considered a situation that was not covered by any industry standards in the liability context. *Orlando Executive Park v. Robbins,* 433 So. 2d 491 (Fla.1983), *receded from on other grounds, Mobil Oil Corp. v. Bransford,* 648 So. 2d 119 (Fla.1995). In *Robbins* a guest at Howard Johnson Motor Lodge ("HJ") owned and operated by Orlando Executive Park ("OEP"), was attacked by an unidentified man. *Id.* at 492. The guest sued for damages alleging that HJ and OEP violated their legal duty to exercise reasonable care for her safety as a guest on their premises. *Id.* The jury returned a verdict for the guest and the Fifth District Court of Appeal affirmed the judgment. HJ and OEP sought review in the Florida Supreme Court.

The supreme court agreed with the district court that "the absence of industry standards does not insulate the defendants from liability." *Robbins*, 433 So. 2d at 493 (emphasis in original). The court further agreed that the district court properly phrased the question as one of foreseeability and explained that it is

"peculiarly a jury function to determine what precautions are reasonably required in the exercise of a particular duty of due care." *Id.* (citation omitted).

The same holds true here, where the repair company undertook the repair of the aquarium system. The surveillance video captured the cracking that occurred during the work performed by Erisa. There is a visible correlation between the two cracks and the actions taken by Erisa's employees. The first crack occurred as one employee was attempting to pry apart a piece of the bridge with a piece of wood and it is visible between 2-minutes and 30-seconds and 3-minutes.[2] The second crack occurred when a different contractor was cutting the acrylic to remove the bridge, visible around the 14-minute mark. The crack clearly continued to propagate as the contractor kept using the bridge as a staging area and as makeshift scaffolding. Depositors' expert, Dr. Ornstein, opined that it was improper for Erisa to use the bridge as makeshift scaffolding and that the weight of the employee caused and contributed to the cracking in the larger tank during ERISA's attempted repair work. According to Dr. Ornstein, if there was no weight applied "on the plexiglas [sic], it would not have cracked. . . it's like a DNA match, one in a billion." (ECF 38 at 23:17-25:3, 58:11-25, 63:11-22, 66:22-67:21, 84:5-25, 87:3-10, 88:18-90:7, 169:4-19.)

[2] https://vimeo.com/541823979/b7523e03df.

A reasonable jury could have inferred from this evidence that it was foreseeable that applying weight on an already overstressed and relatively old aquarium system like this could have resulted in damage to the aquarium. Additionally, the negligence issue could have been decided by the jury under the res ipsa loquitur doctrine, which allows "the trier of fact to infer a defendant's negligence from unexplained circumstances," by recourse to circumstantial evidence. *Tesoriero v. Carnival Corporation*, 965 F.3d 1170, 1180 (11th Cir. 2020). Because this was a jury function, the district court erred in taking this determination away from the jury and finding as a matter of law that Erisa could not be found negligent and, therefore, the Negligent Work exclusion did not apply.

B. The district court erroneously interpreted the policy to provide coverage for Kawa's second loss to the larger tank under the Equipment Breakdown Additional Coverage.

The policy's Equipment Breakdown Additional Coverage provision provides as follows:

> **B. 5. ADDITIONAL COVERAGES**
> …
> **n. Equipment Breakdown**
> (1) We will pay for direct physical loss of or damage to Covered Property caused by or resulting from, an "accident" to "covered equipment." If an initial "accident" causes other accidents," all will be considered one "accident." All "accidents" that are the result of the same event will be considered one "accident."

(ECF 1-9 at 53.) Thus, in order for Kawa's second loss to the larger tank to be covered, it had to qualify as a direct physical loss or damage to Covered Property

caused by or resulting from an "accident" to "covered equipment." As discussed below, this has not happended here.

1. The acrylic aquarium system is not "Covered Equipment."

"Covered Equipment" is a specially defined term for purposes of equipment breakdown coverage. Covered equipment can be one of two things, it is property that either (1) "generates, transmits or utilizes energy" or (2) which under "normal usage, operates under vacuum or pressure, other than the weight of its contents." (ECF 1-9 at 81.)

The district court found that the aquarium system operated under vacuum or pressure because it "operated in part via a submersible filtration pump and under pressure during its normal usage. The filtration pump utlizies suction to create water pressure circulating throughout the aquarium system. Thus, the aqaurium operates under vacuum." (ECF 104 at 8.) On this basis, the court concluded that the aquarium system was "Covered Equipment." This determination, however, was clearly erroneous.

The aquarium system was not fully enclosed on all sides, as the top of each acrylic container was open, allowing access for maintenance, upkeep, and feeding. (ECF 48 ¶¶ 75, 77.) While the tanks were being used as aquariums, they were capable of functioning as atriums, enclosures for other non-aquatic animals such as lizards, and they could simply act as containers to hold a multitude of items all of

which did not require equipment or which could use different equipment, such as heating lamps. It was the addition of water and fish that made them operate as an aquarium. Underneath the acrylic tank, there was equipment for aerating the water, heating the water, circulating it and maintaining homeostasis to support the tropical fish. (ECF 48 ¶¶ 76, 78, 79.)

Because the tanks were not fully enclosed, the aquarium system could not be deemed to operate under a vacuum, which is an enclosed space devoid of matter, while a vacuum actively removes air from a space via pump or other mechanical equipment. *Bausch & Lomb Inc. v. Moria S.A.*, 222 F. Supp. 2d 616, 646 (E.D. Pa. 2002) ("Vacuum is defined as 'a space partially exhausted (as to the highest degree possible) by artificial means (as an air pump),' *Merriam Webster Medical Dictionary* available at http://www.intelihealth.com and *Meriam–Webster's Collegiate Dictionary* available at http://www.m-w.com, and 'a device creating or utilizing a partial vacuum.' *Webster's Third New International Dictionary* at 2527 (1986)".) The acrylic tanks also did not operate under pressure as they were not pressurized.[3] Thus, the district court erroneously found that the aquarium system was "Covered Equipment."

[3] *Under Pressure*, Merriam-Webster, https://www.merriam-webster.com/dictionary/under%20pressure (last visited January 21, 2025).

2. There was no "accident" under the policy's definition of the term that would provide coverage for the second loss to the larger tank.

The district court next determined that the initial crack, which was discovered in the bridge to the aquarium on March 1, 2021, was an "accident" in the sense that the system was subject to a "mechanical breakdown." (ECF 104 at 10.)

The term "accident" is defined in the policy as follows:

> 1. **"Accident"** means a fortuitous event that causes direct physical damage to "covered" equipment. The event must be one of the following:
>
> **a.** Mechanical breakdown, including rupture or bursting caused by centrifugal force;

(ECF 1-9 at 81.) After examining that definition, the district court concluded that the crack in the bridge was a "rupture."

The court found that the relevant policy phrase "mechanical breakdown, including rupture or bursting caused by centrifugal force" was susceptible to more than one reasonable interpretation, to the point it became ambiguous. (ECF 104 at 9.) As a result, the court resorted to principles of contract interpretation and construed the phrase "caused by centrifugal force" to only modify the immediately preceding noun, i.e., "bursting," because that would extend coverage for Kawa's loss. (ECF 104 at 9.) Thus, the court found that Kawa only had to show that its aquarium system suffered a rupture to meet the definition of mechanical

breakdown and, therefore, qualify as an accident under the insurance policy. (ECF 104 at 9.) Because the policy does not define the term "rupture," the court relied on the dictionary definition of the term, defining "rupture" as "the tearing apart [of a tissue]; a breaking apart or the state of being broken apart. (ECF 104 at 9, n.3.)

The district court then declared that there was a rupture in this case because Depositors' corporate representative admitted that much when he "testified that the entire incident involving the aquarium system was an accident and that Kawa had experienced direct physical loss to covered property." (ECF 104 at 10.) This finding was clearly erroneous as revealed by Depositors' corporate representative's testimony:

> Q. In other words, the person that was doing these repairs didn't intentionally break the acrylic glass, correct?
> …
> THE WITNESS: Correct. I doubt they did that intentionally.
> Q. So it would be fair to say that it was simply an accident?
> …
> A. Potentially.
> Q. Why "potentially"? Why is it a yes or no? … let me put it a different way. Was the incident that occurred an accident, or was it something intentionally done?
> …
> A. I believe it was an accident.

(ECF 33 at 46:22-47:19.)

> Q. Does equipment – the provision for equipment breakdown in the policy of insurance provide coverage for this loss?
> A. No.
> Q. Okay. There was a direct physical loss, wasn't there?
> …

Q. You agree to that?
A. Yes.
Q. Okay. And it was accidental, you already testified to that, correct?
A. It was accidental, but that doesn't mean that it meets the definition of accident in the additional coverage for equipment breakdown.
Q. Okay.

(ECF 33 at 102:19-103:12.)

Furthermore, Depositors' corporate representative testified as to his understanding that the acrylic aquarium tank was not mechanical equipment under the Equipment Breakdown Additional Coverage provision and as such that provision was not applicable to the subject loss. (ECF 33 at 40:5-41:17, 42:15-22, 102:15-103:11, 103:18-106:4.) Clearly, and contrary to the district court's finding, Depositors' corporate representative did not admit coverage under the Equipment Breakdown Additional Coverage provision when he referred to the second loss as an "accident." He only meant to say he had no reason to believe that Erisa caused the second loss to the larger tank intentionally. As such, the trial court's reliance on his testimony to find there was an accident when the initial crack in the bridge occurred is clearly erroneous and cannot stand.

Additionally, the district court's analysis of the word "rupture" was incomplete as it stopped with the dictionary definition of 'rupture" as "the tearing apart [of a tissue]; a breaking apart or the state of being broken apart. (ECF 104 at 9, n.3.) The court did not look further into the meaning of "apart" which is defined as being "in or into two or more parts: two pieces." Merriam-Webster (11th ed.

2019). There is nothing in the record to support a finding that the initial crack in the bridge constituted a rupture under this definition. On the contrary, Kawa's corporate representative, was unable to testify that there was any leaking associated with the crack or that the crack went all the way through the acrylic panel. (ECF 36 at 28:20-23.)

There is nothing in the record that identifies any "accident" that was caused in any fashion pursuant to the terms and conditions of the policy. Even assuming there was some sort of mechanical breakdown that is insufficient to afford coverage. The policy requires that a fortuitous event occur. There is simply no showing of such a fortuitous event in the record. As no such factual determination was made as to the fortuitous event that caused the direct physical loss of, or damage to, the acrylic panel on the bridge, there remains a genuine issue of material fact to be determined at trial. Furthermore, while Depositors was not able to inspect the original bridge crack because the acrylic panel was disposed of by Kawa, Kawa's own expert indicated that the damage to the bridge could have resulted from vandalism or latent defect or stresses in the materials. Thus, at the minimum, there are issues of material fact as to whether there was, in fact, an accident, and it was improper for the district court to resolve this issue at the summary judgment stage.

3. The second loss to the larger tank was not caused by the initial crack in the bridge of the aquarium system and was not the result of the same event to be considered one "accident."

The district court's finding that the initial crack in the bridge of the aquarium system was an "accident" does not automatically warrant a finding that the second, unrelated, loss to the larger tank was also an accident. Under the policy: "[i]f an initial 'accident' causes other 'accidents,' all will be considered one 'accident.' All 'accidents' that are the result of the same event will be considered one 'accident.' " (ECF 1-9 at 53.) The district court's analysis is devoid of any valid factual findings that would support a determination that the first crack in the bridge of the aquarium system caused the second loss to the larger tank. And, as already discussed in Issue II.B.2. supra, the sweeping generalization that Depositors' corporate representative admitted the intire incident involving the aquarium system was an accident, was clearly erroneous and cannot stand.

Instead, the record supports a finding that the crack in the bridge and the subsequent cracks in the larger tank were not caused by the same event, because they were almost two (2) months apart, and while the former was potentially the result of latent stresses in the PMMA or of vandalism, the latter happened during Erisa's attempt to remove the bridge piece from the two larger tanks to which it connected. Regarding the cracks in the larger tank, Depositor's expert opined that

had there been no weight applied "on the plexiglas [sic], it would not have cracked. . . it's like a DNA match, one in a billion." (ECF 38 at 169:4-19.)

Thus, clearly, the second loss to the larger tank—the only loss for which Kawa made a claim and for which she sought recovery in this lawsuit—was not an "accident" as that term is defined under the policy. As a result, the district court's finding of coverage cannot stand.

C. Alternatively, the policy's Wear and Tear, Deterioration, Hidden/Latent Defect, and Cracking provisions exclude coverage for the second loss to the larger tank.

The district court dismissed offhand Depositors' argument that the Wear and Tear, Hidden/Latent Defect, and Cracking exclusions precluded coverage for the second loss. This was due to the court's unsupported finding that the parties agreed the sole basis for denying coverage was the Negligent Work exclusion. (ECF 104 at 8.) The denial letter, however, speaks for itself and reflects that Depositors listed as grounds for denial both the Negligent Work exclusion and the Other Types of Loss exclusion which included wear, tear, deterioration, latent defect and/or cracking. (ECF 43-11 at 1-2.) Furthermore, Depositors' corporate representative confirmed that the reasons stated in the denial letter, which included Other Types of Loss were the only reasons for denying coverage for the second loss to the larger tank. (ECF 33 at 108:21-109:8.)

The policy specifically excludes damage caused by or resulting from wear and tear, cracking, deterioration, hidden/latent defect or any quality in property that causes it to damage or destroy itself, and cracking. (ECF 1-9 at 64, 66, 68.) Depositors' corporate representative testified concerning numerous exclusion provisions in the policy applicable to the loss, including wear and tear, and cracking. (ECF at 33 at 37:22-39:8, 49:4-54:5.) Defendant's expert explained how PMMA/acrylic deteriorates, what factors influence deterioration, how cracks manifest, and how the subject tank was impacted by wear and tear, aging, deterioration, scratching, and imperfections leading to the cracking. He opined, based upon his training and experience, including prior investigations of several failed acylic aquarium tanks, and existing detailed knowledge of plexiglass/acrylic, that there were pre-existing issues with the acrylic used in the tanks, and that overtime deterioration, degredation and stresses contributed to the failures, in conjunction with the negligent work by Erisa. He could not, however, identify the definitive cause of the bridge crack as the bridge had already been discarded and never available for inspection and assessment. (ECF 38 at 12:11-20:16, 23:17-25:3, 26:9-27:1, 29:10-22, 43:14-44:18, 47:21-49:9, 52:7-53:21, 170:4-21.) Thus, Depositors demonstrated coverage was excluded on this basis and summary judgment should have been granted in its favor.

III. The district court abused its discretion when it denied Depositors' motion for reconsideration because Depositors raised clear errors in the court's findings.

As discussed in Issue II *supra*, the district court made clear errors in its findings and Depositors' motion for reconsideration was not merely a regurgitation of previously raised arguments, nor were they mere expressions of disagreement with the court's rulings. Thus, the district court abused its discretion when it denied reconsideration. *See Pizarro v. Vida Cafe, LLC*, 440 Fed. Appx. 861, 862 (11th Cir. 2011) (finding abuse of discretion where district court based its decision on a clearly erroneous factual finding).

The court attempted to distinguish *Orlando Executive Park v. Robbins,* 433 So. 2d 491 (Fla.1983) and *Pascual v. Florida Power & Light Company*, 911 So. 2d 152 (Fla. 3rd DCA 2005) from the instant case to justify its finding that the lack of industry standards warranted a finding of no negligence on the part of Erisa. The court reasoned that those cases were distinguishable because they involved the lack of industry standards for adequate public safety measures and the applicable duty of care, whereas this case involves the interpretation of a narrowly construed insurance policy related to coverage for the repair of the aquarium. (ECF 124 at 4.) This distinction fails to persuade. Neither the *Robbins* court nor the *Pascual* court limited their analysis to the specific context of the case. Such a distinction would lead to unjust results if in one context the lack of industry standards were to

automatically absolve a negligent actor of any liability, whereas in a different context the reasonable person standard were to apply.

The district court also found that reconsideration was not warranted because its ruling was not based solely on the lack of industry standards but also on the finding that "the aquarium was damaged beyond repair to the extent that a new aquarium was necessary," as allegedly testified by Depositors' own expert. This led the court to conclude that the repair company's work was not the cause of Kawa's loss. (ECF 124 at 4.) The court's finding that Depositors' own expert testified the aquarium was beyond repair and needed to be fixed is clearly erroneous.

A review of Dr. Ornstein's deposition transcript shows the statements relied on by the trial court were taken out of context, as Dr. Ornstein was discussing his investigation of the aquarium system after the second loss and not opining whether the aquarium was a total loss after the initial crack to the bridge:

> Q. You recall this is during the second inspection of the aquarium, right?
> ….
> Do you recall actually reaching down to try to get to that area near the bottom? Do you recall reaching down - -
> A. I was not in the tank. Yeah. Uh-huh.
> Q. You're actually putting pressure right there on the tank, right, or no?
> A. Well, I'm not so sure. I don't know.
> Q. Okay. But you were leaning over with your arms on that tank, just like you testified the Erisa personnel did on the - -

A. Excuse me. I'm not trying to fix something - - I'm there looking at something that's totally destroyed and is going to be replaced. That's a little bit different than looking at something that has minimum damage that's going to be fixed. There's a big difference.

(ECF at 164:16-165:11.)

Q. You're on the tank, you're reaching down. That's where the tank is. See the line over there? You're actually putting your full body weight, okay, not just a little bit of your weight, on that tank.
A. Okay. We're looking at something that's going to be totally replaced.
So what's your point?
Q. No. I'm just wondering, before …
You said it's very stupid for somebody to lean on that previously in your deposition, and here you are leaning over the side?
…
A. You left out some very important points. You're leaving out a very important point. If the thing is damaged and you want to go ahead and fix it and you don't want to do any more damage, that's correct.
However, here we have a situation where this thing is toast, and it's not going - - we're not trying to save anything or fix anything. And basically, I'm not destroying it. If it's broken, it's already broken.

(ECF at 165:25-167:1.)

When talking about the initial loss to the bridge, Dr. Ornstein testified it was repairable even without removing the bridge, but those solutions would not have been long term:

Q. Was the initial crack repairable in any way, other than by removing the bridge?
A. Most probably, yes.
Q. How do you repair that crack without removing the bridge?
A. … you can get a temporary fix, and I found in my work the RTV cement worked quite well. However, I was only looking for a short-term fix.

> For a long-term fix . . . was going ahead and taking a sheet of plastic, you know - - well, slice of acrylic and actually cementing it on like a butt weld and go ahead and hold it together and prevent the stress from continuing. However [the Madison Group's] thought was it would not hold up over a long period of time.

(ECF at 26:24-27:19.) Evidently, Dr. Ornstein's testimony does not support a finding of no causation and the district court's finding was clear error.

Furthermore, an even bigger problem plagues the district court's reliance on the first loss to the bridge of the aquarium system to support a finding of no causation between Erisa's work and the second loss. The fact that Kawa never made a claim for that first loss and never pled a breach of contract count based on that first loss made it impossible for Depositors to investigate that loss and to assert its defenses in a breach of contract action encompassing that loss. Kawa discarded the bridge before it gave notice of the loss to Depositors and before Depositors and its representatives and expert were ever able to inspect it. Thus, at the minimum, Depositors had a viable late notice defense, that the district court completely took away by finding coverage for the first loss and then premising coverage for the second loss on that determination. This undermines any confidence in the district court's findings and requires a remand for further proceedings.

CONCLUSION

Wherefore, for the reason set forth herein, Depositors respectfully requests that this Court reverse the district court's entry of summary judgment in favor of Kawa and the denial of Depositors' final summary judgment motion and remand for entry of final judgment in favor of Depositors' or, in the alternative, remand the case for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Opening Brief complies with the word and page limits of the Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding all parts of the document exempted by rule 32(f) and 11th Circuit Rule 32-4, this document contains 10,998 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in proportionally spaced typeface using Microsoft Word in size 14 font.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Opening Brief was served by electronic notification generated by CM/ECF system on all counsel or parties of record on January 28, 2025.

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