UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO.: 9:21 cv 81884-RS

KAWA ORTHODONTICS, LLP,

Plaintiff,

vs.

DEPOSITORS INSURANCE COMPANY,

Defendant.
_____/

DEFENDANT, DEPOSITORS INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

Defendant, DEPOSITORS INSURANCE COMPANY ("DEPOSITORS"), by and through its undersigned counsel, and pursuant to Federal Rule of Civil Procedure 56, moves for summary judgment in its favor against Plaintiff, KAWA ORTHODONTICS, LLP ("KAWA"), and in support thereof, states as follows:

I. INRODUCTION AND SUMMARY OF ARGUMENT

DEPOSITORS is entitled to summary judgment as a matter of law due to Plaintiff's untimely notice and/or Plaintiff's failure to prove covered damages in excess of the deductible, there is no coverage under the subject policy for damages caused by uncovered causes of loss, speculative damages, business interruption, costs associated with repair to undamaged property, costs for damage caused by age, wear, tear, deterioration, cracking, marring or scratching or faulty, inadequate or defective materials, repairs, maintenance or construction.

II. STANDARD OF REVIEW

a. Summary Judgment Standard

A court "shall grant summary judgment when the movant shows there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The moving party bears the initial burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Jeffery v. Sarasota White Sox*, 64 F.3d 590, 593-94 (11th Cir. 1995); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991)." *Talat Enterprises, Inc. v. Aetna Casualty & Surety Co.*, 952 F. Supp. 773, 775 (M.D. Fla. 1996).

"A moving party discharges its burden on a motion for summary judgment by showing the Court that there is an absence of evidence to support the non-moving party's case. *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2553-54." *Id.* After the moving party discharges its burden, "the non-moving party must then 'go beyond the pleadings.' And by its own affidavits or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Talat* at 324. The evidence presented cannot consist of conclusory allegations or legal conclusions. *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991).

b. The Policy Terms are Clear and Should Be Given Their Plain Meaning

"The interpretation of an insurance contract is a matter of law to be decided by the court." *Luke Ready Air, LLC* at 1306; *see also Jones v. Utica Mut. Ins. Co.,* 463 So. 2d 1153, 1157 (Fla. 1985). "Where the duty of an insurer rests upon the legal effect of the provisions of an insurance policy, the interpretation of the policy is a matter of law for the Court to determine,

and is therefore amenable to summary judgment." *Great Am. Fid. Ins. Co. v. JWR Constr. Servs., Inc.,* No. 10-61423-CIV, 2012 WL 1193848 (S.D. Fla. April 9, 2012).

The policy should be read as a whole, and interpreted according to the intent reflected therein. *Luke Ready Air, LLC* at 1307 (*internal citations omitted*). Language in an insurance contract that is 'clear and unambiguous,' will be enforced and given its plain meaning. *Id.* At 1307 (*citing Rey v. Guy Gannett Pub. Co.,* 766 F.Supp. 1142, 1146 (S.D. Fla. 1991) and *Hurt v. Leatherby Ins. Co.,* 380 So. 2d 432 (Fla. 1980)).

In this diversity action, Florida law governs the analysis and interpretation of an insurance policy. *Residences at Ocean Grande, Inc. v. Allianz Global Risks,* Case No. 07-22656-CIV, 2009 WL 7020044 (S.D. Fla. Sept. 9, 2009)(*citing Fernandez v. Bankers Nat'l Life ins. Co.,* 906 F.2d 559, 564 (11th Cir. 1990)). "[A] single policy provision should not be considered in isolation, but rather, the contract shall be construed according to the entirety of its terms as set forth in the policy and as amplified by the policy application, endorsements, or riders." *Royale Green Condo Ass'n, Inc. v. Aspen Specialty Ins. Co.,* 2008 WL 2074383 *2 (S.D. Fla. May 14, 2008)(*citing Gen. Indem. Co. v. West Fla. Village Inn, Inc.,* 874 So. 2d 26, 30 (Fla. Dist. Ct. App. 2004)).

A policy's plain language controls and a court must "not … give the contract any meaning beyond that expressed." *Walker v. State Farm Fire & Cas. Co.,* 758 So. 2d 1161, 1162 (Fla. 4th DCA 2000)(*citing Walgreen Co. v. Habitat Dev. Corp.*, 655 So. 2d 164, 165 (Fla. 3d DCA 1995)).

Ambiguous policy language, or policy language that is susceptible to more than one 'reasonable interpretation,' will be construed in favor of the insured. *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.,* 845 So. 2d 161, 165 (Fla. 2003)(internal citations omitted). However,

"simply because a provision is complex and requires analysis for application, it is not automatically rendered ambiguous." *Id.* at 165 (*citing Eagle American Ins. Co. v. Nichols,* 814 So. 2d 1083, 1085 (Fla. 4th DCA 2002).

III. ARGUMENT

A. No Covered Cause of Loss

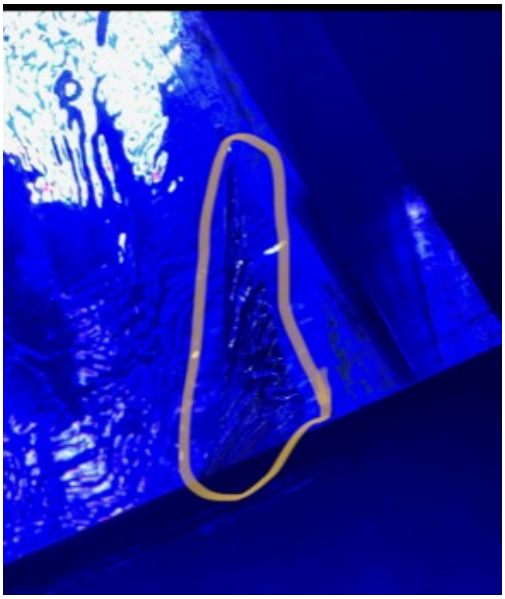
"[C]ausation is a coverage question for the court when an insurer wholly denies that there is a covered loss…". *Johnson v. Nationwide Mutual Insurance Co.*, 828 So.2d 1021, 1022 (Fla. 2002). Further, interpretation of an insurance contract is also a question of law for determination by the court. *Penzer v. Transportation Ins. Co.*, 29 So.3d 1000, (Fla. 2010), *referencing Auto Owners Ins. Co. v. Pozzi Window Co.*, 984 So.2d 1241, 1246 (Fla. 2008); *see also Jones v. Utica Mut. Ins. Co.*, 463 So.2d 1153, 1157 (Fla. 1985).

Here, DEPOSITORS asserts there is no coverage for the claimed loss and the claim was properly denied. The subject orthodontic practice has fifteen (15) different aquariums throughout the office, including the aquarium at issue which is comprised of two different aquariums, one (1) 10' x 3' x 4' tank, one (1) 6' x 4' x 4' tank and one bridge which connects to the two tanks[1]:

Pre-Loss Photos of Tank provided by Plaintiff [Lomenzo Dep. Ex. 3 pg. 1 & 6][2]

[1] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 20, **Ex. I**].
[2] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 4].

It is asserted by experts for both sides that the subject tank is made of polymethyl methacrylate ("PMMA" also referred to hereafter as "acrylic") and not glass[3]. On March 1, 2021, Ian Russo noticed a crack in the bridge piece of the subject aquarium[4]:

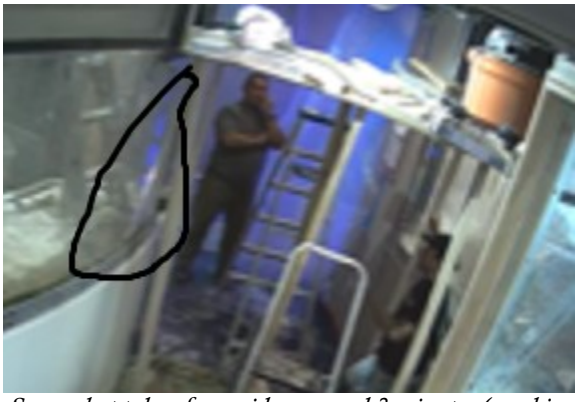


Photos of bridge damage taken by Ian Russo 3.2.21 [Russo Dep. Ex. 1]

The above photos provided by Ian Russo are the only known images of the crack in the bridge piece, which was discarded prior to reporting the claim to DEPOSITORS and investigation of the claim by DEPOSITORS and experts for both parties.[5] Plaintiff's expert, Sonny Gulati, P.E., has speculated the bridge damage could have been caused by vandalism or was the result of latent defects/stresses on the material.[6] DEPOSITORS' expert, Dr. Harold Ornstein, P.E., also speculated that age, deterioration or rupture creep could have caused the bridge damage.[7]

[3] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 26].
[4] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 8].
[5] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 15, 22, 25].
[6] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 25].
[7] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 22-24].

Thereafter, Plaintiff secured its own repair contractors, DML Construction and ERISA Improvements, and determined itself what work was going to be performed.[8] DEPOSITORS was not informed of the damaged bridge, was not involved with the selection of repair contractor or the determination of the method or scope of repair undertaken by ERISA.[9] During the attempted removal of the damaged bridge connected to the larger tank on April 24, 2021, two cracks manifested in that larger tank:



First Crack – Screenshot taken from video around 3 minutes (marking by counsel)[10]

Second Crack – Screenshot taken from video around 14 minutes (marking by counsel)[11]

After the appearance of the above cracks, the damage was reported to DEPOSITORS on April 29, 2021 by Plaintiff's public adjuster, Tad Balzer.[12] While Plaintiff's expert, Gulati, believes the subsequent cracks in the larger acrylic tank were an inherent risk and potentially

[8] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 9-13].
[9] *Id.*
[10] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 12]; video file https://vimeo.com/541823979/b7523e03df
[11] *Id.*
[12] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 14].

unavoidable; DEPOSITORS' expert, Dr. Ornstein, believes the subsequent cracking was the result of wear, tear, deterioration and faulty, inadequate or defective work by ERISA.[13] Plaintiff claims the cost of not only replacing all three (3) parts of the subject aquarium in this action, but also the cost of new equipment, fish, coral and substantial costs associated with removal and installation of new tanks.[14] The equipment was not damaged in the repairs and has not been tested as the tanks were drained. The coral was disposed of, and the fish were relocated prior to ERISA undertaking work on the aquarium.[15]

1. *In Order to Recover Plaintiff Must Prove Evidence of the Threshold Issue Concerning Covered Damages in Excess of the Deductible*

A Plaintiff seeking insurance benefits under a policy has the burden to prove not only that a loss occurred while the policy was in effect but also "[t]his includes the burden to prove that a covered cause of loss caused damage in excess of the policy's deductible." *Porben v. Atain Specialty Ins. Co.*, 546 F.Supp.3d 1325, 1330 (S. D. Fla. 2021)(granting summary judgment in favor of insurer when insured failed to provide any expert evidence or testimony to support that a covered cause of loss occurred and that damage exceeded the deductible, also noting that an estimate alone is not admissible if the only evidence is the written estimate itself particularly when it estimates replacement cost without depreciation); *Citizens Property Ins. Corp. v. Manning*, 966 So.2d 486, 488 (Fla. 1st DCA 2007)(summary judgment was improper and reversed when the insured failed to established "the amount of damage attributable to wind alone exceeded the policy deductible", noting such evidence is needed to establish a threshold fact, that until such threshold is met, there is no shift in burden to Citizens to prove an exclusion); *Wood v. Hartford Ins. Co. of the Midwest*, 2021 WL 6882444

[13] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 21-26].
[14] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 17-20, 27].
[15] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 8-12, 25, 27].

(N.D. Fla. 2021)(noting that testimony on the scope of repairs and costs cannot be accomplished by a lay witness); *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018)(summary judgment proper when expert evidence was excluded so there was no evidence to show a covered cause of loss occurred and caused damage which cannot be answered by a lay witness); *Young v. Lexington Ins. Co.*, 269 F.R.D. 692, 694 (S.D. Fla. 2010)(expert is essential to establish extend of damage caused by a windstorm); *Bray & Gillespie Plaza, LLC v. Lexington Ins. Co.*, 2010 WL 11623659, at *4 (M.D. Fla. Feb. 10, 2010)(insureds burden to prove a storm caused damage above the deductible); *Sunflower Condo. Association, Inc. v. Everest National Ins. Co.*, 2020 WL 5757085, at *6 (S.D. Fla. Sept. 28, 2020)(no recovery until covered damages exceed deductible).

"In insurance coverage disputes such as this, it is well-settled that expert evidence is generally necessary to establish the cause and scope of damage." *Porben*, 546 F.Supp.3d at 1330. "It is a known fact in cases such as this that expert witnesses are essential to establish the extent of damage caused by a windstorm." *Young*, 269 F.R.D. at 694; *see also Guinn v. AstraZeneca Pharm. LP*, 602 F.3d 1245, 1251 (11th Cir. 2010)(without expert testimony on causation the insured could not show a breach of the policy by the insurer); *Matthews v. State Farm Fire and Cas. Co.*, 500 Fed.Appx. 836, 841 (11th Cir. 2012)(summary judgment was appropriate when Plaintiffs had no expert testimony to refute the scope of damage determined by the insurer).

Here, there are no covered damages, let alone damages, which exceed the deductible. The majority of the cost of repair identified by Plaintiff's experts are for items, which were not damaged, as the only alleged damage is the cracks in the larger tank of the subject aquarium. The policy limits recovery to repair direct physical damage to covered property.

Specifically, coverage is extended for "direct physical loss or damage to Covered Property". Florida courts have interpreted the use of the words "direct" and "physical" in this context to "impose the requirement that the damage be actual." *Homeowner's Choice Property & Cas. v. Maspons,* 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017).

Plaintiff has provided estimates for repair to property not physically damaged by the purported cause of loss, per the testimony of Plaintiff's Corporate Representative and its experts, such as for the coral, fish and livestock which were disposed of, moved or destroyed offsite; aquarium equipment which has not been in use since ERISA undertook the repair work; as well as the costs associated with removing windows, doors, cabinets, floors, walls, ceiling, framing and similar building materials purportedly impacted by the removal and replacement of the subject aquarium. Those amounts are not recoverable under the terms of the policy and DEPOSITORS is entitled to summary judgment.

2. *The Subject Policy Excludes Damage Caused by Wear and Tear, Deterioration Hidden or Latent Defect, Cracking and Marring of Personal Property*

The Subject Policy specifically excludes damage caused by or resulting from wear and tear; deterioration, hidden or latent defect or any qualify in a property that causes it to damage or destroy itself; cracking; mechanical breakdown; and marring or scratching of personal property.[16] Plaintiff's expert has taken the contradictory position that the original crack in the bridge may have been the result of latent defect/stresses but also argues that PMMA is not subject to deterioration and the cracking of the larger tank was largely expected and unavoidable.[17] However, as detailed in DEPOSITORS' *Daubert* Motion, Plaintiff's expert is a geotechnical engineer whose opinions are unsupported and inadmissible. Defendant's

[16] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 2, 3, **Ex. B** PB 00 02 11 14 pg. 25 of 42].
[17] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 25, 26].

expert has explained how PMMA 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.[18] All of these causes are explicitly excluded from coverage under the policy and DEPOSITORS is entitled to summary judgment.

3. The Subject Policy Excludes Coverage for Faulty, Inadequate or Defective Construction, Maintenance, Repair and Materials

As is evident from a review of the surveillance video, which captures the cracking occurring during the work being performed by ERISA, there is a visible correlation to the cracks occurring and actions being taken by ERISA.[19] The first crack occurs as a contractor from ERISA is attempting to pry apart a piece of the bridge with a piece of wood, visible between 2-minutes and 30-seconds and 3-minutes.[20] The second crack appears as a different contractor continues to work on cutting the acrylic to remove the bridge, visible around the 14-minute mark, the crack continues to propagate as the contractor continues to use the bridge as a staging area and as makeshift scaffolding.[21] Dr. Ornstein opined that it was improper to use the bridge as makeshift scaffolding, further that the weight of the contractor caused and contributed to the cracking, which manifested during ERISA's work.[22] Under the express terms of the policy there is no coverage for damage caused by or resulting from faulty, inadequate or defective, "workmanship, work methods, repair, construction"… "materials

[18] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 21-24, 26].
[19] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 12].
[20] *Id.*
[21] *Id.*
[22] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 21-24, 26, **Ex. J & L**].

used in repair"…."or [m]aintenance".[23] Accordingly, there is no coverage under the terms of the policy and DEPOSITORS is entitled to summary judgment.

4. No Collapse Has Occurred as Defined by the Policy Concerning Personal Property as There is No Building Coverage Under the Subject Policy

Plaintiff's Complaint alleges there is coverage for the alleged damage due to collapse.[24] The insurance policy in this claim does not provide building coverage. Therefore, there is no additional coverage for collapse for the "abrupt falling down or caving in of a building." As far as personal property, collapse coverage would still not apply as there was not an abrupt falling down or caving in of the aquarium. Moreover, "evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion" as well as "marring and/or scratching" is not sufficient to trigger collapse additional coverage.[25] *See Kings Ridge Community Ass'n, Inc. v. Sagamore Ins. Co.*, 98 So.3d 74, 77 (Fla. 5th DCA 2012)(after referencing Merriam-Webster's Collegiate Dictionary, concluding abrupt "is defined as 'characterized by or involving action or change without preparation or warning: unexpected''; accordingly finding a collapse where there was a single moment, without warning, a portion of a building's ceiling caved in 12 inches, when there was no prior indication of deficiencies or progressive deterioration); *N.P.V. Realty Corp. v. Nationwide Mut. Ins. Co.*, 2011 WL 4948542, *4 (M.D. Fla. Oct. 17, 2011)(finding there could be no coverage for collapse when the damage was alleged to have occurred gradually over a period of time, it accordingly could not be read to have been abrupt); *S.O. Beach Corp. v. Great American Ins. Co.*, 305 F.Supp.3d 1359, 1364 (S.D. Fla. 2018)(not enough to allege a building was starting to cave in or that it was structurally

[23] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 2, 3, 16, 24, **Ex. B** PB 00 02 11 14 pg. 26 of 42**, F, K**].
[24] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 1, **Ex. A** ¶ 7, 9].
[25] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 2, 3, **Ex. B**, PB 00 02 11 14, pg. 5-6 of 42].

unsound to constitute collapse, further by alleging gradual deterioration which occurred over a period of years the damage could not constitute an "abrupt falling down or caving in" to trigger collapse coverage).

"The Court must construe the present insurance contract 'in accordance with the plain language of the polic[y] as bargained for by the parties'." *Bird Road Shoppes, LLC v. Scottsdale Ins. Co.*, 2019 WL 8892624, at *2 (S.D. Fla. Feb. 11, 2019)(rejecting a requested interpretation of a collapse coverage endorsement as applying to a drain line pipe, finding it could not possibly strain the terms of the policy to find a drain line pipe could be "occupied" for an "intended purpose"). Further, "the Florida Supreme Court has made clear that the language of the policy is the most important factor." *Garcia v. Federal Ins. Co.*, 2017 WL 3706695, at *6 (M.D. Fla. April 17, 2017)(finding decay, rot and deterioration damages to fall under the policy exclusion for wear and tear, deterioration and rot).

Accordingly, no collapse has occurred pursuant to the terms of the policy and there is no coverage as alleged by Plaintiff and DEPOSITORS is entitled to summary judgment on the issue.

5. Equipment Breakdown Coverage is Not Applicable and Not Available

Similarly, Plaintiff has alleged in its Complaint that it is entitled to coverage under the equipment breakdown provisions of the policy.[26] However, under the terms of the policy, there is no damage, which is the result of an "accident" to "covered property" as defined in the equipment breakdown coverage.[27] There has been no covered "accident" meaning "mechanical breakdown…caused by centrifugal force"; "artificially generated electrical,

[26] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 1, **Ex. A** ¶ 7, 9].
[27] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 2, 3, **Ex. B**, PB 00 02 11 14, pg. 10-12, 38-39 of 42].

magnetic or electromagnetic energy…that damages, disturbs, disrupts or otherwise interferes with any electrical or electronic wire, device, appliance, system or network"; nor has there been any explosion, loss or damage to steam or hot water boilers.[28] Similarly, there is no purported damage to "covered equipment" as defined by the policy as PMMA is an "insulating or refractory material" which is explicitly excluded from covered equipment for equipment breakdown coverage.[29] Accordingly, there is no coverage under the terms of the subject policy for equipment breakdown and DEPOSITORS is entitled to summary judgment on this issue.

B. No Coverage for Actions of Plaintiff's Contractors and/or Expected Damage

The subject policy provides coverage for the business personal property of Plaintiff, it does not extend coverage to ERISA, DML, Maintenance & Improvements, Dr. Frag It, or any other contractor or service provider contracted by Plaintiff to provide services related to the subject aquariums.[30] Plaintiff was provided Additional Insured Certificates for the contractors and service providers Commercial General Liability (CGL) policies that Plaintiff entered into agreements with to perform work at the subject property regarding the aquarium at issue.[31] DEPOSITORS does not provide coverage for those contractors under Plaintiff's business personal property policy for any actions taken by others which may or may not fall under their own CGL policies. None of Plaintiff's contractors are parties to this action and none of them were contracted through DEPOSITORS to provide work at the subject

[28] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 2, 3, **Ex. B**, PB 00 02 11 14, pg. 38 of 42].
[29] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 2, 3, **Ex. B**, PB 00 02 11 14, pg. 38 of 42].
[30] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 2, 3, 8-13, **Ex. B**].
[31] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 10, 11, **Ex. M**].

property.[32] Whether there is coverage under ERISA's CGL policy for the damage which occurred during their work on the aquarium, whether it be deemed an inherent risk or expected outcome as alleged by Gulati[33], is unknown, but regardless even if excluded that would not create coverage under the terms of the subject policy between Plaintiff and DEPOSITORS. Similarly, while there may be coverage under Dr. Frag It's CGL policy for the offsite power loss which lead to the death of the fish and aquatic life that were removed from the subject aquarium and held offsite in the custody and control of Dr. Frag It[34], such coverage would be irrelevant to coverage under the subject policy between DEPOSITORS and Plaintiff. Accordingly, DEPOSITORS is entitled to summary judgment in that the subject policy does not provide coverage for the work performed by Dr. Frag It, ERISA, DML or Maintenance & Improvements.

C. Plaintiff Has Breached its Duties Under the Policy By Failing to Provide Prompt Notice and Maintain Control of Damaged Personal Property to the Detriment of DEPOSITORS

"Under Florida law, the purpose of policy provisions requiring prompt notice 'is to enable the insurer to evaluate its rights and liabilities, to afford it an opportunity to make a timely investigation, and to prevent fraud and imposition upon it'." *PDQ Cooolidge Formad, LLC v. Landmark American Ins. Co.*, 566 Fed.Appx. 845, 847 (11th Cir. 2014) *citing Laster v. United States Fidelity & Guaranty Co.*, 293 So.2d 83, 96 (Fla. 3rd DCA 1974). "Policy provisions that require 'timely notice' or 'prompt notice' are interpreted identically, and mean that notice must be given with 'reasonable dispatch and within a reasonable time in view of all the facts and circumstance of the particular case'." *Id* at 848 (finding six-month delay after Tropical Storm was untimely as a matter of law); *Ideal Mut. Ins. Co. v. Waldrep*, 400 So.2d 782, 783

[32] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 1-3, 8-11, **Ex. A, B, M**].
[33] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 25].
[34] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 11, **Ex. M**].

(Fla. 3rd DCA 1981)(finding 6-week delay untimely as a matter of law); *Deese v. Hartford Accident & Idemnity Co.*, 205 So.2d 328, 329 (Fla. 1st DCA 1967)(reporting a car accident 4 weeks later was deemed untimely as a matter of law).

"Notice is necessary when there has been an occurrence that should lead a reasonable and prudent man to believe that a claim for damages would arise." *Yacht Club on the Intracoastal Condo. Association, Inc. v. Lexington Ins. Co.*, 599 Fed.Appx. 875, 879 (11th Cir. 2015). Furthermore, "[p]rompt notice is not excused because an insured might not be aware of the full extent of damage or that damage would exceed the deductible." *Id* at 880. "An insured's good faith belief that the damage is trivial or not covered by the policy is insufficient to justify non-compliance with the policy's notice provision." *Adderly v. Hartford Ins. Co. of the Midwest*, 2020 WL 4915575, at *4 (S.D. Fla. Aug. 21, 2020)(finding 18 month delay unreasonable) *citing Kendall Lakes Towers Condo. Association, Inc. v. Pacific Ins. Co.*, 2012 WL 266438, at *4 (S.D. Fla. Jan. 30, 2012).

Being able to determine causation is not the only measure as to whether the insurer was prejudiced by the late notice but would also include not being able to investigate the extent of the loss due to the passage of time. *See De La Rosa v. Florida Peninsula Ins. Co.*, 246 So.3d 438, 442 (Fla. 4th DCA 2018)(granting summary judgment to insurer when water loss was reported 15 months after the occurrence when the insured failed to rebut the presumption of prejudice, further noting being unaware of ones rights under a policy is not an excuse); *Hope v. Citizens Property Ins. Corp.*, 114 So.3d 457, 459 (Fla. 3rd DCA 2013)(granting summary judgment to insurer on failure to timely notify the carrier of the hurricane damage claim and for failing to overcome presumption of prejudice which included the passage of time); *Soronson v. State Farm Fla. Ins. Co.*, 96 So.3d 949, 953 (Fla. 4th DCA 2012)(granting summary

judgment finding three years was untimely, despite the insured alleging the damage was not discovered until shortly before reporting, and insured failed to rebut the presumption of prejudice against insurer); *Lehrfield v. Liberty Mutual Fire Ins. Co.*, 396 F.Supp.3d 1178, 1184 (S.D. Fla. 2019)(summary judgment granted on 8 month delay, regardless of whether the damage was believed to be under the deductible and when presumption of prejudice was not rebutted on potential long term water damage claim).

Plaintiff did not report the initial crack in the bridge and did not retain the damaged property, which was discarded prior to reporting the loss to DEPOSITORS.[35] The additional cracking damage which occurred on April 24, 2021, more than 54 days after the initial discovery of the bridge damage, was also not reported for another week and in between that the time, the conditions were materially changed, as DML drilled additional holes in the PMMA and hung chains and support from the ceiling, which materially altered the aquariums.[36] Plaintiff's expert, Sonny Gulati, P.E., testified that he was unable to do anything more than speculate on the potential cause of the bridge crack and his opinions were clearly influenced by his belief the chain support was original.[37] Similarly, DEPOSITORS' expert, Dr. Harold Ornstein, P.E.'s investigation was also hindered by the disposal of evidence and the delay in reporting.[38] Plaintiff's failure to provide prompt notice, maintain evidence and violation of the duties in the event of loss or damage under the policy substantially impacted DEPOSITORS and impaired its ability to complete its investigation, accordingly, DEPOSITORS is entitled to summary judgment.[39]

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[35] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 15].
[36] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 8-15].
[37] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 25]; *see also* DEPOSITORS' Daubert Motion to Strike Sonny Gulati, P.E., filed contemporaneously.
[38] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 15, 21-24].
[39] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 8-16, 21-24].

D. As the Damaged Property Has Not Been Repaired or Replaced Plaintiff is Limited to the Actual Cash Value

The term "actual cash value" generally means "'fair market value,' or 'replacement cost minus normal depreciation,' where depreciation is defined as a decline in an asset's value because of use, wear, obsolescence, or age." *Trinidad v. Fla. Peninsular Ins. Co.,* 121 So. 3d 433, 438 (Fla. 2008). *See generally*, *South v. Progressive Select Ins. Co.,* 2021 U.S. Dis. LEXIS 165364 (S.D. Fla., August 31, 2021) ("Under Florida law, market value is routinely interpreted to mean replacement costs less depreciation.") *See also Goff v. State Farm Fla. Ins. Co.,* 999 So. 2d 684, 690 (Fla. 2d DCA 2008). No case in Florida contemplates that actual cash value can be determined without some calculation for depreciation.

An insurance company's liability for replacement cost does not arise unless and until the repair or replacement has been completed. *See, e.g., State Farm Fire & Cas. Co. v. Patrick*, 647 So. 2d 983 (Fla. 3d DCA 1994). *See also Buckley Towers Condo., Inc. v. QBE Ins. Corp.*, 395 Fed. Appx. 659, 663 (11th Cir. 2010) (quoting *Ceballo v. Citizens Prop. Ins. Corp.*, 967 So. 2d 811, 815 (Fla. 2007)) ("The Florida Supreme Court has explained that, replacement cost damages do not 'arise until the repair or replacement has been completed.'"). In *American Reliance Ins. Co. v. Perez,* 689 So. 2d 290 (Fla. 3d DCA 1997), the court started that where a policy provides that only actual cash value will be paid prior to repair or replacement by an insured, that replacement cost value is not awardable until such repairs have been effectuated. The court equated actual cash value with "fair market value" if the insured did not repair or replace.

Under the Policy, Actual Cash Value is defined as "the cost to repair or replace Covered Property, at the time of the loss or damage, whether that property has sustained partial or total loss or damage, with material of like kind and quality, subject to a deduction

for deterioration, depreciation, and obsolescence."[40] Further, under the terms of the policy, DEPOSITORS "will not pay on a replacement cost basis for any loss or damage: (i) Until the lost or damage property is actually repaired or replaced; and (ii) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage."[41]

Plaintiff has only provided replacement cost value estimates created by Northern Inc., and Triad and admittedly, repairs have not been made.[42] The estimates prepared by Northern Inc., and Triad do not apply depreciation or the applicable deductibles.[43] Accordingly, as Plaintiff cannot meet its initial burden of proof, DEPOSITORS is entitled to summary judgment as a matter of law.

E. DEPOSITORS is Entitled to Summary Judgment Concerning Any Claim for Business Interruption as Plaintiff Has Failed to Introduce Any Evidence of Such Damages

"It is plaintiff's burden to prove 'entitlement to business interruption insurance proceeds under the policy'." *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, at *10 (S.D. Fla. June 11, 2018), *affirmed* 823 Fed.Appx. 868 (11th Cir. 2020). Plaintiff has not provided any evidence of entitlement to or quantification of business interruption damages outside of claiming entitlement to such damages in their Complaint.[44] Further, it has been represented that such damages are not presently being sought as nothing has been incurred and there has been no impact on the business to date, particualrly as no repairs have been undertaken.[45] As Plaintiff's Corporate Representative and Counsel have acknowledged there is no present

[40] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 2-3, **Ex. B** PB 00 02 11 14 pg. 38 of 42].
[41] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 2-3, **Ex. B** PB 00 02 11 14 pg. 29-30 of 42].
[42] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 17-20, 27].
[43] *Id*.
[44] [Defendant's Statement of Facts in Support of Motion for Summary Judgment ¶ 1, **Ex. A** ¶ 7, 12].
[45] [Lomenzo Dep. 53:18-54:10].

claim for business interruption, DEPOSITORS is entitled to summary judgment on this issues.

IV. CONCLUSION

WHEREFORE, Defendant, DEPOSITORS INSURANCE COMPANY, respectfully requests entry of judgment in its favor due to Plaintiff's untimely notice and/or Plaintiff's failure to prove covered damages in excess of the deductible. Further, there is no coverage for damages caused by uncovered causes of loss, speculative damages, business interruption damages, costs associated with repair to undamaged property, costs for damage caused by age, wear, tear, deterioration, cracking, marring or scratching or faulty, inadequate or defective materials, repairs, maintenance or construction. Additionally, there is no coverage for collapse or equipment breakdown. DEPOSITORS seeks summary judgment as Plaintiff's has failed to show DEPOSITORS breached the subject policy, and all other relief as this Court may deem just and proper under the circumstances.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on the following counsel of record:

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