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

CASE NO.: 9:21-CV-81884-RS

KAWA ORTHODONTICS, LLP

Plaintiff,

v.

DEPOSITORS INSURANCE COMPANY,

Defendant.
_____/

PLAINTIFF'S, KAWA ORTHODONTICS, LLP,
MOTION FOR SUMMARY JUDGMENT
WITH INCORPORATED MEMORANDUM OF LAW

Plaintiff, Kawa Orthodontics, LLP ("Kawa") hereby moves the Court pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1 for summary judgment in its favor, and in support, states as follows:

PRELIMINARY STATEMENT

This is a breach of contract claim concerning a commercial insurance policy. Kawa owns and operates a dental office in Boca Raton, Florida. In exchange for a premium of $21,384.21, Kawa purchased a premiere businessowners policy from Defendant, Depositors Insurance Company ("Depositors") for the policy period of June 23, 2020, through June 23, 2021. The subject insurance policy is otherwise known as an all-risk policy, meaning all risks are covered except those specifically excluded.

During the subject policy period, covered property consisting of a large aquarium system that was damaged by an accident and a mechanical breakdown. The insurance policy specifically provides additional coverage for equipment breakdown.

Equipment breakdown is defined under the insurance policy as damage to covered property caused by or resulting from an accident to covered equipment. An accident under the insurance policy is defined as fortuitous event that causes direct physical damage to covered equipment from mechanical breakdown, including rupture or bursting from centrifugal force. Further, if one accident causes another accident, all will be considered one accident.

The accident and mechanical breakdown in this case involved stress and centrifugal force within the connecting bridge of the aquarium system that was under vacuum and pressure. As a result of the initial accident and mechanical breakdown, a crack developed in acrylic glass of the connecting bridge between two parts of the aquarium system. There is no long-term fix for the crack in the connecting bridge so it must be replaced. The initial accident resulted in a total loss of the entire aquarium system as it is a single functional system that requires all parts to function for its intended purpose.

The initial accident and mechanical breakdown then caused a subsequent accident and mechanical breakdown to one of the walls of the aquarium system. The subsequent accident and mechanical breakdown resulted from the removal of the connecting bridge. As a result of the subsequent accident and mechanical breakdown, a second crack developed in the acrylic glass of a wall in the aquarium system. This second crack was an inherent risk of removing the connecting bridge, but it was also the only long-term repair available for the aquarium system. The subsequent accident also resulted in a total loss of the entire aquarium system as it is a single functional system that requires all parts to function for its intended purpose. In either case, whether it was from the initial accident or the second accident, the result is the same as the aquarium system was a total loss as it cannot be used for its intended purpose.

Notwithstanding the foregoing, Depositors has wrongfully denied Kawa's claim for damages to the aquarium system. This lawsuit for breach of contract followed Depositor's denial. The aquarium system is covered property under the terms of the subject insurance policy. Likewise, the damage to the aquarium system is additional coverage under the subject insurance policy. There is no applicable exclusion to the additional coverage afforded under the subject insurance policy. Likewise, there are no disputed material facts as to the additional coverage. Accordingly, this Court may render summary judgment as to the denial of coverage for the aquarium system as this is a matter of interpretation and law for the subject insurance policy.

FACTUAL BACKGROUND

A. Commercial Insurance Policy.

During the time of the subject loss, Kawa and Depositors were parties to a Commercial Insurance Policy ("insurance policy"). SOF[1] ¶1. The insurance policy is considered an all-risk insurance policy, meaning that all risks are covered except those specifically excluded or limited. SOF ¶ 2. The covered property under the insurance policy includes business personal property, which is defined as personal property owned and used in the business, including fixtures, equipment, betterments and tenant improvements. SOF ¶ 4.

Relevant to this claim, the insurance policy includes Additional Coverages for equipment breakdown. SOF ¶ 5. The insurance policy defines equipment breakdown as direct physical loss to covered property caused by or resulting from an accident to covered equipment. SOF ¶ 6. Accident is defined under the insurance policy as a fortuitous event that causes direct physical damage to covered equipment. Notably, the event can be from mechanical breakdown, including

[1] References to "SOF" are to Kawa's Statement of Material Facts in Support of The Motion for Summary Judgment which is contemporaneously being filed. Capitalized or bolded terms not otherwise defined have the meanings ascribed to them in the SOF.

rupture or bursting caused by centrifugal force. SOF ¶ 8. The insurance policy further provides that if an initial accident causes other accidents, all will be considered one accident, and all accidents that are the result of the same event will be considered one accident. SOF ¶ 7. Finally, the insurance policy includes a definition of covered equipment as covered property which during normal usage operates under vacuum or pressure, other than the weight of its contents. SOF ¶ 9.

B. The Aquarium System.

During the effective policy period of the insurance policy, Kawa had a large aquarium system on its premises consisting of two acrylic glass tanks and an acrylic bridge that connected the two other parts. SOF ¶¶ 10, 12. The intended purpose of the aquarium system is to sustain marine life and is also a marketing tool for Kawa's dental practice. SOF ¶ 11.

The aquarium system and its three pieces are in their totality one piece of equipment and one aquarium. SOF ¶¶ 12, 18. Approximately 1,500 gallons of water is being circulated and filtered within the aquarium system. SOF ¶ 14. Through its plumbing components, the aquarium system operates under vacuum and pressure. SOF ¶¶ 13, 15. The equipment beneath the aquarium system (i.e., pumps) will no longer work if it is shut off for a certain amount of time. SOF ¶ 16. Due to the loss at issue, none of the equipment that is part of the plumbing for the aquarium system can be used and now must be replaced. SOF ¶ 17. The aquarium system is a single unit and will not function for its intended purpose without all of its parts. SOF ¶ 20. In other words, one part of the aquarium system (i.e., the two tanks with the plumbing system components) will not work without the other (i.e., bridge). SOF ¶ 19.

C. Aquarium System is Covered Property

The aquarium system is covered property under the insurance policy as business personal property. SOF ¶ 22. The aquarium system is a tenant leasehold improvement that cannot be removed and was built into a structural supporting wall. SOF ¶¶ 23-25. Depositors has conceded

that the aquarium system is an independent fixture of the business, is personal property, and is considered covered property under the insurance policy. SOF ¶¶ 26-28.

D. Coverage for First Accident: Initial Crack of Aquarium System

Kawa discovered a crack in the connecting bridge of the aquarium system during the effective period of the insurance policy. SOF ¶ 31. This was the first time that a crack had developed in the aquarium system. SOF ¶¶ 29, 32-33, 35. As a consequence, Kawa took out all of the water from the aquarium system as well as the fish. SOF ¶ 34.

Depositors has admitted the only reason for denying the loss is contained in its denial letter and for no other reason. SOF ¶ 69. The only reason the loss was denied by Depositors in its denial letter is that the loss was due to the negligent work of Erisa Improvements. SOF ¶ 68. Importantly, Depositors has also admitted that the initial crack in the bridge did not take place during a subsequent repair process. SOF ¶ 36. Consequently, Depositors has not and cannot assert that the initial loss is not covered because of the negligent work of Erisa. As a result, there is no denial reason for the initial crack, its resulting damages, and the subsequent accident, and therefore the initial crack is covered under the insurance policy.

The insurance policy provides additional coverage for equipment breakdown caused by an accident, a fortuitous event that causes direct physical damage to covered equipment which during normal usage operates under vacuum or pressure, from mechanical breakdown, including rupture or bursting caused by centrifugal force. SOF ¶¶ 5-9.

Depositors has admitted that there was a direct physical loss to covered property that was accidental. SOF ¶ 63. Depositors' own retained expert, Harold Ornstein, Ph.D., has admitted he does not know the initiating event was for the initial crack. SOF ¶ 37. Further, Ornstein admits he has no confirmed cause of the initial crack and that it is unknown to him. SOF ¶ 43. Ornstein was

of the opinion that the initial crack was caused by a failure most likely from an overstressed condition. SOF ¶ 42. Based on Ornstein's testimony, he has not and will not be able to provide opinions that the initial crack in the bridge was not caused by mechanical breakdown, including rupture or bursting caused by centrifugal force.

In terms of repair for the initial crack to the bridge, Ornstein admitted he was not familiar with the methodology to repair the initial crack pursuant to either FBC or ASTM standards. SOF ¶ 38. In fact, Ornstein stated there is no long-term fix for the initial crack. SOF ¶ 40. Kawa's expert, Sonny Gulati, P.E., confirmed that there is no proper methodology to repair the crack in the acrylic glass. SOF ¶ 39. According to Ornstein, for all the people he spoke to after inspecting the aquarium system, the consensus was that the bridge with the initial crack should be thrown away and to start from scratch. SOF ¶ 41.

E. Coverage for Second Accident: Second Crack to Aquarium System

After the initial crack to the connecting bridge was discovered, Kawa hired Erisa, a company to address how to handle the aquarium system. SOF ¶ 44. The plan of Erisa was to remove the bridge for safety reasons. SOF ¶ 45. When Erisa was dismantling the connecting bridge, another crack developed in a wall of the aquarium system. SOF ¶¶ 46-47.

Depositors' expert, Harold Ornstein, Ph.D., stated he was not in possession of any documentation that illustrates the proper way to make the repair to the aquarium system and there is no uniformity amongst others on how to do this. SOF ¶ 48. Ornstein admitted that not everyone would undertake the repair in the same way. SOF ¶ 49. When Depositors' own expert admits there are no standards for the repair work on the aquarium system, he should not be able to later assert there was negligence in that same repair work.

Kawa's expert, Sonny Gulati, P.E., opined that Erisa was taking the proper course of action to replace the bridge because you cannot repair it and take the chance of leaving a cracked bridge in place. SOF ¶ 50. Gulati further stated that he saw nothing wrong with the procedure that Erisa followed to remove the bridge and that was the only thing they could have done under the circumstances. SOF ¶ 52. Finally, Gulati was of the opinion that the proper procedure for removing the bridge had the inherent risk of causing the second crack but that was the proper procedure for Erisa, and they followed it step-by-step. SOF ¶ 53.

Ornstein confirmed after watching the video of the incident that he did not see any cracks in the wall of the aquarium system before the removal of the bridge but believed there were stresses. SOF ¶ 55. In fact, Ornstein believes that due to the initial crack in the bridge, the same material in the wall of the aquarium system was "an accident waiting to happen". SOF ¶ 59.

Notwithstanding the fact that Ornstein admitted that the second crack was an accident just waiting to happen and there are no standards for undertaking this repair, he still thought if Erisa would not have placed any weight on the bridge the second crack would not have occurred. SOF ¶ 57. After observing the video of the incident, Ornstein claims that the arm of Erisa employee on the bridge caused the second crack and it does not matter how much of load that was, it was just not supposed to be there. SOF ¶ 56. Ornstein believes that Erisa should have used an articulating ladder or a set of ladders with a deck between them so there was no possible way to touch the top of the glass of the wall of the aquarium system that was connected to the bridge. SOF ¶ 58. From a practical sense, Ornstein's opinion that the top of the glass of the wall should not be touched and absolutely no weight was to be placed upon it when removing the attached bridge appears to be an impossible task to undertake.

Conversely, Gulati opined that the observed shoring installed by Erisa was to withstand any load on top of the bridge. SOF ¶ 54. In Gulati's professional opinion, the weight of Erisa's worker had nothing to do with the second crack as it was just a function of trying to remove the bridge which was not negligent. SOF ¶ 51.

While the experts may have differing opinions as to how to undertake the repair, these are not material facts that prevent summary judgment. The material fact not in dispute is that the initial crack to the bridge required the removal of that bridge attached to walls of the aquarium system. The accident of the initial crack as defined under the insurance policy naturally led to the subsequent accident of the second crack. Under the terms of the insurance policy if an initial accident causes other accidents, all will be considered one accident, and all accidents that are the result of the same event will be considered one accident. SOF ¶ 7. One has to reconcile how a bridge attached to the wall of the aquarium system can be removed without expected damage when Depositors' expert claims that it should not be touched, nor any weight be placed upon it. But for the initial crack, the removal of the bridge would not be necessary nor the inherent risk of causing a second crack which was "an accident just waiting to happen".

As to the second crack in wall of the aquarium system, Depositors has conceded that the second crack was an accident and took place during the repair process. SOF ¶¶ 60-61. Depositors has further conceded that the acrylic glass of the aquarium system had a crack and broke, and as a result the aquarium system lost its structural integrity to hold water that it was designed to hold. SOF ¶¶ 62, 64.

F. Depositors' Denial Reason

Depositors had denied all claims for damages to the aquarium system on the basis it is not a covered loss. SOF ¶ 65. Depositors' position is that the repair was negligent and caused the

second crack. SOF ¶ 66. The factual basis for the denial that Depositors relies upon is the report of its expert, Harold Ornstein, Ph.D., the video of the incident, and how the incident was reported by Kawa's representative. SOF ¶ 67.

Depositors' denial letter states: "The reason for this denial of coverage are as follows: Our investigation determined that the loss was due to the negligent work of Erisa Improvements". SOF ¶ 68. Depositors has confirmed that the denial for the damages to the aquarium system was for the reasons stated in the denial letter and for no other reason. SOF ¶ 69.

Accordingly, the facts in the record show that Depositors has improperly denied the claim for the initial crack to the bridge in the aquarium system since additional coverage under the insurance policy provides coverage for equipment breakdown caused by or resulting from an accident that caused mechanical breakdown, rupture or bursting from centrifugal force to the bridge which operates under vacuum and pressure. SOF ¶¶ 5-9. Since the aquarium system is one unit and cannot function without its other parts, the damage to the bridge has rendered the entire aquarium system a total loss as it can no longer be used for its intended purpose. SOF ¶¶ 18-20. Additionally, the facts in the record show that Depositors has improperly denied the claim for the second crack since additional coverage under the insurance policy provides coverage for an equipment breakdown accident (initial crack) that causes another accident (second crack) or is the result of the same event. SOF ¶ 7. Kawa is therefore entitled to summary judgment for the claim of breach of contract in the complaint.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the initial

burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party can satisfy this burden by either: (1) presenting evidence that negates an essential element of the nonmoving party's case; or (2) demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to its case. *Id.* at 322-23. A moving party may also show the absence of evidence to support the non-moving party's case. *King v. Akima Glob. Services, LLC*, 16-CV-25254, 2021 WL 5205960, at *2 (S.D. Fla. Nov. 8, 2021) (citations omitted).

The burden then shifts to the nonmoving party to show that specific facts exist that raise a genuine issue for trial. *Boyle v. City of Pell City*, 866 F.3d 1280, 1288 (11th Cir. 2017). All evidence and reasonable factual inferences drawn therefrom are reviewed in a light most favorable to the non-moving party. *Rojas v. Fla.*, 285 F.3d 1339, 1341-42 (11th Cir. 2002). Nevertheless, [t]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Only disputes over facts that might affect the outcome of the suit under the governing substantive law will properly preclude the entry of summary judgment. *Rodriguez v. Procter & Gamble Co.*, 465 F. Supp. 3d 1301, 1314 (S.D. Fla. 2020) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S.242, 248 (1986)). "[T]o raise a genuine dispute, the nonmoving party must point to enough evidence that a reasonable jury could return a verdict for [her]." *Shaw v. City of Selma*, 884 F.3d 1093, 1098 (11th Cir. 2018) (internal quotation marks omitted). "A nonmoving party, opposing a motion for summary judgment supported by affidavits cannot meet the burden of coming forth with relevant competent evidence by simply relying on legal conclusions or evidence which would be inadmissible at trial. The evidence presented cannot

consist of conclusory allegations or legal conclusions." *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991) (internal citations omitted).

In *Qantum Communications Corp. v. Star Broad., Inc.*, 473 F. Supp. 2d 1249, 1257 (S.D. Fla. 2007), this Court spoke directly to the challenge confronting a nonmoving party for summary judgment:

> ***[T]he party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts."*** *Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In determining whether this evidentiary threshold has been met, the trial court "must view the evidence presented through the prism of the substantive evidentiary burden applicable to the particular cause of action before it." *Anderson,* 477 U.S. at 254, 106 S.Ct. 2505. Summary judgment may be granted if the nonmovant fails to adduce evidence which, when viewed in a light most favorable to him, would support a jury finding in his favor. *Id.* at 254–55, 106 S.Ct. 2505.
>
> Furthermore, the nonmoving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.,* 477 U.S. at 322–23, 106 S.Ct. 2548. ***The failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment. Id. If the non-movant's evidence is merely colorable, or is not significantly probative, summary judgment may be granted.*** *See Celotex Corp.,* 477 U.S. at 322–23, 106 S.Ct. 2548; *Matsushita Elec. Indus. Co.,* 475 U.S. at 586–87, 106 S.Ct. 1348.
>
> Lastly, this Court emphasizes that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp.,* 477 U.S. at 327, 106 S.Ct. 2548 (quoting Fed. R. Civ. P. 1).

ARGUMENT

I. Kawa Is Entitled to Judgment as a Matter of Law for Breach of Contract

Coverage clauses in insurance policies are to be construed liberally and broadly to effect the greatest extent of coverage; and its exclusions, narrowly. *Lenhart v. Federated Nat. Ins. Co.*,

950 So.2d 454, 457 (Fla 4th DCA 2007); *Mejia v. Citizens Property Insurance Corporation*, 161 So.3d 576, 578 (Fla. 2nd DCA 2014); *Hudson v. Prudential Prop. & Cas. Ins. Co*., 450 So.2d 565, 568 (Fla. 2d DCA 1984); *National Merchandise Co. v. United Serv. Auto Ass'n*., 400 So.2d 526,532 (Fla. 1st DCA 1981); *Valdes v. Smalley*, 303 So.2d 342,344 (Fla. 3d DCA 1974). "[W]hen analyzing an insurance contract, it is necessary to examine the contract in its context and as a whole, and to avoid simply concentrating on certain limited provisions to the exclusion of the totality of others." *Swire Pacific Holding, Inc. v. Zurich Insurance Co.,* 845 So. 2d 161 (Fla. 2003).

When an insurer fails to define a term in a policy, the insurer cannot demand a narrow restrictive interpretation of the coverage provided. *Barcelona Hotel, LLC v. Nova Cas. Co.,* 57 So.2d 228, 232 (Fla 3rd DCA 2011); (*Abreu v. Lloyd's of London*, 877 So.2d 834, 836 (Fla. 3d DCA 2004); *Duran v. Owners Ins. Co*., 779 So.2d 307, 308-09 (Fla. 2d DCA 1999); *State Comprehensive Health Ass'n. v. Carmichael*, 706 So.2d 319, 320-21 (Fla 4th DCA 1997)(quoting *Budget Rent-A-Car Sys., Inc. v. Gov't Employees Ins. Co*., 698 So.2d 608, 609 (Fla. 4th DCA 1997). A failure to define a term in an insurance policy can result in ambiguity, thereby causing the policy to be construed in the insured's favor. See: *Abreu*, 877 So.2d at 835. Ambiguous policy provisions are to be construed in favor of the insured and against the insurer as the drafter of the insurance policy. *Wash, Nat'l Ins. Corp. v. Ruderman*, 117 So.3d 943,953 (Fla. 2013); *Swire Pacific Holdings, Inc. v. Zurich Ins. Co*., 845 So.2d 161, 165 (Fla. 2003); *Discover Prop. & Cas. Ins. Co. v. Beach Cars of West Palm Inc.*, 929 So.2d 729, 732 (Fla. 4th DCA 2006. This construction will generally result in a finding of coverage for the insured. *Discover Prop*., 929 So.2d at 732; *Farrer v. U.S. Fid. & Guar. Co*., 809 So.2d 85, 88 (Fla. 4th DCA 2002).

In *State Farm Mut. Ins. Co. v. Menendez*, the Third District Court of Appeals held that "if a policy's language is subject to differing interpretations, the language should be construed

liberally in favor of the insured and strictly against the insurer." 24 So. 3d 809, 811 (Fla. 3d DCA 2010) quoting *State Farm Fire & Cas. Co. v. CTC Dev. Corp*., 720 So. 2d 1072, 1076 (Fla. 1998). Absent ambiguity or inconsistency, "insurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties." *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000).

When the language of a contract or insurance policy is clear and unambiguous, it must be construed to mean just what the language implies and nothing more. *Walker v. State Farm Fire & Cas. Co.*, 758 So. 2d 1161 (Fla. 4th DCA 2000). Plain and unambiguous language in an insurance contract will be given that meaning which it clearly expresses. *U. S. Liability Ins. Co. v. Bove*, 347 So. 2d 678 (Fla. 3d DCA 1977). Furthermore, in *Oil, Inc. v. Universal Security Insurance Co*., the First District Court of Appeals stated, "we are bound to assign to contract provisions the meaning that would be attached to them by an ordinary person of average understanding," 584 So. 2d 1068, 1070 (Fla. 1st DCA 1991), citing *United States Fidelity & Guaranty Co. v. Rood Investments, Inc*., 410 So. 2d 1373, 1374 (Fla. 5th DCA 1982).

A. The Damages Caused to the Aquarium System due to Equipment Breakdown are Covered.

1. **Damages to Aquarium System from Initial Crack**

Kawa made a claim for damages for a 1,500-gallon aquarium system, which is covered business personal property. Those damages include a crack to a connecting bridge that is attached to two acrylic glass tanks, a second crack to a wall of the aquarium system, and all of the pumps and plumbing equipment that circulated the water under pressure and vacuum. There is no dispute that the damaged property was covered property under the insurance policy or that the cause of the damage was accidental.

Depositors has not tendered monies for any of the damages to the aquarium system. Rather, Depositors has denied the claim on the basis that the loss was caused by negligent work of the contractor and for no other reason. As cited in its denial letter, Depositors relies upon the following policy language:

> **B. EXCLUSIONS**
> **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, construction, renovation or remodeling; or
> (4) Maintenance;

However, the exclusion for negligent work is not applicable to the Additional Coverages for Equipment Breakdown. The insurance policy must be reviewed in its context and as a whole, and not on certain limited provisions to the exclusion of the totality of others." *Swire Pacific Holding, Inc. v. Zurich Insurance Co.*, 845 So. 2d 161 (Fla. 2003). In this case, the appropriate analysis for coverage lies with Additional Coverages afforded under the insurance policy for Equipment Breakdown, which provides:

> 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".

Accident and Covered Equipment are defined under the insurance policy as:

> H. **PROPERTY DEFINITIONS**
>
> 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:
>
> b. Which, during normal usage, operates under vacuum or pressure, other than weight of its contents.

The record shows that the initial crack to the bridge of the aquarium system was absolutely not caused by any repair work by the contractor. Accordingly, the exclusion for negligent work does not apply to the initial crack. The record also shows that the initial crack was the result of an accident as defined under the insurance policy. An accident under the insurance policy includes a mechanical breakdown, or rupture caused by centrifugal force to equipment that operates under vacuum or pressure. Kawa's expert, Sonny Gulati, P.E., testified that the aquarium system circulates 1,500 gallons of water under pressure and vacuum. Likewise, Ian Russo, the person who maintains the aquarium system testified that he discovered a crack in the acrylic glass of the bridge in the aquarium system. It is therefore clear that the bridge, which under normal usage operates under vacuum and pressure, suffered a mechanical breakdown or rupture caused by centrifugal force. Accordingly, the initial crack falls is covered under Additional Coverage for Equipment Breakdown. Depositors' own expert, Harold Ornstein, Ph.D., testified that the initial crack was caused by a failure most likely from an overstressed condition, but has no confirmed cause and it remains unknown to him. This policy is an all risk policy. As such, Depositors cannot muster admissible evidence to overcome summary judgment that the initial crack is covered under Equipment Breakdown for the insurance policy.

As a consequence of the initial crack to the bridge, the bridge had to be removed. Depositors' own expert, Harold Ornstein, Ph.D., admitted there was no long-term fix for the initial crack. In fact, Ornstein stated that from those that he consulted, all agreed that the bridge should be thrown away and to start from scratch. Ian Russo who maintained the aquarium system, testified that he removed all the water from the aquarium system as a result of the initial crack. Russo

further confirmed that the plumbing equipment and pumps for the aquarium system will not work if turned off for a period of time and now must all be replaced. Further, the bridge is attached to two acrylic glass tanks. Russo has testified that the aquarium system is one big piece of equipment that requires all of its components to function. The operations manager for Kawa, Michael Lomenzo, confirmed that one part of the aquarium system will not work without the other nor would it function to support marine life without all the components. This means that the aquarium system cannot function without its connecting bridge and therefore the entire aquarium system can no longer function for its intended purpose. Accordingly, the damages as a result of the initial crack to the connecting bridge include the connecting bridge itself, the plumbing equipment and pumps that must be replaced, as well as the two tanks that can no longer function without the bridge.

2. Damages to Aquarium System from Second Crack

As a consequence of the initial accident involving a crack to the connecting bridge, a second accident occurred resulting in a crack to the wall of the aquarium system. The damages from the second accident are also covered under the Additional Coverages for Equipment Breakdown since the insurance policy provides that if an initial "accident" causes other "accidents", all will be considered one "accident". As already addressed, the initial crack to the bridge was the result of an accident to covered equipment. The record shows the initial accident either caused the second accident or was the second accident was the result of the same event, meaning a mechanical breakdown, or rupture caused by centrifugal force to equipment that operates under vacuum or pressure.

The record shows the initial accident caused the second crack. As discussed earlier, the initial accident required that the cracked connecting bridge to be removed. Kawa's expert, Sonny Gulati, P.E., confirmed that the contractor was taking the proper steps in removing the bridge as

the cracked bridge could not be left in place. It was during the removal of the bridge that a second crack developed in the wall of the aquarium system. Gulati testified that there was an inherent risk for causing another crack when removing the bridge attached to the aquarium system but that was the proper course to take. Depositors' expert, Harold Ornstein, Ph.D., agrees there was a risk in removing the bridge. Ornstein acknowledged that the aquarium wall did not appear to have any cracks prior to the bridge removal but there had to be stresses. In fact, Ornstein testified that the due to the initial crack in the bridge, the same material in the tank was "an accident waiting to happen." Regardless of the inherent risk, the bottom line is that the bridge had to be removed due to the initial accident. But for the initial accident, the bridge would not have to removed. Accordingly, the initial accident caused or resulted in a second crack in the aquarium wall when its repair required the removal of the bridge. Given the initial accident caused or resulted in a second accident, the resulting second crack from the second accident is covered under Additional Coverages for Equipment Breakdown.

Notwithstanding the foregoing, Depositors tries to blame the contractor for causing the second crack and thereby denying this claim under an exclusion for negligent work. In order to assert a claim for negligence, Depositors would have to prove a breach of a duty for a standard of care. The record shows that Depositors will never be able to prove a breach of a duty of care since it admits there is no accepted or uniform standard of care for the specialized repair needed in this case.

Depositors' expert, Harold Ornstein, Ph.D., specifically testified that he has no documentation that illustrates the proper way to make the repair of the bridge and that there is no uniformity amongst others on how to do it. Ornstein confirmed that not everyone would make the repair the same way. Given this unique situation, Ornstein's testimony demonstrates there is no

standard of care for the bridge repair. Accordingly, Depositors will be unable to establish a breach of a standard of care when a standard of care does not exist under these circumstances. *See Qantum Comm'cs*, 473 F. Supp. 2d at 1261 n.17 (a party opposing summary judgment "cannot meet the burden of coming forth with relevant competent evidence by simply relying on legal conclusions or evidence which would be inadmissible at trial" (quoting *Avirgan*, 932 F.2d at 1577). See *Transp. Eng'g, Inc. v. Cruz*, 152 So. 3d 37, 49, 2014 Fla. App. LEXIS 18273, *27-29, 39 Fla. L. Weekly D 2333 citing *U.S. ex rel. J&A Mech., Inc. v. Wimberly Allison Tong & Goo*, No. 6:05CV1207 ORL 31DAB, 2006 U.S. Dist. LEXIS 84561, 2006 WL 3388450 (M.D. Fla. Nov. 21, 2006) applied to a plaintiff asserting the negligence. ("Where a duty is not so obvious to be apparent to persons of common experience, as is generally the case with professional negligence, a [plaintiff] must offer expert testimony to establish the standard of care used by similar professionals in the community under similar circumstances.").

Notwithstanding the self-admitted lack of standard of care for the repair, Ornstein claims that no weight should be placed on the acrylic glass connected to the bridge nor should it have been touched. This of course begs the question as to how a contractor who must remove the bridge connected to that glass, can do so without touching it. Such "opinions" rest on inadmissible conclusions and conjecture that should never see the light of day in a courtroom and cannot be relied upon to survive summary judgment. "[C]onclusory allegations without specific supporting facts have no probative value. *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985) .

Regardless, Depositors' corporate representative, John G. Holland, testified that the second crack took place during the required repair. Holland further confirmed that the acrylic glass in the wall of the aquarium system had a crack and broke. Finally, Holland admitted that with respect to the second crack, there was a direct physical loss to covered property that was accidental.

The damages as a result of the second crack to the wall of the aquarium system include a tank that must be replaced, the plumbing equipment and pumps that must be replaced, and the entire aquarium system as it cannot function for its intended purpose without the damaged tank. Depositors' corporate representative, John G. Holland, testified that as a result the second crack, the aquarium system lost its integrity to effectively hold the water that it was designed to hold.

CONCLUSION

Based on the foregoing, Plaintiff, Kawa Orthodontics, LLP, respectfully requests the Court grant summary judgment in its favor for breach of contract and coverage for the aquarium system under Additional Coverages for Equipment Breakdown, with such other relief as deemed just and proper.

Dated: September 19, 2022

HAROLD B. KLITE TRUPPMAN, P.A.
Attorney for Plaintiff
28 West Flagler Street, Suite 201
Miami, Florida 33130
(305) 374-7974
Email: hbkt@truppmanlawoffices.com
Secondary: truppmanparalegal@gmail.com
By: */s/ Harold B. Klite Truppman*
HAROLD B. KLITE TRUPPMAN, ESQ.
FBN: 0856126

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will also send notice of this electronic filing to all counsel of record.

By: */s/ Harold B. Klite Truppman*
HAROLD B. KLITE TRUPPMAN, ESQ.
FBN: 0856126