UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO.: 23-13662-J

DEPOSITORS INSURANCE COMPANY,

Appellant,

v.

KAWA ORTHODONTICS, LLC,

Appellee.

On Appeal From The United States District Court
Southern District Of Florida
District Court Case No.: 9:21-cv-81884-RS

PRINCIPAL BRIEF OF APPELLEE

Douglas H. Stein, Esq.
DOUGLAS H. STEIN, P.A.
121 Alhambra Plaza, Suite 1500
Coral Gables, Florida 33134
Telephone: (305) 206-1506
Email: dhs@steinappeal.com

Counsel for Appellee

APPELLEE'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellee, Kawa Orthodontics, LLC, pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2 and 26.1-3, hereby certifies that the following persons or entities may have an interest in the outcome of this litigation:

1. Butler Weihmuller Katz Craig, LLP – Counsel for Appellant
2. Cabuela, Mihela – Counsel for Appellant
3. Depositors Insurance Company – Appellant
4. Douglas H. Stein, P.A. – Counsel for Appellee
5. Elza, Kristin Wood – Counsel for Appellant
6. Frank, Scott J. – Counsel for Appellant
7. Harold B. Klite Truppman, P.A. – Counsel for Appellee
8. Kawa Orthodontics, LLP – Appellee
9. Keller, Thomas A. – Counsel for Appellant
10. Massey, David - Counsel for Appellee
11. Matthewman, William – U.S. Magistrate Judge, Southern District of Fla.
12. Smith, Rodney – U.S. District Judge, Southern District of Fla.

13. Stein, Douglas H. – Counsel for Appellee

14. Truppman, Harold B. Klite – Counsel for Appellee

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and Eleventh Circuit Local Rules 26.1-1, 26.1-2 and 26.1-3, no publicly traded company or corporation has an interest in the outcome of the case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

Appellee, Kawa Orthodontics, LLC, believes that because the record, issues and applicable law are readily discernable, Oral Argument will be of no assistance to this Court.

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STATEMENT OF JURISDICTION[1]

This is an appeal of a final judgment entered in a case in which Kawa Orthodontics, LLC ("Kawa"), a limited liability company incorporated in Florida with its principal place of business in Palm Beach County, Florida, is seeking damages in excess of $75,000 it alleges are owed by its insurer Depositors Insurance Company ("Depositors"), a corporate citizen of Iowa with its principal place of business in Bentonville, Arkansas.

The final judgment was entered October 2, 2023. (DE 105; A-X,p40). Depositors filed the Notice of Appeal on November 2, 2023. (DE 114; A-X,p52). On August 24, 2024, the District Court denied Depositor's motion for reconsideration (DE 124; A-X,p77) and entered an amended final judgment awarding prejudgment interest to Kawa. (DE 126; A-X,p83). Depositors filed an amended Notice of Appeal on August 30, 2024. (DE 127; A-X,p85).

The District Court had diversity jurisdiction pursuant to 28 U.S.C. §1332. This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291 as an appeal from a final decision of the District Court.

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[1]Throughout this Brief, the Record is referred to by the Docket Entry ("DE") number followed by the corresponding volume (roman numeral) and page number ("p") of the Appendix ("A") filed by Depositors. Depositors' Opening Brief is referred to as "OB." and all emphasis is added unless otherwise noted.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly ruled that Kawa properly submitted and pled a claim for its entire loss.

2. Whether the District Court correctly ruled that the second accident is covered by the insurance policy where the insuring provisions apply, and no exclusion applies.

3. Whether the District Court properly exercised its discretion upon denying Depositors' motion for reconsideration.

STATEMENT OF THE CASE AND FACTS

(i) Course of Proceedings and Disposition in Court Below

On June 30, 2021, Plaintiff, Kawa Orthodontics, LLP ("Kawa"), filed a one (1) count breach of contract action against its insurance carrier, Depositors Insurance Company ("Depositors"), in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. (DE 1-9; A-I,pp33-36).

On August 19, 2021, Depositors filed its answer and affirmative defenses, denying the complaint's material allegations. (DE 1-9; A-I,pp40178).

On August 20, 2021, Kawa filed its reply to Depositors' affirmative defenses. (DE 1-9; A-I,pp179-85).

On October 7, 2021, Depositors timely removed the Florida state court action to the United States District Court for the Southern District of Florida on the basis of diversity of citizenship. 28 U.S.C. § 1332; 28 U.S.C. § 1441. (DE 1; A-I,pp20-26).

On September 19, 2022, Kawa filed its motion for summary judgment, (DE 39; A-V,pp220-39), and its statement of facts supporting its motion for summary judgment. (DE 40; A-VI,pp2-150).

On September 19, 2022, Depositors filed its motion for summary judgment, (DE 44; A-VIII,pp100-19), and its statement of facts supporting its motion for summary judgment. (DE 43; A-VI,p50-62).

On October 10, 2022, Depositors filed its opposition to Kawa's motion for summary judgment, (DE 47; A-VIII,pp121-38), and its response to Kawa's statement of facts in support of Kawa's motion for summary judgment. (DE 48; A-VIII,pp140-53).

On October 11, 2022, Kawa filed its opposition to Depositors' motion for summary judgment, (DE 50; A-VIII,pp202-26), and its response to Depositors' statement of facts regarding Depositors' motion for summary judgment. (DE 52; A-IX,pp3-27).

On October 17, 2022, Kawa filed its reply to Depositors' response to Kawa's motion for summary judgment. (DE 55; A-IX,pp175-85).

On October 18, 2022, Depositors filed its reply to Kawa's response to Depositor's motion for summary judgment. (DE 57; A-IX,pp198-206).

On September 29, 2023, the District Court entered its order on Kawa's and Depositors' cross motions for summary judgment, granting Kawa's motion and denying Depositors' motion. (DE 104; A-X,pp26-38).

On October 2, 2023, final judgment was entered in favor of Kawa in the amount of $326,004.33. (DE 105; A-X,p40).

On October 30, 2023, Depositors filed a motion for reconsideration of the District court's order on the cross motions for summary judgment. (DE 113; A-X,pp42-50).

On November 1, 2023, Depositors filed a notice of appeal. (DE 114; A-X,pp52-67).

On November 12, 2023, Kawa filed its response in opposition to Depositors' motion for reconsideration. (DE 117; A-X,pp69-75).

On August 29, 2024, the District Court denied Depositors' motion for reconsideration. (DE 124; A-X,pp77-81).

On August 29, 2024, the District Court entered an amended final judgment in the amount of $326,004.33, plus $45,629.33 in prejudgment interest, for a total of $371,633.66. (DE 126; A-X,p83).

On August 30, 2024, Depositors filed its amended notice of appeal. (DE 127; A-X,pp85-93).

(ii) Statement of the Facts

The Parties And The Policy

Kawa, a limited liability partnership offering orthodontic services in Palm Beach County, Florida, was formed in or around 1993 by Doctor Larry Kawa.

Depositors, an insurance company authorized to conduct business in the State of Florida, provides its customers with commercial insurance policies and other insurance services.

Kawa and Depositors entered into a commercial insurance policy (the "insurance policy") with effective dates of June 23, 2020 through June 23, 2021. (DE 40; A-VI,pp14, 28).

The insurance policy insures Kawa against direct physical loss subject to a variety of policy conditions, amendments, and endorsements. Specifically, the insurance was an all risk policy, meaning that all risks are covered unless specifically excluded or limited:

> **COVERAGES**
>
> We will pay for 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.
>
> * * *
>
> **COVERED CAUSES OF LOSS**

> This Coverage Form insures against direct physical loss unless the loss is:
>
> a. Excluded by Section B. EXCLUSIONS;
>
> b. Limited in Paragraph A. 4. LIMITATIONS in this section; or
>
> c. Limited or Excluded in Section E. PROPERTY LOSS CONDITIONS or SECTION F. PROPERTY GENERAL CONDITIONS.

(DE 40; A-VI,pp33-34).

Covered property under the insurance policy includes business personal property, defined as personal property owned and used in the business, including fixtures, equipment, betterments, and tenant improvements:

> 1. **COVERED PROPERTY**
>
> Covered Property includes Buildings as described under paragraph a. below, Business Personal Property as described under paragraph b. below, depending on whether a Limit of Insurance is shown in the Declarations for that type of property.
>
> * * *
>
> b. **Business Personal Property** located in or on the buildings or structures at the described premises . . . , consisting of the following:
>
> (1) Personal property you own that is used in your business, including but not limited to furniture, fixtures, machinery, equipment and "stock";

(3) Tenant improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:

(a) Made a part of the building or structure you occupy but do not own; and

(b) You acquired or made at your expense but cannot legally remove[.]

(DE 40; A-VI,pp33-34).

Covered equipment is defined as covered property which during normal usage operates under a vacuum or pressure, other than the weight of its contents:

"Covered equipment" means, Covered Property:

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

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

(DE 40; A-VI,p69).

The insurance policy also includes additional coverage for equipment breakdown which is defined as direct physical loss to covered property caused by or resulting from an accident to covered equipment:

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".

(DE 40; A-VI,p41).

The policy defines an accident as a fortuitous event that causes direct physical damage to covered equipment, and such an accident may be caused by mechanical breakdown, including rupture or bursting caused by centrifugal force:

> "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[.]

(DE 40; A-VI,p69).

Kawa's Aquarium System Accident

Kawa operates an orthodontic practice. As a part of the practice, Kawa had an aquarium system on its business premises consisting of two water tanks and a bridge that connected the two (2) tanks. (DE 36; A-IV,p13). Together, the tanks and the connecting bridge comprised one (1) large aquarium; one part of the aquarium system would not function without the other parts. The aquarium system was utilized in part as a marketing tool for Kawa's orthodontic practice. (DE 36; A-IV,p 50).

The aquarium system was a leasehold improvement installed by Kawa built into a structural supporting wall of the building and, pursuant to the lease with the landlord, could not be removed. (DE 36; A-IV,pp24, 47, 53). Depositors deemed the aquarium system covered property under the policy. (DE 32; A-II,p116). The aquarium system operated by circulating and filtering approximately 1,500 gallons of water under pressure. (DE 36; A-IV,p51); (DE 37; A-IV,p109). The aquarium system operated under a vacuum caused by the water's circulation from the plumbing system. (DE 37; A-IV,p145). Because the aquarium system is a single unit, all of its components must be functioning for it to work. (DE 34; A-III,pp164-65).

The aquarium system operated without incident for years until Ian Russo, who maintained the aquarium system for Kawa, discovered a crack in the connecting bridge of the aquarium system during office hours on March 1, 2021. (DE 34; A-III,pp146-47). Mr. Russo removed the fish and all of the water from the aquarium system. (DE 34; A-III,p152).

Kawa's operation manager, Michael Lorenzo, thereafter hired Erisa Improvements ("Erisa") to address the crack in the bridge. (DE 36; A-IV,p32).The plan was for Erisa to remove the bridge for safety purposes. (DE 36; A-IV,p33).

During the process of dismantling the bridge, secondary cracks developed in the wall of one of the aquarium tanks. (DE 37; A-IV,pp105, 116-17).

The plumbing equipment beneath the aquarium system does not work if it is shut off for a certain period of time. Given what occurred to the system, none of the equipment can be used. (DE 34; A-III,pp31-32).

The Insurance Claim Response

Kawa submitted an insurance claim to Depositors. After investigation, on June 7, 2021, Depositors advised Kawa that there was no coverage for the aquarium system's loss because the loss was purportedly the product of Erisa's negligence. (DE 43; A-III,pp152-61).

Depositors cited its policy provision that it purports excludes coverage for negligence:

> **B. EXCLUSIONS**
>
> *** * ***
>
> 3. We will not pay for loss or damage caused 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, construction, renovation or remodeling; or

(4) Maintenance [] of part or all of any property on or off the described premises.

(DE 40; A-VI,pp52-57).

The Lawsuit

Kawa sued Depositors in a one (1) count breach of contract action alleging that it had purchased insurance from Depositors that covered the aquarium system from the accident. (DE 1-9; A-I,pp33-36). Kawa asserted that it had suffered direct physical damage or loss when the aquarium fractured, rendering the system no longer capable of serving its intended purpose. Despite a clear obligation to indemnify Kawa for its loss, Depositors failed to honor its contractual obligation. Kawa alleged that Depositors breached the insurance contract.

Depositors denied Kawa's material allegations in its complaint alleging that there had been a lack of timely notice of the claim and that Kawa's loss was the product of Erisa's negligence which was excluded under the policy of insurance. (DE 1-9; A-I,pp40-51).

The Summary Judgment Motions

Kawa moved for summary judgment asserting that during the policy period, the aquarium system consisted of two (2) water tanks and a bridge that connected the two (2) tanks. (DE 39; A-V,pp221-39). Together, the two (2) tanks and the connecting bridge comprise one (1) aquarium system; one part of the aquarium system would not function without the other parts. (DE 39; A-V,p224).

Kawa further asserted that during the subject policy period, the aquarium system that was under vacuum was damaged by an accident and a mechanical breakdown. (DE 39; A-V,p225). As a result of the initial accident and mechanical breakdown, a crack developed in the acrylic glass of the connecting bridge between the two (2) tanks of the aquarium system. (DE 39; A-V,p225). There is no long-term fix for a crack in the connecting bridge so the initial accident resulted in a total loss of the entire aquarium system as it is a single functioning system. (DE 39; A-V,p226).

Kawa further asserted that the initial accident then caused a subsequent accident to one of the walls of the aquarium system. The subsequent accident resulted during the removal of the connecting bridge. (DE 39; A-V,p226). As a result of the subsequent accident, a second crack developed in the acrylic glass of a wall in the aquarium system. The incident 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 aquarium system was a total loss. (DE 39; A-V,p222).

Kawa contended the aquarium system was covered property under the terms of the subject insurance policy, and damage to it was covered under additional coverage afforded by the insurance policy. There was no applicable exclusion to the additional coverage afforded under the policy. Kawa asserted there are no disputed material facts as to coverage and moved the District Court for judgment in its favor. Kawa sought as damages the replacement value of aquarium system. (DE 39; A-V,p239).

In support of its motion for summary judgment, Kawa outlined the terms and conditions of the insurance policy, how its aquarium system operated, and the loss suffered when the bridge and tank cracked. (DE 40; A-V,p3-12). Kawa cited testimony from its expert, Sonny Gulati, P.E., to address Depositors' negligence coverage defense. Mr. Gulati testified there was no proper methodology to repair a crack in acrylic glass. (DE 37; A-IV,p109). He said that although the procedure Erisa utilized to remove the bridge had some inherent risk, it was proper. (DE 37; A-IV,pp125-26). The shoring used by Erisa was to withstand any load on top of the bridge and Erisa's work had nothing to do with the second crack that developed

in a tank wall. (DE 37; A-IV,pp143-44). Mr. Gulati stated that the weight of Erisa's worker had nothing to do with the second crack in the wall of the aquarium system and Erisa took the proper steps to replace the bridge. (DE 37; A-IV,pp123-25).

Kawa also cited the testimony of Harold Ornstein, Ph.D., Depositors' expert. Dr. Ornstein said the most likely cause of the crack on the bridge was an overstressed condition, but he could not identify the initiating event for the initial crack. (DE 38; A-V,pp40-42). Dr. Ornstein testified he was not familiar with any methodology to repair the initial crack to industry standards. (DE 38; A-V,p37).

Dr. Ornstein testified that there was no consensus as to the process of, or any documentation to illustrate, the proper way to perform such a repair. (DE 38; A-V,pp63-64). He stated there was no long-term fix for the initial crack, (DE 38; A-V,p29), and everyone he consulted with said the bridge should be thrown away and started again from scratch. (DE 38; A-V,pp37-38). Given the initial crack in the bridge, the same material in the wall was "an accident waiting to happen." (DE 38; A-V,p82).

Kawa also cited the testimony of John G. Holland, Depositors' corporate representative. Mr. Holland testified that he had no information that there were cracks in the aquarium system before the bridge crack appeared. (DE 33; A-

III,p37). He also testified that the initial crack did not take place during the repair process. (DE 33; A-III,p50). He stated that the incident involving the aquarium system was an accident and resulted in a direct physical loss to covered property. (DE 33; A-III,pp49, 104-05). The aquarium system lost its structural integrity to effectively hold the water it was designed to hold. (DE 33; A-III,pp108-09).

Mr. Holland testified it was Depositors' position that the damage to the aquarium system was not a covered loss because Erisa was negligent during the attempted repair and caused the second crack in the tank wall. (DE 33; A-III,pp21, 52-53). The factual basis for denying coverage was the findings of their expert, Dr. Ornstein, the video of the incident, and the report of the incident by Kawa. (DE 33; A-III,pp52-53). The denial by Depositors was for no reason other than those set forth in its claim denial letter. (DE 33; A-III,pp110-11).

Depositors opposed Kawa's motion for summary judgment and moved for summary judgment on its own. (DE 44; A-VIII,pp100-19). Depositors argued that Kawa failed to prove there were covered damages; the loss was precipitated by wear and tear and deterioration; the loss was the product of faulty, inadequate, and defective maintenance and repair; no collapse had occurred; there was no covered equipment breakdown; there was no coverage for damages caused by Erisa's work;

there had been a lack of prompt notice; and any potential recovery was limited to actual cash value, rather than fair market or replacement value.

Depositors also responded in opposition to Kawa's motion for summary judgment. (DE 47; A-VIII,pp121-38; DE 48; A-VIII,pp139-54). Depositors argued that the crack in the bridge was outside the scope of the pleadings and the events did not give rise to a covered accident to covered equipment.

Kawa opposed Depositors' motion for summary judgment asserting it had met its burden of demonstrating it had suffered property damage, and the burden was on the insurer to establish any exclusions, which it had not done. (DE 50; A-VIII,pp202-22).

Kawa noted that Depositors had acknowledged compliance with all conditions precedent to bring the claim and admitted it had suffered no prejudice. (DE 33; A-III,p94). Kawa further argued that there was no evidence that the cracks were caused by any negligence of Erisa. (DE 50; A-VIII,pp203-04); (DE 52; A-IX,pp3-27).

The Summary Judgment Ruling

The District Court granted Kawa's motion for summary judgment and denied Depositors' motion for summary judgment. (DE 104; A-X,p38). After outlining the insurance policy provisions at issue, the District Court discussed Kawa's aquarium system, how it worked and outlined the events giving rise to Kawa's claim. (DE 104; A-X,pp28-29).

The District Court noted that the parties agreed the aquarium system was covered as business personal property as defined by the insurance contract, that the incident involving the aquarium system was an accident, and that Kawa had experienced direct physical loss to covered property. (DE 104; A-X,pp28-29).

After citing the applicable summary judgment standard and insurance coverage law governing the dispute, the District Court agreed with Kawa that Depositors breached the insurance policy:

> At the outset, the Court notes that the parties are in agreement regarding the existence of a valid contract (the insurance contract) and the reason for Defendant's denial of Plaintiff's insurance claim, which is the alleged negligent repair work of the third-party company hired following the initial crack to the aquarium's connecting bridge. Defendant argues that its denial was appropriate given the allegedly negligent repair work of the third-party company and given that the parties' insurance contract excludes coverage for damage caused by or resulting from faulty, inadequate, or defective workmanship, repair, or maintenance. However,

> Defendant has not demonstrated how the repair work was negligent, or how Plaintiff's damage was caused by faulty, inadequate, or defective workmanship, repair, or maintenance.
>
> Instead, it is Plaintiff that has demonstrated that the repair work was not negligent, and that Plaintiff's damages were caused by an accident to covered equipment. Indeed, Defendant's own expert testified that a subsequent crack to the aquarium system's wall was "an accident waiting to happen" due to the initial crack in the acrylic glass. The same expert admitted that there was no long-term solution for the initial crack to the aquarium system, and that all individuals he consulted recommended that the bridge be discarded, and the aquarium system rebuilt anew. Moreover, the parties agree that there is no industry-approved methodology to repair acrylic glass of the type found in Plaintiff's aquarium system. Because there is no such methodology, there is no identifiable standard of care applicable to the repair work in this instance. As such, the Court cannot hold that the repair company breached its duty of care, and was therefore negligent, in the attempted repair of Plaintiff's aquarium system. Because the parties agree that the repair company's work is the only basis for Defendant's denial of Plaintiff's insurance claim, and because the Court has held that the repair company's work was not the cause of Plaintiff's loss, there remains no basis for Defendant to deny Plaintiff's insurance claim.

(DE 104; A-X,pp32-33).

Regarding Depositors' argument that Kawa's loss did not meet the definition for equipment breakdown coverage because there was no accident to covered equipment, the District Court found Kawa had demonstrated precisely that. The aquarium system is covered property, which, during normal usage, operated under

a vacuum. An accident occurred in the system that was subject to a mechanical breakdown, which includes a rupture. Because the aquarium system suffered a rupture, coverage is extended under the insurance policy's additional coverage provision for equipment breakdown. (DE 104; A-X,pp34-35).

Regarding Depositors' argument that Kawa failed to provide parts of the aquarium system for inspection, the District Court noted Kawa presented evidence of Depositors' representatives acknowledging it was not prejudiced by the absence of some parts of the system. Further, the District Court noted, Depositors' corporate representative stated property preservation was not applicable to the parties' dispute. The District Court stated it would not permit the insurer to argue the issue conceded in discovery and, in any event, there was no prejudice demonstrated by a lack of preservation of property. (DE 104; A-X,pp35-36).

On the issue of timeliness, the District Court found that because the parties agreed Kawa had complied with all conditions precedent prior to filing the notice of claim and Depositors' representative testified Kawa had given timely notice, Kawa had complied with timely notification of loss. (DE 104; A-X,pp36).

As to damages, the District Court rejected Kawa's claim of replacement cost since the aquarium system had not been replaced. Instead, the District Court awarded Kawa the actual cash value recovery in the amount of $326, 004.33:

> For the reasons stated herein, Defendant's Motion is denied, and Plaintiff's Motion is granted. The Court holds that Plaintiff's aquarium system is covered equipment as defined by the parties' insurance contract. An accident occurred to this piece of covered equipment which caused direct physical loss of and damage to the covered equipment during the policy period. This accident was a fortuitous event and can be best understood as a mechanical breakdown due to the rupture and breach of the aquarium system wall and connecting bridge. Because there was a direct physical loss of and damage to covered property resulting from an accident to covered equipment, Defendant was obligated to insure Plaintiff's loss pursuant to the parties' insurance contract.

(DE 104; A-X,p37).[2]

Final judgment was thereafter entered in Kawa's favor. (DE 104; A-X,p40).

The Reconsideration Motion

Depositors moved for reconsideration of the summary judgment ruling arguing the District Court erred in its conclusion that Depositors failed to show negligence on the part of Erisa on the basis of an absence of industry standards; erred in concluding an accident occurred under the policy; and erred in its determination there had been a rupture to the aquarium system. (DE 113; A-X,pp42-50).

Kawa filed a response in opposition to reconsideration. (DE 117; A-X,pp69-75). Kawa argued that the motion for reconsideration was improper because it

[2] Depositors has not raised any issue on appeal concerning the amount of damages.

presented arguments available at the time of the District Court's ruling and reiterated arguments already made. Accordingly, Kawa asserted that Depositors' arguments did not give rise to a right of relief.

The Reconsideration Ruling

The District Court denied Depositors' motion for reconsideration. (DE 124; A-X,pp77-81). Regarding the argument that the District Court erred in determining Erisa was not negligent due to a lack of industry standards, the District Court found that the case authority cited by Depositors was distinguishable. It also noted that its determination that Depositors failed to prove how the repairs had been negligent or caused by faulty work was not based solely on lack of industry methods of repair. Both experts determined the aquarium system had been damaged beyond repair. The District Court found the remaining issues raised by the motion for reconsideration to be nothing but disagreements with its reasoning and did not provide proper grounds for reconsideration.

An amended final judgment was entered in Kawa's favor in the amount of $371,633.66, representing the summary judgment amount of $326,004.33 plus prejudgment interest in the amount of $45,629.33. (DE 126; A-X,p83).

This appeal ensued.

STANDARD OF REVIEW

The entry of a summary judgment is subject to *de novo* review. *Baxter v. Santiago-Miranda*, 121 F.4th 873, 883 (11th Cir. 2024).

Under Florida law, construction of an insurance policy is a question of law for the court. *Public Risk Mgmt. of Fla. v. Munich Reinsurance Am., Inc.*, 38 F.4th 1298 (11th Cir. 2022).

Under Florida law, an insurance policy is to be construed in accordance with the plain language of the contract. Generally, insurance coverage must be broadly construed in favor of the insured, while exclusions must be narrowly construed against the insurer. Furthermore, ambiguous policy provisions are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy, and ambiguous insurance policy exclusions are construed against the drafter and in favor of the insured. *Liberty Surplus Ins. Corp. v. Kaufman Lynn Constr., Inc.*, 130 F.4th 903, 910 (11th Cir. 2025).

Depositors refers to the standard of review applicable to a court's findings of fact. (OB. at p. 24). However, because a district court does not make factual findings in deciding a summary judgment motion, no question of clear error review is relevant here. Because summary judgment is appropriate where there is no genuine issue of material fact, any purported 'factual findings' of the district court

are actually conclusions as a matter of law that no genuine issue of material fact exists. *Jones v. American Gen. Life & Acc. Ins. Co.*, 370 F.3d 1065 (11th Cir. 2004).

A district court's denial of a motion for reconsideration is reviewed for an abuse of discretion. *Roland Corp. v. inMusic Brands, Inc.*, 2025 WL 926703 (Fed. Cir. Mar. 27, 2025). However, a district court's denial of a motion for reconsideration does not change the standard of review applied to its decision to grant summary judgment. When reviewing a disposition after a denial of a motion for reconsideration, the original disposition itself is reviewed under whatever standard of review would normally apply. *ECB USA, Inc. v. Chubb Ins. Co. of New Jersey*, 113 F.4th 1312 (11th Cir. 2024), *cert. denied*, 2025 WL 889161 (U.S. Mar. 24, 2025).

SUMMARY OF THE ARGUMENT

Kawa both properly included its claim for damage to the bridge in its notice of the claim provided to Depositors before the suit and pled it in the Complaint. The aquarium system and all of its components constitute a system as a whole. Damage to one (1) component is damage to the whole system. Depositors' policy states that if an initial accident causes other accidents, all of the accidents are considered one (1) accident. Pursuant to the plain terms of Depositors' insurance policy, the claim for the initial accident was subsumed within Kawa's allegation that the second accident occurred. Kawa was not required to plead every accident as a separate claim under the policy.

Additionally, the District Court correctly ruled that the second accident is covered by the insurance policy.

First, no exclusion to coverage for "negligent work" applies. An element for any claim of negligence is a duty requiring the defendant to conform to a certain standard of conduct. Accordingly, Erisa could only have been negligent if there was an applicable standard of conduct to which it was required to conform. Depositors' expert, Harold Ornstein, never testified that Erisa was negligent or did not comply with any particular standard of conduct. In fact, he never testified that there was a particular standard of conduct to repair the bridge. Rather, although he

testified as to what **he** would have personally done to repair the bridge, he unequivocally stated that others might do it differently. That testimony establishes that there is no standard of conduct applicable to the repair of the aquarium system.

Second, the insuring provisions of the insurance policy do cover Kawa's loss. Depositors' request that this Court re-write the policy should be rejected. The aquarium system was "covered equipment" as defined in the policy because the evidence indisputably establishes that it operated under a "vacuum" and "pressure." The crack to the tank was an "accident" as defined in the policy because it was a "rupture" as that term is used in the policy. Even Depositors' corporate representative acknowledged that it was an accident. The second accident falls squarely within the coverage of the policy. The policy provides that all "accidents" that are the result of the same "event" will be considered one "accident." The record evidence indisputably establishes that the second accident was the result of the first accident and therefore was the same "event."

The second accident is covered even if it was caused by Erisa's negligence. Coverage for "Equipment Breakdown" is provided by the "Additional Coverages" of the insurance policy. Pursuant to that coverage Depositors is required to pay for direct physical loss to the aquarium system caused by or resulting from an "accident." The second accident falls squarely within that coverage. If applicable,

the "Negligent Work" exclusion would completely contradict the insuring provisions and render the insurance coverage illusory. Depositors' policy cannot provide coverage for loss resulting from an accident and simultaneously exclude coverage because the accident resulted from purported negligence.

Dr. Orenstein never testified that the glass cracked due to "wear and tear." Rather, he testified that he had no opinion as to what initiated the crack in the bridge and the crack in the tank was caused by a worker who put his weight on it. He testified that the glass degraded over time which weakened the material. The mere passage of time is not wear and tear. Wear and tear is gradual damage caused by repeated use or external factors. Aging, on the other hand, is a natural process. With no evidence of what caused the crack in the bridge, and the only evidence as to the second crack is that it was caused by a worker putting his weight on it, Depositors presented no evidence that the second accident was caused by "wear and tear." The "Other Types of Loss" section of the insurance policy, which sets forth such exclusionary language, nonetheless states that if the accident results from such exclusion, Depositors is required to pay for the loss. No exclusion applies to exclude Kawa's claim from coverage.

Lastly, the District Court properly exercised its discretion in denying Depositors' motion for reconsideration. Depositors violated Federal Rule of Civil

Procedure 59 by raising new arguments previously available to it and rearguing its previously asserted arguments. Additionally, Depositors presented no viable substantive grounds which would preclude the original ruling of the District Court.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT KAWA PROPERLY SUBMITTED AND PLED A CLAIM FOR ITS ENTIRE LOSS.

Before addressing the substantive issue raised by Depositors, a straw issue it raises must first be addressed. Throughout its Brief Depositors intersperses comments concerning the disposal of the bridge after it was removed from the aquarium system. (OB. at pp. 12, 26, 27, 29-30, 41, 44, 48). Those comments are a bald attempt to create a false narrative that Depositors was somehow at a disadvantage because of the absence of the bridge. In reality, this is a non-issue. Both video and photographic evidence were available to Depositors to review. Most importantly, Depositors' own corporate representative, John Holland, testified that Depositors was not prejudiced by the disposal of the bridge:

> Q Okay. And again, that disposal did not prejudice the -- did not prejudice Depositors Insurance Company, correct?
>
> MS. ELZA: Object to form.
>
> THE WITNESS: Based on the facts we know now, that's correct.

(DE 33; A-III,p94).

Kawa implores this Court to ignore Depositors' transparent attempt to distract it from the complete absence of merit to any of Depositors' substantive arguments. The first of those baseless arguments is that there is no insurance coverage for Kawa's claim for damage to the bridge because, Depositor's falsely contends, Kawa failed to include that damage in its notice of the claim provided to Depositors before the suit and failed to plead it in the Complaint. (OB. at pp. 28-31). Nothing could be further from an accurate consideration of the Record, and Depositors' own insurance policy in particular.

Depositors' insurance policy states unequivocally that if an initial accident causes other accidents, all of the accidents will be considered one (1) accident:

> 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".

(DE 40; A-VI,p41).

It is important for the Court to understand the nature of the aquarium system at issue. The aquarium system was not a simple fish tank. Rather, it was a system of two (2) large tanks connected by an overhead bridge, serviced by pumps and other equipment. Ian Russo, who maintained the aquarium system, testified:

> Q You used the word tank, I just want to get an understanding of what an aquarium is in total.

What is the purpose of an aquarium such as the one that we're talking about today with the small tank, large tank with the bridge, what is the purpose of that?

A What do you mean by purpose?

Q Is it to keep the fish alive?

A Yes.

Q Okay. Now, in order to keep the fish alive, does it just require just to have a tank or there has to be all sorts of components to the aquarium itself?

A There needs to be components to the aquarium, yes.

Q They're all considered one unit together, otherwise, it wouldn't work, correct?

A Correct.

Q Okay. So there's knowledge thrown around saying equipment or tank. Would you consider the aquarium like one big piece of equipment in the sense that it requires all these components?

A One does not run without the other.

Q So it's one piece of equipment, correct?

A Correct.

(DE 34; A-III,pp164-65).

Thus, the aquarium system, and all of its components, constitute a system as a whole. Damage to one component is damage to the whole system.

On or about March 1, 2021, Kawa first noticed the crack in the bridge. (DE 43; A-VI,p154). As established by the record evidence, and will be discussed below, that crack was caused by an accident covered by the insurance policy. On October 21, 2021, during Erisa's attempt to repair the crack in the bridge caused by the initial accident, a crack manifested in the wall of the larger part of the aquarium system. (DE 43; A-VI,p155). Again, as established by the record evidence, and will be discussed below, that crack was caused by an accident which itself was caused by the initial accident.

Because the subsequent accident was caused by the initial accident, pursuant to the terms of the insurance policy, the initial accident is subsumed within the second accident for the purpose of determining insurance coverage. Thus, in any claim or pleading for insurance coverage, a claim for coverage due to the subsequent accident is by definition a claim for coverage for the initial accident. Accordingly, Kawa properly claimed and pled its claim for insurance coverage.

Additionally, Depositors' feigned "shock" at discovering that Kawa's claim also included the initial accident should fall on deaf ears. Prior to the lawsuit, Depositors never informed Kawa that the notice of the claim was somehow deficient and never requested Kawa to preserve any portion of the aquarium system including the bridge.

On the contrary, Depositors' own adjuster, Vincent Ciurca, testified that Kawa complied with all of the conditions precedent and subsequent to making a claim for the loss. (DE 32; A-II,pp130-31). This, of course, would include providing notice of the claim. Additionally, Depositors' corporate representative, John Holland, testified that Kawa provided timely notice of the claim to Depositors. (DE 33; A-III,p110).

Mr. Holland also testified that no provision in the insurance policy required Kawa to preserve the bridge after it failed. (DE 33; A-III,p32). In fact, he testified that any failure to preserve the pieces of the aquarium system did not prejudice Depositors. (DE 33; A-III,p94).

Depositors' contention that the crack in the bridge was not part of the claim or pleadings is contrary to all record evidence. Any claim for that initial accident was subsumed within the claim for the subsequent accident - - and there is no applicable law requiring that at claim subsumed within another be separately pled.

Depositors' failed argument is very similar to that made by the defendant in *Agrofollajes, S.A. v. E.I. Du Pont De Nemours & Co., Inc.*, 48 So. 3d 976 (Fla. 3d DCA 2010), *rev. denied*, 69 So. 3d 277 (Fla. 2011) where the plaintiffs filed a products liability action alleging the defendant's fungicide harmed the plaintiffs' crops. Although the plaintiffs alleged in the complaint that the product contained a

design defect, they did not specifically allege their "microbe shift theory," *i.e*. that the fungicide adversely effected microbes in the plants. The jury returned a verdict for the plaintiffs. On appeal, the defendant argued that the plaintiffs' failure to specifically plead their "microbe shift theory" barred recovery. The court rejected that argument holding that although not specifically pled, the plaintiffs' "microbe shift theory" was adequately embraced within the pleading of a design defect:

> Admittedly "microbe shift" is not specifically mentioned in the general allegations of negligence contained in the Euro Flores Amended Complaint, but we do not believe that such specificity is required. For example, plaintiffs are regularly allowed to plead that "the defendant negligently operated a vehicle so as to collide with the plaintiff's vehicle and as a direct and proximate result of which the plaintiff was injured." Under Du Pont's argument, plaintiffs would have to plead specifically that plaintiff's collar bone was broken when it struck the steering wheel. If the evidence showed that the collar bone was actually broken when it struck the door, then that would be an unpled theory.

Id. at 996.

Thus, the plaintiffs stated a cause of action for design defect and were not required to plead specifically the "microbe shift theory." The court noted that rules of discovery were precisely designed to allow defendants to ascertain the specifics of a plaintiff's claim:

> **We conclude that "microbe shift" and "white fly" were both matters to be ascertained during discovery, not subjects with which to encumber the pleadings.**

Id. at 996.

Those are the precise circumstances present in this case. Kawa presented a claim and stated a cause of action for Depositors' failure to provide insurance coverage for an accident. It is noteworthy that contrary to Depositors' statement, Kawa did not allege that the loss occurred "on April 24, 2021." (OB. at p. 14). Rather, Kawa pled that it "suffered a covered loss to its insured property **on or about** April 24th, 2021." (DE 1-9; A-I,pp35). Pursuant to the plain terms of Depositors' insurance policy and Kawa's pleading, the claim for the first accident was subsumed within Kawa's allegation that the loss occurred on or about April 24, 2021. Kawa was not required to plead every accident as a separate claim under the policy. The District Court properly entered the judgment for Kawa.

II. THE DISTRICT COURT CORRECTLY RULED THAT THE SECOND ACCIDENT IS COVERED BY THE INSURANCE POLICY WHERE THE COVERAGE TERMS OF THE POLICY APPLY AND NO EXCLUSION APPLIES.

When a plaintiff who has moved for summary judgment shows an absence of genuine issue of material fact as supported by credible evidence, the burden shifts to the non-moving party, who must produce significant, probative evidence demonstrating the existence of a triable issue of fact to avoid summary judgment. *Baker v. Upson Reg'l Med. Ctr.*, 94 F.4th 1312 (11th Cir. 2024). Unless the nonmoving party "comes forward with significant, probative evidence demonstrating the existence of a triable issues of fact," the moving party is entitled to summary judgment. *Id*. at 317 (citations omitted). Here, Kawa has demonstrated an absence of any genuine issue of material fact. Moreover, Depositors has not come forth with any, let alone "significant," probative evidence even indicating the existence of a triable issue of fact. Accordingly, the District Court properly entered summary judgment for Kawa.

Depositors argues that there is no coverage for Kawa's claim for the second accident because that accident does not fall within the coverage terms of the insurance policy and even if it did, certain policy exclusions exclude it from coverage. (OB. at pp. 32-43). That argument is baseless as it is founded on a

misreading of the insurance policy and an inaccurate representation of the applicable law.

A. The District Court Correctly Ruled That The Negligent Work Exclusion Does Not Apply.

Depositors included a provision in its insurance policy that excludes coverage for certain types of negligent work:

> 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:
>
> * * *
>
> (2) Design, specifications, workmanship, work methods, repair, construction, renovation, remodeling, grading, compaction, failure to protect the property; . . .

(DE 40; A-VI,pp52-57).

Thus, the exclusion only applies if the second accident was caused by Erisa's negligence when it was repairing the aquarium system. In Florida, a required element for any claim for negligence is "[a] duty, or obligation, recognized by the law, **requiring the defendant to conform to a certain standard of conduct**, for the protection of others against unreasonable risks." *Clay*

Elec. Coop., Inc. v. Johnson, 873 So. 2d 1182, 1185 (Fla. 2003). "The existence of a duty of care is a legal question, not a factual one, duty being "the standard of conduct given to the jury for gauging the defendant's factual conduct." *Morris v. Capital City Bank*, 2025 WL 395336, at *2 (Fla. 1st DCA Feb. 5, 2025)(quoting *McCain v. Florida Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992)). Accordingly, Erisa could only have been negligent if, as a matter of law, there was an applicable standard of conduct to which it was required to conform.

Applicable standards of conduct can arise from various sources including legislation, common law, administrative rules and industry standards as evidenced through expert testimony. *See Arevalo v. Coloplast Corp.,* 2020 WL 3958505 (N.D. Fla. July 7, 2020*), aff'd*, 2022 WL 16753646 (11th Cir. Nov. 8, 2022); *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, 2021 WL 765019 (N.D. Fla. Feb. 28, 2021). In the instant case, Depositors attempted to establish the standard of conduct applicable to Erisa through the testimony of its expert, Harold Ornstein. That attempt failed.

Dr. Orenstein never testified that Erisa was negligent or did not comply with any particular standard of conduct. In fact, he never testified that there was a

particular standard of conduct to repair the bridge. [3] Rather, although he testified as to what **he** would have personally done to repair the bridge, he unequivocally stated that others might do it differently:

> Q Do you have any documentation from any source that illustrates the proper way that this repair should have been performed?
>
> A No. I think what -- I think I sent you something which talked about one particular manufacturer methodology that they used. I think we're talking about proprietary there**. I don't think there's uniformity amongst everyone.**
>
> Q It's not common in the industry to having do this type of repair, correct?
>
> A. I think it's a onesie-twosie-type thing. Basically, you're dealing with a highly specialized area. There are very few people - and, you know, basically, if I were the one doing it, the first thing I would do is, I'd go back to the manufacturer of the material and get their recommendations before I start with any kind of a circular saw to make changes.

(DE 38; A-V,p63).

> Q So it's fair to say you don't have an opinion regarding this issue?
>
> A **I told you what I would do if I were given the job. That doesn't mean that everybody else would do it the same way.**

(DE 38; A-V,pp64-65).

[3]At most, Dr. Orenstein testified that Erisa's repair work was "improper." (DE 38; A-V,pp101,151). He never defined that term.

The testimony of Depositors' own expert establishes that there is no standard of conduct applicable to the repair of the aquarium system. Although others might use techniques different than what Dr. Orenstein would have used, the use of those techniques, even if they fail, does not establish that the failure was due to negligence. Indeed, the mere fact that a worker placed weight on the bridge does not even approach demonstrating that Erisa was supposedly negligent.

In the District Court Depositors did not attempt to establish the standard of conduct other than through the testimony of Dr. Ornstein. In fact, it argued, as it does on appeal, that the absence of an applicable standard of conduct is irrelevant to the determination of whether a defendant owed a duty to the defendant and, therefore, could be deemed negligent under the law.

In support of that argument Depositors relies on two (2) cases, neither of which applies here. First is *Pascual v. Florida Power & Light Co.*, 911 So. 2d 152, 154 (Fla. 3d DCA 2005), *rev. denied*, 921 So. 2d 628 (Fla. 2006) in which the complaint alleged that the power company's failure to maintain a traffic signal caused a motor vehicle accident which itself caused the death of the driver of a vehicle. Nothing in the entirety of the Opinion refers to industry standards - - the presence or absence of industry standards simply was not an issue in the case. Although the issue of industry standards was not an issue, the court did find that

there was an applicable standard of conduct established in the common law by the Supreme Court of Florida:

> Recently, in *Goldberg* [*v. Fla. Power & Light Co.*, 899 So. 2d 1105 (Fla. 2005)], the Florida Supreme Court held that FPL's deactivation of a traffic signal to effectuate repairs created a foreseeable zone of risk and gave rise to a legal duty to warn motorists of the hazardous condition. *Goldberg*, 899 So.2d at 1110–1111. Applying the undertaker's doctrine, the Court held that, by undertaking the maintenance of a traffic signal, an electric company assumes a specific, legally recognized duty to act with reasonable care. *Goldberg*, 899 So. 2d at 1113.

Pascual, 911 So. 2d at 154.

Here, Depositors failed to establish that there was any standard of conduct applicable to the repair of the aquarium system. Accordingly, *Pascual* is completely inapplicable to the instant case.

The second case relied on by Depositors is *Orlando Executive Park, Inc. v. Robbins*, 433 So. 2d 491 (Fla. 1983). Although that case does address the issue of industry standards, it is equally inapplicable here. In *Robbins*, the plaintiff alleged she was assaulted while a guest at a motel. She alleged the motel proprietors were negligent in not having provided sufficient security. The defendants argued that they could not be negligent because there were no applicable industry standards. The Supreme Court of Florida disagreed.

In its Brief, Depositors attempts to quote that court's holding. However, Depositors has unfortunately mis-quoted the court as follows:

> "The absence of industry standards does not insulate the defendants from liability."

(OB. at p. 33).

That quote is inaccurate. Depositors only presents this Court with a portion of the court's sentence and has not used an ellipsis to indicate it has done so. What the court actually held was:

> We agree, however, with the district court's assessment of OEP's liability. In commenting on OEP's attack on the lack of standards the district court stated that the absence of industry standards does not insulate the defendants from liability **when there is credible evidence presented to the jury pointing to measures reasonably available to deter incidents of this kind, against which the jury can judge the reasonableness of the measures taken *in this case.***

Robbins, 433 So. 2d at 493 (italics in original).

In its Brief, Depositors simply excluded the bolded portion of the holding, which most importantly qualifies the portion of the holding that Depositors did provide. The actual holding of the court is that a defendant can be found to have been negligent in the absence of industry standards only when there are other measures reasonably available, *i.e.* an applicable standard of conduct, to deter incidents of the kind at issue in the case. In *Robbins*, that standard existed. Citing

to long-standing precedent, the court noted that "[a]n innkeeper owes a duty of reasonable care for the safety of his guests." *Robbins,* 433 So. 2d at 493.

Unlike the circumstances in *Robbins*, here Depositors presented no standard of conduct applicable to the repair of the aquarium. Although Dr. Orenstein opined that no weight should have been placed on top of the bridge, he did not testify how a reasonable repairer should have performed the repair. Rather, he testified that he personally would have contacted the manufacturer:

> Q It's not common in the industry to having do this type of repair, correct?
>
> A I think it's a onesie-twosie-type thing. Basically, you're dealing with a highly specialized area. There are very few people - and, you know, basically, **if I were the one doing it**, the first thing I would do is, I'd go back to the manufacturer of the material and get their recommendations before I start with any kind of a circular saw to make changes.

(DE 38; A-V,p63).

> Q So it's fair to say you don't have an opinion regarding this issue?
>
> A **I told you what I would do if I were given the job. That doesn't mean that everybody else would do it the same way.**

(DE 38; A-V,p64).

Dr. Orenstein did not know who manufactured the material at issue in the instant case and could not testify as to what the manufacturer might have recommended if it had been asked:

> Q Who was the manufacturer of this material.
>
> A I said earlier I don't know. But the thing is, if the person is given the assignment to get the thing fixed, it would be incumbent upon them to go back to the owner, to go back to the GC. Now, I know Living Colors put it in. But there's -- I would expect there would be some kind of a roadmap where they can find out who was, or if they don't know that particular acrylic, talk to an acrylic manufacturer. As I say, the two that were most memorable to me are Rohm and Haas and General Electric. And there are others, I'm sure.
>
> **Q And do you know what they would recommend.**
>
> **A No. I would ask them.**
>
> **Q You don't know?**
>
> A I -- I have something on a guy who makes repair materials. But I'm not sure -- like you get yourself a dishwasher and they say, we recommend the use of such and such detergent. It doesn't mean the other detergents don't work, but you sort of get their preference.

(DE 38; A-V,pp63-64).

Since Dr. Orenstein could not testify what the manufacturer would have recommended, and in light of his testimony that not everybody would perform the

repair in the same way, it is possible that the manufacturer might have recommended that the repair be performed in the same manner as Erisa performed it. This squares perfectly with Dr. Orenstein's testimony that the entire aquarium system was aged and an accident waiting to happen. (DE 38; A-V,p82). Any repair he could recommend would only have been temporary. (DE 38; A-V,p29). Indeed, the second accident was not due to Erisa's negligence. When working with aged glass that has inherent micro-cracks, further cracking is inevitable when attempting a repair - - simply stated, accidents happen.

Dr. Orenstein testified that no amount of weight, even three (3) ounces, should have been placed on the bridge during the repair. (DE 38; A-V,p87). In essence this would require that the bridge not be touched during the repair. Yet, contrary to his own testimony, Dr. Orenstein testified that one (1) method of repair, albeit temporary, could have been to open the crack and apply a sealant. (DE 38; A-V,p37). This begs the question - - how is one to open the crack and apply the sealant without touching the bridge? Not only does Dr. Orenstein's opinion fail to create a triable issue, its admissibility is questionable. *ParkerVision, Inc. v. Qualcomm Inc.*, 627 F. App'x 921, 924 (Fed. Cir. 2015), *cert, denied*, 577 U.S. 1236 (2016)("[T]he self contradictory testimony of a single witness did not satisfy

the burden of establishing actionable negligence when that statement is balanced against all the other uncontradicted evidence in this record.")(citations omitted).

In its Brief Depositors makes a passing reference to the doctrine of res ipsa loquitur. (OB. at p. 35). As recognized by this Court, "[r]es ipsa loquitur—Latin for 'the thing speaks for itself"—is an evidentiary doctrine that permits a trier of fact to infer a defendant's negligence from unexplained circumstances." *Tesoriero v. Carnival Corp.,* 965 F.3d 1170, 1180 (11th Cir. 2020), *cert denied*, 141 S. Ct. 2516 (2021)(footnote omitted). For the doctrine to apply it must be shown that "the mishap is of a type that ordinarily does not occur in the absence of negligence." *Id*.

Res ipsa loquitur has no application here and its application would be counter-intuitive to Depositors' argument. First, the instant case concerns an action in contract, not tort. Additionally, Depositors' entire argument is that the second accident was caused by Erisa's negligence, *i.e*. that a worker placed his weight on the bridge. Depositors has made no argument that the second accident was caused by "unexplained circumstances." In fact, absent affirmative evidence that the second accident was caused by Erisa's negligence, *i.e.* if res ipsa loquitur somehow applies here, the second accident would undoubtedly be covered by the insurance policy.

B. The District Court Correctly Interpreted The Insurance Policy In Determining That The Insuring Provisions Cover The Second Accident.

Any evaluation of whether a court has properly interpreted an insurance policy must begin with the consideration of various unwavering principles. First, insuring or coverage clauses are construed in the broadest possible manner to affect the greatest extent of coverage. *McCreary v. Florida Residential Prop. & Cas. Joint Underwriting Ass'n*, 758 So. 2d 692, 695 (Fla. 2d DCA 2014). *See also, Westchester Gen. Hosp., Inc. v. Evanston Ins. Co.,* 48 F.4th 1298, 1302 (11th Cir. 2022)("[I]nsurance coverage must be [interpreted] broadly . . . ")(quoting *Hudson v. Prudential Prop. & Cas. Ins. Co.*, 450 So. 2d 565, 568 (Fla. 2d DCA 1984)).

Second, "[i]f there is more than one reasonable interpretation of policy language—one affording coverage; one ruling out coverage—the policy is ambiguous and coverage is inferred. *Lenhart v. Federated Nat'l Ins. Co.,* 950 So. 2d 454, 457 (Fla. 4th DCA 2007).

Third, where the lack of a definition of a term in a policy renders the policy language subject to differing interpretations, the term should be construed liberally in favor of the insured and strictly against the insurer. *Container Corp. of Am. v. Maryland Cas. Co.,* 707 So. 2d 733, 736 (Fla. 1998); *Berkshire Life Ins. Co. v. Adelberg,* 698 So. 2d 828, 830 (Fla.1997). "[W]hen an insurer fails to define a term in a policy, ... the insurer cannot take the position that there should be a 'narrow,

restrictive interpretation of the coverage provided." *State Farm Fire & Cas. Co. v. CTC Dev. Corp.,* 720 So. 2d 1072, 1076 (Fla. 1998).

With those principles established, the District Court properly determined that the following insuring provision provided coverage for Kawa's claim:

> B. 5. **ADDITIONAL COVERAGES**
>
> * * *
>
> N. **Equipment Breakdown**
>
> (l) 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".

(DE 40; A-VI,p41).

The terms "accident" and "covered equipment" are defined in the policy:

> 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.

(DE 40; A-VI,p69).

Pursuant to the language drafted by Depositors, and the undisputed record evidence, that insuring provision covers Kawa's claim.

1. <u>The aquarium is "Covered Equipment."</u>

Depositors first argues that the aquarium system was not "covered equipment" as defined under the policy because it did not operate under a "vacuum." (OB. at p. 37). Depositors seems to mistakenly believe that the aquarium could not be operating under a vacuum because the tanks "were not fully enclosed." (OB. at p. 37). Because the word "vacuum" is not defined in the policy the word must be afforded an ordinary meaning resulting in the broadest coverage. *See CTC Dev. Corp.*, 720 So. 2d at 1076. Pursuant to the Merriam-Webster Dictionary at merriam-webster.com/dictionary, the word "vacuum," means to "draw or take in by or as if by suction." This is exactly how Kawa's aquarium system operated to distribute aerated water throughout the system. As Micheal Lomenzo, Kawa's Operations Manager, testified:

> Q Is the aquarium under a vacuum of some type? In other words, is water being sucked in and out of the aquarium?
>
> A Yes.

Q Okay. How so?

A It's sucked out through pumps, and it has water that comes in, it gets chilled, so there is a chiller on the roof.

There filtration pumps, sump pumps. There's - it's -- it just won't sustain life anymore, not from the equipment that we have.

(DE 36; A-IV,pp51-52).

Kawa's expert, Sonny Gulati, also testified that the aquarium system worked under a vacuum and pressure:

Q As the aquarium is working, okay? The large aquarium, actually, it's, whatever, the three pieces as they're functioning, is it under vacuum and pressure?

A Yes, it is. Yes. Absolutely. Yes, sir.

Q Okay. And when I talk about pressure, I'm just not talking about pressure of the contents of the water. I'm talking about the pressure from piping. Is it under pressure from the -- from the plumbing, if you like?

A Oh, yeah. That's the circulation. That's how the water circulates, yes, uh-huh.

(DE 37; A-VI,p145).

Depositors presented no evidence that the aquarium system did not operate under a vacuum and pressure. The aquarium system indisputably operates under vacuum and pressure and, therefore, falls squarely within Depositors' own definition of "covered equipment" and the coverage of the policy.

2. <u>The second accident falls squarely within the definition of an "Accident" as provided in the insurance policy.</u>

Depositors next argues that the second accident does not fall within the definition of "accident" it placed in the policy. (OB. at p. 38). That argument is baseless. An "accident" as defined in the policy includes a mechanical breakdown, including a "rupture or bursting caused by centrifugal force." (DE 40; A-VI,p69). Once again, Depositor's failed to provide a definition of the word "rupture." Pursuant to the Merriam-Webster Dictionary at merriam-webster.com/dictionary, the word "rupture," means "a breaking apart." Pursuant to that same source, a "crack" is a "break" or a "split." Thus, in its ordinary use, a crack is a form of rupture and falls within the policy's definition of an "accident."

However, Depositors takes its tortured interpretation of its insurance policy further and argues that to be considered an "accident," any rupture must have been caused by centrifugal force, which is absent here. Once again Depositors ignores the manner in which it chose to write its own policy. The relevant sentence crafted by Depositors states that an "accident" is a "[m]echanical breakdown, including rupture or bursting caused by centrifugal force." The language could not be more clear. There are two (2) types of mechanical breakdown that can constitute an "accident": (1) a rupture as occurred here; or (2) a bursting caused by centrifugal force that did not occur here.

Depositors requests this Court to impermissibly re-write the policy by applying the phrase "by centrifugal force" not only to the word "bursting" but also to the word "rupture." Of course, a court "cannot rewrite the contract by judicial interpretation." *Simon v. USAA Life Ins. Co.,* 2024 WL 1342948, at *4 (11th Cir. Mar. 29, 2024)(citation omitted). Moreover, Depositors' proposed re-write of the policy violates the classic canon of the "rule of the last antecedent." That canon provides that "a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Oak Grove Res., LLC v. Director, OWCP*, 920 F.3d 1283, 1290 (11th Cir. 2019)(citation omitted). As to the issue at bar, the cannon requires that at the phrase "by centrifugal force" only apply to the word "bursting" which immediately precedes the phrase. The phrase does not apply to the word "rupture."

Not only does the policy language establish that the second accident is an "accident" under the policy, the testimony of Depositors' corporate representative, John Holland, does the same:

> Q Okay. So what -- let me put it a different way. Was the incident that occurred an accident, or was it something intentionally done?
>
> MS. ELZA: Object to form.
>
> THE WITNESS: **I believe it was an accident**.
>
> BY MR. TRUPPMAN:

Q Any reason to believe differently?

A. No.

(DE 33; A-III,p49).

Mr. Holland did later attempt to walk back his unequivocal testimony:

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.

(DE 33; A-III,p105).

However, he gave no explanation which might have clarified his seemingly conflicting statement that although the second crack was an accident, it was not an accident as apparently Depositors is seeking to define that word.

The second accident falls squarely within the definition of an "accident" as provided in the insurance policy.

3. <u>The undisputed facts establish that the second accident was an "Accident" covered under the insurance policy.</u>

Depositors next argues that the record evidence does not place the second accident within the coverage of the policy. (OB. at p. 42). To even make that argument, Depositors simply ignores the testimony of its own witnesses.

The policy provides that all "accidents" that are the result of the same event will be considered one "accident." Despite that the policy contains no definition of

the term "event," Depositors boldly proclaims that the second accident was not the result of the first accident, and therefore not the same "event." However, in its Brief, Depositors actually acknowledges the fallacy of its argument and admits that the second accident was the result of the first accident. As Depositors states:

> [T]he 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 was connected.**

(OB. at p. 42).

Once again Depositors did not provide a definition of the word "result" in its policy. However, pursuant to the Merriam-Webster Dictionary at merriam-webster.com/dictionary, the word "result," means "a consequence, effect or outcome of something." Pursuant to Depositors' own description, the second accident which occurred during the repair process necessitated by the first accident would not even have occurred if the first accident had not occurred. It simply cannot be denied that the second accident was a consequence of the first accident, *i.e*. it was a result of the first accident, and was therefore part of the same event.

Depositors is attempting to impose an unwritten "intervening cause" exception to its definition of when two (2) accidents are considered to be the result

of the same event. Of course, there is no such exception in the policy. Nor would the evidence support one if it did exist.[4] The passage of time between the two (2) accidents is irrelevant. The question is whether the second accident was the result of the first accident. Depositors' own expert established that it was.

Dr. Orenstein testified that the crack in the bridge occurred because the material had degraded, and the repair exacerbated that condition:

> Q Let's talk about the crack occurred when Erisa did what they did. Part of the reasons, I believe, in your report, was that the material itself degraded, and that contributed to what occurred when Erisa was doing the attempted repair, correct?
>
> A Wait a minute. **It was degraded, to begin with, before they got there. And they went ahead and irritated it even more.**

(DE 38; A-V,p54).

That testimony alone establishes that the second accident resulted from the first accident. But there is much more. Dr. Orenstein further testified that because the bridge was on the verge of failure, **any** amount of weight could cause the second crack:

> Q Okay. How much extra weight was on it then?

[4]"[O]nly when an intervening cause is completely independent of, and not in any way set in motion by, the tortfeasor's negligence [does] the intervening cause relieve[ ] a tortfeasor from liability." *Serrano v. Dickinson,* 363 So. 3d 162, 166 (Fla. 4th DCA 2023)(citation omitted).

> A Asked and answered. I don't know what he weighed. All I know is, it's more than zero.
>
> Q So could it be 3 ounces and it would Is that fair to say? Is that your testimony?
>
> MS. ELZA: Object to form.
>
> THE WITNESS: I don't know the amount that's needed. All I know is, **if you have something that's on the verge of failure that's already had a crack starting,** if you go ahead and irritate it more, it's not gonna help. And the amount is gonna make a difference on how long it takes to propagate as such.

(DE 38; A-V,pp57-58).

Again, that testimony of Dr. Orenstein establishes that the first accident caused the bridge to be on the verge of failure and caused the second accident. In fact, Dr. Orenstein could not eliminate the possibility that the aquarium tank had already been cracked before Erisa began its repair:

> Q So where was the crack in the aquarium wall, you know, before Erisa came in to actually doing the attempted repair?
>
> MS. ELZA: Object to form.
>
> THE WITNESS: My understanding it was on the top.
>
> BY MR. TRUPPMAN:
>
> Q. In the bridge area, correct?
>
> A I presume so.

Q But not in the wall area, correct?

A Look, here's the thing: Let's go back again. The entire material is aged. The entire material is in a degraded condition. It is vulnerable to damage from increased stresses.

Q And you're saying that's as to the entire system, both aquariums and the bridge between the two?

A They're all aged. And then it's a question of where you have your worst condition from the standpoint of material capability to withstand.

(DE 38; A-V,p58).

When reviewing the video, Dr. Orenstein again made it clear that the aquarium tank had already been cracked before Erisa began its repair:

A It hadn't propagated, but it started.
You know, again, when you go ahead and have a small crack, it doesn't necessarily propagate instantly. The fact -- the fact is, without that irritation of the extra load, that crack would not have appeared.

* * *

Q Is there anything that occurred between the last part of the video and 2:36, where we're at right now, that was significant?

A Not visible to the viewer at this point. However, something is probably going on.

Q What's "something"?

A It's growing.

(DE 38; A-V,pp92-93).

Dr. Orenstein clearly testified that the second accident was an accident waiting to happen:

> A This material is degraded. This material was 16 years old. It had one area where it had a - - a crack had propagated to get people to be aware of the fact that it was not going to last forever that way and they had to go ahead and change it. **However, the same material at other parts that had gone through the same experience age-wise and they're basically an accident waiting to happen.**

(DE 38; A-V,p82).

Depositors' corporate representative, Mr. Holland, confirmed that the second accident resulted from the first:

> Q Let me ask you a different way. Did the negligent repair itself, okay, result in the crack in the Plexi - - sorry, the crack in the acrylic glass?
>
> MS. ELZA: Object to form.
>
> THE WITNESS: **It resulted in it expanding and expanding to other parts of the tank.**

(DE 33; A-III,pp57-58).

Thus, the second accident was not an occurrence independent of the first. It was an "expansion" of the first. The undisputed evidence establishes that the second accident is an accident covered under the policy.

4. <u>The second accident is covered even if it was caused by Erisa's negligence.</u>

The coverage for Equipment Breakdown lies within the "Additional Coverages" provided by the insurance policy. Pursuant to that coverage Depositors is required to pay for direct physical loss to the aquarium system caused by or resulting from an "accident":

> 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**".

(DE 40; A-VI,p41).

As fully discussed above, the second accident falls squarely within that coverage. Notwithstanding that express coverage, Depositors seeks to deny this claim under the "Negligent Work" exclusion which provides:

> **B. EXCLUSIONS**
>
> *** * ***
>
> 3. We will not pay for loss or damage caused 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, construction, renovation or remodeling; or

(4) Maintenance [] of part or all of any property on or off the described premises.

(DE 40; A-VI,pp52-57).

However, this is not an excluded loss since any "Negligent Work" of Erisa resulted in the aquarium system to breakdown which is additional coverage included in the policy. This Court has unequivocally held that "when limitations or exclusions completely contradict the insuring provisions, insurance coverage becomes illusory." *Interline Brands, Inc. v. Chartis Specialty Ins. Co.,* 749 F.3d 962, 966 (11th Cir. 2014). Coverage is illusory when "the insurance policy grants coverage with one hand and then with the other completely takes away the entirety of that same coverage." *Travelers Indem. Co. of Connecticut v. Richard Mckenzie & Sons, Inc.,* 10 F.4th 1255, 1265 (11th Cir. 2021). That is an ambiguity which creates an "absurd" result which must be "abandoned." *Interline Brands,* 749 F.3d at 966. "Under Florida law, the remedy for an ambiguous provision is to resolve the ambiguity against the insurer and in favor of coverage. *Id.*

Here, Depositors' policy provides coverage for loss resulting from an accident, yet Depositors seeks to deny coverage because it resulted from purported negligence. Depositors' interpretation of the policy renders the coverage improperly narrow or illusory under this all-risk policy of insurance. Moreover, the purpose of the exclusion appears to have it apply after a repair has been completed and then subsequently fails and not during the repair process itself.

Accordingly, as to the second accident, notwithstanding whether Depositors' assertion is factually accurate, the policy affords coverage. That is, the Negligent Work "result[ed] in" … "direct physical loss or damage to Covered Property caused by or resulting from an "accident" to "covered equipment'" pursuant to the all-risk policy.

5. <u>The undisputed facts establish that any exclusion from coverage for wear and tear, hidden/latent defect and cracking do not apply.</u>

Continuing its futile attempt to find some provision in the policy that will allow it to deny Kawa coverage (OB. at p. 43), Depositors relies on exclusions in the policy that provide as follows:

> 2. We will not pay for loss or damage caused by or resulting from any of the following:
>
> * * *
>
> 1. **Other Types of Loss**
>
> (1) Wear and tear;

> (2) Rust or other corrosion, decay, deterioration, hidden or latent defect or a quality that causes it to damage or destroy itself;
>
> * * *
>
> (6) Settling, cracking, shrinking or expansion . . .
>
> But if an excluded cause of loss that is listed in paragraphs (1) through (7) results in an "specified cause of loss, "accident" or building glass breakage, we will pay for the loss caused by that "specified cause of loss", "accident" or building glass breakage.

(DE 40; A-VI,pp52-57).

None of the key terms, including "wear and tear," are defined in the policy. Dr. Orenstein never testified that the glass cracked due to "wear and tear." Rather, he testified that he had no opinion as to what initiated the crack in the bridge (DE 38; A-V,pp24, 42, 82), and the crack in the tank was caused by a worker who put his weight on it. (DE 38; A-V,pp70, 90). Dr. Orenstein testified that the glass degraded over time which weakened the material. (DE 38; A-V,pp46, 55, 83).

The mere passage of time is not wear and tear. Wear and tear is the gradual damage caused by repeated use or external factors. Aging is a natural process.

It cannot be over-emphasized that Dr. Orenstein testified he had no opinion as to what initiated the crack in the bridge, (DE 38; A-V,pp24, 42, 82), and the crack in the tank was caused by a worker who put his weight on it. (DE 38; A-V,pp70, 90). With no evidence of what caused the crack in the bridge, and the only

evidence as to the second crack is that it was caused by a worker putting his weight on it, Depositors presented no evidence that the second accident was caused by "wear and tear." The "Other Types of Loss" section of the insurance policy, that sets forth such exclusionary language, nonetheless states that if the accident results from such exclusion the Defendant is required to pay for the loss. (DE 40; A-VI,pp55-57). No exclusion applies to exclude Kawa's claim from coverage.

III. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION UPON DENYING DEPOSITORS' MOTION FOR RECONSIDERATION.

"A district court abuses its discretion when it misapplies the law in reaching its decision or bases its decision on findings of fact that are clearly erroneous." *Arce v. Garcia*, 434 F.3d 1254, 1260 (11th Cir.2006). "[R]econsideration is an extraordinary remedy that should be employed sparingly." *Khullar v. Goldstein*, 2025 WL 984622, at *2 (S.D. Fla. Mar. 27, 2025)(citations omitted).

The grounds warranting reconsideration are narrow. As this Court has held:

> The only grounds for granting a Rule 59 motion are newly-discovered evidence or manifest errors of law or fact. **A Rule 59(e) motion cannot be used to relitigate old matters, raise arguments or present evidence that could have been raised prior to the entry of judgment**.

PBT Real Est., LLC v. Town of Palm Beach, 988 F.3d 1274, 1287 (11th Cir. 2021)(citations omitted).

Depositors' motion for reconsideration violated that well-established rule. Accordingly, the District Court did not abuse its discretion in denying it.

First, Depositors raised new arguments based on the two (2) cases it first cited in its motion, *Orlando Executive Park v. Robbins*, 433 So.2d 491 (Fla. 1983), and *Pascual v. Florida Power & Light Co.*, 911 So. 2d 152 (Fla. 3d DCA 2005), *rev. denied*, 921 So.2d 628 (Fla. 2006). Both of those cases were obviously available to Depositors prior to the District Court ruling on the motions for summary judgment. Thus, it was improper for Depositors to raise them for the first time in its motion for reconsideration.

Additionally, as discussed above, neither of those cases applies here. *Pascual* did not concern the issue of industry standards and *Robbins* involved the lack of industry standards for adequate public safety measures and the applicable duty of care. The instant case, in contrast, involves insurance contract questions related to coverage for the repair of an aquarium system.

More importantly, as the District Court made clear in its ruling, the case was not disposed of solely on the basis of an absence of industry standards. (DE 124; A-X,p124). Rather, given the factual record presented, Depositors did not demonstrate that the aquarium system's failure was the product of negligence in the repair process. A motion for reconsideration of a previous order is an

extraordinary remedy to be employed sparingly. Courts and litigants cannot be repeatedly called upon to backtrack through the paths of litigation. Accordingly, motions for reconsideration should not be entertained where the moving party seeks solely to relitigate an issue already decided.

However, that is what Depositors sought to do by attempting to relitigate issues that had already been considered and ruled on by the District Court. Depositors' motion did not demonstrate that the District Court misapplied the law in reaching its decision or based its decision on findings that were clearly erroneous. Accordingly, the denial of Depositors' motion for reconsideration was not an abuse of discretion.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should affirm the Final Judgment entered for Kawa.

Respectfully submitted,

DOUGLAS H. STEIN, P.A.
121 Alhambra Plaza, Suite 1500
Coral Gables, Florida 33134
Telephone: (305) 206-1506
Email: dhs@steinappeal.com

By: /s/ Douglas H. Stein
Douglas H. Stein
Fla. Bar No. 355283

CERTIFICATE OF COMPLIANCE

I hereby certify that this Principal Brief of Appellee complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(g)(1) and 32(a)(7)(B)(i) and contains no more than 13,000 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 29th, 2025, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will also send notice of this electronic filing to all counsel of record.

DOUGLAS H. STEIN, P.A.
121 Alhambra Plaza, Suite 1500
Coral Gables, Florida 33134
Telephone: (305) 206-1506
Email: dhs@steinappeal.com

By: /s/ Douglas H. Stein
Douglas H. Stein
Fla. Bar No. 355283