IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COURT OF APPEALS CASE NO.: 18-12887-A
D.C. Docket No. 1:17-cv-23362-KMM

MAMA JO'S, INC., D/B/A BERRIES,

Plaintiff/Appellant,

vs.

SPARTA INSURANCE COMPANY,

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

INITIAL BRIEF OF APPELLANT MAMA JO'S, INC., D/B/A BERRIES

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APPELLANT'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

COMES NOW, the Appellant, MAMA JO'S, INC., D/B/A BERRIES, by and through the undersigned counsel and pursuant to 11th Cir. R. 26.1-2 (f), hereby files this Certificate of Interested Persons and Corporate Disclosure Statement, and, in furtherance thereof, sets forth the following interested persons:

1. Alvarez Feltman & Da Silva, P.L., Attorney for Plaintiff/Appellant
2. Clyde & Co US, LLP, Attorney for Defendant/Appellee
3. Da Silva, Leonardo H., Alvarez Feltman & Da Silva, P.L., Attorney for Plaintiff/Appellant
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MAMA JO'S, INC., D/B/A BERRIES,

v.

SPARTA INSURANCE COMPANY,

CASE NO.: 18-12887-A

Plaintiff/Appellant

7. Mama Jo's, Inc. d/b/a Berries, Plaintiff/Appellant
8. Martinez, Christopher A., Alvarez Feltman & Da Silva, Attorney for Plaintiff/Appellant
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10. Moore, Hon. K. Michael, Chief United States District Judge
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STATEMENT REGARDING ORAL ARGUMENT

Oral Argument is desired in the above-styled Appeal. Oral argument will assist the Court in determining the merits of this case. Oral Argument will enhance consideration of the issues dealing with whether the Lower Court has committed reversible error and whether this case should be remanded to the Lower Court for further consideration.

CERTIFICATE OF TYPE SIZE AND STYLE

The font used in Appellant's brief is proportionally-spaced Times New Roman, 14-point pursuant to the Federal Rules of Appellate Procedure.

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1332. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered final summary judgment on June 11, 2018 [D.E 146]. Plaintiff/Appellant Mama Jo's, Inc. d/b/a Berries filed a timely notice of appeal on July 9, 2018 [D.E. 147]. This is an appeal from the entry of a final summary judgment entered by the United States District Court for the Southern District of Florida that disposed of all claims.

STATEMENT OF THE ISSUES

This appeal presents the following issues:

1. whether the district court erred in granting summary judgment in favor of Defendant/Appellee based on its conclusion that "direct physical loss" under an all-risk insurance policy does not include cleaning and/or requires that the property be rendered "uninhabitable" or substantially "unusable";

2. whether the district court erred in granting summary judgment in favor of Defendant/Appellee based on its conclusion that Plaintiff/Appellant failed to establish business income coverage because Plaintiff/Appellant could not show there was any suspension of operations caused by physical damage; and

3. whether the district court erred in striking Plaintiff/Appellant's causation experts.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On May 19, 2017, Plaintiff/Appellant Mama Jo's, Inc. d/b/a Berries ("Berries") filed suit in state court in Miami-Dade County, Florida based on damages it sustained because of dust and debris from road work being performed on S.W. 27th Avenue. [D.E. 1]. Defendant/Appellee Sparta Insurance Company ("Sparta") [Berries' insurance company], Prohost USA, Inc. ("Prohost") [Berries' insurance agent], and Corey Buford ("Buford") [the adjuster retained by Sparta to investigate and adjust Berries' claim] were named as defendants in the complaint, which included counts for declaratory relief, breach of contract, and negligence. *Id.*

On September 6, 2017, Sparta removed the state court action to the United States District Court for the Southern District of Florida. *Id.* Buford was voluntarily dismissed as a defendant on January 30, 2018. [D.E. 63]. Prohost was voluntarily dismissed as a defendant on February 1, 2018. [D.E. 66]. Berries' claim for declaratory relief against Sparta was dismissed on February 9, 2018. [D.E. 67]. On March 26, 2018, Berries filed an amended complaint asserting a single claim for breach of contract against Sparta. [D.E. 102].

On April 6, 2018, Sparta moved for summary judgment and to exclude the testimony of Berries' experts at trial. [D.E. 105 and 106]. On April 7, 2018, Berries likewise moved for summary judgment and to exclude the testimony of Sparta's

experts at trial. [D.E. 110 and 111]. On June 11, 2018, the district court granted Sparta's motion for summary judgment and excluded the testimony of Berries' causation experts, Alex Posada (audio/lighting), Chris Thompson (awning), and Alfredo "Al" Brizuela (engineering/causation). [D.E. 146]. This timely appeal followed. [D.E. 147].

STATEMENT OF THE FACTS

Berries owns and operates a restaurant by the same name in Miami, Florida located at 2884 S.W. 27th Avenue, Miami, FL 33133. [D.E. 146]. The restaurant was insured by Sparta at the time of loss under an "all risk" commercial insurance policy (the "Policy"). *Id.* The Policy covered "direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss". *Id.* (quoting Policy). "Covered Causes of Loss" means "direct physical loss unless the loss is" excluded or limited. *Id.* (quoting Policy). The term "direct physical loss" is not defined in the Policy.

The Policy's Business Income Loss (and Extra Expense) Coverage Form provides that Sparta 'will pay for actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration'. The 'suspension' must be caused by direct physical loss of or damage to property". *Id.* (quoting Policy). The term "suspension" is defined as "[t]he slowdown or cessation of your business activities". *See* Policy [D.E. 102, Exhibit A].

On June 7, 2018, the parties filed a Joint Pretrial Stipulation [D.E. 143], which, among other things, stipulated that (1) "[t]here was roadwork on S.W. 27th Avenue which is adjacent to Berries' restaurant" and that (2) "[d]ust and debris generated by roadway construction migrated onto Berries' premises". It is undisputed that Berries was forced to continually clean its restaurant during the roadwork. [D.E. 146]. In December 2014, Berries reported the claim to Sparta. *Id.* Berries hired Epic Group Public Adjusters ("Epic") to assist them with the claim. *Id.* Epic prepared a preliminary damage estimate of $16,275.58, which included cleaning and painting portions of the restaurant, cleaning the restaurant's awning, and striping the parking lot. *Id.* Epic also submitted a Sworn Statement in Proof of Loss to Sparta for $13,775.58 (the amount of the estimate minus the $2,500.00 deductible), $292,550.84 for lost business income, and $4,000.00 for claims data expenses[1]. *Id.*; *see also* Denial Letter [D.E. 110-13]. Sparta denied the claim in January 2017. *Id.* Berries thereafter filed suit. [D.E. 1].

During the course of litigation, Berries retained an awning expert and audio/lighting expert to assess the damage at the restaurant. Upon rendering their

[1] The Policy's Property Enhancement Endorsement provides that "in the event of a covered cause of loss, we will pay for all reasonable expenses incurred by you at our request to assist us in: (1) the investigation of a claim (2) the determination of the amount of loss, including the cost of taking inventory, getting appraisals, and preparing other data in order to determine the extent of your covered loss". The Policy refers to these types of expenses as "claims data expenses". *See* Policy [D.E. 102, Exhibit A].

expert opinions, Berries learned that the damage to its awning system was more severe than previously thought and that there was damage to its audio/lighting system that was attributable to the roadwork. [D.E. 128]. Berries supplemented its damage claim to include $318,688.57 in property damage, $187,000.00 for business income losses (less than previously demanded), and $4,000.00 for claims data expenses. *Id.* The primary reason for the increase in Berries' damage model was the difference between repair (or cleaning) versus replacement of Berries' sophisticated awning system, which consists of fixed canopies, roll-up curtains, a retractable roof, and related hardware. *Id.*

In April 2018, the parties filed cross-motions for summary judgment and to exclude the testimony of the other's experts. [D.E. 105, 106, 110, and 111]. On June 11, 2018, the district court granted Sparta's motion for summary judgment and excluded the testimony of Berries' experts, Alex Posada (audio/lighting), Chris Thompson (awning), and Al Brizuela (engineering/causation). [D.E. 146]. The district court concluded that, although they were qualified to testify as experts, (1) Alex Posada's testimony should be excluded because he did not conduct quality control (QC) diagnostic testing, (2) Chris Thompson's testimony should be excluded because his visual testing and personal experience were not enough to raise his testimony beyond "unexplained assurances and unsupported speculation", and (3) Al Brizuela's testimony should be excluded because he did not conduct chemical testing and was

"unable to attribute damage to the construction dust with any degree of certainty". *Id.*

Given the exclusion of these experts, the district court found that summary judgment in Sparta's favor was appropriate because "[Berries] cannot show that the construction dust and debris from 2014 caused the alleged 'direct physical loss' to their awnings, retractable roof, HVAC system, railings, and audio and lighting system". *Id.* The district court implicitly acknowledged that Berries could still proceed with its initial claim for cleaning notwithstanding the striking of Messrs. Posada, Thompson, and Brizuela. *Id.* However, the district court entered summary judgment on the cleaning claim as well based on its conclusion that "cleaning is not considered direct physical loss" and that "physical loss occurs when property becomes 'uninhabitable' or substantially 'unusable'." *Id.* The district court also entered summary judgment on Berries' business income loss claim because it felt that (1) Berries "has not established a direct physical loss or damage" to the restaurant and (2) Berries "cannot show that there was any suspension of operations by 'physical damage'" because the "restaurant remained open every day". *Id.*

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed *de novo*, applying the same legal standards used by the district court. *Kingsland v. City of Miami*, 382 F. 3d 1220, 1225 (11th Cir. 2004). Summary judgment may only be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law". *Celotex Cop. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). The moving party "bears the burden of demonstrating that no genuine dispute exists as to any material fact in the case". *Twiss v. Kury*, 25 F. 3d 1551, 1554 (11th Cir. 1994). "All reasonable doubts about the facts should be resolved in favor of the non-moving party." *Id.* at 1555. "If reasonable minds could differ on any inferences arising from undisputed facts, summary judgment should be denied." *Id.*

In diversity actions, such as this one, the substantive law of the forum state (Florida) applies. *LaFarge Corp. v. Travelers Indem. Co.*, 118 F. 3d 1511, 1515 (11th Cir. 1997). Florida has long adhered to the rule of *lex loci contractus*. *State Farm Mut. Auto. Ins. Co. v. Roach*, 945 So. 2d 1160, 1163 (Fla. 2006). "That rule, as applied to insurance contracts, provides that the law of the jurisdiction where the contract was executed governs the rights and liabilities of the parties in determining an issue of insurance coverage." *Id.*

It is well settled Florida law that "exclusionary clauses are construed more strictly than coverage clauses". *Wallach v. Rosenberg*, 527 So. 2d 1386, 1389 (Fla. 3d DCA 1988) (citing *Demshar v. AAACon Auto Transport, Inc.*, 337 So. 2d 963, 965 (Fla. 1976)). "[T]he insurer's burden is even heavier under an all-risk policy. *Id.* "Further, exclusionary clauses that are uncertain in meaning are construed in favor of

the insured." *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986)); *see also Triano v. State Farm Mut. Auto. Ins. Co.*, 565 So. 2d 748, 479 (Fla. 3d DCA 1990) ("It is a fundamental principle of contract interpretation that any ambiguities in an insurance policy must be strictly construed against the insurer and in favor of the insured…This is particularly true in interpreting exclusionary clauses") (internal citations omitted).

Rulings on the admissibility of expert testimony are reviewed for abuse of discretion. *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F. 3d 548, 556 (11th Cir.) (citing *General Elec. v. Joiner*, 522 U.S. 136 (1997)).

SUMMARY OF THE ARGUMENT

The district court's grant of summary judgment on Berries' property damage claim should be reversed because "direct physical loss", an undefined term in the Policy, does not require structural damage or a finding that the property is rendered "uninhabitable" or substantially "unusable". The Policy is an all-risk insurance policy that covers all causes of loss unless specifically excluded or limited. The district court's ruling essentially rewrites the Policy and erroneously imposes a heightened standard to trigger coverage. Such an interpretation of the Policy also contradicts (or ignores) other portions of the Policy and conflicts with well-reasoned opinions from state and federal courts throughout the country that "direct physical loss" encompasses changes to property that can be perceived by the senses (sight, touch, smell, etc.) and can be

cleaned. Roadwork dust and debris falls squarely within that definition of "direct physical loss" and should have been found to be covered. Further, the fact that the Policy limits coverage for interior dust damage (distinct from the exterior dust damage at issue here) necessarily indicates that Sparta considered dust to be a potential "cause of loss" and thereby covered unless excluded or limited.

The district court's grant of summary judgment on Berries' business income claim should also be reversed. The district court erroneously concluded that Berries was not entitled to coverage for its business income losses because it had not suffered a direct physical loss or damage. This was based on the district court's reliance on authority from other jurisdictions that "direct physical loss" requires "tangible damage" and/or that the insured property be rendered "uninhabitable" or substantially "unusable". This interpretation is at odds with the Policy itself and well-reasoned decisions from other jurisdictions that "direct physical loss" can exist without structural damage. The district court also erroneously concluded that Berries had not suffered a "suspension of operations" because its restaurant was able to continue operating. This conclusion was based on a misapplication of the term "suspension" in the Policy, which by its very definition includes a cessation or slowdown of business activities. Neither the Policy's definition of "suspension" nor whether Berries had suffered a "slowdown" of its business activities was addressed by the district court.

The district court's striking of Berries' causation experts should also be reversed. The district court agreed that these experts were qualified to testify but prejudged or nitpicked their proffered testimony and, in doing so, abused its discretion in excluding their testimony. Their opinions and methodology satisfied the "qualification", "reliability", and "helpfulness" prongs for admissibility of expert testimony and should have been challenged via the traditional means of attack (cross-examination, presentation of contrary evidence, instructions on burden of proof, etc.).

For all these reasons, the Court should reverse the district court's final summary judgment in its entirety, enter summary judgment on coverage in Berries' favor, and remand the case for further proceedings.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT BASED ON ITS CONCLUSION THAT "DIRECT PHYSICAL LOSS" DOES NOT INCLUDE CLEANING AND REQUIRES THAT THE PROPERTY BE "UNINHABITABLE" OR SUBSTANTIALLY "UNUSUABLE"

The Policy covers "Risks of Direct Physical Loss unless the loss is (1) Excluded in Section B., Exclusions; or (2) Limited in Section C., Limitations". *See* Policy, [D.E. 102, Exhibit A]. In other words, all causes of loss are covered unless expressly excluded or limited by the Policy. This type of insurance policy is known as an "all-risk" policy, which provides coverage for "all fortuitous loss or damage other than that

resulting from willful misconduct or fraudulent acts". *Fayad v. Clarendon Nat. Ins. Co.*, 899 So. 2d 1082, 1085 (Fla. 2005); *see also Hudson v. Prudential Prop. & Cas. Ins. Co.*, 450 So. 2d 565, 568 (Fla. 2d DCA 1984) (all-risk policy provides coverage for "all losses not resulting from misconduct or fraud unless the policy contains a specific provision expressly excluding the loss from coverage"). It is undisputed that the Policy is an "all risk" insurance policy. [D.E. 146].

An "insured claiming under an all-risks policy has the burden of proving that the insured property suffered a loss while the policy was in effect". *Mejia v. Citizens Prop. Ins. Corp.*, 161 So. 3d 576, 578 (Fla. 2d DCA 2014). "The burden then shifts to the insurer to prove that the cause of loss was excluded under the policy's terms." *Id.* "The term *all-risk* is given a broad and comprehensive meaning." *Wallach*, 527 So. 2d at 1388 (italics in original). It is "well settled law in Florida that exclusionary clauses are construed more strictly than coverage clauses". *Id.* Thus, "the insurer's burden is even heavier under an all-risks policy". *Id.* "Further, exclusionary clauses that are uncertain in meaning are construed in favor of the insured." *Id.*

The parties agreed in their Joint Pretrial Stipulation [D.E. 143] that (1) "[t]here was roadwork construction on S.W. 27th Avenue which is adjacent to Berries' restaurant" and (2) that "[d]ust and debris generated by roadway construction migrated onto Berries' premises". The term "direct physical loss" is not defined in the Policy. However, relying on authority from other circuits, the district court erroneously

concluded that "direct physical loss" does not include cleaning and/or requires the extraordinary step that the property be rendered "uninhabitable" or substantially "unusable". [D.E. 146]. This finding is contradicted by the terms of the Policy and cases from the Eleventh Circuit and other jurisdictions that have recognized that "direct physical loss" can occur in the absence of structural damage.

A. Policy Language

For example, the Policy contemplates, but only limits, coverage for certain types of dust damage. If dust and debris could simply be wiped up (cleaned) to remedy the problem, then the following limitation would not exist in the Policy's Causes of Loss - Special Form:

> Causes of Loss – Special Form. C. Limitations. 1. We will not pay for loss of or damage to property, as described and limited in this section. In addition, we will not pay for any loss that is a consequence of loss or damage as described and limited in this section…c. The interior of any building or structure…caused by or resulting from…dust, whether driven by wind or not…

See Policy [D.E. 102] (emphasis added).

Given that all risks of loss are covered by the Policy unless specifically limited or excluded, and dust is contemplated, but only limited to lack of payment for interior dust damage, then it logically follows that exterior dust damage (Berries' claim at issue in this matter) is covered. It further follows that "dust" is covered except when it damages the interior of a building or structure, at which point it is

excluded unless it entered through a peril created opening. *See* Policy [D.E. 102, Exhibit A]. Clearly, the drafters of the Policy were aware that dust was a potential cause of loss and ensured that the Policy addressed Sparta's concerns for coverage related to interior dust damage. Sparta could have, but did not, include an exclusion or limitation for exterior dust damage.

Further, even though the district court concluded that "direct physical loss" does not include cleaning [D.E. 146], the Policy repeatedly contemplates causes of loss that can be remedied through cleaning. For example, soot or smoke damage resulting from a fire would require cleaning, just like water, dust, or debris. The Policy provides coverage for cleaning of this type of damage. "Pollutants" is defined in the Policy's Building and Personal Property Coverage Form as "any solid, liquid, gaseous or thermal irritant or contaminant, including **smoke**, vapor, **soot**, fumes, acids, alkalis, chemicals and waste". *See* Policy [D.E. 102, Exhibit A] (emphasis added). Coverage for clean-up of "pollutants" is limited (not excluded) by the Policy as follows:

> 4. Additional Coverages d. Pollutant Clean-up and Removal. We will pay your expense to extract "pollutants" from land or water at the described premises if the discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the policy period…The most we will pay under this Additional Coverage for each described premises is $10,000 for the sum of all covered expenses…

See Policy [D.E. 102, Exhibit A].

The "Additional Coverages" section of the Policy also provides coverage for debris removal (another type of cleaning):

> 4. Additional Coverages. a. Debris Removal (1) Subject to Paragraphs (3) and (4), we will pay your expenses to remove debris of Covered Property caused by or resulting from a Covered Cause of Loss that occurs during the policy period.

See Policy [D.E. 102, Exhibit A].

Alternatively, while Berries is not arguing that roadwork dust and debris is a "pollutant", even if it were, the "Additional Coverages" section of the Policy contemplates pollution, limits (not excludes) coverage for certain types of pollutants, and once again allows for cleaning, repair, or remediation:

> 4. Additional Coverages. a. Debris Removal (2) Debris Removal does not apply to costs to: (a) Extract "pollutants" from land or water; or (b) Remove, restore or replace polluted land or water.

See Policy [D.E. 102, Exhibit A].

Even if the cleaning, repair, or remediation was to be performed to land or water, said act is limited, not excluded, by the "Additional Coverages" section of the Policy:

> 4. Additional Coverages. d. Pollutant Clean-up and Removal. We will pay your expenses to extract pollutants from land or water at the described premises if the discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the policy period....the most we will pay under this

> Additional Coverage for each described premises is $10,000.00.

See Policy [D.E. 102, Exhibit A].

The Policy is an all-risk policy meaning that all risks of loss are covered unless excluded or limited. It contemplates dust and cleaning, but only limits coverage when dealing with interior dust damage or pollution clean-up (neither of which is present here). Accordingly, the district court, applying a reasonable and practical interpretation of the Policy as a whole, should have determined that there was coverage for Berries' property damage claim. *First Profs. Ins. Co., Inc. v. McKinney*, 973 So. 2d 510, 514 (Fla. 1st DCA 2007) ("Like other contracts, contracts of insurance should receive a construction that is reasonable, practical, sensible, and just"); *Purrelli v. State Farm Fire and Cas. Co.*, 698 So. 2d 618, 620 (Fla. 2d DCA 1997). ("Florida case law does not allow insurers to 'use obscure terms to defeat the purpose for which a policy is purchased'").

B. Case Law Regarding "Direct Physical Loss"

Cleaning, restoration, remediation, and similar services are regularly the subject of covered insurance loss cases in the Eleventh Circuit. For example, in *Jackson v. Scottsdale Ins. Co.*, 2016 WL 8716487 (S.D. Fla. Aug. 4, 2016), the district court acknowledged that water remediation and dry out services were covered under an all-risk policy as necessary measures to protect an insured's property from further damage. Specifically, the district court noted that "ServPro, a

professional water restoration company, perform[ed] necessary measures to protect the property from further damage", *Id.* at *1, and "ServPro performed water remediation and dry-out services to covered property solely to protect the Insured Premises from further damage". *Id.* at *2.

Dry-out services are a type of remediation of a loss, much like cleaning dust and debris, which are covered in scores of assignment-of-benefit (AOB) restoration cases. *See J.P.F.D. Inv. Corp. v. United Specialty Ins. Co.*, 2017 WL 4685254 (M.D. Fla. Sept. 29, 2017) (noting coverage in commercial policy for water mitigation services to insured property); *Taylor v. Foremost Ins. Co.*, 2017 WL 8777469 (M.D. Ga. Aug. 31, 2017) (drying costs and mold remediation were covered under an all-risk policy); *Southard v. State Farm Fire and Cas. Co.*, 2013 WL 209224 (S.D. Ga. Jan. 17, 2013) (noting coverage for water and mold remediation services following a plumbing pipe burst in the insureds' home).

Another case out of the Eleventh Circuit, *Crosslink Group, LLC v. Fidelity and Guaranty Ins. Underwriters, Inc.*, 2010 WL 11549940 (N.D. Ga. Feb. 23, 2010), is noteworthy and specifically deals with dust cleaning (the issue presented in this case). Crosslink Group, the insured, filed a claim after rainwater leaked into its art gallery damaging pieces of art inside. *Id.* at *2. Shortly thereafter, Crosslink Group filed a second claim based on property damage caused by construction dust generated by renovations to the shopping center where the insured premises were

located (similar to the dust and debris that the parties agreed migrated onto Berries' restaurant in this case). *Id.* The policy, much like the Policy at issue here, required the insurer, Fidelity, to reimburse Crosslink Group in the event of a "direct physical loss to Covered Property at the premises…caused by or resulting from any Covered Cause of Loss". *Id.* Not surprisingly, Fidelity admitted coverage and "advanced Crosslink $40,000.00…for use towards the dust contamination claim". *Id.* This is what should have occurred in this matter.

Notwithstanding that the Policy provides coverage for cleaning in several instances, limits (not excludes) coverage for interior dust, and does not include a specific exclusion or limitation for exterior dust, the district court, relying on *Universal Image Productions, Inc. v. Federal Ins. Co.*, 475 Fed. Appx. 569 (6th Cir. 2012), concluded that "cleaning is not considered direct physical loss" under an all-risk policy. [D.E. 146]. In *Universal*, the insured made a claim for mold and bacteria contamination, which included lost leasehold improvements, cleaning and moving expenses, and lost business income. *Id.* at 570-71. Federal, the insurer, denied the claim. *Id.* at 571. After Universal filed suit, Federal moved for summary judgment claiming Universal had not suffered any "direct physical loss" as required by the policy. *Id.* Applying Michigan law, the Sixth Circuit concluded that "physical loss" requires "tangible damage". *Id.* at 573. The Sixth Circuit affirmed the district court's summary judgment and noted that "Universal's remediation

efforts were paid for by its landlord and not a single piece of Universal's physical property was lost or damaged as a result of mold or bacterial contamination". *Id.*

This case is distinguishable because, unlike *Universal*, Berries' restaurant was structurally damaged by roadwork dust and debris as reflected by Epic's damage estimate and the opinions of Berries' causation experts. *See* Frank Inguanzo Report [D.E. 105-6] (damage estimate); Depo. of Alex Posada [D.E. 108-1] at 84:3-11; 93:25-94:21 (audible confirmation that speakers were damaged by construction dust and debris based on unique sound made by such speakers); 25:6-14; 32:24-33:8 (visual confirmation that lights were filled with dust and not working based on LED screens showing a lack of a DMX signal); Depo. of Chris Thompson [D.E. 108-3] at 40:5-9 (debris and deteriorated awning material observed at restaurant); 40:13-18 (high amount of sediment in roll-up curtain tracks); 43:15-19 (broken drive belt); 43:20-22 (black sediment all over exterior awning fabric); 64:22-65:8 (discolored and broken drive belt); 79:3-18 (shrunken roll-up curtains); 116:8-13 (deteriorated lacquer topcoat observed on exterior awning fabric); Depo. of Al Brizuela [D.E. 110-7] at 115:24-116:22; 131:24-132:1; 154:2-7 (dust and debris observed at restaurant that had adhered to various surfaces in the restaurant and could not be removed without damaging the finish); 58:10-11 (damages observed to canopy); 63:12-64:10 (evidence of construction dust observed on awning's metal framing); 64:13-65:2 (evidence of construction dust observed on exterior awning); 67:10-18 (concrete observed on

railings).

At a minimum, whether Berries' restaurant suffered structural damage or not was a material issue of fact that should have precluded summary judgment. *See Twiss*, 25 F. 3d at 1554 ("If reasonable minds could differ on any inferences arising from undisputed facts, summary judgment should be denied"). However, even if this Court finds that Berries did not establish below that its restaurant was structurally damaged, summary judgment in favor of Sparta should still be reversed. *Universal* was decided by the Sixth Circuit applying Michigan law and is not binding on this Court. There are well-reasoned and persuasive decisions from other jurisdictions that hold that physical loss may exist even when there is no structural damage.

For example, in *Mellin v. Northern Sec. Ins. Co., Inc.*, 167 N.H. 544, 545-46 (N.H. 2015), the insured was seeking a declaration that cat urine odor emanating from another condominium unit was direct physical loss. The New Hampshire Supreme Court rejected the insurer's claim that "physical loss" is commonly understood to mean tangible change to property (the argument raised by Sparta below) and held that "physical loss need not be read to include only tangible changes to the property that can be seen or touched, but can also encompass changes that are perceived by the sense of smell". *Id.* at 548. In reaching this conclusion, the court relied on the definition of "physical" as "[o]f or pertaining to matter, or the world as perceived by the senses; material as [opposed] to mental or spiritual". *Id.* (quoting

Shorter Oxford English Dictionary 2194 (6th ed. 2007)).

Similarly, in *Yale University v. Cigna Ins. Co.*, 224 F.Supp.2d 402, 412-13 (D. Conn. 2002), the district court found that a claim for asbestos and lead contamination at the insured property (which could be cleaned) was covered by the all-risk policy based on "the substantial body of case law in which a variety of contaminating conditions have been held to constitute 'physical loss of or damage to property'". *Id.* at 413 (citing *Matzner v. Seaco Ins. Co.*, 1998 WL 566658 (Mass. Super. Aug. 12, 1998) ("direct physical loss" was ambiguous, thus carbon monoxide contamination would come under definition); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, 1999 WL 619100 (D. Or. Aug. 4, 1999) (mildew contamination (which could be cleaned) was direct physical loss); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P. 2d 1332 (1993) (losses caused by odors from illegal methamphetamine cooking (no structural damage) were direct physical loss); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E. 2d 1, 16–17 (W. Va. 1998) ("Losses covered by the [all risk] policy…may exist in the absence of structural damage to the property"); *BellSouth Telecomm., Inc. v. W.R. Grace & Co.*, 77 F. 3d 603 (2d Cir. 1996) (asbestos contamination (not causing structural damage to premises) was event triggering coverage)).

The district court, relying on *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F. 3d 226, 236 (3d Cir. 2002), also concluded that

"physical loss" occurs when property becomes "uninhabitable" or substantially "unusable". [D.E. 146]. In that case, the Port Authority, the insured, filed suit to recover damages based on asbestos contamination to numerous facilities it owned in New York and New Jersey. In affirming the district court's grant of summary judgment, the Third Circuit held that, while "[f]ire, water, smoke and impact from another object are typical examples of physical damage from an outside source that may demonstrably alter the components of a building and trigger coverage", "[p]hysical damage to a building as an entity by sources unnoticeable to the naked eye must meet a higher threshold". *Port Auth. of New York & New Jersey,* 311 F. 3d at 235. Applying this heightened standard, the Third Circuit concluded that the claimed asbestos contamination was not covered unless it rendered the property "uninhabitable" or "unusable". *Id.* at 236.

This case is distinguishable for at least two reasons. First, the Third Circuit's use of a heightened standard in *Port Auth. of New York & New Jersey* hinged on the presence of an "invisible" form of contamination that was "unnoticeable to the naked eye". *Id.* at 235. Here, in its summary judgment papers [D.E. 119 and 123], Berries pointed to the deposition of Berries co-owner, Robert Snider, who testified that the roadwork dust and debris littered throughout Berries' restaurant (which was undisputed by the parties'stipulation) [D.E. 143] was clearly visible to Berries and its patrons:

Q. Did you ever turn away any customers because Immaculate Reflections was cleaning?

A. I never turned anyone away, but people walked away. People would walk in and I would see them getting in their car or I would hear things they would say under their breath, you know. I don't want to repeat that here, but it wasn't, you know, a pretty picture.

Q. That's because of how dirty it was?

A. Because of all the construction debris it was, you know, a lot of these lawyers dress well like yourself, you know, the come in in tailormade suits and shoes and, you know, they don't -- it's hard to, you know, it's hard to try to eat.

Q. Could you have served them if they wanted to eat there?

A. We served everybody and sometimes we got people masks and we put fans and we bought drinks for tables. And, I mean, you name it, we did, you know. Broke a lot of glassware. It's hard to -- big--ole construction running through the restaurant. People jumping like they saw a rat. It was just -- it was just a very trying time, Jorge, very trying time.

See Depo. of Robert Snider [D.E. 128-10] at 105:9-106:8.

Second, the application of this heightened standard is contrary to the well-recognized purpose (and benefit) of an all-risk policy in the State of Florida, which covers all risks of loss unless specifically limited or excluded. The drafters of the Policy were thorough in including limitations or exclusions to coverage in the Policy. They could have, but did not, include language in the Policy that required that the insured property be deemed "uninhabitable" or "unusable" to trigger coverage. Thus, in the absence of such policy language, limitations, or exclusions,

the district court erred in essentially rewriting the Policy to impose an "uninhabitable" or "unusable" requirement for coverage. *See Shuster v. South Broward Hosp. Dist. Physicians' Professional Liability Ins. Trust*, 570 So. 2d 1362, 1368 (Fla. 4th DCA 1990) (court cannot adopt views that rewrite insurance policies); *Fayad*, 899 So. 2d at 1086 ("insurance contracts are construed in accordance with 'the plain language of the polic[y] as bargained for by the parties'").

The district court's erroneous ruling in this case is in line with its proclivity to deny similar cleaning claims based on "pollution". For instance, in *General Fidelity Ins. Co. v. Foster*, 808 F.Supp.2d 1315 (S.D. Fla. 2011), the insurer sought a declaration that the insurance policy did not cover a homeowner's personal injury or property damage that was caused by using defective drywall to build a home. *Id.* The drywall emitted various sulfide gases and other noxious orders that caused bodily injury and property damage. *Id.* at 1317. The insurer claimed it had no duty to defend because excessive amounts of sulfur and strontium that comprise the drywall are "pollutants" and subject to the policy's pollutant exclusion. *Id.* The district court (Judge Moore) held that strontium and sulfur (naturally occurring elements) are pollutants based on the definition of "irritant" in Webster's Dictionary and that, despite the fact they are naturally occurring, the defective nature of the gypsum rendered it an irritant (and thus a pollutant). *Id.* at 1321.

In *WPC Industrial Contractors LTD v. Amerisure Mut. Ins. Co.*,

720 F.Supp.2d 1377 (S.D. Fla. 2009), the builder of a waste water treatment plant filed suit against Amerisure seeking a declaration that Amerisure had a duty to defend the builder in an underlying action based on alleged sewer backups at a home serviced by the waste water treatment system. *Id.* The homeowner experienced sewage backups that contaminated the home with fecal contaminate that rendered the home uninhabitable. *Id.* Amerisure denied coverage for the claim based on a "pollutant" exclusion in the subject insurance policy. *Id.* at 1379. The district court (Judge Moore) held that the "pollutant" exclusion in the subject insurance policy applied because "fecal contaminant" is a pollutant because it is "a solid irritant and contaminant, which falls within the [policy's] definition of a "pollutant". *Id.* Notably, the claim was for property damage to the house itself and bodily injury because of the "pollutant", and the district court (Judge Moore) did not dispute that same constituted damage.

In *U.S. v. Sartori*, 62 F.Supp.2d 1362 (S.D. Fla. 1999), the United States brought a lawsuit against property owners for violating the Clean Water Act ("CWA"). *Id.* at 1362-63. The CWA prohibits the discharge of pollutants as unlawful, including the addition of any pollutant to navigable waters from any point source. *Id.* at 1363. The property owners moved to dismiss the complaint, in part, based on the allegation the property owners "discharged dredged and/or fill material, including but not limited to dirt, rocks, and other indigenous materials [into the

water] by clearing, dredging, sidecasting, filling, draining, spreading, and leveling with earth-moving machinery". *Id.* at 1365. The district court (Judge Moore) held there was "absolutely no doubt" that such operations constituted the "discharge of a pollutant" for purposes of the CWA. *Id.*

The district court could not rely on the Policy's "pollutant" exclusion in this matter for at least two reasons. First, while Berries does not contend that roadwork dust and debris is a "pollutant", even if it were, coverage for clean-up of "pollutants" is limited (not excluded) by the Policy as follows:

> 4. Additional Coverages d. Pollutant Clean-up and Removal. We will pay your expense to extract "pollutants" from land or water at the described premises if the discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the policy period…The most we will pay under this Additional Coverage for each described premises is $10,000 for the sum of all covered expenses…

See Policy [D.E. 102, Exhibit A]. Cleanup is absolutely covered.

Second, even if the district court had determined that roadwork dust and debris was a "pollutant", the Policy still provides coverage for Berries' claim because the roadwork dust and debris was caused by a "specified cause of loss" (vehicles). Section B (Exclusions) of the Policy's Causes of Loss - Special Form excludes coverage for:

> I. Discharge, dispersal, seepage, migration, release or escape of "pollutants" **unless** the discharge, dispersal, seepage, migration, release, or escape is itself caused by any of the "specified causes of loss"

See Policy [D.E. 102, Exhibit A] (emphasis added). "Specified causes of loss" is defined in the Policy as "fire; lightning; explosion; windstorm or hail; smoke; aircraft or **vehicles**; riot or civil commotion; vandalism; leakage from fire-extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage". *Id.* (emphasis added).

Berries established below that vehicles, excavators, and trucks caused the migration of dust and debris onto Berries' restaurant. [D.E. 124 and 110-3]. Vehicles are afforded a broad definition by the courts, including machinery such as floor scrapers, excavators, bulldozers, and tractors. Under Florida law, the term "vehicle" has been interpreted to include an excavator because it was a mechanized equipment that served as means to carry and transport an operator. *See Barcelona Hotel, LLC v. Nova Cas. Co.*, 57 So. 3d 228, 231 (Fla. 3d DCA 2011). "[T]he definition of "vehicle" does not require carrying or transporting over a certain distance or at a certain speed, nor does it require that the equipment must be able to travel on a roadway or have wheels." *Id.* The excavator is a machine driven and operated by a person that moves and digs material from one place to another. *Id.* Similarly, "[t]he fact that a bulldozer moves on caterpillar treads instead of on wheels and bears an earth-moving blade in front does not prevent it from coming within the words of the above [vehicle] definition". *See Osborne v. Am. Ins. Co.*, 37 Pa. D. & C.2d 402, 403 (Pa. Com. Pl. 1965).

The term "vehicle", as applicable to Berries' claim, is not defined in the Policy.[2] Absent the definition of "vehicle" in the insurance policy, other courts have used similar reasoning to hold that a floor scraper is a "vehicle" and a "specified cause of loss" under the exceptions to a pollution exclusion. *See Cincinnati Ins. Co. v. German St. Vincent Orphan Ass'n, Inc.*, 54 S.W.3d 661, 666 (Mo. Ct. App. 2001). Although the appellate court in *Cincinnati* determined that asbestos particles released by a floor scraper during removal of an old vinyl flooring constituted a "pollutant", the floor scraper was a vehicle and a specified cause of loss covered under the policy. *Id.* ("there is no question that this "ride-on unit" served as "a means of .... transporting the operator while the machine, under his direction, functioned to remove the vinyl flooring"). Therefore, when faced with an ambiguity between (1) not awarding coverage because the asbestos dust released into the air fell under the "pollutant" definition in the policy's pollutant exclusion and (2) awarding coverage because the floor scraper is a "vehicle" and a "specified cause of loss" exempt from the pollutant exclusion, the *Cincinnati* court interpreted the policy in favor of the insured and awarded coverage. *Id.* at 668.

Here, the district court was not able to rely on the Policy's "pollutant"

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[2] The Policy does define "vehicle" as a "car, truck, bus, trailer, train, aircraft, watercraft, forklift, **bulldozer**, tractor or harvester", but limits that definition to the "Equipment Breakdown Coverage" form. *See* Policy [D.E. 102, Exhibit A] (emphasis added).

exclusion, as it typically does, and thus erroneously concluded that "direct physical loss" does not include cleaning and/or requires that the property be rendered "uninhabitable" or substantially "unusable". [D.E. 146]. For all of the foregoing reasons, the district court's grant of summary judgment on Berries' property damage claim should be reversed and summary judgment on coverage entered in Berries' favor.

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT BASED ON ITS CONCLUSION THAT BERRIES COULD NOT RECOVER BUSINESS INCOME LOSSES BECAUSE IT DID NOT SUFFER A DIRECT PHYSICAL LOSS AND COULD NOT SHOW A SUSPENSION OF ITS OPERATIONS

As discussed *supra*, the district court erred when it concluded that Berries "has not established a direct physical loss or damage". [D.E. 146]. The district court also erred when it concluded that Berries "cannot recover under the Business Income (And Extra Expense) Coverage because Plaintiff cannot show that there was any suspension of operations caused by 'physical damage'". *Id.* This erroneous finding was based on the district court's view that Berries had not suffered a "suspension of operations" because the "restaurant remained open every day, customers were always able to access the restaurant, and suppliers were always able to access the restaurant". *Id.* This conclusion ignores the express definition in the Policy,

"Suspension" is defined in the Policy's Business Income (and Extra Expense) Coverage Form as:

a. The **slowdown** or cessation of your business activities; or

b. That a part or all of the described premises is rendered untenantable, if coverage for Business Income Including "Rental Value" or "Rental Value" applies.

See Policy [D.E. 102, Exhibit A] (emphasis added).

While the term "business activities" is not defined in the Policy, *Black's Law Dictionary* defines "business activities" as an "umbrella term covering all the functions, processes, activities and transactions of an organization and its employees". *Black's Law Dictionary*, Second Online Edition.

Based on the plain and ordinary meaning of this section of the Policy, Berries did not have to completely close its restaurant to trigger coverage for business income losses. Like other contracts, contracts of insurance should receive a construction that is reasonable, practical, sensible, and just. *General Star Indemnity Co. v. West Florida Village Inn, Inc.*, 874 So. 2d 26, 29 (Fla. 2d DCA 2004). Under the terms of the Policy, a slowdown in Berries' restaurant sales qualified as a "suspension" of operations under the Policy. *See* Policy [D.E. 102, Exhibit A] ("Suspension is defined…as (a) the slowdown or cessation of your business activities"). Neither the definition of "suspension" nor whether Berries' suffered a slowdown of its business activities was addressed by the district court. [D.E. 146].

As argued by Berries' below in their summary judgment papers [D.E. 119 and 124], the layout of Berries' restaurant is an important consideration in considering

why roadwork dust and debris undeniably caused a slowdown in Berries' business operations. The restaurant is an indoor/outdoor bar and restaurant that has long provided its patrons with the option to enjoy outdoor, covered seating, open-air patio seating, and a covered outdoor bar. *Id.* The allure that distinguishes the restaurant from hundreds of other nearby restaurants is the ability to allow its patrons to take in the Miami breeze while still being shielded from the sun. *Id.* Sparta presented no evidence below to rebut this.

Although not addressed in the district court's Omnibus Order [D.E. 146], Berries' summary judgment papers [D.E. 119 and 123] also pointed to the deposition testimony of Robert Snider, one of Berries' principals, regarding the nightmare and financial hardship that Berries had to endure during the roadwork construction. For example, Mr. Snider testified that Berries had to close the restaurant on multiple occasions to allow cleaning of the roadwork dust and debris to occur:

> Q. Did you ever have to close off any portion of the restaurant to allow them [Immaculate Reflections] to clean?
>
> A. Yes.
>
> Q. How often did that happen?
>
> A. Too long, too many times.

See Depo. of Robert Snider [D.E. 128-10] at 105:4-8.

Mr. Snider also testified about how potential patrons walked out of the restaurant because of the dust and debris, and, those that stayed to eat, were given

masks or provided complimentary drinks due to the dust and debris throughout the restaurant:

> Q. Did you ever turn away any customers because Immaculate Reflections was cleaning?
>
> A. I never turned anyone away, but people walked away. People would walk in and I would see them getting in their car or I would hear things they would say under their breath, you know. I don't want to repeat that here, but it wasn't, you know, a pretty picture.
>
> Q. That's because of how dirty it was?
>
> A. Because of all the construction debris it was, you know, a lot of these lawyers dress well like yourself, you know, the come in in tailormade suits and shoes and, you know, they don't -- it's hard to, you know, it's hard to try to eat.
>
> Q. Could you have served them if they wanted to eat there?
>
> A. We served everybody and sometimes we got people masks and we put fans and we bought drinks for tables. And, I mean, you name it, we did, you know. Broke a lot of glassware. It's hard to -- big--ole construction running through the restaurant. People jumping like they saw a rat. It was just -- it was just a very trying time, Jorge, very trying time.

Id. at 105:9 - 106:8.

Mr. Snider also described how Berries was forced to reallocate operational funds to hire a dedicated full-time employee to clean the restaurant and had to supplement that by paying a third-party cleaning service, Immaculate Reflections, to regularly come in to clean the restaurant night and day. *Id.* at 100:19-101:4; 101:19-105:3.

All of these facts, taken in the light most favorable to Berries, were sufficient to trigger coverage under the Policy's Business Income (and Extra Expense) Coverage Form due to the slowdown in business or, at a minimum, created disputed issues of material fact, either of which precluded entry of summary judgment in Sparta's favor. The district court's grant of summary judgment on Berries' business interruption loss should therefore be reversed and summary judgment on coverage entered in Berries' favor.

III. THE DISTRICT COURT ERRED IN EXCLUDING THE TESTIMONY OF BERRIES' CAUSATION EXPERTS

The Supreme Court's decision in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), directed district courts to act as "gatekeepers" regarding the admissibility of expert testimony. "The gatekeeper role, however, is not intended to supplant the adversary system or the role of the jury: '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence'." *Allison v. McGhan Medical Corp.*, 184 F. 3d 1300, 1311 (11th Cir. 1999). As such, "the rejection of expert testimony is the exception, rather than the rule". Fed. R. Evid. 702 advisory committee notes (2000).

This Court has held that expert testimony is admissible if: "(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as

determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of facts, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue". *City of Tuscaloosa*, 158 F. 3d at 562-63. These are known as the "qualification", "reliability", and "helpfulness" prongs. *U.S. v. Frazier*, 387 F. 3d 1244, 1260 (11th Cir. 1994). "The burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion." *Id.*

"[E]xperts may be qualified in various ways". *Id.* at 1261. "While scientific training or education may provide possible means to qualify, experience in a field may offer another path to expert status." *Id.* at 1261-62; *see also* Fed. R. Evid. 702 (noting that expert may be qualified "by knowledge, skill, experience, training or education"). When evaluating reliability, district courts should assess "whether the reasoning or methodology underlying the testimony is scientifically valid and…whether that reasoning or methodology properly can be applied to the facts in issue". *Id.* (citing *Daubert*, 509 U.S. at 592-93).

"In the end, although '[r]ulings on admissibility under *Daubert* inherently require the trial court to conduct an exacting analysis of the proffered expert's methodology,'…it is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence." *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F. 3d 1333, 1341 (11th Cir. 2003). Whether expert testimony

will assist the jury (i.e. be helpful) goes primarily to relevance and requires that district courts determine "whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute". *Id.* at 1347.

Berries named five experts to testify regarding the key components of Berries' claim that were outside the ordinary knowledge of a juror, including Alex Posada (audio/lighting), Chris Thompson (awning), Al Brizuela (engineering/causation), Frank Inguanzo (damages expert), and Roy Garcia (accounting/business income losses). The district court excluded the testimony of Messrs. Posada, Thompson, and Brizuela. [D.E. 146][3]

A. Alex Posada (Audio/Lighting Expert)

Alex Posada, Berries' audio/lighting expert, has several years of experience in the audio/lighting industry, including, most notably, experience working with nightclub audio/lighting systems damaged by construction dust and debris. [D.E. 118]. The district court concluded that Mr. Posada was "qualified because of his experience in the field". [D.E. 146]. However, the district court excluded Mr. Posada's testimony because he failed to perform quality control (QC) diagnostic testing, which led the district court to believe that his "methodology was unreliable, providing nothing

[3] The district court did not address the admissibility of the testimony of Frank Inguanzo (Berries' damages expert) or Roy Garcia (Berries' accounting expert). [D.E. 146].

more than speculation about the cause of the damage to audio and lighting equipment". *Id.* Exclusion of Mr. Posada's testimony was an abuse of discretion.

Mr. Posada testified during his deposition that he performed a walkthrough of the restaurant on February 13, 2018 and conducted visual and auditory testing of Plaintiff's audio/lighting system. *See* Depo. of Alex Posada [D.E. 108-1] at 24:5-47:5. Although Sparta and the district court criticized Mr. Posada for not conducting a QC diagnostic test[4], Mr. Posada testified that, based on his several years of experience, he developed the ability to auditorily determine whether a speaker was damaged by dust or debris based on the unique sound that such speakers make:

> Q. Is there a certain sound that speakers make when they have been damaged by construction dust?
>
> A. Yes.
>
> Q. That sounds like nothing else?
>
> A. Yes, it does.
>
> Q. And that's based on what? On your experience?

[4] Octavio Oliu, Sparta's audio/lighting expert, did not perform QC diagnostic testing during his inspection of the restaurant. Instead, he performed what he called "non-destructive auditory inspection of the audio system." Octavio Oliu Report [D.E. 111-1] at 2. However, as detailed in Berries' motion to exclude Mr. Oliu's testimony [D.E. 111], Mr. Oliu failed to perform a thorough and comprehensive auditory test, which rendered his opinions unreliable. *See* Depo. of Octavio Oliu [D.E. 112] at 102:16-17, 21-103:5; 103:21-104:2 (failure to inspect external components of subwoofers and failure to plug in disconnected subwoofers); 76:10-77:3 (failure to turn up volume of speakers to confirm they were operational); 77:12-19; 77:1-2, 10-12, 17-19 (failure to identify whether speaker was two-way speaker (woofer and regular speaker) or three-way speaker (woofer, tweeter, and regular speaker)).

A. Yes.

Depo. of Alex Posada [D.E. 108-1] at 84:3-11.

Q. Now I'll be talking about the listening part. Specifically, what is it about the speakers that you can tell its construction debris and dust as opposed to something else.

A. The sound is tedious. It's hard to explain in words. I don't know if I can give you an exact word of -- it's like when you hear the song that has vocals and the vocals are very distorted. I would say that's probably the perfect word, "distortion." When there is a lot of distortion, it's based on too much dust. And besides the distortion, it's like a clap where it's hitting against dust or rocks or something. You can hear it's slapping something inside of this driver because, basically, like I explained to you before, with the woofers, it has a coil. It does this type of movement into the actual speakers when the particles and the actual dust gets into the speaker into the coil. It starts to make this distortion noise, and it's a very noticeable noise.

Id. at 93:25-94:21.

Mr. Posada further testified that he was able to visually confirm that dust was affecting the speakers because they were covered with dust and had corroded speaker cables. *Id.* at 24:15-25; 38:15-17. One of the factors that led him to believe the damage to the speakers was caused by roadwork dust and debris, as opposed to something else, was the corrosion he visually observed on the exterior of the speaker boxes, which could not be caused by water (i.e. normal weather elements) because the grills were constructed of fiberglass. *Id.* at 96:9-97:11.

With respect to the lighting system, Mr. Posada testified that he did not need to conduct QC diagnostic testing because he visually observed that the lights were not

working and that the lighting fixtures were filled with dust. *Id.* at 25:23-25; 32:17-20. In particular, Mr. Posada visually observed that the light fixtures each had an LED screen that "tells you if there is power" and "tells you if there is a DMX signal -- which DMX signal basically determines that there is continuation of the signal between each and every light fixture -- but this LED screen on – all lights are not even on, so that being said, these lights are basically not working at all". *Id.* at 25:6-14.

He also testified that "if that LED screen is on, it shows you a couple of messages. It shows you, number one, the address of that light fixture. It shows you DMX through -- which means every single light fixture in that installation has continuation of signal. Unfortunately, all light fixtures didn't have this LED screen on…And the lights they were not functioning at all". *Id.* at 32:24-33:8.

Based on his visual and auditory testing and his experience, Mr. Posada opined that Berries' audio/lighting system should be replaced because "most systems that are damaged by construction debris and sediments reveal that it is more cost effective to replace the system with brand new audio & lighting components" and "[t]he cost in labor, parts and refurbishing this equipment is almost equivalent to the cost of replacing the entire system." *See* Alex Posada Report [DE. 110-6] at 3.

Mr. Posada employed reliable methodology to formulate his opinions based on his experience in the audio/lighting industry. He sufficiently and credibly

explained how he was able to conclude that Plaintiff's audio/lighting system was damaged by dust and debris and why he was able to make that conclusion without performing a QC diagnostic test. *See* Depo. of Alex Posada [D.E. 108-1] at 84:3-11; 93:25-94:21 (audible confirmation that speakers were damaged by construction dust and debris based on unique sound made by such speakers); 25:6-14; 32:24-33:8 (visual confirmation that lights were not working based on LED screens showing a lack of a DMX signal). He also explained why and how his years of experience led him to believe that QC diagnostic testing was unnecessary because the costs of repairing Berries' audio and lighting systems would exceed the cost of replacement:

> Based on our experience with similar cases, the audio and lighting systems can be put through a QC diagnostic to determine the extent of damage. **However, most systems that are damaged by construction debris and sediments reveal that it is more cost effective to replace the system with brand new audio & lighting components.** The cost in labor, parts and refurbishing this equipment is almost equivalent to the cost of replacing the entire system. We recommend complete replacement of the entire audio and lighting system.

See Alex Posada Report [DE. 110-6] at 3 (emphasis added).

Mr. Posada should have been permitted to testify. His lack of QC diagnostic testing did not affect the reliability of his opinions. He was not required to conduct such testing. If Sparta wanted to challenge Mr. Posada's opinions[5], then the

[5] Sparta did not challenge the helpfulness of Mr. Posada's testimony. The cause and extent of damage to Berries' audio/lighting system involve technical issues outside a juror's ordinary knowledge.

appropriate vehicle was to do so at trial through the traditional means of attack (cross-examination, presentation of contrary evidence, etc.). *Allison*, 184 F. 3d at 1311. It would then have been properly left to the jury to determine whether they accepted Mr. Posada's testimony.

B. Chris Thompson (Awning Expert)

Chris Thompson, Berries' awning expert, has over 30 years of experience in the awning industry and has received numerous awards from the Industrial Fabrics Association International (IFAI) in the areas of design and manufacturing. *See* Chris Thompson Report [D.E. 105-4]. Mr. Thompson was also particularly well suited to opine on damage to Berries' awning system because he installed it. *See* Depo. of Chris Thompson [D.E. 108-3] at 32:6-9. The district court found that Mr. Thompson was "at least minimally qualified to render an expert opinion from his years of experience". [D.E. 146]. The district court, however, excluded Mr. Thompson's testimony because it felt that his "testimony is nothing more than unexplained assurances and unsupported speculation". [D.E. 146]. Exclusion of Mr. Thompson's testimony was an abuse of discretion.

Mr. Thompson testified during his deposition that he performed visual testing during his walkthrough of the restaurant and observed several instances of damage that, based on his experience, were attributable to the roadwork on S.W. 27th Avenue.[6]

[6] Similarly, Federico Bordignon, Sparta's awning expert, visually inspected Berries'

When asked about the awnings and roll-up curtains, Mr. Thompson testified that he visually observed awnings at the restaurant that "had a lot of debris inside them and the material was deteriorated". *See* Chris Thompson Depo. [D.E. 108-3] at 40:5-9. He also testified that he observed that "the tracks on the sides had a lot of sediment" or what he considered "pollution, road debris, a lot of dirt". *Id.* at 40:13-18.

When asked about Berries' retractable roof, Mr. Thompson testified that: "I could observe the belt drive. When I was walked around the back, it was hanging out. So, therefore, there would be no reason to touch the remote because you can't operate something when you have a broken component base". *Id.* at 43:15-19. He also testified that he saw what he described as "contamination of a black sediment on top of all the material". *Id.* at 43:20-22. When asked if he knew what the black sediment was, Mr. Thompson testified that, in his opinion, "it was debris from the road construction, dirt". *Id.* at 44:12-15. He also discussed his personal observations while a patron of the restaurant during the roadwork: "So to me, if you have a road

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awning system and came to his opinions based on his "normal visual senses" and "experience in the awning business". *See* Federico Bordignon Report [D.E. 111-3]. He did not perform any lab testing. *See* Federico Bordignon Depo. [D.E. 111-4] at 10:19-20. However, Mr. Bordignon's opinions were nothing more than guesses based on speculation or conjecture. *Id.* at 42:24-43:7 ("my guess is it just failed'); 43:18-20 ("I didn't have -- I didn't measure. But my guess, maybe 30 feet, 35"); 58:15-18 ("If I had to guess, it probably is just dirt, something that hasn't been cleaned"); 66:12-14 ("that would be my guess"); 79:16-23 ("If I had to guess, it would be Ferrari. But I couldn't -- I wouldn't put my hand on fire to that"); 101:8-10 ("My guess would be dirt").

and you have -- when I've been there and eaten lunch over the years and you have road debris going on and your curtains are down, and the dirt is flying, it leads me to believe that that would be from there". *Id.* 46:13-17.[7]

Mr. Thompson noted that "[t]he sediment on the awning, the roof is not operating because the belt and the curtains are not able to go up and down freely, and the material was -- the gloss that comes on the material when it's brand new, I could not see any of the gloss finish that was on it. Inside I did observe as well on the structure, where I derived the place where the frame is held, there is a lot of dirt on the inside as well". *Id.* at 47:1-12. When asked if the observed sediment could be washed off, Mr. Thompson testified "no" because "of how thick it is on there". *Id.* at 62:20-25.

When asked about the retractable roof's broken drive belt, Mr. Thompson highlighted the difference between the drive belt's original ivory color and the "brown, black streaks all through it". *Id.* at 64:22-65:8. When asked why he believed the drive belt snapped in half, Mr. Thompson noted how unusual that was and opined that it was "based upon all that dirt that's in -- or contamination or whatever, sediment, is that when the roof opens and closes, that debris gets caught

[7] This testimony was consistent with the stipulated facts contained in the parties' Joint Pretrial Stipulation [D.E. 143], including that "[t]here was roadwork construction on S.W. 27th Avenue which is adjacent to Berries' restaurant" and that "[d]ust and debris generated by roadway construction migrated onto Berries' premises".

up in the moving components and at some point, it's not floating freely". *Id.* at 71:4-23. Mr. Thompson emphasized the significance that the white drive belt had turned black and attributed the change in color to "it's sediment that's on there or dirt or road debris". *Id.* at 72:6-16.

Mr. Thompson also testified that he noted that Berries' roll up curtains were short. *Id.* at 78:4-6. When asked why, Mr. Thompson testified that the sediment on the curtains caused them to shrink:

> Q: Your opinion is that this sediment caused it to shrink?
>
> A. That's my opinion because the materials that are on there -- if it's on there, if they are not -- you know, it gets on there and it eats into that material -- the clear -- the clear doesn't have the scrim that we talked about earlier. So if you don't have a scrim, there is no reinforcement. So it is very sensitive material at that point because there's nothing to keep it stable. Once you environmentally put other things on it, it causes it to shrink a quarter inch it's now tight.

Id. at 79:3-18.

When asked why he believed the roll-up roof had components that were damaged by construction debris, Mr. Thompson did not speculate or guess. Instead, he confidently stated that "[t]he belt drive is definitely damaged as a result of that [referring to roadwork debris]" and noted the impact that would have on his ability to repair the awning: "but more relevant, I would probably say that the manufacturer doesn't exist anymore, so I can't replace it". *Id.* at 81:10-20.

When asked why he believed the sediment he observed on the awning could

deteriorate the awning fabric, Mr. Thompson testified that "the sediment eats through the lacquer top-coating that we discussed, then it starts deteriorating through the material". *Id.* at 116:8-13.

While Sparta criticized Mr. Thompson for not taking samples and conducting lab tests of the sediment he observed at the restaurant, the Omnibus Order [D.E. 146] did not address this flawed argument; *nor should it have given the parties' Joint Pretrial Stipulation* [D.E. 143], which stipulated that (1) "[t]here was roadwork construction on S.W. 27th Avenue which is adjacent to Berries' restaurant" and (2) that "[d]ust and debris generated by roadway construction migrated onto Berries' premises". This is important because it indisputably established that the roadwork dust and debris affected Berries' restaurant. Thus, Mr. Thompson's testimony is not about whether roadwork dust and debris came into contact with Berries' awnings. It is about roadwork dust and debris' effect on the awnings once contact is made. The latter point is exactly what Mr. Thompson's testing, methodology, and opinions addressed.

The district court should have allowed Mr. Thompson to testify at trial. His opinions were reliable based on his extensive experience in the awning industry and his sound application of that experience to what he personally observed, whether as a patron during the roadwork construction or during his post-suit inspection of the restaurant. The district court erroneously nit-picked Mr. Thompson's testimony, rather than determine whether his testimony, when considered as a whole, was "sufficiently

tied to the facts of the case that it will aid the jury in resolving a factual dispute". *Quiet Tech. DC-8, Inc.*, 326 F. 3d at 1347.[8] If Sparta wanted to challenge Mr. Thompson's opinions, then the appropriate vehicle was to do so at trial through the traditional means of attack (cross-examination, presentation of contrary evidence, etc.). *Allison*, 184 F. 3d at 1311. The jury would then have been given the proper opportunity to determine whether they accepted Mr. Thompson's testimony.

C. Al Brizuela (Engineering/Causation Expert)

Alfredo "Al" Brizuela, Plaintiff's causation expert, is a licensed engineer with over 33 years of experience in assessing commercial and residential property for structural and architectural damage. *See* Al Brizuela Report [D.E. 110-3]. The district court found that Mr. Brizuela was qualified based on his education and background. [D.E. 146]. Nonetheless, the district court excluded Mr. Brizuela's testimony because it felt that he was "unable to attribute damage to the construction dust with any degree of certainty". *Id.* Exclusion of Mr. Brizuela's testimony was an abuse of discretion for several reasons.

First, the district court erroneously concluded that Mr. "Brizuela's testimony is not based on any methodology". [D.E. 146]. Mr. Brizuela's report and deposition

[8] Sparta did not challenge the helpfulness of Mr. Thompson's testimony. The multiple parts of Berries' awning system (fixed canopies, roll up curtains, retractable roof, motors, hardware, and electronics) involve technical issues outside a juror's ordinary knowledge.

testimony explained in detail how roadwork dust and debris can aerosolize, migrate, and then, when combined with water, such as rain, become a corrosive paste that bonds to the metal, paint, glass or other materials it encounters. *Id.* at 5; Deposition of Al Brizuela [D.E. 110-7] at 98:11-112-21. Mr. Brizuela was not asking the jury to "take his word for it". Rather, Mr. Brizuela's report and deposition testimony reflected that his opinions were based on sound and verifiable scientific principles, such as chemistry and authoritative scientific literature analyzing pH levels of materials used in roadwork construction. Al Brizuela Report [D.E. 110-3] at 4; Al Brizuela Depo. [D.E. 110-7] at 79:2-82:16].

Second, the district court erroneously disregarded Mr. Brizuela's opinions because he did not perform chemical testing. [D.E. 146]. There is no legal requirement that Mr. Brizuela perform any chemical testing.[9] Nor should such testing have been a consideration given the parties' Joint Pretrial Stipulation [D.E. 143], which stipulated that (1) "[t]here was roadwork construction on S.W. 27th Avenue which is adjacent to

[9] Dean Carlson, Sparta's causation expert, inspected the restaurant and performed "close-up visual observations of the condition of exposed building elements at the building exterior". *See* Dean Carlson Report [D.E. 111-5] at 3. He did not perform any chemical testing. *Id.* at 4. Instead, he performed a bizarre "lick test" where he wiped off "dirt like" substances from sections of the restaurant and tasted them. *Id.* at 4-7. Mr. Carlson lent great weight to this "lick test" in formulating his opinion that airborne sale particles or salt spray were a contributing cause of the damage to Berries' restaurant. *Id.* at 7; Dean Carlson Depo. [D.E. 111-6] at 45:8-46:1; 50:3-17; 54:17-22; 131:22-132:4. Notably, when asked if the "lick test' was a scientific test, Mr. Carlson responded "no". Dean Carlson Depo [D.E. 111-6] at 32:4-8.

Berries' restaurant" and (2) that "[d]ust and debris generated by roadway construction migrated onto Berries' premises". As stated by the Supreme Court, no one set of factors (including chemical testing) is determinative of whether expert testimony is reliable. *Kumho*, 526 U.S. at 150.

Moreover, Mr. Brizuela testified that he performed visual and tactile testing during his walkthrough of the restaurant and explained how that testing led him to conclude that the dust and debris from the roadwork had resulted in mud adhering to various surfaces of the restaurant that could not be removed without damaging the finish. *See* Deposition of Al Brizuela [D.E. 110-7] at 115:24-116:22; 131:24-132:1. For example, Mr. Brizuela testified his opinions were "based on the adhesion of the -- of the mud to the surfaces of the finishes in the restaurant" and that "based on my tactile test, the mud was adhered, which will require either abrasive or some extraordinary measures to clean, which would, in effect, damage the finish". *Id.* at 154:2-7. Mr. Brizuela's visual and tactile testing, together with his extensive experience, was sufficient to render his testimony reliable. *See Clena Investments, Inc. v. XL Specialty Ins. Co.*, 280 F.R.D. 653, 663-664 (S.D. Fla. 2012) (finding that expert's experience as an engineer and his visual inspection provided reliable basis for his testimony that damage was caused by Hurricane Wilma).

Third, the district court erroneously concluded that Mr. Brizuela's testimony would not be helpful to the jury. [D.E. 146]. The chemical processes that Mr. Brizuela

was opining about involved technical issues outside a juror's ordinary knowledge. Contrary to the district court's findings in the Omnibus Order [D.E. 146], Mr. Brizuela did testify about damage to other portions of the restaurant (awnings, awning frame, railings, etc.) that he either observed in pictures of the restaurant or during his walkthrough. *See* Al Brizuela Depo. [D.E. 110-7] at 58:10-11 (damages observed to canopy during walkthrough similar to damage observed in pictures); 63:12-64:10 (evidence of construction dust observed on awning's metal framing); 64:13-65:2 (evidence of construction dust observed on exterior awning); 67:10-18 (concrete observed on railings).

The district court should have allowed Mr. Brizuela to testify at trial. His opinions and methodology were reliable and based on verifiable scientific principles and authoritative scientific literature. His lack of chemical testing did not affect the reliability of his testimony. He was not required to perform chemical testing in light of (1) the parties' stipulation that roadwork dust and debris migrated onto Berries' restaurant, (2) his experience as an engineer, and (3) his visual and tactile testing during his inspection of the restaurant. If Sparta wanted to challenge Mr. Brizuela's opinions, then the appropriate vehicle was to do so at trial through the traditional means of attack (cross-examination, presentation of contrary evidence, etc.). *Allison*, 184 F. 3d at 1311. The jury would then have been properly given the opportunity to decide whether to accept Mr. Brizuela's testimony. It was not the

district court's role to opine on the correctness or persuasiveness of the proffered testimony. *Quiet Tech*, 326 F. 3d at 1341.

CONCLUSION

For all of the foregoing reasons, the district court's final summary judgment [D.E. 146] should be reversed.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume, type-style, and length requirements of FRAP 32(a)(5)-(7). This brief is typed in Times New Roman, 14-point font, and, excluding the parts of the brief exempted by FRAP 32(f), contains 11,821 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on October 1, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record named below:

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