BEFORE THE IOWA SUPREME COURT

No. 23-0321

WATERLOO COMMUNITY SCHOOL DISTRICT,

Plaintiff/Appellant,

vs.

EMPLOYERS MUTUAL CASUALTY COMPANY,

Defendant/Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY

HON. JEFFREY D. BERT

PLAINTIFF/APPELLANT'S FINAL BRIEF

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ROUTING STATEMENT

This appeal should be retained in the Iowa Supreme Court pursuant to Iowa Rule of Appellate Procedure 6.1101(2)(c) because it presents a substantial issue of first impression. Although courts in many other jurisdictions have determined that ordinance and law insurance coverage applies to costs of code compliance outside the specific area of damage, there is no Iowa state court case directly on point that might have prevented the District Court's error.

STATEMENT OF THE CASE

This case arises from an insurance dispute regarding coverage for massive damages Plaintiff/Appellant Waterloo Community School District (the "District") sustained as a result of a catastrophic roof collapse at Lowell Elementary School ("Lowell") in February 2019. The property insurance policy (the "Policy") that the District purchased from Defendant/Appellee Employers Mutual Casualty Company ("EMC") provides ordinance and law ("OL") additional coverage. That OL coverage applies to the increased costs of building code compliance whenever there is a covered loss and a law that "affects the repair or rebuilding of the lost or damaged building." Policy at A.4.e(1) (Appx. 147).

There is no dispute that the collapse at Lowell (a covered loss) revealed for the first time that the mortar concealed in the center layer of load-bearing walls had deteriorated, and that the deteriorated mortar was pervasive throughout the older areas of the school. Engineering experts on both sides agree that Lowell was unsafe after the collapse and would continue to be unsafe and threaten the lives of students, faculty, and staff unless the District repaired or rebuilt all deteriorated walls. There is no dispute that the City of Waterloo Building Code (the "Code") required the District to make the entire school safe and structurally sound by repairing or

rebuilding all deteriorated walls, both inside and outside the specific area of collapse. The OL coverage provision covers the cost of all such code compliance because there was a covered loss and a law that affected the repair or rebuilding of Lowell.

Although EMC acknowledged its obligation to pay for repairs in the immediate vicinity of the collapse, EMC took the position that it is not obligated to pay to repair anything outside the specific area of collapse. On February 2, 2021, the District filed a petition seeking coverage for the full costs of repairing and rebuilding Lowell in accordance with the Code. Petition (Appx. 7-16). On June 27, 2022, the District and EMC cross-moved for summary judgment on the issue of whether the Policy's OL coverage applies outside the specific area of collapse. District MSJ (Appx. 774-1047); EMC MSJ (Appx. 34-773). A hearing was held on October 5, 2022.

On January 31, 2023, the District Court denied the District's motion for summary judgment and granted EMC's motion for summary judgment. MSJ Order (Appx. 1114-1133). The District Court "construe[d] the Policy to exclude coverage for the repairs required outside the area of the initial roof collapse." MSJ Order at 2 (Appx. 1115).

STATEMENT OF THE FACTS

A. Construction of Lowell Elementary School

Lowell was built almost 90 years ago, in 1931. EMC Answer at 4 (Appx. 20). In 2006, additions were made to the school. *Id*.

The exterior walls of the school had three layers (or wythes). The load-bearing layer in the middle consisted primarily of hollow clay masonry units, held together by mortar. That middle layer is normally completely concealed, sandwiched between the wall's outer and inner layers. The outer layer of the wall (visible from the outside of the building) was exterior cosmetic cladding made of brick. The inner layer of the wall (visible from the inside of the building) was finished plaster. *See* Oct. 25, 2021 Childress Report at 6 (Appx. 451).

B. The February 2019 Collapse Was Caused by Age Deterioration of Mortar in the Load-Bearing Walls of the School.

On the morning of February 20, 2019, a portion of the roof collapsed into a second-floor classroom (classroom 208) after a snowstorm. EMC Answer at 3 (Appx. 19). Fortunately, school had been cancelled for the day, so no students were in the building and no one was injured. The following photograph shows the collapsed roof. *Id.* at 4 (Appx. 20).

The parties' engineering experts concur that the collapse occurred because the mortar in the middle load-bearing layer of the exterior walls had deteriorated to the point that the walls could no longer support the weight of the snow and ice that had collected on the roof. The District's expert Tony Childress determined that the mortar "had grown weaker over time and the combination of that weakening and the weight of several feet of snow in February 2019 exceeded the structure's capacity, causing the wall to fail and the roof to collapse." Oct. 25, 2021 Childress Report at 2 (Appx. 447).

EMC's expert Brian Heffernan similarly concluded that the "cause of the collapse is a combination of age deterioration and weight of ice and snow. Examination of the wall found that the mortar and clay masonry wall structure was deteriorated." *See* Apr. 8, 2019 Heffernan Report at 5 (Appx.

426); *see also* May 3, 2022 Hefferman Dep. Tr. at 50:16-51:18 (Appx. 818-19). Mr. Heffernan noted that the mortar was "[l]oose and powdery" and "soft and sand-like in many locations," and that "[l]arger mortar sections could be crushed by hand." Apr. 8, 2019 Heffernan Report at 3, 5 (Appx. 424, 426).

The parties' engineering experts likewise agree that the mortar deterioration was pervasive throughout the areas of the school constructed in 1931. Deteriorated mortar was observed all over the older portions of the building. *See* Oct. 25, 2021 Childress Report at 23, 25-26 (Appx. 468, 470-71). As Mr. Heffernan testified, "we found it everywhere we looked." May 3, 2022 Hefferman Dep. Tr. at 58:3-14 (Appx. 826). Consequently, a serious risk of further collapse existed throughout the school, and there was a significant chance that the next major snowstorm or weather event would bring down a different part of the building.

C. The Collapse Revealed the Mortar Deterioration for the First Time.

1. The District Was Not Aware of the Deteriorated Mortar Prior to the Collapse.

EMC admits there is no evidence that the District knew the mortar in the load-bearing middle layer of the walls had deteriorated prior to the February 2019 collapse. EMC Response to Statement of Undisputed Facts

¶ 14 (Appx. 1075). The deteriorated mortar was hidden from view, sandwiched between the exterior cladding and the interior finished walls. City of Waterloo Building Official Greg Ahlhelm testified during his deposition that before the collapse, the District had no responsibility to open up the walls of the school and go looking for structural issues. Oct. 5, 2021 Ahlhelm Dep. Tr. at 65:24-66:2 (Appx. 692-93).

2. The City of Waterloo Building Official Confirmed that the District Was in Compliance with the Code Prior to the Collapse.

Prior to the collapse, the City of Waterloo Building Department had not cited the District for any building code violations. *Id.* at 65:12-23 (Appx. 692); *see also* EMC Response to Statement of Undisputed Facts ¶ 17 (Appx. 1076). Mr. Ahlhelm also was not aware of any building code provision with which the District was not in compliance prior to the collapse. Oct. 5, 2021 Ahlhelm Dep. Tr. at 65:12-23 (Appx. 692).

3. EMC's Own Inspectors Had Identified No Structural or Maintenance Issues.

EMC periodically inspected Lowell and made loss prevention recommendations. EMC stressed the importance of these recommendations, describing them as part of EMC's "effort to assist you in the prevention of losses and/or accidents," which is a "vital part" of the services EMC offers. EMC also explained that the recommendations are "an outgrowth of a

premises survey in connection with our management of insurance protection under policies placed with our Company." *See* EMC survey reports for Lowell for 2001, 2004, 2008, 2012, and 2016 (Appx. 838-930).

Not a single EMC report ever flagged any deterioration, sign of potential deterioration, or structural issue. *See id.* Nor did any EMC report mention missing or loose mortar; recommend tuck pointing, caulking, or other repairs; or suggest that the District's maintenance of the building was in any way deficient. *See id.* To the contrary, the reports repeatedly described the District's maintenance as "good." *See* 2001 EMC survey report (Appx. 839); 2008 EMC survey report (Appx. 868); 2012 EMC survey report (Appx. 881); 2016 EMC survey report (Appx. 913). If the inspector that EMC sent to the school—a technically qualified person whose very job was to spot potential risks—did not identify any such issues, it is not reasonable to expect the District—which is in the business of education, not structural engineering—to realize that the hidden load-bearing layer of the walls had deteriorated.

D. After the Collapse, Lowell Was Unsafe and Had to Be Repaired or Rebuilt.

There is no dispute that the school was unsafe and dangerous after the collapse. *See* EMC Response to Statement of Undisputed Facts ¶¶ 25-38 (Appx. 1079-82). Mr. Ahlhelm informed the District on March 25, 2020,

and again on June 9, 2020, that the City would not allow Lowell to be occupied. (Appx. 730, 931). During his deposition, Mr. Ahlhelm explained that "there was no way for me to be able to say that children could occupy that structure…. I was assuming I guess that the roof throughout the rest of the building was probably constructed the same way, so I -- I couldn't say that I'm going to allow children in there." Oct. 5, 2021 Ahlhelm Dep. Tr. at 30:13-19 (Appx. 657). Mr. Ahlhelm added that, after the collapse, he determined that the building could not be occupied until unsafe conditions had been mitigated at all areas of the building. *Id.* at 34:13-20 (Appx. 661).

All engineers who examined Lowell after the collapse are likewise in agreement that Lowell was unsafe after the collapse. *See, e.g.*, Oct. 25, 2021 Childress Report at 21-23 (Appx. 466-68); Apr. 8, 2019 Heffernan Report at 8 (Appx. 429). Mr. Heffernan testified that he concluded after his initial post-collapse investigation that the school could not be reoccupied safely. *See* May 3, 2022 Hefferman Dep. Tr. at 50:12-15 (Appx. 818). EMC's expert Mr. Nesvold testified that the entire building was unsafe immediately after the collapse. *See* May 9, 2022 Nesvold Dep. Tr. at 59:19-60:21 (Appx. 835-36).

There also is no dispute that the school would have continued to be unsafe and dangerous if only the specific area of collapse were repaired. Mr.

Ahlhelm testified that he would not have considered the building to have been made safe if the District had only repaired the specific classroom that collapsed. Oct. 5, 2021 Ahlhelm Dep. Tr. at 77:15-78:11 (Appx. 704-05). Mr. Heffernan likewise acknowledged that the "preexisting age and deterioration that made the building unstable prior to the collapse will still exist and continu[e] to make the building unfit for occupancy after collapse damages are repaired." Apr. 8, 2019 Heffernan Report at 8 (Appx. 429). During his deposition, Mr. Heffernan testified that his opinion was that the school was not safe and could not be occupied without repairing the deterioration outside the area of collapse. May 3, 2022 Hefferman Dep. Tr. at 59:18-60:2, 63:16-19 (Appx. 827-28, 831). He understood Mr. Ahlhelm to share that opinion. *Id.* at 63:20-64:2 (Appx. 831-32).[1] Mr. Nesvold also testified that Lowell still would have been unsafe if the District had repaired

[1] Other contemporaneous accounts confirm that the building official was requiring extensive repairs outside the area of collapse. *See* Feb. 21, 2019 email from EMC's adjuster (Appx. 932) ("The city building officials are saying that due to these conditions [severely deteriorating mortar], they are recommending the school be closed until all necessary repairs are made to strengthen the support of the roofs, not just repair the area of the collapse."); Feb. 21, 2019 activity log from EMC's adjuster (Appx. 933) ("Engineers are advising that deterioration of mortar on interior sides of walls where roof framing ties into had lead [sic] to the collapse. They are finding evidence of this same thing going on in other areas. City is now saying that they are going to close down this building and will not issue a certificate of occupancy until collapse area is repaired and other issues with similar problems with framing/walls are corrected.").

only the area of collapse. May 9, 2022 Nesvold Dep. Tr. at 60:22-61:18 (Appx. 836-37).

E. The Building Code Required Extensive Repair and Rebuilding of Lowell Outside the Specific Area of Collapse.

At the time of the collapse, the City of Waterloo had adopted several standardized building codes, including the 2015 International Building Code ("IBC"), the 2015 International Existing Building Code ("IEBC"), and the 2015 International Property Maintenance Code ("IPMC"). *See* Oct. 5, 2021 Ahlhelm Dep. Tr. at 13:5-15 (Appx. 640); Selections from the IBC, IEBC, and IPMC (Appx. 936-1039).

EMC acknowledged that Lowell was "unsafe" after the collapse, as that term is used in the Code, and that the "unsafe" conditions extended outside the specific area of collapse. *See* EMC MSJ at 5-6 (Appx. 41-42). The definitions of "unsafe" in the IBC and the IEBC include buildings that are "dangerous to human life or the public welfare" or "in which the structure or individual structural members meet the definition of 'Dangerous.'" IBC 116.1 (Appx. 974); IEBC Ch. 2 (definition of "unsafe") (Appx. 1023). A building shall be deemed "dangerous" if it "has collapsed" or "has partially collapsed," or if there "exists a significant risk of collapse, detachment or dislodgement of any portion, member, appurtenance or

ornamentation of the building or structure under service loads." IBC Ch. 2 (definition of "dangerous") (Appx. 981); IEBC Ch. 2 (same) (Appx. 1022).

EMC also acknowledged, and the District Court correctly found, that the Code required the deteriorated mortar throughout the school to be repaired before the building could be safely reoccupied. *See* EMC MSJ at 5-6 (Appx. 41-42); MSJ Order at 4 (Appx. 1117). The IBC provides that unsafe structures "shall be taken down and removed or made safe, as the building official deems necessary and as provided for in this section." IBC 116.1 (Appx. 974). The IEBC similarly provides that buildings "that are or hereafter become unsafe, shall be taken down, removed or made safe as the code official deems necessary and as provided in this code." IEBC 115.1 (Appx. 1020). The District thus was obligated by law to do what was necessary to make the entire building safe, including repairing or rebuilding walls outside the area of collapse.

In addition, as soon as the collapse revealed that the deteriorated mortar that caused the collapse was likely to be present in other areas of the school, the Code likewise required the District to repair or rebuild all of the deteriorated walls to make them structurally sound and strong enough to support the applicable loads set forth in the IBC or IEBC. *See* IPMC 304.1, 304.1.1, 304.4 (Appx. 1037-38).

F. The Policy's OL Coverage Provision Expressly Covers the Loss of "Damaged and Undamaged" Portions of the Building.

EMC issued a commercial property policy (Policy No. 1A1-97-35-19) (the "Policy") to the District that insured against all risks of physical loss or damage to Lowell and several other schools and other facilities. The Policy was in force from July 1, 2018 to July 1, 2019. *See* Policy (Appx. 69-340); EMC Answer at 8 (Appx. 24).

The Policy's primary grant of coverage states that EMC "will pay for direct physical loss of or damage to Covered Property … caused by or resulting from any Covered Cause of Loss." Policy at A (Appx. 144).

Among many other covered losses, the Policy covers loss resulting from collapse. Specifically, the Policy covers "direct physical loss or damage to Covered Property, caused by abrupt collapse of a building or any part of a building that is insured under this Coverage Form ... if such collapse is caused by ... [b]uilding decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse." *Id.* at A.4.g(2) (Appx. 148-49).

The Policy also provides additional OL coverage. *Id.* at A.4.e(1) (Appx. 147). The Policy's OL coverage provision broadly applies "[i]f there is an Ordinance or Law in effect at the time of loss that regulates zoning,

land use or construction of a building, and if that law affects the repair or rebuilding of the lost or damaged building." *Id*. In that event, EMC will pay "(i) for the loss of the damaged **and undamaged** portion of the building; (ii) the cost to demolish and clear the site of the damaged **and undamaged** portions of the building; and (iii) if the Replacement Cost Additional Coverage applies, the increased cost to repair or rebuild a building intended for similar occupancy and of the same general size as the current property." *Id.* (emphasis added).

The OL coverage provision also states that EMC "will not pay any costs due to an ordinance or law that (a) You were required to comply with before the loss, even when the building was undamaged, and (b) You failed to comply with." *Id.* at A.4.e(2) (Appx. 147).

Although the Policy contains an OL exclusion, *see id.* at B.1.a (Appx. 157-58), the OL coverage provision explicitly states that "This Additional Coverage is not subject to the terms of the Ordinance or Law Exclusion, to the extent that such Exclusion would conflict with the provisions of this Additional Coverage." *Id.* at A.4.e(4) (Appx. 147). The OL exclusion likewise explicitly states that "This exclusion does not apply … To the extent that limited coverage is provided in the Additional Coverage – Ordinance or Law." *Id.* at B.1.a (Appx. 158).

There is no dispute that the District paid all premiums due under the Policy, made a timely claim under the Policy, and generally cooperated with EMC's investigation of the claim. *See* EMC Answer at 15 (Appx. 31).

EMC has admitted that the Policy provides coverage for the cost to repair damage in the area of collapse. *See id.* at 10 (Appx. 26). EMC also has admitted that OL coverage "applies to any increased costs incurred by the District to repair the partial collapse." Jan. 8, 2020 EMC Letter at 10 (Appx. 747). At the same time, EMC has refused to pay for any repairs outside the specific area of collapse. *See id.* at 10-11 (Appx. 747-48).

ARGUMENT

The District Court's ruling ignored the language of the Policy and the weight of applicable authority. The District Court erroneously inserted a nonexistent causation requirement into the Policy's OL coverage provision, misunderstood the relationship between the Policy's primary and additional coverages, and rendered portions of the Policy superfluous. Because there was a covered loss, the Policy provides additional coverage for the cost of making repairs in compliance with the Code, wherever those repairs were required by the Code. Unlike OL provisions in many other cases, the OL coverage provision in the Policy contains no extra causation language at all, let alone language requiring that the covered loss cause the code enforcement.

Even if the OL provision did include such a causation requirement, the collapse did in fact cause the Code enforcement. It is undisputed that the District is seeking OL coverage for the costs of repairing structural problems that were discovered only as a result of the collapse, and which were precisely the same structural problems that caused the collapse. Several courts have extended coverage outside the specific area of damage in similar circumstances. Indeed, the District Court appears to be the only court to deny coverage where the covered loss revealed that the same condition that

caused the covered loss existed in other parts of the building and needed to be repaired to prevent future losses.

The District Court's rulings regarding the Policy's exclusions are likewise incorrect. The court's reliance on the Policy's OL exclusion is particularly misplaced because that exclusion applies only to the extent that OL coverage does not exist. In other words, because there is coverage under the OL additional coverage provision, the OL exclusion cannot apply under its own terms. The exclusion for preexisting code violations likewise does not apply because, as the City of Waterloo Building Official testified and EMC admitted, the District did not fail to comply with the Code prior to the collapse. The deterioration exclusion does not bar coverage because the District's obligation to comply with the Code is at least one proximate cause of the cost of the repairs outside the area of collapse. In addition, EMC's recognition that none of these exclusions precludes coverage inside the area of collapse shows that the exclusions also should not preclude coverage outside the area of collapse.

The District recognizes that the costs of repairing the deteriorated walls outside the specific area of collapse are substantial. However, the District should not be denied the very broad OL coverage for which it paid. The Policy also should not be rewritten because EMC or the District Court

does not like the result. EMC could have included a strict causation requirement in the OL coverage provision, but it did not. EMC could have said that it would pay only for costs of code compliance in the specific area of damage, but it did not. In fact, the OL coverage provision says the opposite—it says that EMC will pay for loss of "undamaged" portions of the damaged building. Moreover, EMC failed to modify the Policy language even though it was totally foreseeable that code compliance costs in a building of Lowell's age could be very high in the event of a covered loss. There is no reason to excuse EMC from its coverage obligations because the risk became a reality—that is the entire purpose of insurance.

The District Court's decision should be overturned and the District should be granted summary judgment in its favor.

I. The District Court's Ruling that the District Lacks Coverage for Code Compliance Outside the Specific Area of Collapse Is Erroneous Because It Contradicts the Policy's OL Coverage Provision and Conflicts with the Majority View.

The District Court's ruling that the District lacks coverage for code compliance outside the specific area of collapse is erroneous because it contravenes the language of the Policy. While the District's interpretation of the Policy is consistent with all of its provisions, the District Court's interpretation of the Policy is not. Although the District Court purported to be reading the Policy as a whole, that principle does not allow the court to

add terms that are not there or rewrite the Policy in the way EMC wishes it had been written. Moreover, any ambiguity in the Policy must be construed in favor of the District. *See Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 502 (Iowa 2013); *see also Grinnell Mut. Reinsurance Co. v. Jungling*, 654 N.W.2d 530, 536 (Iowa 2002) (Iowa courts "interpret ambiguous policy provisions in favor of the insured because insurance policies are in the nature of adhesion contracts"); *Cincinnati Ins. Co. v. Hopkins Sporting Goods, Inc.*, 522 N.W.2d 837, 839 (Iowa 1994) ("if words of an insurance policy are susceptible to two interpretations, the interpretation favoring the insured must be adopted").

A. Error Preservation and Standard of Review (Rule 6.903(2)(g))

The District extensively addressed the proper interpretation and scope of the OL coverage provision in both its motion for summary judgment and its response to EMC's motion for summary judgment. *See* District MSJ at 9-17 (787-95); District MSJ Response at 3-12 (Appx. 1052-61). The District Court decided those issues at pages 6-15 and 18 of its Ruling and Order on Motions for Summary Judgment. MSJ Order at 6-15, 18 (Appx. 1119-28, 1131).

Iowa appellate courts review a summary judgment ruling interpreting an insurance policy "for correction of errors at law." *Boelman*, 826 N.W.2d

at 500-01; *Hudson Hardware Plumbing & Heating, Inc. v. AMCO Ins. Co.*, 888 N.W.2d 682 (Iowa Ct. App. 2016). Iowa appellate courts "can resolve a matter on summary judgment if the record reveals a conflict concerning only the legal consequences of undisputed facts." *Boelman*, 826 N.W.2d at 501.

B. The District's Interpretation of the OL Coverage Provision Gives Effect to All Parts of the Policy.

The District's interpretation of the OL coverage provision properly takes account of all parts of the Policy, including the straightforward language of the OL coverage provision itself. It also makes sense given the purpose of the OL coverage provision, which is to provide additional coverage to policyholders, such as the District, faced with extra unexpected repairs required for code compliance after a covered loss occurs. Such repairs are often extensive and expensive, especially when the building at issue, like Lowell, is 90 years old.

1. The District's Interpretation Is Faithful to the Policy's Language and Structure.

The additional OL coverage that the District purchased from EMC applies if there is (1) a covered loss and (2) a law that "affects the repair or rebuilding of the lost or damaged building." If those conditions are met, then EMC will pay for the increased costs of complying with the law. There is no dispute that the collapse at Lowell was a covered loss. There likewise

is no dispute that there were laws affecting the repair or rebuilding of Lowell, namely, the code provisions that required the District to make Lowell safe and structurally sound. Accordingly, EMC is obligated to pay the increased costs of making Lowell safe, including the costs of repairing the deteriorated walls outside the specific area of collapse.

The District's interpretation of the OL coverage comports with the Policy's description of the coverage as both "additional" and "limited." *See* Policy at A.4, B.1.a (Appx. 146, 158). The coverage is "additional" because it is coverage on top of the coverage granted in Section A. It is "limited" because it does not apply unless there is a covered loss and a law that affects the repair or rebuilding of the lost or damaged building. The District agrees with the District Court that "the simple discovery of an ordinance or law violation is not a covered loss," and that "if the Building inspector, during a routine inspection of the building, found a building violation requiring repair, the repairs would be excluded by the Ordinance Or Law exclusion." MSJ Order at 10-11 (Appx. 1123-24). Unlike the District Court, however, the District reaches that conclusion by recognizing that there must be a covered loss before the OL coverage provision is triggered, not by inserting nonexistent causation requirements into the OL coverage provision.

2. The District's Interpretation Does Not "Negate" the OL Exclusion.

The District Court also asserted that the District's interpretation of the OL coverage provision "negates" the Policy's OL exclusion. *Id.* at 11 (Appx. 1124). To the contrary, the District's interpretation gives full effect to the OL exclusion, which applies, as noted above, when there has been no covered loss. It is the District Court that erred by reading the OL exclusion as totally eviscerating the OL coverage provision. That reading conflicts with the language in both parts of the Policy.

Both the OL coverage provision and the OL exclusion make clear that the coverage provision takes precedence over the exclusion. The OL coverage provision states that it is "not subject to" the OL exclusion, "to the extent that such Exclusion would conflict with the provisions of this Additional Coverage." Policy at A.4.e(4) (Appx. 147). The OL exclusion likewise explicitly states it "does not apply" to the extent that OL coverage is provided. *Id.* at B.1.a (Appx. 158). Accordingly, by definition, if the OL coverage provision provides coverage—as it does here—the OL exclusion does not apply.

C. The District Court's Ruling Improperly Inserts a Causation Requirement into the OL Coverage Provision.

The District Court distorted the language of the Policy by injecting a phantom causation requirement into the OL coverage provision.

1. The Causation Requirement in the Primary Coverage Provision Has Been Met.

The District Court correctly observed that the Policy's primary grant of coverage in Section A includes a causation requirement. Section A provides coverage for "direct physical loss of or damage to Covered Property … caused by or resulting from any Covered Cause of Loss." Policy at A (Appx. 144). The District Court suggested that the District is trying to circumvent that causation requirement. *See* MSJ Order at 10-12 (Appx. 1123-25). But there is no dispute that the causation requirement in the primary coverage provision has been fully satisfied here—a covered cause of loss (the collapse) caused direct physical loss of or damage to the covered property (Lowell).

2. The District Court Misconstrued the Relationship Between the Policy's Primary and Additional Coverages.

Furthermore, Section A does not say that coverage is provided only for physical loss or damage caused by a covered cause of loss. Policy at A (Appx. 144). Indeed, the Policy contains several "Additional Coverages"

that expand on the Policy's primary grant of coverage in various ways. *Id.* at A.4 (Appx. 146-54). Some of those additional coverages state that the expense at issue is covered only if it "is caused by or results from a Covered Cause of Loss." *See, e.g.*, *id.* at A.4.a(1) ("Debris Removal") (Appx. 146); A.4.d ("Pollutant Clean-up And Removal") (Appx. 147). Other additional coverages—such as the OL additional coverage—do not. The fact that some additional coverages include that causation language and others do not indicates that the language deliberately was omitted from certain additional coverages—such as the OL additional coverage—and should not gratuitously be read into those coverages. Instead, those additional coverages apply whenever the conditions actually set forth in them are met.

3. There Is No Causation Requirement in the OL Coverage Provision.

The District Court therefore erred when it inserted a causation requirement into the OL additional coverage. The District Court never spelled out exactly what that causation requirement is, but it seemed to be holding that the District is covered only for the cost of repairing physical damage directly caused by the collapse in accordance with the Code. *See* MSJ Order at 11-13 (Appx. 1124-26). That is not what the OL coverage provision says. Rather, in contrast to the debris removal and pollutant clean-up provisions cited above, the OL coverage provision does not require that a

covered cause of loss cause anything. It does not require that the code enforcement be caused by a covered cause of loss. Nor does it require that the condition that led to the code enforcement be caused by a covered cause of loss. Rather, the OL coverage provision requires merely that there be a covered loss and a law that "affects the repair or rebuilding of the lost or damaged building." The District Court itself even admitted that it was adding a causation requirement into the OL coverage provision "even though the causation language is not repeated in the Additional Ordinance Or Law coverage." *Id.* at 11-12 (Appx. 1124-25).

4. The District Court's Interpretation of the OL Coverage Provision Improperly Reads Portions of that Provision out of the Policy.

The District Court's interpretation of the OL coverage provision also improperly renders portions of that provision meaningless. The OL coverage provision states that EMC will pay for loss of "damaged and undamaged" portions of the building, as well as the cost to demolish "damaged and undamaged" portions of the building. Policy at A.4.e(1) (Appx. 147). The inclusion of "and undamaged" demonstrates that OL coverage extends beyond the specific area of damage. Yet the District Court held that "repairs required to undamaged areas are excluded by the Ordinance Or Law exclusion and are not recaptured by the limited additional

coverage for Ordinance Or Law." MSJ Order at 17 (Appx. 1130). Pursuant to that interpretation of the Policy, which bars OL coverage for everything but repair of physical damage caused by a covered cause of loss, there would never be coverage for repairs to any "undamaged" portion of the building, and the term "and undamaged" would be read out of the Policy.

The District Court's interpretation of the OL coverage provision thus violates the maxim that every word in an insurance policy should be given effect and not rendered superfluous. *See Boelman*, 826 N.W.2d at 502 ("We will not interpret an insurance policy to render any part superfluous, unless doing so is reasonable and necessary to preserve the structure and format of the provision.") (citation omitted); *The Phoenix Ins. Co. v. Infogroup, Inc.*, 147 F. Supp. 3d 815, 822 (S.D. Iowa 2015) (courts avoid "interpreting the policy in such a way as to render parts of a contract 'surplusage'") (citing *Fashion Fabrics of Iowa, Inc. v. Retail Inv'rs Corp.*, 266 N.W.2d 22, 26 (Iowa 1978)).

The Eighth Circuit made exactly that point in *Cincinnati Insurance Co. v. Rymer Companies, LLC*, 41 F.4th 1026 (8th Cir. 2022). In *Rymer*, the issue was whether a policy's OL provision covered code-mandated replacement of a mall's entire roof, even though the roof suffered only localized damage in a tornado (the covered cause of loss) and the roof was

water-soaked prior to the tornado. The policy's OL coverage was triggered "'[i]f a Covered Cause of Loss occurs to a covered building or structure, resulting in the enforcement of an ordinance or law.'" *Rymer*, 41 F.4th at 1028. Similar to the OL coverage provision in the District's Policy, the OL provision in *Rymer* also covered "demolition of *undamaged* parts of a covered building" and costs to "reconstruct or remodel *undamaged* portions" of the affected building. *Id.* at 1030 (emphasis in original).

The Eighth Circuit held that the policy's OL provision covered replacement of the entire roof. The Eighth Circuit explained that

> the causal relationship required by the endorsement is between the covered cause of loss and the "enforcement of an ordinance." Here, the causal link between the tornado and the enforcement of § 1511.3.1.1 is clear—the ordinance would not have been enforced "but for" the tornado…. In other words, without the tornado, the County would not have enforced § 1511.3.1.1 against Rymer.

Id. at 1029. Even if the policy required something more than "but for" causation, the Eighth Circuit determined there was a sufficiently "close causal relationship" between the tornado and the enforcement of the ordinance because the county had no "grounds to enforce the ordinance" until the tornado occurred. *Id.* at 1030.

Furthermore, the Eighth Circuit observed that its

> interpretation harmonizes with the general scheme of the [OL] endorsement. The endorsement covers "demolition of

> *undamaged* parts of a covered building" and pays for costs to "reconstruct or remodel *undamaged* portions" of the affected building. (emphasis added). We understand "undamaged portions" to mean parts of the building not physically damaged *by the covered cause of loss*. So, the endorsement assumes the additional covered costs are for parts of the building not physically damaged by the covered cause of loss, as here.

Id. at 1030-31 (emphasis in original).

The District Court attempted to distinguish *Rymer* because the OL coverage provision in *Rymer* used different language than the OL coverage provision in the Policy. *See* MSJ Order at 13 (Appx. 1126). But the OL coverage provision in the Policy is actually broader than the OL provision in *Rymer*, because the *Rymer* OL provision contained an explicit causation requirement that the covered cause of loss "result[] in" the code enforcement. The OL provision in the Policy contains no causation requirement at all. The District Court also noted that the OL provision in *Rymer* involved an endorsement, which "governs over conflicting language in the body of the policy," while the Policy's OL provision is in the body of the Policy. *See id.* That difference is irrelevant because the Policy includes no language that "conflict[s]" with the OL coverage provision and that provision should be applied as written.

5. EMC's Concession that OL Coverage Applies Inside the Specific Area of Collapse Means that EMC Must Pay for Repairs Outside the Specific Area of Collapse.

Indeed, EMC's admission that OL coverage was triggered inside the specific area of collapse is fatal to EMC's argument that it need not pay for increased costs outside the specific area of collapse, because the OL coverage provision explicitly expands coverage to undamaged areas of the building. The inclusion of "and undamaged" in the OL coverage provision demonstrates that OL coverage—the applicability of which EMC has conceded—extends beyond the specific area of damage. The District Court rejected that argument, *see id.* at 18 (Appx. 1131), but that rejection was based on the District Court's erroneous interpretation that read "and undamaged" out of the Policy altogether.

6. The Lack of a Causation Requirement in the OL Coverage Provision Distinguishes This Case from the Cases on Which the District Court Relied.

The lack of a causation requirement in the Policy's OL coverage provision differentiates this case from the cases cited by EMC and the District Court. The OL coverage provision in the Policy affords broader coverage than the OL provisions in those cases. For example, in the main case on which the District Court relied, *Chattanooga Bank Associates v. Fidelity & Deposit Co. of Maryland*, *see* MSJ Order at 12 (Appx. 1125), the

policy provided coverage only "[i]n the event of loss or damage under this coverage part that causes the enforcement of any law or ordinance regulating the construction or repair of damaged facilities." 301 F. Supp. 2d 774, 776-77 (E.D. Tenn. 2004) (emphasis added).

The Policy here instead resembles the policy in *City of Elmira v. Selective Insurance Co. of New York*, which did not require that the covered loss cause the enforcement of a law. 83 A.D.3d 1262, 1264, 921 N.Y.S.2d 662 (2011). Rather, the policy in that case required only that a "Covered Cause of Loss" occur and that the enforcement of a law cause loss or damage. *Id.* In *City of Elmira*, a windstorm caused a portion of an armory's southern wall to collapse. It was discovered that the collapse was caused by hidden mortar deterioration that weakened the wall, and that similar conditions existed in other areas of the armory. *Id.* at 1262-63. The code official determined that the armory could not be occupied until all the walls were repaired, and if the repairs were not performed, the armory had to be demolished. *Id.* at 1263. The court ruled that there was coverage for demolishing the armory (and there would have been coverage for rebuilding the armory), because "the only causal link required under that provision is that the costs to demolish the undamaged portions of the building be caused by enforcement of an ordinance or law." *Id.* at 1265.

The District Court acknowledged that *City of Elmira* was "factually similar" to this case but tried to distinguish *City of Elmira* by noting that the Policy here "only covers 'direct physical loss or damage … caused by or resulting from a Covered Cause of Loss,'" and that "causation element" is not present in *City of Elmira*. MSJ Order at 14 (Appx. 1127). First, as discussed above, it is not correct that the Policy "only" covers "direct physical loss or damage … caused by or resulting from a Covered Cause of Loss." The word "only" does not appear in the primary coverage provision. Second, the policy in *City of Elmira* did include a similar "causation element." The OL coverage in *City of Elmira* was not triggered unless there was a "Covered Cause of Loss" under the policy, meaning that there had to be some loss resulting from a covered cause. However, as with the Policy here, after the existence of that covered cause of loss (e.g., the collapse of the armory's southern wall) and code compliance costs were established, the OL coverage provision required no further causal analysis.

Courts interpreting similar OL provisions lacking causation requirements are in accord. *See Regents of Mercersburg Coll. v. Republic Franklin Ins. Co.*, 458 F.3d 159, 162, 170 (3d Cir. 2006) (after dormitory fire, OL coverage required insurer to cover alterations to undamaged portion of building caused by enforcement of ADA); *NextSun Energy Littleton, LLC*

v. Acadia Ins. Co., 494 F. Supp. 3d 1, 19 (D. Mass. 2020) (policy provided that "once direct physical damage from a covered peril causes an interruption of energy generation, any increase in the duration of the interruption caused by the enforcement of an ordinance or law extends the lost-income coverage," regardless of whether the physical damage causes enforcement of the ordinance or law).

D. Even If There Were a Causation Requirement in the OL Coverage Provision, There Is a Clear Causal Connection Between the Collapse and the Code Enforcement.

Even if the Policy's OL provision did contain a causation requirement, the District still would be entitled to coverage outside the area of collapse because there is a direct causal link between the collapse and the requirement that the District repair or rebuild the walls outside the area of collapse. There is no dispute that precisely the same condition that led to the collapse (namely, previously undetected deteriorated internal mortar) also led to the need for further repair and rebuilding throughout the school to prevent future collapses. The discovery of the deteriorated walls thus was not merely "incidental" to the collapse. *See* MSJ Order at 12 (Appx. 1125).

This strong causal connection belies the District Court's assertion that the District is trying to convert the Policy into a "maintenance contract." *See id.* at 14, 17-18 (Appx. 1127, 1130-31). The District is not asking EMC

to pay for random unrelated maintenance work throughout the school. Rather, the District is asking EMC to pay for the costs of correcting exactly the same structural problem that caused the covered loss and was discovered only as a result of the covered loss.

Many courts considering similar situations have determined that OL coverage applies to the costs of code compliance outside the specific area of damage. In one highly analogous case, a windstorm caused damage to one floor of a building. *DEB Assocs. v. Greater New York Mut. Ins. Co.*, 407 N.J. Super. 287, 970 A.2d 1074, 1075 (App. Div. 2009). When local code officials inspected the building, they discovered that the walls throughout the building were unstable and concluded that the building would be unsafe unless walls on all floors were brought up to code. *Id.* The court ruled that the policy covered all increased costs of construction due to building code enforcement because the policyholder had demonstrated "a clear causal connection between the collapse of the seventh floor wall and the code official's mandate that plaintiff bring the remaining floors into compliance to prevent them from collapsing." *Id.* at 1082. Here too there is a "clear causal connection" between the collapse and the requirement that the District repair or rebuild other walls of the school to prevent them from collapsing.

The District Court claimed that "the facts here differ" from those in *DEB*, but the court did not identify any such differing facts. MSJ Order at 15 (Appx. 1128). In reality, the two cases are very similar. In both cases, a collapse of one portion of a building led to the discovery of unsafe conditions in other undamaged portions of the building that needed to be repaired to avoid another collapse. The District Court also attempted to distinguish *DEB* by stating that the OL exclusion in the Policy "directly applies." *Id.* However, as discussed above, that argument assumes the conclusion. The OL exclusion only applies if the OL coverage provision does not apply.

The District Court did not address several other similar cases that the District cited in its summary judgment briefs. In one such case, an earthquake damaged a courthouse. The policyholder sought OL coverage for alterations required to upgrade nonconforming but undamaged systems in the building. *Commonwealth Ins. Co. of Am. v. Grays Harbor Cty.*, 120 Wash. App. 232, 84 P.3d 304, 306 (2004). The court held that the alterations were covered provided that the code enforcement was caused by the covered loss (i.e., the earthquake damage), and not by the policyholder expanding the scope of its repair proposal. *Id.* at 309.

In another case, a water leak in a hotel led to city building inspectors requiring compliance with numerous building code provisions. *Davidson Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 136 F. Supp. 2d 901 (W.D. Tenn. 2001). Again, the court found coverage for correcting the violations because of the "causal connection" between the loss and the code enforcement. *Id.* at 911. Because the "inspection occurred only because of the incident giving rise to liability," the insurer was liable for all costs associated with code compliance. *Id.*

Cases where courts declined to find OL coverage outside the area of damage are distinguishable because they deal with situations where a covered loss led to the discovery of unrelated code violations. In *Chattanooga Bank Associates*, for example, the court found no coverage for a host of unrelated building code violations that local inspectors happened to notice when they came to survey damage from a fire. 301 F. Supp. 2d at 780-81. Neither EMC nor the District Court have cited a single case denying coverage where the covered loss revealed that the same condition that caused the covered loss existed in other parts of the building and needed to be repaired to prevent future losses.

Courts have drawn this precise distinction regarding the relationship between the covered loss and the code violations. In *St. George Tower v.*

Insurance Co. of Greater New York, for example, the court found no coverage for the replacement of cracked and deteriorated concrete slabs "fortuitously discovered" while remediating covered flood damage. 139 A.D.3d 200, 30 N.Y.S.3d 60 (N.Y. App. Div. 2016). The court observed that

> the latent problem that was uncovered by inspection necessitated by the covered damage was not a problem related to the covered damage; rather, the inspection discovered a latent, unrelated problem with the building's infrastructure. The condition of the concrete slabs in plaintiff's building, which had to be repaired to bring the building into compliance with the Building Code, bore no relationship to the covered loss—the water damage—in the way that the collapsed wall in *DEB Associates* was related to the code violation and the resultant requirement that the mortar be replaced with steel angle irons.

139 A.D.3d at 206, 30 N.Y.S.3d at 64.

In the present case, as in *DEB*, the "latent problem that was uncovered by inspection necessitated by the covered damage"—namely, the deterioration of the internal mortar at Lowell—was related to the covered damage. If the mortar had not been repaired or replaced throughout the older areas of the school, exactly the same type of catastrophic failure and collapse that occurred over classroom 208 would be likely to occur in other parts of the school. Accordingly, the OL coverage provision in the Policy

covers the repair and rebuilding of walls beyond the specific area of collapse.

II. The District Court's Ruling that the Exclusion for Preexisting Code Violations Precludes Coverage Is Erroneous Because the District Did Not Fail to Comply with the Code.

The District Court erroneously ruled that the exclusion for preexisting code violations in the OL coverage provision bars coverage.[2] The OL provision states that EMC "will not pay any costs due to an ordinance or law that (a) You were required to comply with before the loss, even when the building was undamaged, and (b) You failed to comply with." Policy at A.4.e(2) (Appx. 147). That exclusion does not apply here because—as the City of Waterloo Building Official testified—there were no Code provisions the District "failed to comply with" prior to the collapse. The District's duty to investigate and repair the deteriorated walls arose only after the collapse revealed the deterioration for the first time.

All Policy exclusions are strictly construed against EMC, and EMC has the burden of establishing that an exclusion precludes coverage. *See*

[2] The District Court also erroneously ruled that the Policy's OL exclusion bars coverage. *See* MSJ Order at 15, 17 (Appx. 1128, 1130). As explained above, the OL exclusion cannot itself preclude coverage under the OL coverage provision because by definition, the OL exclusion applies only if the OL coverage provision does not apply. Because the OL coverage provision does apply, the OL exclusion does not apply.

Boelman, 826 N.W.2d at 502; *Brammer v. Allied Mut. Ins. Co.*, 182 N.W.2d 169, 174 (Iowa 1970).

A. Error Preservation and Standard of Review (Rule 6.903(2)(g))

The District extensively addressed the proper interpretation and scope of the preexisting code violation exclusion in both its motion for summary judgment and its response to EMC's motion for summary judgment. *See* District MSJ at 18-20 (Appx. 796-98); District MSJ Response at 16-20 (Appx. 1065-69). The District Court decided those issues at pages 14-19 of its Ruling and Order on Motions for Summary Judgment. MSJ Order at 14-19 (Appx. 1127-32).

The standard of review for this section is the same as the standard of review for the preceding section. Iowa appellate courts review a summary judgment ruling interpreting an insurance policy "for correction of errors at law." *Boelman*, 826 N.W.2d at 500-01; *Hudson Hardware*, 888 N.W.2d 682. Iowa appellate courts "can resolve a matter on summary judgment if the record reveals a conflict concerning only the legal consequences of undisputed facts." *Boelman*, 826 N.W.2d at 501.

B. There Is No Evidence that the District "Failed to Comply" with Any Code Provision.

The District Court appeared simply to assume that the District "failed to comply" with a Code provision prior to the collapse. *See* MSJ Order at 14 (Appx. 1127). That assumption is contrary to the record. Neither the District Court nor EMC has identified any Code provision the District was "required to comply with before the loss" but "failed to comply with."

Lowell was not deemed unsafe prior to the collapse. The City of Waterloo Building Official testified, and EMC admitted, that the City of Waterloo Building Department had not cited the District for any Code violations prior to the collapse. Oct. 5, 2021 Ahlhelm Dep. Tr. at 65:12-15 (Appx. 692); EMC Response to Statement of Undisputed Facts ¶ 17 (Appx. 1076). Importantly, the Building Official did not stop there. He also specifically testified that—even now, after having learned as a result of the collapse that the building was unsafe—he was not aware of any Code provision with which the District was not in compliance prior to the collapse. Oct. 5, 2021 Ahlhelm Dep. Tr. at 65:16-23 (Appx. 692). The Building Official thus implicitly rejected the argument that the District somehow failed to comply with the Code before the collapse. EMC's own risk management inspector likewise did not flag any issues whatsoever with

the exterior walls of the school, let alone suggest that the District might have run afoul of the Code. *See* EMC survey reports for Lowell (Appx. 838-930).

The District Court asserted that the District is injecting a "knowledge element" into the preexisting code violation exclusion, such that the exclusion would apply only if the District knew about the code violation before the collapse. *See* MSJ Order at 14 (Appx. 1127). That criticism is not valid. The District is not attempting to insert words into the Policy. *See id.* Rather, the District's argument is based on the language of the exclusion, which applies only if the District "failed to comply with" a Code provision before the collapse.

As noted, there is no evidence that the District "failed to comply with" any Code provision before the collapse. In part, that is because—as the District Court acknowledged, *see* MSJ Order at 4 (Appx. 1117)—the Code does not require property owners to open up their walls to check for damage or go looking for problems. Nor does the Code require property owners to update vintage materials or construction methods so that they meet current code standards. *See* IBC 102.6 (Appx. 966); IEBC 101.4.2 (Appx. 1012). The District Court and EMC merely supposed that if hypothetical experts had observed the school at some hypothetical point between 2006 and the collapse, the school hypothetically would have been deemed unsafe and the

District hypothetically would have been obligated to perform extensive repairs and rebuilding at that hypothetical time. But none of that actually happened. The District therefore did not "fail to comply" with any now-applicable Code provisions because it was not even "required to comply" with such provisions until the collapse exposed for the first time that the building was no longer structurally sound.

To the extent the Court determines that the terms "required to comply" or "failed to comply" are ambiguous, the Court must resolve all ambiguities in favor of the District. *Boelman*, 826 N.W.2d at 502; *Grinnell*, 654 N.W.2d at 536; *Cincinnati Ins. Co.*, 522 N.W.2d at 839.

The inability of the District Court and EMC to show a specific Code provision with which the District actually failed to comply distinguishes this case from *Celebrate Windsor, Inc. v. Harleysville Worcester Ins. Co.*, No. 3:05CV282 (MRK), 2006 WL 1169816 (D. Conn. May 2, 2006), the only case the District Court cited where the preexisting code violation exclusion barred coverage. In *Celebrate Windsor*, the court determined the exclusion applied because there was no dispute that prior to the collapse, the collapsed structure did not comply with specific building code regulations regarding snow load and wind pressure tolerances. *Id.* at *16-18. Unlike the District,

the policyholder in *Celebrate Windsor* was required to comply, but did not comply, with those regulations prior to the collapse.

C. Courts Have Rejected the Argument that the Mere Possibility of a Preexisting Unsafe Condition Defeats OL Coverage.

Other courts explicitly have rejected the argument that the hypothetical existence of an unsafe condition prior to a catastrophic event is sufficient to defeat coverage. In *DEB*, for example, the policy included the same exclusion as the Policy here. *See* 970 A.2d at 1076 n.2. The court ruled the exclusion was not implicated, because that case, like this one, did not involve "improvements made to correct pre-existing code violations." *Id.* at 1076. Rather,

> the prior nonconforming condition was considered legally acceptable before the disaster occurred. But after one wall collapsed, the condition of the other walls was reasonably perceived as posing a danger to human life and safety. It was the wall collapse that proximately caused the authorities to specifically look for similar problems elsewhere in the building and to designate the building as an "unsafe structure" when they found them.

Id. at 1082 (citing *Grays Harbor*, 84 P.3d at 308). While the policy in *DEB* "explicitly excluded pre-existing code violations which the insured had failed to correct," it "did not specifically exclude situations where, as here, a covered structure was grandfathered under the current code but lost its

grandfathered status because of the occurrence of covered damage." *Id.* at 1083.

Lowell presents precisely the same type of situation as *DEB*—the vintage materials and construction methods used at Lowell were "grandfathered" under the Code until the collapse occurred. But when the collapse revealed for the first time that those vintage materials and construction methods likely had become unsafe, it triggered the District's obligations under the Code to investigate the extent and scope of the structural damage, repair that structural damage, and make the building safe.

D. The District's Interpretation of the Preexisting Code Violation Provision Is Consistent with the Expectations of a Reasonable Policyholder.

In addition to being consistent with the language of the Policy, the District's interpretation also is consistent with the expectations of a reasonable policyholder. The obvious purpose of the exclusion is to eliminate coverage for delinquent policyholders who know they have a code violation but do nothing to correct it, and then try to shift to the insurer the cost of making fixes that should have been made prior to the loss. This is the concern that the court in *Davidson* suggested an insurer could address through an exclusion like the exclusion here. *See Davidson*, 136 F. Supp. 2d at 911 ("St. Paul asserts that the effect of such liability upon an insurer

would serve as an incentive for the insured to forego correcting code violations, including those related to life safety, in hopes that a fortuitous event will occur which will trigger liability upon the insured.").

The exclusion should not be interpreted to preclude coverage for policyholders, like the District, who are suddenly faced with a massive bill when a covered loss triggers the enforcement of code provisions that no one enforced or had any reason to enforce before the loss.

The District Court rejected this argument based on its erroneous conclusion that there is no OL coverage outside the specific area of collapse in the first place. MSJ Order at 19 (Appx. 1132). However, if the Policy is correctly interpreted to provide OL coverage outside the specific area of collapse, a reasonable policyholder would not anticipate losing that coverage because the policyholder had not made repairs prior to a collapse that the Code did not require the policyholder to make until after the collapse.

E. EMC's Recognition that the Pre-Existing Code Violation Exclusion Does Not Apply in the Area of Collapse Shows that the Exclusion Should Not Apply Anywhere.

EMC's recognition that the pre-existing code violation exclusion does not apply within the area of collapse shows that the exclusion also should not apply outside the area of collapse. By acknowledging OL coverage within the area of collapse, EMC implicitly conceded that there was no Code

provision with which the District failed to comply before the collapse revealed the mortar deterioration for the first time. Since there was no failure of compliance within the area of collapse, there also was no failure of compliance outside the area of collapse, since the same conditions were present throughout the older area of the building.

III. The District Court's Ruling that the Deterioration Exclusion Precluded Coverage Is Erroneous Because the District's Duty to Comply with the Code Caused the District to Incur the Cost of Repairing and Rebuilding the School.

Although it is not entirely clear, the District Court appeared to rule that the Policy's deterioration exclusion bars coverage. MSJ Order at 15-16 (Appx. 1128-29). That ruling is erroneous. After the collapse, the District's obligation to make Lowell safe pursuant to the Code caused the District to incur the costs of repairing and rebuilding the school. Well-established Iowa law on concurrent causation dictates that those costs therefore are covered, even if excluded causes such as deterioration also may have played a role.

A. Error Preservation and Standard of Review (Rule 6.903(2)(g))

The District extensively addressed the proper interpretation and scope of the deterioration exclusion in both its motion for summary judgment and its response to EMC's motion for summary judgment. *See* District MSJ at 20-22 (Appx. 798-800); District MSJ Response at 13-16 (Appx. 1062-65).

The District Court decided those issues at pages 14-19 of its Ruling and Order on Motions for Summary Judgment. MSJ Order at 14-19 (Appx. 1127-32).

The standard of review for this section is the same as the standard of review for the preceding two sections. Iowa appellate courts review a summary judgment ruling interpreting an insurance policy "for correction of errors at law." *Boelman*, 826 N.W.2d at 500-01; *Hudson Hardware*, 888 N.W.2d 682. Iowa appellate courts "can resolve a matter on summary judgment if the record reveals a conflict concerning only the legal consequences of undisputed facts." *Boelman*, 826 N.W.2d at 501.

B. The Deterioration Exclusion Does Not Bar Coverage Because Code Compliance Is At Least One Cause of the Cost of Repair and Rebuilding the School.

In Iowa, when insurance policies lack anti-concurrent causation language, "an accident that has two independent causes, one of which is covered and one excluded, is covered unless the excluded cause is the sole proximate cause of injury." *Amish Connection, Inc. v. State Farm Fire & Cas. Co.*, 861 N.W.2d 230, 241 (Iowa 2015). As the Supreme Court of Iowa has explained:

> If a proximate cause of an injury is within the included coverage of an insurance policy, the included coverage is not voided merely because an additional proximate cause of the injury is a cause which is excluded under the

> policy. Thus, in order for an injury to be excluded from coverage under an insurance policy, the injury must have been caused ***solely*** by a proximate cause which is excluded under the policy.

Kalell v. Mut. Fire & Auto. Ins. Co., 471 N.W.2d 865, 868 (Iowa 1991) (emphasis added; internal quotation marks and citation omitted). More than one proximate cause may exist. *See Grinnell Mut. Reinsurance Co. v. Employers Mut. Cas. Co.*, 494 N.W.2d 690, 693 (Iowa 1993); *Kalell*, 471 N.W.2d at 868.

There is no anti-concurrent causation language that applies to the deterioration exclusion, which is located in Section B.2 of the Policy. *See* Policy at B.2.d (Appx. 159-60). Although the Policy contains anti-concurrent causation language before the exclusions in Section B.1 of the Policy, *see id.* at B.1 (Appx. 157), there is no such language before the exclusions in Section B.2 of the Policy. *Id.* at B.2 (Appx. 159). The District Court's attempt to add anti-concurrent causation language to exclusions where it does not exist is clear error. *See* MSJ Order at 15 (Appx. 1128). The deliberate omission of anti-concurrent causation language in Section B.2 shows that the exclusions in that section are subject to the normal causation analysis described above. *See S. Ins. Co. v. CJG Enterprises, Inc.*, No. 315CV00131RGESBJ, 2017 WL 3453369, at *9 (S.D. Iowa Feb. 10, 2017) ("The inclusion of a clear anticoncurrent-cause provision in the

policies' first exclusion section and its absence from the second exclusion section…. demonstrates the drafters understood how to contract out of coverage for multiple causes through an anticoncurrent-cause provision and chose to do so only in a specific section of the policies.").

Here, the need for the District to undertake repairs and rebuilding outside the specific area of collapse was directly caused by the District's duty to comply with the Code, which was itself triggered by an indisputably covered event. Even the District Court recognized that the Code "certainly impacted the repairs required by the school after the covered loss." MSJ Order at 16 (Appx. 1129). The District repaired and rebuilt the walls because it was determined that the school would be structurally unsound and unsafe without the repairs. The District did not repair and rebuild the walls solely because of hidden deterioration, and the District did not base its claim on losses caused by such hidden deterioration. Rather, the District has made a claim for the costs of repairing and rebuilding Lowell in accordance with the Code. The requirement that the District comply with the Code is at least one proximate cause of such costs. Even if hidden deterioration also partially contributed to those costs, they are still covered. *See Joseph J. Henderson & Sons, Inc. v. Travelers Prop. Cas. Ins. Co. of Am.*, 956 F.3d 992, 999 (8th Cir. 2020) (finding coverage when covered windstorm and

excluded faulty workmanship "operated in tandem to cause the resulting damage").

C. The District Court's Interpretation of the Deterioration Exclusion Contradicts EMC's Coverage Determination and Would Render the OL Coverage Illusory.

The District Court's ruling that the deterioration exclusion precludes OL coverage conflicts with EMC's determination that OL coverage is available within the area of collapse. EMC correctly concluded that OL coverage applies within the area of collapse because, regardless of whether deterioration had some part in the repair and rebuilding process, the collapse and the ensuing enforcement of the Code caused the need to undertake that repair and rebuilding. The same reasoning applies outside the area of collapse.

Furthermore, if the District Court were correct that the deterioration exclusion bars OL coverage, OL coverage would be rendered almost entirely illusory. It will virtually always be the case that code enforcement addresses a condition encompassed by a policy exclusion, such as deterioration. If such a condition were sufficient to defeat OL coverage, OL coverage would almost never apply, despite plain language indicating it should apply whenever there is a covered loss and a code provision affecting repair and rebuilding, regardless of the specific nature of the code provision.

CONCLUSION

The District Court's ruling contradicts the language of the OL coverage provision and is in conflict with the weight of applicable authority. The ruling should be reversed. The District's motion for summary judgment should be granted and EMC's motion for summary judgment should be denied.

REQUEST FOR ORAL ARGUMENT

The District respectfully requests oral argument. The District believes that an oral argument may help clarify some of the policy interpretation and other issues of first impression in this case.

Dated: September 18, 2023

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point and contains 10,753 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

/s/ Shelli L. Calland

CERTIFICATE OF SERVICE

I hereby certify on the 18th day of September, 2023, I electronically filed the foregoing Appellant's Proof Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following parties:

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