

IN THE SUPREME COURT OF IOWA

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No. 23-0321

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**WATERLOO COMMUNITY SCHOOL DISTRICT,**

Plaintiff-Appellant,

vs.

**EMPLOYERS MUTUAL CASUALTY COMPANY,**

Defendant-Appellee.

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ON APPEAL FROM THE IOWA DISTRICT COURT  
FOR POLK COUNTY  
THE HONORABLE JEFFREY D. BERT  
CASE No. LACL149796

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**DEFENDANT-APPELLEE'S PROOF BRIEF**

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## STATEMENT OF ISSUES

- I. The District Court properly determined the partial collapse—the covered peril—did not cause the need to remediate the Age Deterioration in other parts of the building under the applicable building codes, so the Ordinance or Law Additional Coverage does not apply.**

*Boelman v. Grinnell Mut. Reins. Co.*, 826 N.W.2d 494 (Iowa 2013)

- II. Because the pre-existing Age Deterioration constituted an unsafe condition requiring repair under the applicable building codes even if the partial collapse did not occur, the District Court properly determined the exception to the Ordinance or Law Additional Coverage for pre-existing building code violations applies to preclude coverage.**

*Celebrate Windsor, Inc. v. Harleysville Worcester Ins. Co.*, No. 3:05CV282, 2006 WL 1169816 (D. Conn. May 2, 2006)

*Commonwealth Ins. Co. of America v. Grays Harbor Cty.*, 84 P.3d 304 (Wash App. 2004)

International Existing Building Code § 202 (2015)

- III. The District Court properly determined the Deterioration Exclusion applies to preclude coverage for the Age Deterioration in parts of the building unaffected by the partial collapse.**

*City of West Liberty v. Employers Mut. Cas. Co.*, 922 N.W.2d 876 (Iowa 2019)

*Houston Specialty Ins. Co. v. Meadows West Condo Assoc.*, 640 Fed. Appx. 267 (5<sup>th</sup> Cir. 2016)

- IV. Although not decided by the District Court, the Collapse Exclusion applies to preclude coverage for the Age Deterioration in parts of the building unaffected by the partial collapse.**

*Davis v. American States Ins. Co.*, No. C10-1605-JCC, 2012 WL 2004866 (W.D. Wash., June 5, 2012)

*Hickory Grove Missionary Baptist Church, Inc v. Church Mut. Ins. Co.*, Civ. No. 5:11-CV-407, 2014 WL 1159592 (M.D. Ga., March 21, 2014)

## **ROUTING STATEMENT**

This case should be retained by the Iowa Supreme Court pursuant to Iowa R. App. P. 6.1101(2) as it presents a fundamental issue of broad public importance and a substantial question of enunciating legal principles in the interpretation of property coverage language requiring determination by the Iowa Supreme Court.

## **STATEMENT OF THE CASE**

This case arises from an insurance coverage dispute for a partial roof collapse caused by a combination of deterioration of the mortar in a building's exterior masonry walls and the weight of snow that accumulated on the building's roof. An investigation revealed the deterioration also existed in areas of the building unaffected by the collapse, rendering it unsafe to occupy under the applicable building codes. The building official advised that even if the area of partial collapse were repaired, the building could not be occupied until the deterioration in other parts of the building had been remediated.

Defendant/Appellee Employers Mutual Casual Company ("EMC") provided insurance coverage to the building owner, Waterloo Community School District (the "District") for the cost to repair the area of partial collapse (the "Collapse Damage"), but it declined coverage for the cost to repair the deterioration in other parts of the building (the "Age Deterioration") because a covered peril did not cause the Age Deterioration and policy exceptions or exclusions applied to

preclude coverage. The District disagreed and filed this lawsuit. The parties filed cross motions for summary judgment, and the District Court granted summary judgment to EMC.

The District seeks coverage to remedy the Age Deterioration under the insurance policy's Ordinance or Law ("OL") Additional Coverage. The District Court found the OL Additional Coverage does not apply, and this determination should be affirmed for three reasons. First, the partial collapse—the covered peril—did not cause the need to remediate the Age Deterioration under the applicable building codes, as required to trigger coverage under the policy's insuring agreement. Second, the OL Additional Coverage contains an exception for building codes an insured is required to comply with before the loss, but failed to do so. Because the pre-existing Age Deterioration constituted an unsafe condition requiring repair under the applicable building codes even if the partial collapse did not occur, the exception applies to preclude coverage. Finally, the policy contains exclusions for deterioration and continuous or repeated seepage or leakage of water, the two purported causes of the Age Deterioration, that apply to preclude coverage. For all of these reasons, this Court should affirm and enter summary judgment in favor of EMC.

## STATEMENT OF FACTS

The District owns a number of school buildings, including Lowell Elementary School located at 1628 Washington Street in Waterloo, Iowa (“Lowell”). Insurance Policy Form CP7001A ED. 2-12 at 1–54 (Appx. 70–125). The District obtained a commercial property insurance policy with EMC, Policy No. 1A1-97-35-19, with effective dates of coverage from July 1, 2018, to July 1, 2019 (the “Policy”). Insurance Policy No. 1A1-97-35-19 (Appx. 70). The Policy lists Lowell as Location 7. Insurance Policy Form CP7001A ED. 2-12 at 5 (Appx. 78).

The District constructed Lowell in 1931. Petition at ¶ 11 (Appx. 9). Two additions were added in 2006. Petition at ¶ 11 (Appx. 9). The District performed tuckpointing<sup>1</sup> of parts of the masonry exterior walls and replaced a portion of the roof of the existing building at that same time. Petition at ¶ 11 (Appx. 9); Depo. Ex. 1 at 4–5 (Appx. 348–49); Change Order #6 at 1 (Appx. 769).

On the morning of February 20, 2019, Lowell’s roof partially collapsed in the vicinity of Room 208 on the second floor of the original building. Depo. Ex. 1 at 4 (Appx. 348). The collapse occurred in an area that had been tuck-pointed and re-roofed as a part of the 2006 construction, but was not part of the newly

constructed additions. Depo. Ex. 1 at 4 (Appx. 348). School had been cancelled for the day due to snow storms in the area, and a significant amount of snow and ice had accumulated on the roof prior to the collapse. Depo. Ex. 1 at 8 (Appx. 352).

The District reported an insurance claim to EMC, and an investigation of the cause of the collapse ensued. *See, generally* Petition (Appx. 7). The District retained Bradley Penar of ISG Inc., an architectural and engineering firm, to assess the damage from the partial collapse and hazards to other areas of the building. Depo Ex. 1 at 2 (Appx. 346). The District later retained Tony Childress of Childress Engineering Services, Inc. to further investigate the cause of the partial collapse and the application of building codes to repairs. Depo Ex. 6 at 2 (Appx. 389). EMC retained Brian Heffernan of HDHY Engineering, Inc. to investigate the cause of the partial collapse and John Krudwig of Krudwig Structural Engineers to prepare repair specifications. Depo Ex. 2 at 1 (Appx. 422); Depo Ex. 3 (Appx. 432). EMC later retained Scott Nesvold of ESi<sup>2</sup> to evaluate the application of building codes to repairs. Depo Ex. 7 at 1 (Appx. 434).

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<sup>1</sup> Tuckpointing refers to the process of repairing deteriorated mortar joints by grinding and raking out a portion of the old mortar and pressing new mortar into the joint. Depo Ex. 1 at 5 (Appx. 349).

<sup>2</sup> Nesvold worked for Crane Engineering at the time of his initial retention, and ESi subsequently merged with Crane with ESi as the survivor.

The experts<sup>3</sup> agree that a combination of age deterioration of the mortar in the joist bearing pockets of the exterior masonry wall and the weight of snow and ice caused the partial collapse. Depo Ex. 2 at 5 (Appx. 426); Depo Ex. 6 at 2 (Appx. 389); Depo Ex. 40 at 2 (Appx. 447). The building's basic structural system consisted of load-bearing multi-wythe<sup>4</sup> masonry walls at the perimeter with a cast-in-place concrete joist system at the first and second floors with open web steel joist roof framing. Depo Ex. 1 at 3 (Appx. 347). The mortar in the upper portion of the wall had become soft and sand like in many locations. Depo Ex. 2 at 5 (Appx. 426). The deteriorated mortar condition also existed in the exterior walls outside the area of collapse, this condition had been present for some time, and it rendered the building unsafe to occupy. Depo Ex. 2 at 8 (Appx. 429); Depo Ex. 6 at 19 (Appx. 406); Depo Ex. 40 at 22 (Appx. 467); Childress Depo at 106 (Appx. 597); Depo Ex. 1 at 5–6, 10 (Appx. 349–50, 354).

The experts disagree, however, on the cause of the deteriorated mortar. Heffernan concluded the deterioration resulted from long term water intrusion. Depo Ex. 2 at 6 (Appx. 427); Depo Ex. 8 at 2–4 (Appx. 615–17); Depo Ex. 6 at 15–17 (Appx. 402–04); Depo Ex. 40 at 18–20 (Appx. 463–65). Childress, on the

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<sup>3</sup> The District designated Childress as an expert, and EMC designated Heffernan, Krudwig, and Nesvold as experts.

<sup>4</sup> A wythe refers to a vertical section of masonry wall one unit thick. International Building Code § 202 (2015 Edition).

other hand, opines the deterioration arose from normal aging of the original construction materials rather than water intrusion. Depo Ex. 2 at 6 (Appx. 427); Depo Ex. 8 at 2–4 (Appx. 615–17); Depo Ex. 6 at 15–17 (Appx. 402–04); Depo Ex. 40 at 18–20 (Appx. 463–65).

Like the causation analysis, the experts hold shared and divergent opinions regarding application of the building codes to repairs. The City of Waterloo adopted, with amendments, a number of model codes published by the International Code Council (“ICC”), including the International Building Code (“IBC”), the International Existing Building Code (“IEBC”) and the International Property Maintenance Code (“IPMC”).<sup>5</sup> Depo Ex. 7 at 2 (Appx. 436). The experts agree the age deteriorated mortar present in areas outside the partial collapse renders the building “unsafe” under the IEBC and the IPMC. Depo Ex. 6 at 19 (Appx. 406); Depo Ex. 40 at 22 (Appx. 467); Depo Ex. 7 at 7–10 (Appx. 441–44); Depo Ex. 8 at 5–8, 11 (Appx. 618–21, 624). They also agree the building codes required this Age Deterioration to be repaired before the building could be re-occupied. Depo Ex. 6 at 19 (Appx. 406); Depo Ex. 40 at 21 (Appx. 466); Depo Ex. 7 at 10 (Appx. 444); Depo Ex. 8 at 11 (Appx. 624); Depo Ex. 2 at 8–9 (Appx. 429–30).

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<sup>5</sup> The 2015 editions applied at the time of the collapse. Depo Ex. 7 at 2 (Appx. 436).

The experts disagree, however, concerning how the building code applies to the area of partial collapse. The IEBC authorizes the repair of damaged components of a building to its pre-damaged state unless the damage qualifies as “substantial structural damage” (“SSD”). IEBC §§ 404.4, 606.2.1 (2015).

Nesvold concluded the partial collapse does not meet the definition of “substantial structural damage” (“SSD”), so the area of partial collapse can be repaired to its pre-damaged state consistent with IEBC §§ 404.4 and 606.2.1. Depo Ex. 7 at 6 (Appx. 440); Depo Ex. 8 at 9–11 (Appx. 622–24); Depo Ex. 4 (Appx. 627).

Childress opines the partial collapse constitutes SSD, triggering an engineering evaluation and the need to rehabilitate the entire building and bring it up to compliance with the building code’s current requirements. Depo Ex. 6 at 21–22 (Appx. 408–09); Depo Ex. 40 at 24–26 (Appx. 469–71).

Greg Ahlhelm, the City of Waterloo Building Official, did not undertake an analysis of whether the partial collapse at Lowell resulted in SSD, explaining he would defer to the expertise of the engineers on this issue. Ahlhelm Depo at 85–88 (Appx. 712–15). Ahlhelm also took no action as the authority having jurisdiction to issue a notice of violation, a stop work order, a notice of unsafe building, or a demolition order. Depo Ex. 9 (Appx. 730). He did, however, respond to an inquiry from the District as follows:

Question: Based upon the proposed repairs for the portion of the roof that collapsed at the existing Lowell elementary School and upon your



review of multiple structural engineering analysis reports, would you be willing to grant occupancy to the building after those repairs are made?

Answer: I will have to defer to the structural engineers and the information they have related to my office. Based on those conversations we will not allow this structure to be occupied.

Depo Ex. 9 (Appx. 730). Ahlhelm further agreed that if he had been made aware of the unsafe conditions in the building prior to the partial collapse, he would have required remediation of those conditions. Ahlhelm Depo at 81 (Appx. 708).

A dispute arose between the parties concerning the scope of insurance coverage for repair costs. EMC determined the Policy covered the cost to repair the Collapse Damage because the weight of snow and ice caused the loss, but the Policy did not cover the cost to repair the Age Deterioration. July 19, 2019 Monnier Letter to Fereday (Appx. 731); January 8, 2020 Monnier Letter to Fusco (Appx. 738); February 7, 2020 Monnier Letter to Fusco (Appx. 750). The District disagreed, contending additional coverages for Collapse and OL apply to cover the Age Deterioration repairs. July 3, 2019 Fereday Email to Signor (Appx. 754); October 8, 2019 Fusco Letter to Monnier (Appx. 758); January 17, 2020 Fusco Letter to Monnier (Appx. 762). The District decided to demolish Lowell and construct a new building on the site. Petition at ¶ 21 (Appx. 11). As previously mentioned, the District filed suit, the parties filed cross motions for summary judgment, and the District Court granted summary judgment to EMC. Petition

(Appx. 7); Plaintiff’s Motion for Summary Judgment (Appx. 774); Defendant’s Motion for Summary Judgment (Appx. 34); January 31, 2023 Ruling and Order on Motions for Summary Judgment (Appx. 1114).

## ARGUMENT

**I. The District Court properly determined the partial collapse—the covered peril—did not cause the need to remediate the Age Deterioration in other parts of the building under the applicable building codes, so the OL Additional Coverage does not apply.**

**A. Error Preservation and Standard of Review**

EMC agrees the District preserved error through its motion for summary judgment and resistance to EMC’s motion for summary judgment on the argument articulated in Brief Point I of its appeal brief. Appellate courts review the district court’s grant of summary judgment for correction of errors at law. *Boelman v. Grinnell Mut. Reins. Co.*, 826 N.W.2d 494, 500-01 (Iowa 2013). This appeal requires the court to determine whether the Policy provides coverage for the cost to repair the Age Deterioration. Construction of an insurance policy involves the process of determining its legal effect, something the court must decide as a matter of law. *A.Y. McDonald Industries v. Ins. Co. of North America*, 475 N.W.2 607, 618 (Iowa 1991). Courts first look to the scope of coverage of an insuring agreement, then to the exclusions, and then to the exceptions to the exclusions when determining if an insurance policy affords coverage. *National Sur. Corp. v.*

*Westlake Inv., LLC*, 880 N.W.2d 724, 739 (Iowa 2016) (citing *Pursell Const., Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67, 69 (Iowa 1999)). The insurance policy must be read as a whole, and any exceptions or exclusions cannot expand coverage beyond what the insuring agreement explicitly allows. *Westlake*, 880 N.W.2d at 739.

**B. The Insuring Agreement requires direct physical loss caused by a covered cause of loss to trigger coverage.**

Beginning with the first step, the Policy's Building and Personal Property Coverage Form, under the heading "A. Coverage" provides: "We will pay for 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."

Insurance Policy Form CP7123(1-18) at 1 (Appx. 144). The Policy also contains a series of conditions that apply to the property coverage forms requiring, in part, that loss or damage occur during the policy period shown in the Declarations for coverage to apply. Insurance Policy Form CP 00 90 07 88 at 1 (Appx. 137). This policy language requires that the following factors must be established to trigger coverage: (1) direct physical loss or damage; (2) to Covered Property; (3) at the premises described in the Declarations; (4) caused by a covered cause of loss; (5) during the policy period.

The coverage dispute in this case concerns primarily the fourth factor, whether the conditions for which the District seeks coverage resulted from a

covered cause of loss. The policy defines “Covered Causes of Loss” this way: “Covered Causes Of Loss means direct physical loss unless the loss is excluded or limited in Section **B. Exclusions and Limitations.**” Insurance Policy Form CP7123(1-18) at 3 (Appx. 146). The District’s claim arises from direct physical loss in the form of Collapse Damage and Age Deterioration. A review of why the Policy provides coverage for the Collapse Damage aids in the understanding of why the Policy does not provide coverage for the Age Deterioration.

**C. The Specified Causes of Loss Exception to the Collapse Exclusion applies to the area of partial roof collapse because it was caused by the weight of snow and ice, so the Policy covers the Collapse Damage.**

As previously mentioned, the District initially sought supplemental coverage for the remediation of the Age Deterioration under the Collapse Additional Coverage. July 3, 2019 Fereday Email to Signor (Appx. 754); October 8, 2019 Fusco Letter to Monnier (Appx. 758); January 17, 2020 Fusco Letter to Monnier (Appx. 762). The Building and Personal Property Coverage Form initially excludes collapse as a covered cause of loss:

2. We will not pay for loss or damage caused by or resulting from any of the following:
  - ...
  - k.** Collapse, including any of the following conditions of property or any part of property:
    - (1)** An abrupt falling down or caving in;

- (2) Loss of structural integrity, including separation of parts of the property or property in danger of falling down or caving in; or
- (3) Any cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion as such condition relates to (1) or (2) above.

But if collapse results in a Covered Cause of Loss at the described premises, we will pay for the loss or damage caused by that Covered Cause of Loss.

This exclusion, **k.**, does not apply:

- (a) To the extent that coverage is provided under the Additional Coverage — Collapse; or
- (b) To collapse caused by one or more of the following:
  - (i) The "specified causes of loss";
  - (ii) Breakage of building glass;
  - (iii) Weight of rain that collects on a roof; or
  - (iv) Weight of people or personal property.

Insurance Policy Form CP7123(1-18) at 16–17 (Appx. 159–60). The Building and Personal Property Coverage Form defines “specified causes of loss” to include “weight of snow, ice or sleet...” Insurance Policy Form CP7123(1-18) at 27 (Appx. 170). The Policy, therefore, covers the Collapse Damage due to the exception for collapse caused by the weight of snow and ice. The Collapse Exclusion still applies, however, to the pre-existing loss of structural integrity in the remainder of the building (the Age Deterioration) unless another exception

applies, such as the Collapse Additional Coverage. Application of the Collapse Additional Coverage will be discussed in Brief Point IV below.

**D. The Policy excludes loss or damage caused directly or indirectly by the enforcement of any ordinance or law, except to the extent limited coverage is provided by the OL Additional Coverage.**

The District focuses its argument of coverage for remediation of the Age Deterioration on the OL Additional Coverage. Like collapse, the Building and Personal Property Coverage Form begins by excluding OL as a covered cause of loss:

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

...

**a. Ordinance Or Law**

The enforcement of any ordinance or law:

- (1) Regulating the construction, use or repair of any property; or
- (2) Requiring the tearing down of any property, including the cost of removing its debris.

This exclusion, Ordinance Or Law, applies whether the loss results from:

- (a) An ordinance or law that is enforced even if the property has not been damaged; or
- (b) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property.

This exclusion does not apply:

- (1) To the extent that limited coverage is provided in the Additional Coverage —Ordinance Or Law.

Insurance Policy Form CP7123(1-18) at 14–15 (Appx. 157–58). This exclusion applies to preclude coverage for the cost to remediate the Age Deterioration unless the exception to the exclusion for coverage under the OL Additional Coverage applies.

- E. Reading the Insuring Agreement in conjunction with the OL Exclusion and the OL Additional Coverage, a covered cause of loss must cause the enforcement of an ordinance or law in effect at the time of loss that regulates construction and affects the repair of the damaged building for the OL Additional Coverage to apply.**

The OL Additional Coverage provides, in pertinent part:

**4. Additional Coverages**

...

**e. Ordinance Or Law**

- (1)** If 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, and if you:
- (a)** have repaired or rebuilt the building as soon as reasonably possible we 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;

...

- (2)** Under this Additional Coverage, we 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.

...

- (4) 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.
- (5) The costs addressed in the Loss Payment and Valuation Conditions, and the Replacement Cost Optional Coverage, in this Coverage Form, do not include the increased cost attributable to enforcement of an ordinance or law. The amount payable under this Additional Coverage is not subject to such limitation.

Insurance Policy Form CP7123(1-18) at 4 (Appx. 147). Reading the OL Additional Coverage in conjunction with the Policy’s insuring agreement and the OL Exclusion, the District Court found a causation requirement exists. January 31, 2023 Ruling at 11 (Appx. 1124). In other words, the need to repair damage from a covered peril must be the cause of the requisite code compliance in order for coverage to apply.

The District contends the OL Additional Coverage contains no requirement that code enforcement result from a covered loss. Appellant’s Brief at 32. Rather, it suggests the provision applies any time there is a covered loss and a law that “affects the repair or rebuilding of the lost or damaged building.” *Id.* at 28. The District’s argument lacks merit because it seeks to interpret the OL Additional Coverage in isolation in violation of the rules of interpretation.



One rule of interpretation holds the policy must be read as a whole, not seriatim by clauses. *Boelman*, 826 N.W.2d at 501. Another rule of interpretation holds courts must strive to avoid interpreting an insurance policy to render any part superfluous. *Id.* As previously mentioned, the Policy’s insuring agreement requires direct physical loss caused by a covered cause of loss to trigger coverage. Insurance Policy Form CP7123(1-18) at 1 (Appx. 144). The OL Exclusion precludes coverage for “[t]he increased cost incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property ... following a physical loss to that property.” Insurance Policy Form CP7123(1-18) at 15 (Appx. 158). The OL Exclusion contains an exception stating it does not apply “to the extent that limited coverage is provided” in the OL Additional Coverage. Insurance Policy Form CP7123(1-18) at 15 (Appx. 158). The District Court found the reference to physical loss in insuring agreement and the OL Exclusion to be significant, and it noted the Policy only covers direct physical loss caused by a covered cause of loss. January 31, 2023 Ruling at 9–10 (Appx. 1122–23). The District Court further found nothing in the OL Additional Coverage altered this requirement. The insuring agreement and OL Exclusion must be read in conjunction with the OL Additional Coverage to limit the scope of coverage afforded to those instances where a covered cause of loss triggers the

enforcement of the ordinance or law in question. Otherwise, it would render the OL Exclusion superfluous.

Such an interpretation finds further support in the terms of the OL Additional Coverage. This provision requires, in part, that the ordinance or law in question “affects the *repair* or *rebuilding* of the lost or damaged building”, and it provides coverage, if certain conditions are met, for “the increased cost to repair or rebuild [the] building”. Insurance Policy Form CP7123(1-18) at 4 (Appx. 147) (emphasis added). The terms repair or rebuild are commonly understood to mean to “restore to a previous state” or “restore to a sound or healthy state”. *Merriam-Webster’s Collegiate Dictionary* Repair, Rebuild (11<sup>th</sup> ed. 2004). As the District Court noted, the simple discovery of a code violation does not constitute a covered loss. January 31, 2023 Ruling at 10 (Appx. 1123). If the building inspector discovered a violation during a code inspection, the cost to remedy the violation would be precluded by the OL Exclusion. January 31, 2023 Ruling at 11 (Appx. 1124).

**F. Persuasive authority from other jurisdictions holds the enforcement of an ordinance or law must be caused by a covered loss in order for the OL Additional Coverage to apply.**

Persuasive authority from other jurisdictions has come to the same conclusion as the District Court. For example, the District Court found the reasoning in *Chattanooga Bank Associates v. Fidelity & Deposit Co. of Maryland*,

301 F.Supp.2d 774 (E.D.Tenn.2004) to be compelling. January 31, 2023 Ruling at 12 (Appx. 1125). In that case, a bank building sustained damaged from two fires. *Chattanooga Bank Assoc.*, 301 F.Supp.2d at 776. When local inspectors came to survey the fire damage, they discovered a host of building code violations throughout the structure. *Id.* The violations concerned electrical wiring, the fire alarm system, the elevator, stairway lighting, standpipes, and other matters. *Id.* The bank sought coverage for the cost of remediating those violations. *Id.*

The court observed the policy contained two relevant provisions. First, under the heading “Perils Insured Against,” the policy provided coverage for “all risk of direct physical loss of or damage to property described herein ... except as hereinafter excluded.” *Id.* Second, the policy also contained an OL provision:

14. Demolition And Increased Cost of Construction

In 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, the company shall be liable for:

....

C. Increased cost of repair or reconstruction of the damaged and undamaged facility on the same or another site and limited to the minimum requirements of such law or ordinance regulating the repair or reconstruction of the damaged property on the same site....

*Id.* at 776–77. The court found the perils insured against provision “limit[s] the liability of the insurer to only those cases where the loss or damage results from the [covered] peril.” *Id.* at 780.

The court next considered the OL provision, and it observed the provision applies “in 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.” *Id.* The court concluded the fire did not cause the required code upgrades for which the Bank sought coverage:

The plaintiffs contend that because the inspection was triggered by the fire and resulted in the enforcement of the building code, the fire was the cause of the enforcement of the building code. However, this Court disagrees. Although the violations might have remained undiscovered if not for the fire, the violations in question existed independent of the fire and the fire cannot be said to have “caused” the enforcement of a building code, which was at all times subject to enforcement.

*Id.*

Finally, the court noted the OL provision covered the “increased cost of repair or reconstruction of the damaged and undamaged facility.” *Id.* Interpreting this language, the court found “[u]pgrades to undamaged portions of a building simply do not amount to repair or reconstruction.” *Id.* at 780–81. The court summarized its holding this way:

[T]he mere discovery of a code violation during an inspection after a fire is insufficient to create liability under the policy. The plaintiffs must show at trial that the fire, or the attempts to extinguish it, created the need to repair or reconstruct some portion of the insured property in a manner consistent with current building codes.

*Id.* at 781.

For other cases reaching the same conclusion, see *MarkWest Hydrocarbon, Inc. v. Liberty Mut. Ins. Co.*, 558 F.3d 1184 (10<sup>th</sup> Cir. 2009) (no OL coverage for costs of compliance with corrective action orders (“CAOs”) issued by the Office of Pipeline Safety after a bypass valve in a natural gas liquids pipeline operated by the insured failed resulting in an explosion because the CAOs regulated terms for the safe operation of the entire pipeline and were not aimed at dictating a fix for the damage done by the explosion); *CV Ice Co., Inc. v. Golden Eagle Ins. Co.*, No. CV 14-121 PSG (SPx), 2015 WL 72313 (C.D.Cal. January 6, 2015) (finding no coverage under an identical insuring agreement and substantially similar OL provision when an angle iron fell into the tank of a block ice making system, puncturing a pipe, and a county environmental health department official ordered replacement of all piping due to extensive corrosion and pitting in areas beyond the puncture revealed during post-loss inspection; the OL provision did not cover the cost to replace all the piping because a covered cause of loss—the impact damage to the pipe—did not cause the code enforcement, the pre-existing corrosion did); *Tocci Building Corp. v. Zurich Amer. Ins. Co.*, 659 F.Supp.2d 251 (D. Mass. 2009) (no OL coverage for cost to grout entire retaining wall following storm damage to a portion of the wall where town inspector ordered grouting to address construction defects rather than storm damage; need for grouting not a covered cause of loss); *Sanderson v. First Liberty Ins. Co.*, Case No. 8:16-CV-644, 2019 WL 2009332 at

\*6 (N.D.N.Y. May 7, 2019) (rejecting OL coverage where shoddy work needing upgrade to meet code was wholly unrelated to water damage covered by the policy, reasoning “reading a limited ordinance or law endorsement ... too broadly would put the insurer on the hook for the cost of replacement every single time a problem ‘happened to be uncovered in the course of damage remediation,’ no matter how attenuated the latent problem’s relationship is to the covered loss.”); *St. Paul Fire and Marine Ins. Co. v. Darlak Motor Inns, Inc.*, No. 3:97–cv–1559, 1999 WL 33755848 (M.D.Pa. March 9, 1999), *affirmed without opinion*, 205 F.3d 1330 (3d Cir.1999) (finding no OL coverage for costs incurred in making code repairs and alterations in parts of the building not damaged by fire because the independent existence of the code violations, not the fire, caused the code enforcement). Cases cited by the District as contrary authority are more appropriately addressed and distinguished under Brief Point II.E

The following analogy is a helpful way to understand the proper metes and bounds of coverage under the OL Additional Coverage:

The logical boundaries to the scope of OL Coverage are best explained by analogy to a hypothetical. A store has a[n] ... insurance policy. Two laws apply to the store: (1) a law requiring a wheelchair accessible restroom, and (2) a law requiring fire sprinklers. The laws are different in that the restroom law does not require immediate action—the storeowner does not need to close shop and expand the bathroom right away, but if the storeowner decides to remodel other aspects of the store, it must also expand the bathroom at that time. The fire sprinkler law is immediately applicable; if the store does not have working fire sprinklers at any time, it is violating the law.

In the hypothetical, the store does not have a wheelchair accessible restroom or fire sprinklers. However, if an inspector came to check the store's compliance, it would only issue a violation for the sprinklers because the store owner's obligation to expand that bathroom has not been triggered.

One day, a car crashes into the storefront. The accident is a covered cause of loss under the insurance policy and its repair requires a substantial rebuild of the front façade of the store. This rebuild triggers the obligation under the wheelchair accessibility law to expand the bathroom in the back of the store. It is entirely logical that, under an expansive OL Coverage provision, the insurance company would have to pay not only for the storefront rebuild, but also for the cost of expanding the existing restroom, even though it was undamaged, because the covered cause of loss triggered obligations under a law regarding restroom construction. However, in this scenario, the insurance company would not also be obligated to pay for installing fire sprinklers at this time because that deficiency and obligation pre-dated the occurrence of the covered cause of loss. *If a causation requirement is not read into the OL Coverage provision, the results are absurd. Any covered cause of loss would thrust upon the insurer an obligation to bring the entire insured property up to various building codes when that obligation was already alive and rightfully resting on the insured just prior to the covered cause of loss.*

*CV Ice Co.*, 2015 WL 72313 at \*11 (emphasis added).

**G. Because a covered loss did not cause the need to remediate the pre-existing Age Deterioration in other parts of the building, the OL Additional Coverage does not apply.**

Applying the causation requirement here, the OL Additional Coverage does not apply because the covered partial collapse did not cause the need to remediate the pre-existing Age Deterioration. The Age Deterioration is analogous to the sprinklers in the *CV Ice* hypothetical. The terms of the applicable building codes

require this conclusion. As previously discussed, the IEBC authorizes the repair of damaged components of a building to its pre-damaged state unless the damage qualifies as SSD. IEBC §§ 404.4, 606.2.1. The experts disagree concerning whether the partial collapse meets the definition of SSD. Depo Ex. 7 at 6 (Appx. 440); Depo Ex. 8 at 9–11 (Appx. 622–24); Depo Ex. 4 (Appx. 627); Depo Ex. 6 at 21–22 (Appx. 408–09); Depo Ex. 40 at 24–26 (Appx. 469–71). Regardless, the experts agree and the code official confirmed the conditions present at Lowell outside the area of collapse were unsafe and required remediation under the IEBC or the IPC. Depo Ex. 6 at 19 (Appx. 406); Depo Ex. 40 at 22 (Appx. 467); Depo Ex. 7 at 7–10 (Appx. 441–44); Depo Ex. 8 at 5–8, 11 (Appx. 618–21, 624); Ahlhelm Depo at 81, 85–88 (Appx. 708, 712–15); Depo Ex. 9 (Appx. 730). Because the partial collapse did not cause these pre-existing conditions, the OL Additional Coverage does not cover the cost to remediate the Age Deterioration.<sup>6</sup> To conclude otherwise, as the District Court noted, would transform the insurance policy into a maintenance contract. January 31, 2023 Ruling at 14, 18 (Appx. 1127, 1131); *MarkWest Hydrocarbon*, 558 F.3d at 1192 (to read the policy as covering costs of complying with safety regulations not aimed at dictating a fix for damage caused by portion of pipeline damaged by explosion would be to convert the parties’ policy against unforeseen fortuities into a maintenance contract).

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<sup>6</sup> As discussed further below in Brief Point II, the OL Additional Coverage contains an express



**H. EMC’s grant of OL coverage for repairing the partial collapse does not amount to a concession that OL coverage exists for code required remediation not caused by a covered cause of loss.**

The District claims EMC’s grant of OL coverage for remediation of the partial collapse amounts to a concession that OL coverage applies outside the specific area of collapse. Appellant’s Brief at 37. The District reasons the OL provision states EMC will pay for loss of “damaged and undamaged” portions of the building, and the inclusion of “undamaged” demonstrates OL Additional Coverage extends beyond the specific area of damage. *Id.* This argument misconstrues the OL Additional Coverage and ignores other provisions of the policy.

The District seeks coverage for the cost to repair the Age Deterioration, but the repair provision of the OL Additional Coverage makes no mention of “damaged and undamaged” portions of the building. Insurance Policy Form CP7123(1-18) at 4 (Appx. 147). Rather, as explained above, the need to repair damage from a covered peril must be the cause of the requisite code compliance in order for coverage to apply. This is because the insuring agreement requires a covered cause of loss in order for coverage to apply, which the District’s argument ignores. The location of the repair does not necessarily matter as long as the causal nexus exists. For example, the *CV Ice* hypothetical involving a car crash into a

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exception leading to the same conclusion.

store front contemplates OL coverage for the legal requirement to make the restrooms wheelchair accessible as a part of repairs even though the restrooms were not damaged by the collision and were located in a different part of the store. *CV Ice Co., Inc.*, 2015 WL 72313 at \*11. The court reasoned OL coverage applies to the cost to modify the restrooms because damage from a covered cause of loss—the collision—caused the code official to require modification of this previously legally non-conforming or “grandfathered” condition. Unlike the restrooms but similar to the sprinklers in the hypothetical, the Age Deterioration did not constitute a legally non-conforming condition prior to the partial collapse. Rather, the Age Deterioration violated Section 304.1.1 of the International Property Maintenance Code (“IPMC”) and Section 115.1 of the International Existing Building Code (“IEBC”), as further discussed in Brief Point II below. Because the partial collapse did not cause the pre-existing code violation—the Age Deterioration—the OL Additional Coverage does not apply.

**II. Because the pre-existing Age Deterioration constituted an unsafe condition requiring repair under the applicable building codes even if the partial collapse did not occur, the District Court properly determined the exception to the OL Additional Coverage for pre-existing building code violations applies to preclude coverage.**

**A. Error Preservation and Standard of Review**

EMC agrees the District preserved error through its motion for summary judgment and resistance to EMC’s motion for summary judgment on the argument

articulated in Brief Point II of its appeal brief. Appellate courts review the district court's grant of summary judgment for correction of errors at law. *Boelman*, 826 N.W.2d at 500-01.

**B. The OL Additional Coverage does not apply to costs due to an ordinance or law the insured was required to comply with before the loss, but the insured failed to comply with.**

The District Court also found the OL Additional Coverage does not apply to cover the cost to remediate Age Deterioration due to an exception that amounts to an exclusion. January 31, 2023 Ruling at 14 (Appx. 1127). Paragraph A.4.e(2) of the OL Addition Coverage provides it does not apply for costs due to an ordinance that the insured was required to comply with before the loss, even when the building was undamaged, and the insured failed to do so. Insurance Policy Form CP7123(1-18) at 4 (Appx. 147). This exception clearly applies here.

**C. IPMC Section 304.1.1 requires a property owner such as the District to maintain its building and keep structural members free from unsafe conditions such as deterioration**

As previously mentioned, the City of Waterloo adopted the IEBC and the IPMC. The IEBC applies to the repair, alteration, change of occupancy, addition to and relocation of existing buildings. IEBC Sec. 101.2. It defines an existing building as “a building erected prior to the date of adoption of the appropriate code, or one for which a legal building permit has been issued.” IEBC Section 115.1 provides “[b]uildings, structures or equipment that are or become *unsafe*,

shall be taken down, removed or made safe as the *code official* deems necessary and as provided for in this code.” (emphasis in original). The IEBC offers these general definitions:

**[BS] DANGEROUS.** Any building, structure or portion thereof that meets any of the conditions described below shall be deemed dangerous:

1. The building or structure has collapsed, has partially collapsed, has moved off its foundation, or lacks the necessary support of the ground.
2. 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.

**UNSAFE.** Buildings, structures or equipment that are unsanitary, or that are deficient due to inadequate means of egress facilities, inadequate light and ventilation, or that constitute a fire hazard, or in which the structure or individual structural members meet the definition of “*Dangerous*,” or that are otherwise *dangerous* to human life or the public welfare, or that involve illegal or improper occupancy or inadequate maintenance shall be deemed unsafe. A vacant structure that is not secured against entry shall be deemed unsafe.

IEBC Sec. 202.

The IPMC applies to “all existing residential and nonresidential structures.”

IPMC Sec. 101.2. IPMC Section 304.1 states “the exterior of a structure shall be maintained in good repair, structurally sound and sanitary so as not to pose a threat to the public health, safety or welfare,” and Section 304.4 requires “structural members shall be maintained free from *deterioration*, and shall be capable of

safely supporting the imposed dead and live loads.” (emphasis in original). IPMC Section 304.1.1 further provides “structural members that have evidence of *deterioration* or that are not capable of safely supporting all nominal loads and load effects” constitute an unsafe condition that “shall be repaired or replaced” to comply with the IBC or the IEBC.

**D. Because the pre-existing Age Deterioration constituted an unsafe condition requiring repair under the IPMC prior to the partial collapse, the exception to the OL Additional Coverage for pre-existing building code violations applies to preclude coverage.**

The parties agree repairs of the Age Deterioration are mandated by IPMC Section 304.1.1 and IEBC 115.1. Depo Ex. 6 at 19 (Appx. 406); Depo Ex. 40 at 22 (Appx. 467); Depo Ex. 7 at 7–10 (Appx. 441–44); Depo Ex. 8 at 5–8, 11 (Appx. 618–21, 624); Ahlhelm Depo at 81, 85–88 (Appx. 708, 712–15); Depo Ex. 9 (Appx. 730). No one can dispute the fact that the Age Deterioration had been present at Lowell for years prior to the partial collapse. Depo Ex. 2 at 8 (Appx. 429); Depo Ex. 6 at 19 (Appx. 406); Depo Ex. 40 at 22 (Appx. 467); Depo Ex. 1 at 5–6, 10 (Appx. 349–50, 354); Childress Depo at 106 (Appx. 597). The Age Deterioration constitutes a violation of the IPMC that existed pre-loss, so the exception found in Paragraph A.4.e(2) of the OL Addition Coverage applies to preclude coverage. Other courts have applied the exclusion under analogous facts and policy language. *See Celebrate Windsor, Inc. v. Harleysville Worcester Ins. Co.*, No. 3:05CV282, 2006 WL 1169816 at \*18 (D. Conn. May 2, 2006) (applying

the exception to preclude coverage for increased costs of repair attributable to complying with ordinances that existed before the loss and the need to pay additional costs to re-design and re-build the structure to remedy pre-existing design defects). The District cites cases that reached a contrary conclusion, but those cases are distinguishable because the OL provisions at issue did not have the pre-existing code violation exception present in EMC's Policy. *See Commonwealth Ins. Co. v. Benihana of Tokyo, Inc.*, No. 3:96-CV-0826-R, 1997 WL 361617 at \*3 (N.D.Tex. June 19, 1997) (interpreting policy without the exception, and noting "the fact that the code may have been applicable before the fire is irrelevant since the bylaw does not specify that the regulation being enforced be newly applicable or that the fire hazard not have previously existed"); *City of Elmira v. Selective Ins. Co.*, 921 N.Y.S.2d 662, 665 (S.Ct., App. Div. 3 Dept. 2011) (observing the OL provision in question lacked any unambiguous language excluding coverage where pre-existing conditions contribute to the enforcement of an ordinance or law).

**E. The pre-existing Age Deterioration constitutes a violation of the IPMC regardless of whether the District knew about it prior to the partial collapse.**

The District argues it had no prior knowledge of the Age Deterioration, and the City of Waterloo had not issued any violation notices prior to the partial collapse, so the exception does not apply. Appellant's Brief at 45-49. The District

Court rejected this argument finding it would negate the exclusion, and rightfully so. January 31, 2023 Ruling at 14 (Appx. 1127). Building codes, by their very existence, presume a duty of compliance. Courts have recognized this principle by observing the enforcement of ordinances does not require an affirmative action of some sort; rather, the enforcement begins with the passing of relevant ordinances and continues with either the granting or denial of a permit, or the issuance of a violation. *Window Wizards Inc. v. Charter Oak Fire Ins. Co.*, Civil Action No. 13-7444, 2015 WL 1400726 at \*6 (E.D. Pa., March 27, 2015); *see also Consolidated Rail Corp. v. Aspen Specialty Ins. Co.*, Civil No. 17-12281, 2019 WL 2425118 at \*8-9 (D.N.J., June 10, 2019). Because the Age Deterioration existed prior to the partial collapse and constituted an unsafe condition that required remediation under the IEBC and the IPMC, the exception in Paragraph A.4.e(2) of the OL Additional Coverage applies to preclude coverage for the cost to repair those pre-existing conditions.

The District essentially asks this court to insert the emphasized words below into the exception to the OL Additional Coverage:

- (2) Under this Additional Coverage, we will not pay any costs due to an ordinance or law that:
  - (a) You *knew you* were required to comply with before the loss, even when the building was undamaged; and
  - (b) You failed to comply with.



Under the rules of interpretation, Iowa courts determine the intent of the parties by looking at what the policy itself says, and the court will not strain the words or phrases of the policy in order to find liability that the policy did not intend and the insured did not purchase. *Boelman*, 826 N.W.2d at 501. If an insurance policy and its exclusions are clear, the court will not write a new contract of insurance for the parties. *Id.* at 502. The Court should decline the District's invitation to do so here.

**F. The case law cited by the district is distinguishable from this case.**

The District cites four main cases in contends support its position. These cases are distinguishable based on the facts of the claim or the policy language in question. This court, accordingly, should follow the persuasive authority cited by EMC and adopted by the District Court.

In the first case, *DEB Assocs. v. Greater New York Mut. Ins. Co.*, 970 A.2d 1074, 1075 (N.J. App. Div. 2009), the insured owned an eight-story building constructed with a brick façade over cinderblock walls. A windstorm sheared off most of the façade, perimeter wall, and windows on the north side of the seventh floor. *Id.* A post-loss inspection of the seventh floor by the code official revealed the walls were secured to the concrete floor with only mortar rather than with steel fasteners know as angle irons. *Id.* Further inspection revealed this condition existed throughout the building, and the walls could be moved outward simply by pushing on them. *Id.* The inspector deemed the building unsafe, ordered it



vacated, and required the walls on all floors and the roof to be secured to the structure with angle irons in compliance with the current building code before the building could be re-occupied. *Id.* Similar repairs were made on the eighth floor prior to the loss, but the inspector did not require the installation of angle irons on other floors at that time. *Id.* at 1076, fn. 1. When the insurer agreed to pay for the cost of the angle irons as a part of repairs to the seventh floor but not for the other floors, the insured filed suit. *Id.* at 1076.

The policy in question had the following OL provision:

3. Coverage C—Increased Cost of Construction Coverage
  - a. If a Covered Cause of Loss occurs to the covered Building property, we will pay for the increased cost to:
    - (1) Repair or reconstruct damaged portions of that Building property; and/or
    - (2) Reconstruct or remodel undamaged portions of that Building property whether or not demolition is required;when the increased cost is a consequence of enforcement of building, zoning or land use ordinance or law.

*Id.* The court summarized the parties' arguments this way:

The parties ... agree that the clause would apply to undamaged portions of the same structure which must be brought up to code in the course of repairing the damaged portion. For example, if a portion of a wall collapses, and as result, code officials require the entire wall to be reconstructed using code-compliant materials, there is coverage.

The parties, however, disagree on whether the clause applies where the damage to one portion of a building causes code officials to require repairs to separate, undamaged portions of the building. [Defendant] contends there is never coverage in this situation. Plaintiff contends that there is always coverage so long as “a covered

cause of loss occurs” and the insured incurs “increased cost of construction ‘as a consequence of’ building code enforcement as a result of the covered loss.” In the alternative, plaintiff argues that there is coverage here because of the direct connection between the collapse of the seventh floor wall, necessitating the installation of angle irons, and the requirement that angle irons be installed on the remaining walls to prevent them from collapsing.

*Id.* The court found for the insured, reasoning:

[T]he 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. Further, the required upgrades concerned the same structural part of the building (the walls), the same building code provision, and the same type of repair (installation of angle irons).

The language of the policy itself also supports our conclusion that there is coverage here. In this case, the policy explicitly excluded pre-existing code violations which the insured had failed to correct. However, the policy 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 1082-83.

The *DEB Assocs.* decision differs from the present case for several reasons. Unlike the lack of angle irons which had grandfathered status, the condition of the deteriorated mortar failed to comply with the IPMC prior to the loss. The requirement for installation of the angle irons involved the same code provision, but repairs for the Collapse Damage are governed by a different code provision

(IEBC Chapter 6) than the code requirement for repairs to the Age Deterioration (IPMC 304.1.1 and IEBC 115.1). Finally, in contrast to the angle irons, the policy excludes the subject matter of the code requirement: loss caused by or resulting from deterioration, as discussed further in Brief Point III below.

Another case cited by the District, *Commonwealth Ins. Co. of America v. Grays Harbor Cty.*, 84 P.3d 304 (Wash App. 2004), actually supports EMC's position. The dispute concerned coverage for six safety upgrades required by a city building official as a part of repairs for earthquake damage to a courthouse. *Id.* at 305. The official required the upgrades even though the existing systems were legal nonconforming conditions undamaged by the earthquake. *Id.* The parties disputed the necessary scope of repairs for the earthquake damage, and the insurer contended the broad scope of the insured County's repair proposal triggered the code upgrades as opposed to the earthquake damage. *Id.* at 308-309. The insurance policy's OL provision provided:

In the event of loss or damage under this Policy that causes the enforcement of any law or ordinance regulating the construction or repair of damaged facilities, this Company shall be liable for:

...

C. Increased cost of repair or reconstruction of the damaged and undamaged facility on same or another site and limited to the minimum requirements of such law or ordinance regulating the repair of [sic] reconstruction of the damaged property on the same site. However, the Company shall not be liable for any increased cost of construction loss unless the damaged facility is actually rebuilt or replaced.

*Id.* at 305. The court held the policy covered the safety upgrades if the County could show the earthquake damage caused the building official to enforce the law requiring the upgrades. *Id.* at 308. In reaching this conclusion, the court noted the policy unambiguously required the earthquake damage (the covered loss) to cause the code enforcement in order for coverage to apply. *Id.* at 309. This Court should interpret the insuring agreement of EMC's policy to impose the same requirement here, as discussed above in Brief Point II.

The third case cited by the District, *Davidson Hotel Co., v. St. Paul Fire and Marine Ins. Co.*, 136 F.Supp.2d 901, 910 (W.D. Tenn. 2001), involved a claim for OL coverage when building inspectors required compliance with numerous building code provisions following an inspection of damage caused by a water leak. The court found coverage, and in doing so noted the policy in question had no language limiting coverage for pre-existing code violations. EMC's Policy contains such a provision, and it should be enforced by this Court.

In the final case cited by the District, *City of Elmira v. Selective Insurance Co. of New York*, 921 N.Y.S.2d 662, 663 (3<sup>rd</sup> Dept. 2011), the insured owned a three-story brick building known as the Armory. A windstorm caused a portion of the Armory's southern wall to collapse. *Id.* An engineering inspection determined the collapse resulted from hidden deterioration of mortar, which weakened the wall. *Id.* The engineer reported similar conditions existed elsewhere in the

building, which rendered it unsafe to occupy. *Id.* The Fire Marshall found the Armory to be in violation of several sections of the state's property maintenance code, and he determined the building could not be occupied until repairs were performed. *Id.* If repairs were not performed, he directed the building to be demolished immediately. *Id.*

The insured decided to demolish the building, it purchased a building at a different location, and it relocated the functions formerly performed at the Armory. The insured sought to recover the demolition costs under an OL provision that provided:

- (1) If a Covered Cause of Loss occurs to covered Building property, we will pay:
  - (a) For Loss or damage caused by enforcement of any ordinance or law that:
    - (i) Requires the demolition of parts of the same property not damaged by a Covered Cause of Loss;
    - ...
  - (c) The cost to demolish and clear the site of undamaged parts of the property caused by enforcement of the building, zoning or land use ordinance or law.

*Id.* at 664. The insurer refused to cover the cost to demolish undamaged portions of the Armory, and the insured filed suit. *Id.* at 663.

The court began its analysis by determining the only requirement necessary to trigger the OL provisions was the occurrence of a covered cause of loss. *Id.* at 664. The windstorm qualified as a covered peril, so the court reasoned the insured could recover the demolition costs so long as those costs were caused by the

enforcement of a building, zoning, or land use ordinance or law. *Id.* The court found the Fire Marshall exercised his right to enforce the property maintenance code by requiring the Armory to either be repaired or demolished, so the costs were covered. *Id.* In doing so, the court rejected the insurer's invitation to require a causal connection between the covered peril and the code enforcement:

Defendant contends that the Ordinance or Law provision of the endorsement cannot be invoked because the covered cause of loss—i.e., the windstorm—did not cause the enforcement of the Property Maintenance Code requiring the Armory to be renovated or demolished. The Ordinance or Law provision, however, contains no such requirement. Rather, the clear and unambiguous language of the Ordinance or Law provision required only that a covered cause of loss occur, and that plaintiff incur costs to demolish and clear the site of undamaged parts of the property as a result of the enforcement of an ordinance or law. Thus, 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. Moreover, the Ordinance or Law provision lacks any unambiguous language excluding coverage where, for example, preexisting property damage contributes to enforcement of an ordinance or law. ... If defendant wished to limit its coverage to only those situations where the enforcement of an ordinance or law is caused by a covered loss, it could have easily done so through the language of the contract. It did not, however, and, under the plain and unambiguous language of the Ordinance or Law provision, plaintiff is entitled to coverage for demolition costs

*Id.* at 664-65.

*City of Elmira* can be distinguished for several reasons. The court did not consider the impact of the insuring agreement when it interpreted the OL provision. In fact, the court did not even quote the insuring agreement in its

opinion. The court's cursory review pales in comparison to the more thorough and better reasoned analysis in *CV Ice and Chattanooga Bank Associates v. Fidelity & Deposit Co. of Maryland*, 301 F.Supp.2d 774 (E.D.Tenn.2004). The OL Additional Coverage in EMC's policy also contains an exception for pre-existing code violations the court noted to be absent from Selective's policy with the City of Elmira. Finally, the court did not consider the impact of an exclusion such as the deterioration exclusion found in EMC's policy and further discussed in Brief Point III below. Due to these distinctions and the distinctions noted above, this court should reject the cases cited by the District as persuasive authority.

**G. EMC's grant of coverage for repairs of the partial collapse does not amount to a concession that the exception to the OL Additional Coverage for pre-existing code violations does not apply.**

The District suggests EMC's acceptance of coverage for the Collapse Damage shows the exception to the OL Additional Coverage should not apply to the Age Deterioration. Appellant's Brief at 52. This argument completely misses the mark. A combination of age deterioration of the mortar in the joist bearing pockets of the exterior masonry wall and the weight of snow and ice caused the partial collapse. Depo Ex. 2 at 5 (Appx. 426); Depo Ex. 6 at 2 (Appx. 389); Depo Ex. 40 at 2 (Appx. 447). The Collapse Damage qualifies as a covered cause of loss under the specified causes of loss exception to the Collapse Exclusion, as explained in Brief Point I.C. If an ordinance or law in effect at the time of the loss

regulates construction and affects the repair or rebuilding of the Collapse Damage, the OL Additional Coverage may apply to the increased cost to do so. This has nothing to do with the Age Deterioration. The District's argument, therefore, must be rejected.

**III. The District Court properly determined the Deterioration Exclusion applies to preclude coverage for the Age Deterioration in parts of the building unaffected by the partial collapse.**

**A. Error Preservation and Standard of Review**

EMC agrees the District preserved error through its motion for summary judgment and resistance to EMC's motion for summary judgment on the argument articulated in Brief Point III of its appeal brief. Appellate courts review the district court's grant of summary judgment for correction of errors at law. *Boelman*, 826 N.W.2d at 500-01.

**B. The Policy contains an exclusion that applies to loss or damage caused by deterioration.**

The District Court determined the Deterioration Exclusion applies to preclude coverage for the Age Deterioration. January 31, 2023 Ruling at 16 (Appx. 1129). The District Court observed the experts disagree on whether water infiltration contributed to the mortar deterioration, but they all agreed the age deterioration existed prior to the loss. January 31, 2023 Ruling at 16 (Appx. 1129); Depo Ex. 2 at 6 (Appx. 427); Depo Ex. 8 at 2–4 (Appx. 615–17); Depo Ex. 6 at 15–17 (Appx. 402–04); Depo Ex. 40 at 18–20 (Appx. 463–65). The District Court



also observed the Policy excludes loss or damage caused by deterioration, and where an exclusion applies, no coverage exists. January 31, 2023 Ruling at 16 (Appx. 1129). This determination finds support in the Policy and the facts.

The Building and Personal Property Coverage Form provides in relevant part:

2. We will not pay for loss or damage caused by or resulting from any of the following:
  - d.
    - ... (1) Wear and tear;
    - (2) Rust or other corrosion, decay, *deterioration*, hidden or latent defect or any quality in property that causes it to damage or destroy itself;
    - ... (4) Settling, cracking, shrinking or expansion;
  - f. *Continuous or repeated seepage or leakage of water, or the presence of condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more.*

Insurance Policy Form CP7123(1-18) at 16–17 (Appx. 159–60) (emphasis added).

Thus, the Policy expressly excludes loss caused by deterioration. *See* Steve Plitt,

Daniel Maldonado, Joshua D. Rogers, and Jordan R. Plitt, eds., *Couch on*

*Insurance 3d* § 153:80 (collecting cases applying the deterioration exclusion). The

Policy also excluded loss caused by continuous or repeated seepage or leakage of

water, the other potential cause of the Age Deterioration identified by EMC’s

experts but disputed by the District’s expert.

Courts have declined to find coverage under OL provisions if an exclusion applies to preclude coverage. *Houston Specialty Ins. Co. v. Meadows West Condo Assoc.*, 640 Fed. Appx. 267, 274 (5<sup>th</sup> Cir. 2016) (finding the faulty workmanship exclusion could apply to preclude coverage for losses covered under OL provision); *Jaw the Pointe v. Lexington Ins. Co.*, 460 S.W.3d 597 (Tex. 2005) (applying the flood exclusion to preclude coverage for demolition following hurricane). It would defy logic here to cover repairs of damage unrelated to the partial collapse (a covered cause of loss) when the policy otherwise excludes that very damage.

**C. Iowa law applies the Efficient Proximate Cause Doctrine to resolve questions of concurrent causation in first party property losses.**

The District contends the Deterioration Exclusions do not apply due to what can be described as the concurrent causation doctrine. Appellant’s Brief at 54. A discussion of the principles of concurrent causation in the law of insurance generally and Iowa law specifically demonstrates the fallacy of the District’s argument.

Courts have come to different coverage conclusions in situations where a loss allegedly arises due to multiple causes, some covered and some excluded. Some states apply the “concurrent causation” doctrine and find coverage should be permitted whenever two or more causes appreciably contribute to the loss and at

least one of the causes constitutes a risk covered by the policy. Steve Plitt, Daniel Maldonado, Joshua D. Rogers, and Jordan R. Plitt, eds., *7 Couch on Insurance 3d* § 101:55 at 104-05 (hereinafter *Couch 3d*). Under this approach, the insurer has the burden of proof to show an exclusion constitutes the sole, proximate cause of damage or loss to the property. Other states apply the efficient proximate cause rule whereby the court does not necessarily look at the last act in the chain of events, but rather to the predominant cause which set in motion the chains of events causing the loss. *Couch 3d* at §§ 101:43, 101:55. Insurers have responded to these competing approaches for resolving concurrent causation questions by inserting a provision into the insurance policy known as the anti-concurrent causation clause (hereinafter “ACC”). See *Couch 3d* at § 101:57 and cases cited therein. Although there are different versions, this clause provides something to the effect that such loss is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. *Couch 3d* at § 101:57. Courts generally enforce anti-concurrent causation clauses unless the jurisdiction has statutorily adopted the efficient proximate cause rule. *Couch 3d* at § 101:45.

A close examination of case law reveals Iowa courts consistently have applied the concurrent causation rule in third-party liability claims<sup>7</sup> and the

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<sup>7</sup> *Kalell v. Mutual Fire & Auto Ins. Co.*, 471 N.W.2d 865, 868 (Iowa 1991) (interpreting motor vehicle exclusion in homeowners liability policy); *Grinnell Mut. Reins. Co. v. Emp'rs Mut. Cas.*

efficient proximate cause rule in first-party property cases.<sup>8</sup> Iowa courts have also upheld the validity of ACC clauses when addressing concurrent causation questions.<sup>9</sup> Any suggestion to the contrary in *Amish Connection, Inc. v. State Farm Fire and Cas. Co.*, 861 N.W.2d 230, 240-41 (Iowa 2015) constitutes dicta because the majority found the rain limitation applied to preclude coverage regardless of whether any other cause contributed to the loss. *See also Joseph J. Henderson & Sons, Inc. v. Travelers Property Cas. Ins. Co. of Amer.*, 956 F.3d 992, 998, fn 2 (8<sup>th</sup> Cir. 2020) (noting the distinction).

Courts in other jurisdictions generally follow the same distinction between first party and third-party coverage. *Couch 3d* § 101:56. Why the distinction? Because under all risk property insurance, the policy generally covers all risks of

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*Co.*, 494 N.W.2d 690, 693–94 (Iowa 1993) (interpreting motor vehicle exclusion in general liability policy).

<sup>8</sup> See *Clasing v. State Farm Fire & Cas. Co.*, No. 08-1237, 2009 WL 1492044 (Iowa Ct. App. May 29, 2009) (interpreting a livestock suffocation exclusion in a property insurance policy); *Bettis v. Wayne County Mut. Ins. Ass'n*, 447 N.W.2d 569, 571 (Iowa Ct. App. 1989) (interpreting scope of property insuring agreement for direct loss resulting from overturn or collision); *Qualls v. Farm Bureau Mut. Ins. Co.*, 184 N.W.2d 710, 713 (Iowa 1971) (interpreting scope of property insuring agreement for loss of livestock by attack of dogs or wild animals); *Jordan v. Iowa Mut. Tornado Ins. Co. of Des Moines*, 130 N.W. 177, 181 (Iowa 1911) (analyzing whether wind versus blowing snow caused loss under property policy insuring livestock).

<sup>9</sup> For a series of cases affirming ACC clauses in first party property insurance policies, see *Amish Connection, Inc.*, 861 N.W.2d at 241; *Salem United Methodist Church of Cedar Rapids, Iowa v. Church Mut. Ins. Co.*, No. 13-20086, 2015 WL 1546431 (Iowa Ct. App. April 8, 2015); *Mt. Zion Missionary Baptist Church of Cedar Rapids, Iowa v. Church Mut. Ins. Co.*, No. 13-1598, 2014 WL 7343312 (Iowa Ct. App. Dec. 24, 2014); *MGM Apartments, LLC v. Mid-Century Ins. Co.*, No. 3-1002/13-0661, 2014 WL 251898 (Iowa Ct. App. Jan. 23, 2014); *Lifeline Ministries Church v. Church Mut. Ins. Co.*, No. 12-1181, 2013 WL 2107408 (Iowa Ct. App. May 15, 2013).

physical loss while the exclusions limit coverage for the loss. Jeffery E. Thomas and Susan Randall, eds., *New Appleman on Insurance Law Library Edition*, § 44.03 (13) at 25 (hereinafter “Appleman”). Under a liability policy, the initial focus centers on the insured’s legal obligation to pay for injury or damage. *Id.* If a claim under a property insurance policy involves multiples causes of loss, the coverage question focuses on causation, not tort liability. *Id.* A covered peril usually can be asserted to exist somewhere in the chain of causation in cases involving multiple causes, and applying the concurrent causation rule to property insurance cases would effectively nullify the exclusions in all risk policies. *Id.* at 26.

**D. The only potential causes of the Age Deterioration are excluded causes of loss.**

With this background in mind, let us return to the District’s argument concerning the applicability of the exclusions. Because the District presents a first party property insurance claim, the efficient proximate cause doctrine applies to resolve any concurrent causation questions. The efficient proximate cause doctrine, however, applies only when two or more causes, at least one covered by an insurance policy and at least one excluded, contribute to a loss. *City of West Liberty v. Employers Mut. Cas. Co.*, 922 N.W.2d 876 (Iowa 2019). For example, the City of West Liberty sought coverage for damage to the city’s electrical equipment caused by arcing, but the insurer declined coverage under an electrical

currents exclusion. *Id.* at 877. The arcing in question occurred when a squirrel came into contact with an energized cable clamp while touching a grounded steel frame that supported the cable. *Id.* The court rejected the City’s argument that the squirrel should be deemed the efficient proximate cause of the loss. Instead, it found the doctrine did not apply because the squirrel did not independently cause any damage. *Id.* at 880.

Applying these principles here, there are only two potential causes of the Age Deterioration: deterioration or long-term water intrusion. Because the policy excludes both of these perils, coverage does not apply. The District’s argument to the contrary lacks merit.

**IV. Although not decided by the District Court, the Collapse Exclusion applies to preclude coverage for the Age Deterioration in parts of the building unaffected by the partial collapse.**

**A. Error Preservation and Standard of Review**

EMC raised the Collapse Exclusion as an additional ground for summary judgment, but the District Court did not decide the issue based on its disposition of the case on other grounds. January 31, 2023 Ruling at 7 (Appx. 1120). It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before the court will decide them on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). But, on appeal, the Iowa Supreme Court has recognized that they “will affirm a trial court on any basis appearing in

the record and urged by the prevailing party,” even if not ruled on by the District Court. *Chicago Central & Pacific R.R. Co. v. Calhoun Cnty. Bd. of Sup’rs*, 816 N.W.2d 367, 373 (Iowa 2012). “The claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it.” *Id.* at 540.

**B. The Collapse Exclusion applies to the loss of structural integrity due to the Age Deterioration.**

The District initially sought coverage to remedy the Age Deterioration under the Collapse Additional Coverage. As discussed in Brief Point I.C, the Policy contains a Collapse Exclusion which precludes coverage, in part, for a “loss of structural integrity, including ... property in danger of falling down or caving in.” Insurance Policy Form CP7123(1-18) at 17 (Appx. 160). The Collapse Exclusion therefore applies to any pre-existing loss of structural integrity in the remainder of the building (the Age Deterioration) unless an exception applies, such as the Collapse Additional Coverage.

**C. The Collapse Additional Coverage does not apply to conditions outside the area of partial collapse because those conditions do not qualify as an “abrupt collapse” as required to trigger the additional coverage.**

The only exception to the Collapse Exclusion which could potentially apply to the Age Deterioration concerns the Collapse Additional Coverage. The Building and Personal Property Coverage Form provides:

#### 4. Additional Coverages

...

- g.** The coverage provided under this Additional Coverage — Collapse, applies only to an abrupt collapse as described and limited in **g.(1)** through **g.(7)**.
  - (1)** For the purpose of this Additional Coverage — Collapse, abrupt collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose.
  - (2)** We will pay for 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 or that contains Covered Property insured under this Coverage Form, if such collapse is caused by one or more of the following:
    - (a)** Building decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse;
    - (b)** Insect or vermin damage that is hidden from view, unless the presence of such damage is known to an insured prior to collapse;
    - (c)** Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs during the course of the construction, remodeling or renovation.
    - (d)** Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs after the construction, remodeling or renovation is complete, but only if the collapse is caused in part by:
      - (i)** A cause of loss listed in **(2)(a)** or **(2)(b)**;
      - (ii)** One or more of the "specified causes of loss";



- (iii) Breakage of building glass;
  - (iv) Weight of people or personal property; or
  - (v) Weight of rain that collects on a roof.
- (3) **This Additional Coverage - Collapse does not** apply to:
- (a) A building or any part of a building that is in danger of falling down or caving in;
  - (b) A part of a building that is standing, even if it has separated from another part of the building; or
  - (c) A building that is standing or any part of a building that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

Insurance Policy Form CP7123(1-18) at 5–6 (Appx. 148–49).

Paragraph A.4.g.(1) tells us what constitutes a collapse, while Paragraph A.4.g.(3) tells us what does not. Applying these provisions to the facts of the claim, the Collapse Additional Coverage states collapse does not include a “building or any part of a building that is in danger of falling down or caving in” or “a building that is standing or any part of a building that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, [or] settling ....” Insurance Policy Form CP7123(1-18) at 6 (Appx. 149). Under this definition, the Age Deterioration does not qualify as an “abrupt collapse” as required to trigger coverage.

Courts interpreting similar policy terms agree and have determined that in instances of a partial collapse, the Collapse Additional Coverage does not extend to areas of the building unaffected by the collapse. *Davis v. American States Ins. Co.*, No. C10-1605-JCC, 2012 WL 2004866 (W.D. Wash., June 5, 2012) (finding collapse coverage did not extend to entire roof when only a portion fell to the ground and the remainder suffered from deflected roof trusses); *Hickory Grove Missionary Baptist Church, Inc v. Church Mut. Ins. Co.*, Civ. No. 5:11-CV-407, 2014 WL 1159592 (M.D. Ga., March 21, 2014) (where policy stated we “pay for direct physical loss or damage ... *caused by collapse*,” this meant coverage extends to all damage caused by the collapsed trusses, but not merely the trusses themselves (emphasis added)). This Court should conclude, therefore, that the Collapse Exclusion applies and the Collapse Additional Coverage does not extend to cover the cost to repair portions of the building unaffected by the collapse and specifically the Age Deterioration.

### **CONCLUSION**

In conclusion, the fallacy of the District’s arguments for coverage can be illustrated by a hypothetical. Suppose one of the engineering experts inspected Lowell prior to the partial collapse and discovered the Age Deterioration. If the District submitted a claim for the cost to repair the Age Deterioration, the policy would not have provided coverage because the Age Deterioration does not qualify

as a covered cause of loss. The policy excludes coverage for loss caused by deterioration, continuous or repeated seepage or leakage, or collapse. The Age Deterioration also does not qualify for coverage under the Collapse Additional Coverage because it does not satisfy the definition of an “abrupt collapse”. The Policy covered the partial collapse because an independent peril—the weight of snow and ice—caused new damage. It defies logic that the partial collapse somehow creates coverage for the previously uncovered Age Deterioration via the OL Additional Coverage. This court, accordingly, should affirm the District Court and grant summary judgment to EMC.

### **CONTINGENT REQUEST FOR ORAL ARGUMENT**

Appellee requests to be heard in oral argument if Appellant is granted oral argument.

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**CERTIFICATE OF COST**

I hereby certify that the costs of printing the Appellee’s brief was \$0.00, exclusive of sales tax, delivery, and postage.

By:  /s/ Benjamin J. Kenkel

**CERTIFICATE OF COMPLIANCE**

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 12,073 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman.

By:  /s/ Benjamin J. Kenkel

**CERTIFICATE OF FILING AND SERVICE**

The undersigned certifies a copy of Defendant-Appellee’s Final Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the parties to this appeal by EDMS on the 16th day of November, 2023:

By:  /s/ Benjamin J. Kenkel