No. 13-10138-F

In the United States Court of Appeals
For the Eleventh Circuit

J.B.D. CONSTRUCTION, INC.,

Plaintiff-Appellant,

v.

MID-CONTINENT CASUALTY COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Florida, Tampa Division,
Case No. .: 8:11-cv-00293-EAK-TGW

BRIEF OF PLAINTIFF-APPELLANT, J.B.D. CONSTRUCTION, INC.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Local Rule 26.1-1, the undersigned certifies that the following is a complete list of all trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal, and includes subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held company that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

I. Judges

1. Kovachevich, Honorable Elizabeth A.
2. Wilson, Honorable Thomas G.

II. Parties and Attorneys

1. Christian, Brandon R. (Attorney, formerly with Vaka Law Group, P.L.)
2. Evans, Gregory L. (Attorney)
3. Great American Holding, Inc. (parent corporation of Appellee)
4. Hinshaw & Culbertson, LLP
5. J.B.D. Construction, Inc.
6. John H. Rains, III, P.A.
7. Kammer, Ronald (Attorney)
8. Mid-Continent Assurance Company (subsidiary of Appellee)

9. Mid-Continent Casualty Company, a member of the Great American Insurance Group, and subsidiary of the American Financial Group, Inc. (AFG) [Listed, NYSE and NASDAQ]

10. Oklahoma Surety Corporation (subsidiary of Appellee)

11. Pearcy, Maureen G. (Attorney)

12. Rains, John H. (III) (Attorney)

13. Sylvester, Edward T. (Attorney)

14. Vaka, George A. (Attorney)

15. Vaka Law Group, P.L.

Dated: February 27, 2013

/s/ Gregory L. Evans
An Attorney for Plaintiff-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Appellant, J.B.D. Construction, Inc., requests oral argument in this case. The issues on appeal include important questions of insurance policy interpretation. In addition, oral argument would aid the Court's decision-making process, as the Parties' familiarity with the Record, including the numerous exhibits concerning the underlying litigation, should aid the Court in resolving any questions that it may have about those issues.

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STATEMENT REGARDING JURISDICTION

The District Court properly exercised its diversity jurisdiction under 28 U.S.C. § 1332. On October 25, 2012, the district court entered its order denying summary judgment to Appellant, granting in part and denying in part Appellee's motion for summary judgment, and directing the entry of judgment in favor of Appellee. Dkt. 108. On December 11, 2012, the clerk entered Final Judgment in favor of Appellee. Dkt. 115. On January 8, 2013—within 30 days of the District Court's Final Judgment—Appellant timely filed its notice of appeal. Dkt. 116. Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction to hear Appellant's appeal of the final summary judgment in favor of Appellee, as well as the order denying summary judgment to Appellant, which Appellant challenges in tandem with the final summary judgment. *See, Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs.*, 641 F.3d 197, 205 (6th Cir. 2011) (en banc).

STATEMENT OF THE ISSUES

1. Whether the District Court erred in concluding that MCC had no "duty to defend" JBD in the underlying litigation?

2. Assuming that MCC breached its contractual "duty of defense", whether JBD is entitled to a trial on those consequential damages flowing from the breach?

3. Whether the District Court erred in concluding, as a matter of law, that MCC has no corresponding duty to afford indemnity benefits to JBD?

STATEMENT OF THE CASE

I. Statement of Facts

A. JBD's Construction of Sun City's Fitness Center.

JBD is a Florida-based construction firm. Dkt. 62-1, ¶ 4.[1] In July 2004, JBD and a third-party, Sun City Center Community Association, Inc. ("Sun City") entered into a written contract for the construction of a private community Fitness Center. The Parties agreed that the Fitness Center would be an addition to, and physically connected to at the roof lines, an existing "Atrium" building to the east. *Id.*, at ¶¶ 7-10; Dkts. 62-2, 62-3 [Exhibit "A"], 62-6 [Exhibit "I"], p. 7; 62-12 [Exhibits "J" and "K"], pp. 1, 9. Although the original construction price was $646,050.00, JBD and Sun City thereafter negotiated a series of pre-construction Change Orders, which not only narrowed the scope of JBD's contractual responsibility, but reduced the contract price to $488,212.79. As required by the Change Orders, Sun City agreed to purchase various components of personal property and/or fixtures that, when assembled (and with the exception of the window assemblies), would constitute the Fitness Center structure: a pre-engineered, manufactured building shell (roof and wall panels), slab concrete, insulation, building block, and rubber flooring (the "Fitness Center Components").

[1] References to the Record are to the docket number below, and, where practical, the specific page, paragraph, and/or line reference within the document and/or page of the Record; thus, Dkt. 62-1, ¶ 4 is Document No. 62-1 on the PACER record system, at Paragraph No. 4.

Dkts. 62-1, at ¶¶ 10-12; 62-3 [Exhibit "C"], pp. 34-45. Before construction, JBD never owned, designed or manufactured any of the Fitness Center Components, nor was it responsible for the performance of any type of testing to determine whether said components had any type of design and/or manufacturing defect or flaw, either patent or latent. Sun City ultimately purchased and accepted the delivery of the Fitness Center Components at the project site, and construction then ensued. As of January 18, 2007, the Fitness Center's construction was complete. Dkts. 62-1, at ¶¶ 13-18; 62-3 [Exhibit "C"].

B. Sun City's "water intrusion" claim against JBD.

Upon completion, JBD representatives believed the Fitness Center to be structurally sound, and impervious to any type of water leak(s) or intrusion(s). Beginning in the spring of 2007 and continuing through the fall of 2008, however, Sun City and JBD representatives observed and documented unanticipated water leaks (and the resulting damages) in the Fitness Center. Dkts. 62-1, ¶ 19; 62-4, [Exhibit "E"], pp. 1-38. Sun City representatives "mapped" the leaks as they occurred during and after rain events, including leaks in the proximity of Sun City's newly-installed workout equipment; these specific locations were identified on "Equipment Layout" diagrams. *Id.* The water-intrusion points included that "transition" area connecting the Fitness Center's roof to the "Atrium" roof [the pre-existing structure abutting the east side of the Fitness Center]. Dkt. 62-15

[Exhibit "L"], p. 2. JBD's principal concluded that the resulting physical damage from the leaks included staining, rust, corrosion and blistering. Dkt. 62-1, ¶ 20.

Concurrent with JBD's efforts to remediate the leaks, representatives for JBD, Sun City and the Project Architect questioned whether the water intrusion was due to (i) JBD's work; (ii) manufacturing defects and/or flaws in the Fitness Center Components; and/or (iii) design defects in the Fitness Center Components. Dkts. 62-1, ¶¶ 19-23; 62-4 through 62-14 [Exhibits "F" through "K"]. The parties to the Project retained a series of consultants to evaluate the construction, locate the intrusion points, and determine the potential cause(s) of the water intrusion and the resulting physical damage. Dkt. 62-1, ¶ 24.

At least two consulting firms confirmed the existence of the water leaks at the Fitness Center's and the Atrium's connection points. Slider Engineering Group, Inc. [Richard A. Slider] observed "[s]everal leak events as reported by SCCA identified water on the floor area and at the wall below the juncture of the addition with the existing pool building." Dkt. 62-12 [Exhibit "K"], p. 32. Likewise, FORCON International [Larry Tilton and Garry Cagle] recommended a "…request, from the Architect, of Record for a design detail for the leak area 3 and 4 where the new structure, east side, abuts the existing building, west side". Dkt. 62-6 [Exhibit "I"], p. 8. Finally, SEA, Ltd. [Richard M. Myerson, P.E. and Robert

M. Zaralban] documented "…roof leaks at the east transition between the Health Center and the Atrium building". Dkt. 62-6 [Exhibit "H"], p. 1.

These consultants, however, offered conflicting findings and conclusions concerning the cause(s) for the water leaks. None of these various findings, opinions, or conclusions have been accepted or rejected, either in whole or in part, by the trier of fact in a court of competent jurisdiction. Dkt. 62-1, ¶¶ 24-25. For example, JBD's consultant, Broadway Engineering, P.A. [Elizabeth A. Broadway, P.E.] concluded that the "locations of the leaks do not seem to be consistent over several rain events, and therefore, it is difficult to pinpoint the exact location of a particular leak or the cause of the leak". *Id.*, ¶ 26; Dkt. 62-12 [Exhibit "J"], p. 1. Likewise, SEA, Ltd. found that its "…inspection of the building revealed…design/construction-related conditions which may have caused or contributed to the previous water intrusions and/or are causing or contributing to the current water intrusions". SEA, Ltd. further concluded that "water testing and/or destructive evaluations of various building components, as well as further review of the design plans, is necessary to determine the extent to which specific deficiencies are causing or contributing to water intrusions". Dkts. 62-1, ¶ 27; 62-6 [Exhibit "H"], pp. 2-3.

C. The Sun City Litigation.

Ultimately, JBD and Sun City could not resolve their dispute over those efforts to arrest the ongoing water intrusion, which resulted in Sun City's three (3) count counterclaim against JBD in that certain action styled *J.B.D. Construction, Inc. v. Sun City Center Community Association, Inc.*, Case No.: 08-22933, Thirteenth Judicial Circuit Court, Hillsborough County, Florida ("Sun City Litigation" or "Sun City Counterclaim"). Dkt. 62-17, ¶ 9, [Exhibit "1"], pp. 14-23. In Counts II [Breach of §553.84 *Fla. Stat.*] and III [Negligence-J.B.D.], Sun City alleged:

> 16. ...The owner, SCCCA has been and will be required to spend money for the repair of the defects and deficiencies and damages caused thereby including loss of use, diminution in value, reduction in fair market value of the building, increased insurance costs and premiums, ***damage to other property***, out of pocket expenses to investigate and remediate the defects and prosecute the recovery of fund through the employment of legal counsel….
>
> 20. Among other things, J.B.D.'s breach of the duties set forth above proximately caused damage to the Health Center building including, without limitation, ***damages to the interior of the property, other building components and materials***, and other, consequential and resulting damages.
>
> 21. As a direct and proximate result of the above breaches of duty, the owner, SCCCA has sustained ***and will continue to sustain*** damages, including but not limited to, investigation and remediation of defective and deficient conditions (emphasis applied).

Id. Sun City asserted a contractual and statutory claim for attorney's fees and costs in having to prosecute its action against JBD. *Id.*

In stating its claim, Sun City did not identify any particular date or time frame within which it sustained damages to the "other property" or "the interior of the property, other building components and materials". *Id.* For the balance of the Sun City Litigation, the Sun City Counterclaim was always the operative pleading at issue. Dkt. 62-17, ¶ 9.

D. The MCC Policy.

Beginning in December 2004, MCC issued a consecutive series of Commercial General Liability (CGL) policies to JBD, two of which are at issue and are hereinafter collectively referred to as the "MCC Policy": MID-CONTINENT CASUALTY COMPANY Policy Nos. GL669650 (12/15/06 through 12/15/07) and GL698630 (12/15/07 through 12/15/08). The MCC Policy's "insuring agreement" and "Deductible Liability Insurance" endorsement[2] specifies MCC's "defense" and "indemnity" obligations to JBD:

> **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **1. Insuring Agreement**

[2] JBD incorporates herein by reference the MCC Policy in its entirety, including, but not limited to, the stated definitions of "coverage territory", "occurrence", "products-completed operations hazard", and "property damage", and, in addition, the "Deductible Liability Insurance" endorsement. Dkts. 34-3; 34-4.

> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages…
>
> **b.** This Insurance applies to "bodily injury" and "property damage" only if:
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";…

Dkts. 34-3, pp. 9-10, 12; 34-4, pp. 15-16, 21. Although the MCC Policy's "property damage liability" coverage is subject to a $5,000.00 "per claim" deductible provision, that provision does not supplant or otherwise affect MCC's *duty of defense* obligation [our right and duty to defend the insured against any "suits" seeking those damages… apply irrespective of the application of the deductible amount]. *Id.*

E. JBD's tender of the Sun City Litigation to MCC.

On May 6, 2009, JBD tendered the Sun City Litigation to MCC for a defense and indemnification. MCC acknowledged receipt of JBD's tender no later than May 12, 2009. In conjunction with this tender, JBD supplied, and otherwise agreed to provide, MCC with all relevant pleadings, engineering reports, and supporting documentation. Dkts. 62-1, ¶ 38; 62-17, ¶ 18. In response, MCC's May 21, 2009 Reservation of Rights (ROR) Letter assured JBD's principal that MCC

would commence its claim investigation and coverage determination. With respect to its "defense" and "indemnity" obligations, MCC further advised:

> On the other hand, damage to property other than your work, if any, caused by defective workmanship may be covered, subject to the other terms and conditions of the policy… The above analysis constitutes MCC's best effort to inform you of all of the factors of which we are currently aware that may affect or ultimate responsibility to provide coverage and/or defense of any allegations made by the claimant in this case.

Dkts. 62-1, ¶ 40; 62-15 [Exhibit "O"], p. 16. On May 26, and again on June 1, 2009, JBD's counsel, John H. Rains, III, Esq., renewed JBD's request for a defense against those allegations at issue in the Sun City Counterclaim. With the exception of its assurance that its consideration of JBD's request was "in process", MCC never responded to these inquiries for the balance of the Sun City Litigation. Dkts. 62-17, ¶ 19; 62-1, ¶ 42.

F. JBD's resolution of the Sun City Litigation.

In the early summer of 2009, and finding itself in the position of having to fund its own defense and investigation, JBD found it necessary to accept (at its own expense, and at the request of its surety) those legal and engineering services provided by Shumaker, Loop & Kendrick, LLP ("SLK") and FORCON International ("FORCON"); both firms assisted Attorney Rains in the ongoing evaluation of Sun City's "damages" claim. Dkts. 62-1, ¶ 44; 62-17, ¶ 20. In July 2009, and having completed its liability and damages assessment, JBD found that

it had no choice but to agree to an early mediation with Sun City. Sun City thereafter provided JBD with a pre-mediation DAMAGES/COSTS BREAKDOWN demand of $243,573.20, which included the Fitness Center's Remediation Estimate [$115,530.00], engineering costs [$50,948.71, *aggregated*], and legal fees and costs [$62,413.66, *aggregated*]. Dkt. 62-15 [Exhibit "Q"], p. 19. Sun City's Remediation Estimate was based upon Slider Engineering Group, Inc.'s damages assessment, which included not only the damage to the Fitness Center components, but the "transition" connections from the Fitness Center to the Atrium building. Dkt. 62-13 [Exhibit "K"], p. 11.

On July 13 and 15, 2009, JBD successfully negotiated an $181,750.94 settlement with Sun City, an amount less than Sun City's pre-mediation demand. In accordance with the terms of the *Mediated Settlement Agreement*, JBD solely funded the settlement with money from its operating accounts, which was thereafter transferred to Sun City through Attorney Rains's trust account. Dkts. 62-1, ¶¶ 46-50, 62-17, ¶¶ 22-24, and 74-2.

G. MCC's Post-Litigation Acknowledgement of its Defense Obligation and Attempted "Cure"

Following the July 2009 Mediation, JBD renewed its demand for those damages incurred as a result of MCC's refusal to afford insurance benefits during the course of and/or as the result of the Sun City Litigation. Dkts. 62-1, ¶ 51; 62-17, ¶¶ 25-27. These demands included JBD's request for those attorney's fees

incurred in its defense; in support thereof, JBD tendered Attorney Rains's invoices. Dkts. 62-17; 62-18 [Exhibit "7"], pp. 59-80.

For fourteen months post-settlement, MCC took absolutely no action upon these demands. In October 2010, however, MCC's Branch Manager, John Neff, finally tendered a check made payable to J.B.D. Construction, Inc. in the amount of $5,717.77 for "Legal Expenses" under the MCC Policy. In his accompanying October 12, 2010 cover letter, Mr. Neff unconditionally informed Attorney Rains that "…MCC has determined that [these] fees and expenses are appropriate for payment under the policy of insurance issued to J.B.D Construction, Inc. *for defense of the insured from time of tender of the suit to Mid-Continent through completion of the settlement documents*". Dkts. 62-17, ¶ 30; 62-18, [Exhibit "9"], p. 83 (emphasis added). Although MCC calculated JBD's legal expenses to be at least $10,717.77, it unilaterally reduced this amount by $5,000.00. Notwithstanding its failure to defend JBD in the first instance, MCC justified this reduction by applying the MCC Policy's "Deductible Liability Insurance" endorsement. *Id.* On October 28, 2010, JBD acknowledged receipt of MCC's check; however, Attorney Rains inquired whether JBD could negotiate the check and treat it as a "partial payment" towards its total claimed damages. Dkts. 62-17, ¶ 33; 62-18 [Exhibit "10"], pp. 85-86. In response, MCC advised that it "…placed no

restrictions with regards to negotiation of the reimbursement check for $5,717.77. *Id.*, at [Exhibit "11"], p. 87.

At his April 16, 2012 deposition, Mr. Neff, testifying in his capacity as MCC's corporate representative, re-affirmed MCC's defense obligation to JBD:

> Q. That's not my question. Should Mid-Continent Casualty Company have appointed defense counsel to represent J.B.D.'s interest at any point in time from May 12, 2009, through July 15, 2009?
>
> Mr. Sylvester: Same objection.
>
> A. Yes.

Dkt. 75, p. 11:13-18. Mr. Neff further explained that when MCC provides a defense to it insureds, such defense typically includes the appointment of defense counsel and the assumption of related investigation costs, including engineering expenses. *Id.*, pp. 8:15-9:1; pp. 12:l1-13:2.

H. JBD's *Prima Facie* Claim for Consequential Damages.

With the exception of the "Legal Expenses" check, MCC never tendered any other money to satisfy those damages incurred by JBD during and/or as a result of the Sun City Litigation. In its moving papers, JBD identified those foreseeable damages that it incurred after May 12, 2009 (the date upon which MCC acknowledged receipt of the Sun City Litigation): (i) the $181,750.94 settlement; (ii) JBD's legal and investigation expenses; and (iii) the impairment in JBD's "bonding capacity", with the resulting reduction in its "book net worth". Dkts. 62-

1; 62-16 through 62-21. In support of its *entitlement* claim, and, specifically in support of the "foreseeability" requirement, JBD submitted proof that such consequences, including the reduction in JBD's "book net worth", were foreseeable, as MCC was the seller of both insurance products and surety products in the construction industry. Dkt.74-1, pp. 150:4-151:23.

In identifying these "damage" categories, and as further explained in its moving papers, JBD recognized that the exact amount of the consequential damages has yet to be calculated. JBD, however, requested District Court's ruling upon JBD's *entitlement* to such damages, with the trier of fact to then determine the exact amount in accordance with the District Court's jury instructions. Dkt. 62.

II. Proceedings Below

On January 11, 2011, JBD filed this action against MCC in state court. MCC then removed the action to federal court. Dkts. 1, 2. JBD filed its Second Amended Complaint, and, therein, sought, as result of the Sun City Litigation, (i) those damages flowing from MCC's breach of its contractual "duty of defense"; (ii) indemnity benefits; and (iii) a declaration of the Parties' rights and responsibilities under the MCC Policy. Dkt. 18. MCC then filed its answer, twenty-three separate affirmative defenses, and counterclaim for declaratory relief, to which JBD thereafter filed its response. Dkts. 34, 36.

From April 13 through May 25, 2012, JBD and MCC filed their respective Motions for Summary Judgment.[3] Dkts. 61, 62. In its moving papers, MCC first argued that it did not breach the MCC Policy's contractual "defense" obligation; rather, its issuance, and JBD's acceptance, of the $5,717.77 "Legal Expenses" check operated as an "accord and satisfaction" of its contractual obligation. In response to JBD's "indemnity" claim, MCC next argued that JBD made no payment to settle the Sun City Litigation; therefore, it suffered no "damages", as required by the MCC Policy's insuring agreement. MCC also claimed that even if JBD did pay such money, Sun City's claims were not (i) covered "property damage", and/or (ii) were otherwise wholly within the "Damage To Work Performed By Subcontractors On Your Behalf" exclusion (the "your work" exclusion). Dkt. 61. Of those MCC Policy exclusions raised in its affirmative defenses, the "your work" exclusion was the only one raised and argued by MCC in its moving papers. Dkts. 61, 67.

JBD's moving papers also centered upon these defense and indemnity claims. As to the *duty of defense* claim, JBD argued that the Sun City Counterclaim satisfied Florida's "eight corners" rule; that is, the Sun City Counterclaim's allegations, measured against the MCC Policy's insuring agreement, potentially

[3] The reference to the Parties' respective Motions also includes all filings in response to and/or in support thereof, i.e., affidavits, deposition transcripts, memoranda of law, and supplemental motions, which comprise Dkt. Nos. 58 through 88.

triggered coverage. JBD offered proof of MCC's testifying corporate representative, John Neff's acknowledgement that MCC owed JBD a defense. JBD also argued that MCC's post-settlement acceptance and processing of JBD's legal invoices (albeit belated and untimely) was further evidence of MCC's acknowledgement of its defense obligation. JBD also countered that MCC's reliance upon the "accord and satisfaction" defense was misplaced, because MCC placed no restrictions upon JBD's negotiation of the "Legal Expenses" check. Finally, JBD requested the District Court's finding that it was entitled to those identified damages resulting from MCC's *duty of defense* breach, the exact amount of which would later be calculated by the trier of fact.

In support of its "indemnity" claim, JBD argued that those damages actually claimed by (and paid to) Sun City were the result of covered "property damage" caused by an "occurrence". Once JBD offered evidence of covered third-party "property damage", MCC then failed to satisfy its burden of demonstrating that such damage was otherwise wholly excluded by the "your work" exclusion. Dkt. 62.

The District Court ultimately disagreed with JBD's position, and, in doing so, (i) denied JBD's motion, and (ii) granted in part and denied in part MCC's motion. The District Court concluded that MCC had no duty to defend or

indemnify JBD for those claims/damages at issue in the Sun City Litigation.[4] Dkt. 108. Final Judgment was entered on December 11, 2012. Dkt. 115. JBD's timely appeal followed. Dkt. 116.

III. Standard of Review and Applicable Principles of Law

A district court's ruling on a motion for summary judgment is reviewed *de novo*, applying the same legal standards governing the district court's decision. *Mora v. Jackson Memorial Foundation, Inc.*, 597 F.3d 1201(11th Cir. 2010). Summary judgment is appropriate "if the pleadings, the discovery and materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed.R.Civ.P.* 56(c). The Court must draw all inferences from the evidence in the light most favorable to the non-movant and resolve all reasonable doubts in that party's favor. *Porter v. Ray*, 461 F.3d 1315, 1320 (11th Cir.2006). "If reasonable minds differ on the inferences generated by undisputed facts, then summary judgment is inappropriate." *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502 (11th Cir. 1985).

The basis for this Court's jurisdiction is diversity. Federal courts sitting in diversity in Florida must follow the decision of the state courts and apply Florida law as if they are courts of the state of Florida. *See, Coastal Petroleum Co. v.*

[4] The District Court, however, denied that part of MCC's Motion directed to MCC's "accord and satisfaction" argument. Dkt. 108, at p. 42.

U.S.S. Agri-Chemicals, 695 F.2d 1314, 1319 (11th Cir. 1983). Florida courts apply the rule of *lex loci contractus* in insurance contract matters unless public policy requires otherwise. *See, Prime Ins. Synd. v. B.J. Handley Trucking, Inc.*, 363 F.3d 1089, 1091 (11th Cir. 2004). Under *lex loci contractus*, the law of the jurisdiction where the contract was issued and delivered governs the interpretation of the insurance contract. *See, Lumbermens Mut. Cas. Co. v. August*, 530 So. 2d 293, 295 (Fla. 1998). Here, because the MCC Policy was issued and delivered to JBD in the State of Florida, Florida law governs this insurance coverage dispute.

SUMMARY OF ARGUMENT

This entire insurance coverage dispute is the direct result of MCC's decision to simply ignore one of its fundamental obligations to JBD under the MCC Policy: to fund a meaningful defense against, and investigation of, a third-party's construction defect claim. MCC does not (and cannot) dispute that it never funded JBD's defense and investigation. MCC has since admitted that it owed JBD a defense in this particular instance, and its admission is underscored by the Sun City Counterclaim's allegations. The Sun City Counterclaim unequivocally alleges an "occurrence" with resulting covered "property damage".

The financial fallout from MCC's decision was significant. JBD incurred substantial "consequential" damages, including defense costs, the amount of the Sun City settlement, and the resulting reduction in its "book net worth". These consequential damages were the proximate and foreseeable result of MCC's breach of the MCC Policy. Although MCC belatedly offered a "Legal Expenses" payment in an attempt to "cure" the breach, this offer was too little, too late.

JBD then brought this action to recover those consequential damages flowing from MCC's breach of the MCC Policy. After consideration of the Parties' moving papers, the District Court granted summary judgment to MCC, finding that MCC had neither a duty to defend nor a duty to indemnify JBD with respect to

those damages at issue in the Sun City Litigation. That ruling was error, and it should be reversed on two grounds.

First, application of Florida's "eight corners" rule to the Record unequivocally demonstrates that the Sun City Counterclaim alleges an "occurrence" with resulting covered "property damage". The Record is replete with those facts demonstrating that these allegations were neither empty nor spurious. The Counterclaim included those potential and/or actual damage(s) to a pre-existing Atrium building at the site, and, in addition, the Fitness Center's newly-installed exercise equipment. Because MCC breached its "defense" obligation in failing to defend JBD against Sun City's claims, JBD was (i) absolved of any additional contractual obligations under the MCC Policy, and (ii) thereafter entitled to pursue all "consequential damages" flowing from the breach. JBD proffered its *prima facie* claim for entitlement to such damages, and is entitled to a trial to determine the exact amount of these damages.

Second, MCC failed to satisfy its burden of proof in demonstrating that those damages sued upon and paid to resolve the Sun City Litigation were wholly within the MCC Policy's "your work" exclusion. JBD's mediated settlement with Sun City included payment for the cost of repairing the connection points between the Fitness Center and the pre-existing Atrium building, and, in addition, Sun City's contractual/statutory claim for attorney's fees and costs in prosecuting its

claim for such repairs. Both types of damage constitute and/or are the result of covered "property damage". MCC failed to demonstrate that the Sun City settlement was only for damage to JBD's work that arises out of JBD's work, a necessary showing to trigger the "your work" exclusion. MCC's insistence that the "your work" exclusion wholly applies raises, at the very least, disputed issues of material fact that warrant this Court's reversal of the summary judgment on this basis.

The Final Judgment under review should be reversed and remanded for trial.

ARGUMENT

I. JBD IS ENTITLED TO A PARTIAL SUMMARY JUDGMENT BECAUSE THE DISTRICT COURT ERRED IN CONCLUDING THAT MCC HAD NO "DUTY TO DEFEND" JBD IN THE UNDERLYING LITIGATION.

A. A Liability Insurer's Contractual "Duty of Defense" Under Florida Law

Under Florida, an insurer's duty to defend its insured against a legal action arises when the Complaint alleges facts that fairly and potentially bring the suit within policy coverage. *See generally, Evanston Insurance Co. v. Heeder,* 490 Fed. Appx. 215 (11th Cir. 2012), citing, *Jones v. Florida Insurance Guaranty Association, Inc.,* 908 So. 2d 435 (Fla. 2005). This principle is commonly called the "eight corners rule", a reference to the four corners of the policy and the four corners of the Complaint. *See, Amerisure Mutual Insurance Co. v. Summit Contractors, Inc.*, 2012 WL 716884 (M.D. Fla. Feb. 29, 2012); *Colony Ins. Co. v. Barnes,* 410 F. Supp. 2d 1137 (N.D. Fla. 2005). The "duty to defend" is distinct from and broader than the "duty to indemnify" the insured against those damages ultimately proven and assessed, and if the complaint alleges facts showing two or more grounds for liability, one being within insurance coverage and the other not, the insurer is obligated to defend the entire suit. *See, Jones*, *supra*, at 443; *Colony Ins. Co., supra,* at 1139 (if the complaint alleges <u>any</u> claim that, if proven, <u>might</u> come within the insurer's indemnity obligation, the insurer must defend the entire

action [emphasis supplied]). If the allegations of the complaint leave any doubt regarding the duty of defense, the question must be resolved in the insured's favor and a defense provided. *See generally*, *Jones*, *supra*, at 443. Once the insurer's duty to defend arises, it continues throughout the case unless it is made to appear by the pleadings that the claims giving rise to coverage have been eliminated from the suit. *Baron Oil Co. v. Nationwide Mutual Fire Insurance Co.*, 470 So. 2d 810, 814 (Fla. 1st DCA 1985). An insurer's own investigation is generally legally insufficient to relieve it of its obligation to defend. When the actual facts are inconsistent with the allegations in the complaint, the allegations in the complaint generally govern the resolution of the "duty of defense" issue. *Id.*, at 814.

B. The Sun City Counterclaim Triggered MCC's "Duty of Defense".

Throughout the proceedings below, MCC never challenged JBD's "eight corners" analysis; that is, the conclusion that the Sun City Counterclaim's allegations of an "occurrence" with resulting covered "property damage" triggered MCC's *duty of defense*. In its moving papers, MCC *never* argued that it had no such duty in the first instance; rather, it merely asserted that its tender of the $5,717.77 "Legal Expenses" check in October 2010 satisfied such duty. Dkts. 61, 67.

(i) "Occurrence"

Under Florida law, a claim for "defective construction" is an "occurrence" under a CGL policy.[5] *See generally, Auto Owners Insurance Co. v. Travelers Casualty & Surety Co.*, 227 F. Supp. 2d 1248, 1261 (M.D. Fla. 2002); *State Farm Fire and Casualty Co. v. CTC Development Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998) (builder's mistaken belief that he had received a variance to construct house outside setback line was "occurrence" within meaning of liability insurance policy, even though builder intentionally constructed the house knowing that it was outside the line); *Grissom v. Commercial Union Insurance Co.*, 610 So. 2d 1299, 1306 (Fla. 1st DCA 1992) (observing that "accident" includes an unexpected or unintended cause of an injury or damage, as well as an unexpected or unintended injury or damage that results from a known cause).

In this particular instance, the Sun City Counterclaim itself is unassailable proof of the "occurrence" trigger to MCC's *duty of defense* obligation; the counterclaim centers upon allegations of "construction defect". Each of the stated

[5] Such claims, however, must also "occur" within the policy's effective dates of coverage. In this particular instance, neither MCC nor the District Court have questioned the dates of Sun City's water leaks, or otherwise suggested that they "occurred" outside the effective dates of the MCC Policy (12/15/2006 through 12/15/2008). The fact that the Sun City Counterclaim is silent as to the dates upon which these water leaks occurred is inapposite to this "duty of defense" analysis. Where the operative complaint is silent as to the "occurrence" dates, such ambiguity is construed in the insured's favor. *See generally, Trizec Properties, Inc. v. Biltmore Construction Co., Inc.* 767 F. 2d 810 (11th Cir. 1985).

counts, including Counts II [Breach of § 553.84 *Fla. Stat.*] and III [Negligence] are devoid of any reference to "known", "intended", or "anticipated" defective construction and/or the resulting damage. In short, each of these counts could be read to include "accidental" conduct or "unintended" damage. As to Count II, statutory actions for violations of the Florida Building Code only require a showing that the offending party "…knew or *should have known* that the violation existed". *See*, § 553.84 *Fla. Stat.* [emphasis applied]; *Cohen v. Hartley Brothers Construction, Inc.*, 940 So. 2d 1251 (Fla. 1st DCA 2006). As to Count III, allegations of JBD's "negligence" clearly satisfy the MCC's Policy's "occurrence" definition. *See, Grissom, supra*, at 1307 (flood damage to neighboring church party was an "occurrence" under liability policy, even though insured was alleged to have intentionally filled water drainage system; insured was also alleged to have negligently failed to provide adequate alternative).

(ii) "Property Damage"

The Sun City Counterclaim also satisfies the second trigger to MCC's *duty of defense* obligation: Counts II ["…damage to other property"] and III ["…damages to the interior of the property, building components and materials"] unequivocally allege potentially covered "physical injury to tangible property", as required by the MCC Policy. Dkts. 34-3, 34-4. Count II is a statutory civil action authorized by § 553.84 *Fla. Stat.*, which provides:

> 553.84 **Statutory civil action.** – Notwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class or persons or parties, damaged as a result of a violation of this part or the Florida Building Code, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation; however, if the person or party obtains the required building permits and any local government or public agency with authority to enforce the Florida Building Code approves the plans, if the construction project passes all required inspections under the code, *and if there is no personal injury or damage to property other than the property that is the subject of the permits, plans, and inspections,* this section does not apply unless the person or party knew or should have known that the violation existed (emphasis supplied).

Clearly, the statute contemplates a property owner's right to sue for damage to property outside the construction project's scope. To avoid liability, the alleged violator must first establish, at the very least, three facts: (i) proof of the necessary building permits; (ii) proof that the construction project had passed all required inspections; and (iii) proof that there was no personal injury or damage to property other than the building at issue. Absent such evidence, the suing party can move forward with the statutory claim. *See, Cohen, supra*, at 1252.

Paragraph No. 16 in Count II clearly states Sun City's claim for those "damages" resulting from JBD's violations of the Florida Building Code, including JBD's "damage to other property". Dkt. 62-17 [Exhibit "1", ¶ 16]. The Record is replete with examples of those items of property to which Sun City could have been referring to when it claimed "damage to other property". First, Sun City was undoubtedly referring to that damage to the "pool" or "Atrium" building, which

was physically attached to the east side of the Fitness Center. Those defects and deficiencies documented by Sun City's representatives, including the engineering consultants, included the numerous leaks in the "transition" point of the joined buildings. Sun City's "Remediation Estimate" also referenced the repair cost for this damaged area. Dkts. 62-6 [Exhibits "H" and "I"] pp. 1, 8; 62-12 [Exhibit "K"], p. 32; 62-15 [Exhibit "Q"], p. 19. Likewise, Sun City's reference to "other property" could have also been referring to the fitness equipment and other personal property located within the Fitness Center. Sun City's earliest documented water leaks post-date the Fitness Center's "substantial completion" in January 2008. As the Sun City representatives began mapping these leaks, they did so by referencing the fitness equipment contained within the facility, and, moreover, documented the observed leaks on "equipment layout" diagrams that identified specific locations for treadmills, free weight areas, and weight-training machines. Dkts. 61-1, ¶¶ 18, 19; 62-3 [Exhibits "D"] p. 46; 62-4 [Exhibit "E"], pp. 17-18. As with Count II, Sun City's additional reference to "damages to the interior of the property, other building components and materials" in Paragraph No. 20 to Count III potentially concerns the same non-project property, i.e., the Atrium's transition points and the fitness equipment.

The District Court's entry of summary judgment for MCC was inappropriate and should be reversed because the Record squarely contradicts the District

Court's conclusion that the Sun City Counterclaim allegations did not concern any other type of property other than the Fitness Center itself. Moreover, Florida law warrants this Court's finding that JBD is itself entitled to a summary judgment on this *duty of defense* claim. *See, Auto Owners Insurance Co. v. Tripp Construction, Inc.*, 737 So. 2d 600 (Fla. 3rd DCA 1999) (homeowner's alleged damage caused by construction defects to other elements of their homes was not excluded from CGL coverage); *Auto Owners Insurance Co. v. Pozzi Window Co.*, 984 So. 2d 1241 (Fla. 2008); *Trizec Properties, Inc. v. Biltmore Construction Co., Inc., supra*; *Amerisure Mutual Insurance Co. v. Summit Contractors, Inc., supra,* at *14 (where underlying complaints alleged causes of action for violation of § 553.84 *Fla. Stat.* and negligence, and concerned allegations of potential "property damage" to "other tangible property" caused by contractor's installation of a defective component, but which did not allege a specific time when the alleged property damage manifested itself or was discovered, court concluded that insurer had a "duty of defense"); *Federated National Insurance Co. v. Maryland Casualty Co.*, 2012 WL 5955008 (M.D. Fla. Nov. 28, 2012) (where underlying complaint concerned repair and replacement of defective Concrete Pavement System, but which also included allegations of "resulting damage", including "deterioration of the subgrade", court concluded that there were sufficient allegations of "other property damage" that would support finding of "duty to defend"); *Mid-Continent Casualty Co. v. Clean*

Seas Co., Inc., 2009 WL 812072 (M.D. Fla. Mar. 27, 2009) (court rejects MCC's argument that it had no duty to defend insured manufacturer; underlying complaint's allegation that the cost for repairing damage to boats caused by removal of defective paint constituted allegations of covered "property damage").

II. JBD IS ENTITLED TO A TRIAL ON THOSE CONSEQUENTIAL DAMAGES FLOWING FROM MCC'S BREACH OF THE CONTRACTUAL "DUTY OF DEFENSE".

A. The Non-breaching Party's Entitlement to Consequential Damages Under Florida Law

JBD's entitlement to those consequential damages flowing from MCC's failure to defend is well-established under Florida law. In the context of an insurance dispute, when an "insurer acts negligently in carrying out its duty to defend, its conduct constitutes a breach of contract, entitling the insured to recover all damages naturally flowing from the breach." *See, Travelers Indem. Co. of Ill. v. Royal Oak Enter., Inc.*, 429 F. Supp. 2d 1265, 1273-74 (M.D. Fla. 2004), citing, *Carrousel Concessions, Inc. v. Fla. Ins. Guar. Ass'n*, 483 So.2d 513, 516 (Fla. 3d DCA 1986)); *Gallagher v. DuPont*, 918 So. 2d 342, 247 (Fla. 1st DCA 2005) (an insurer "acts at its peril in refusing to defend its insured and will be held responsible for the consequences"); *Thomas v. Western World Ins. Co.*, 343 So. 2d 1298, 1304 (Fla. 2d DCA 1977) ("If the insurer breaches it duty to defend, it—like any other party who fails to perform its contractual obligations—becomes liable for all damages naturally flowing from the breach"). This is because where "an

insurer denies a claim and refuses to defend, the insured can take whatever steps are necessary to protect itself from a claim." *Hagen v. Aetna Cas. & Sur. Co.*, 675 So. 2d 963 (Fla. 5th DCA 1996); *Nationwide Mut. Ins. Co. v. Beville*, 825 So. 2d 999, 1001 (Fla. 4th DCA 2002) ("If an insurance company breaches its contractual duty to defend, the insured can take control of the case, settle it, and then sue the insurance company for the damages it incurred in settling the action"). Thus, a wrongful failure to defend constitutes a breach of contract subjecting the insurer to all damages that foreseeably flow from the breach, even if those damages are in excess of the policy limits. *See, e.g.*, *Travelers Ins. Co. v. D.J. Wells*, 633 So. 2d 457 (Fla. 5th DCA 1993) ("Appellants argue that damage for breach of an insurance contract is limited to [the policy limits]. Although that is normally the measure of damages for breach of an insurance contract, it is not exclusive. Consequential . . . damage may also be recovered . . ., not because of the occurrence of the contingency which should have been insured against, but because of the breach of contract."); *Thomas*, 343 So. 2d, at 1302 ("There is an important difference between the liability of an insurer who performs its obligations and that of an insurer who breaches its contract. The policy limits restrict only the amount the insurer may have to pay in the performance of the contract; they do not restrict the damages recoverable by the insured for a breach of contract by the insured").

On this point, this Court has summarized Florida law as follows:

> Florida follows the general rule that to be recoverable, damages for breach of contract must arise naturally from the breach, or have been in the contemplation of both parties at the time they made the contract, as the probable result of a breach. . . . Moreover, concerning foreseeability, Florida law does not require that the parties have contemplated the precise injuries which occurred; rather, damages are recoverable so long as the actual consequences of the breach of contract could have reasonably been expected to flow from the breach.

T.D.S. Inc. v. Shelby Mut. Ins. Co., 760 F.2d 1520, 1521 n.11 (11th Cir. 1985). Examples of such foreseeable damages *include* the insured's attorney's fees, costs, and investigative expenses incurred in responding to and defending the underlying action. *See Florida Ins. Guaranty Ass'n, Inc. v. All The Way With Bill Vernay*, 864 So. 2d 1126 (Fla. 2d DCA 2003) ("[T]he trial court found that [the insurer] had breached its duty to defend . . . . Accordingly, Vernay was entitled to recover the damages reasonably flowing from this breach against Reliance, which, in this case, were the attorney's fees and costs incurred in defending the underlying action."); *Thomas*, 343 So. 2d at 1305 n.3 ("[I]f the insurer's refusal to defend is unjustified, it becomes liable to the insured for reasonable attorneys' fees and other expenses incurred in defending the action brought by the third party.").

B. JBD's *Prima Facie* Claim for Consequential Damages

There were significant financial consequences to MCC's decision to abandon JBD. JBD was forced to fund its own legal defense. JBD assumed the cost of its own investigation and engineering evaluation. These expenses necessarily depleted JBD's financial reserves. This inadequate reserve, together with the then-pending Sun City Litigation, further resulted in JBD's surety's decision to no longer issue performance or payment bonds for JBD's future construction work. With an impaired bonding capacity, JBD was unable to qualify for (or even bid) those projects that required performance bonds. Faced with this financial fallout, JBD was forced to negotiate an early settlement with Sun City. JBD's payment of the settlement funds further reduced its financial reserves, which spiraled into an additional impairment of its bonding capacity. Each of these financial albatrosses, — the crippling litigation expenses, the Sun City settlement, and the inability to procure future work — resulted in a quantifiable reduction in JBD's "book net worth". Although the exact amount of these damages had yet to be calculated as of the date it filed its moving papers, JBD proffered that evidence supporting its *prima facie* claim for these consequential damages. This evidence included the affidavit testimony of JBD's principal [John Dwyer], surety representative [Brian Goldbach], counsel [John H. Rains, III, Esq.], accountant [John Semago, Jr.,

C.P.A.], surety agent [John R. "Jack" Neu], and largest recurring client [Rory Salimbene]. Dkts. 62-1, 62-16 through 62-21.

From MCC's perspective, each type of claimed damage was a foreseeable consequence of its breach of the defense obligation. MCC, a company that markets and sells both insurance products and performance bonds throughout the construction industry, clearly appreciated the financial risks and fallout that an insured general contractor would face in the event that it wrongfully failed to honor its defense obligation under a CGL policy. Dkt. 74-1, pp. 150:4-151:12.[6] JBD's surety agent, Jack Neu, confirmed that he has previously placed performance bonds issued through Great American Insurance Group (of which MCC is a corporate member). Dkt. 62-19, ¶ 6. As a surety, MCC necessarily understands that a critical reduction in a contractor's operating capital necessarily reduces the contractor's bonding capability, and that such reduction could be the natural result of a liability insurer's decision to abandon the insured's defense. *Id.*, at ¶¶ 5-8.

This entire action should be remanded for a trial on JBD's recoverable damages because JBD has both pled and established a *prima facie* case of those consequential damages flowing from MCC's contractual breach.

[6] In fact, MCC has identified one of its subsidiaries to be Oklahoma Surety Corporation. *See,* Appellee Mid-Continent Casualty Company's Additions to Certificate of Interested Persons and Corporate Disclosure Statement. [Certificate of Service Date January 28, 2013].

C. MCC's Initial Failure to Defend Bars its Post-Breach Attempt to Apply the "Deductible Liability Insurance" Endorsement

MCC, through its testifying corporate representative, acknowledged its defense obligation to JBD in the Sun City Litigation. Dkts. 75, p. 11:13-18. MCC also admitted that it did not provide this defense. Dkt. 34, ¶ 19, p. 3. Fourteen months after it walked away from its defense obligation, MCC attempted to "cure" its breach by issuing a "Legal Expenses" check;[7] however, in doing so, MCC expected JBD to accept a $5,000.00 offset of its damages claim pursuant to the MCC's Policy's "Deductible Liability Insurance" endorsement. Dkts. 62-17, ¶¶ 33-34; 62-18 [Exhibit "11"], p. 87. MCC's attempt to apply the deductible provision was not only self-serving, it was also a blatant attempt to resurrect a contract that it first breached, which is improper under Florida law. JBD, as the non-breaching party, was excused from further performance under the MCC Policy once MCC abandoned its obligations. Under Florida contract law, a material breach of a

[7] MCC grounds its "cure" argument upon Florida's "accord and satisfaction" doctrine. Dkt. 61, at pp. 16-17. The District Court properly denied MCC's Motion on this basis. *See generally*, *Pino v. Union Bankers Insurance Co.*, 627 So. 2d 535 (Fla. 3d DCA 1993) (insurer's unilateral announcement of rescission accompanied by tender of premiums to insured did not evolve into accord and satisfaction when insured deposited premium check, and insured was relieved of any obligation to tender further performance; insured was entitled to treat check as partial payment of claim and sue for the balance); *St. Mary's Hospital, Inc. v. Schocoff*, 725 So. 2d 454 (Fla. 4th DCA 1999) (genuine fact issue on a hospital's intent in cashing check from health insurer precluded summary judgment on accord and satisfaction; even though the transmittal stated that no further benefits were payable, it did not state that the hospital would be deemed to agree by cashing the check).

contract allows the non-breaching party to treat the breach as a discharge of its contract liability. *See, Kaufman v. Swire Pacific Holdings, Inc.,* 836 F. Supp. 2d 1320 (S.D. Fla. 2011); *Bookworld Trade, Inc., v. Daughters of St. Paul, Inc.,* 532 F. Supp. 2d 1350 (M.D. Fla. 2007) (following distributor's material breach of book distribution agreement by failing to remit collections, publisher was excused under Florida law from complying with its duties under the agreement). JBD's other consequential damages aside, MCC's "cure" argument fails as a matter of law. As the breaching party, MCC was thereafter barred from employing the "deductible" provision as a means of reducing its liability for Attorney Rains's billings. Thus, even if JBD were unable to demonstrate its entitlement to any other category of claimed consequential damages, MCC is still liable for the $5,000.00 balance of those damages that it deemed appropriate and agreed to pay.

III. THE DISTRICT COURT ERRED IN CONCLUDING, AS A MATTER OF LAW, THAT MCC HAS NO CORRESPONDING DUTY TO AFFORD INDEMNITY BENEFITS TO JBD

JBD's *duty of defense* claim aside, the District Court erroneously concluded that those damages at issue in the Sun City litigation were wholly within the "your work" exclusion. In this particular instance, JBD satisfied its initial burden of proof in demonstrating covered "property damage" caused by an "occurrence". The burden of proof then shifted to MCC to demonstrate that these damages were wholly excluded as a matter of law, and MCC failed to carry that burden.

The duty to indemnify is dependent upon the entry of a final judgment, settlement, or a final resolution of the underlying claims by some other means. *See, Northland Casualty Co., v. HBE Corp.*, 160 F. Supp. 2d 1348, 1360 (M.D. Fla. 2001). The duty to indemnify is measured by the facts as they unfold at trial or are inherent in the settlement agreement. *See generally, Celotex Corp. v. AIU Insurance Co., (In re Celotex Corp.)*, 152 B.R. 661 (Bankr. M.D. Fla. 1993). Generally, the burden is on the party seeking to recover on a policy of insurance to establish that there is coverage. An insurer, however, defending on the ground of non-coverage and relying on an exception in the policy bears the burden of establishing that the exception applies. *See generally, Auto Owners Insurance Co. v. Travelers Casualty & Surety Co., supra*, at 1258 (citations omitted).

In this particular instance, JBD and Sun City mediated a settlement agreement based upon those allegations at issue in the Sun City Counterclaim, including those claimed damages to "other property" and "interior of the property, other building components and materials". Dkt. 62-17, ¶ 9. The parties' negotiations centered upon Sun City's $243,573.20 pre-mediation demand, which was itemized in its written DAMAGES/COSTS BREAKDOWN. Dkt. 62-15 [Exhibit "Q"], p. 19. This written itemization quantified those damages claimed in Counts II and III, including, but not limited to: (i) Remediation Estimate [$115,530.00]; (ii) Engineering Invoices [$50,948.71, *aggregated*], and (iii) Legal

Fees and Costs [$62,413.66, *aggregated*]. The Remediation Estimate included, at the very least, those repair costs for the physical damage to the pre-existing Atrium building's connection points to the Fitness Center.[8] Such damage is clearly covered third-party "property damage". *See, Auto Owners Insurance Co. v. Tripp Construction, Inc., supra*, at 601-02 (Fla. 3rd DCA 1999) (costs of repairing the

[8] Moreover, Sun City's Remediation Estimate undoubtedly included the cost of arresting the ongoing water intrusion at the Fitness Center, which, if left uncorrected, would have resulted in additional covered "property damage". By way of example, logic dictates that without the intervening remediation, every significant rainfall would exacerbate the damage to the abutting Atrium building and lead to significant damage to that equipment located within the Fitness Center. The cost for "preventative measures" has been held, in some instances, to be a recoverable damage under a contractor's liability policy. Although there is a dearth of Florida decisional law on this point, other courts from other jurisdictions have allowed recovery. *See generally, Leebov v. United States Fidelity and Guarantee Co.* 401 Pa. 477, 165 A. 2d 82 (Pa. 1960) (under liability policy, insurer was liable for expenses incurred by insured in arresting threatened landslide and preventing other serious damage for which insured would have been liable; court reasoned: "it would be a strange kind of argument and equivocal kind of justice which would hold that the [insurer] would be compelled to pay out, let us say, the sum of $100,000.00 if the [insured] had not prevented what would have been inevitable, and yet not be called upon to pay the smaller sum which the [insured] actually expended to avoid a foreseeable disaster); *Glens Falls Insurance Co. v. Donmac Golf Shaping Co., Inc.*, 203 Ga. App. 508, 417 S.E. 2d 197 (Ga. App. 1992) (CGL policy's insured golf course construction company covered damages arising from insured's alleged negligent placement of golf course on federally protected wet lands, where said damages included cost of restoration, mitigation, and diminished value unconnected with cost of repairing and replacing deficiencies in insured's performance; damages claimed were beyond the reach of the policies' "business risk" exclusions for property damage to project itself). *But see, Rolyn Companies, Inc. v. R & J Sales of Texas, Inc.*, 671 F. Supp. 2d 1314, 1326-27 (S.D. Fla. 2009), affirmed by 412 Fed. Appx. 252 (11th Cir. 2011) (although court acknowledges *Leebov*, it is held to be inapplicable by virtue of the policy's "voluntary payment provision"; court, however, notes one exception: insurers that decline a tendered defense are out of luck).

damage caused by construction defects to other elements of subject homes covered).

Moreover, to the extent that the negotiated settlement centered upon this covered "property damage", Sun City's statutory and contractual claim for attorney's fees and costs would likewise be covered, as such damages are a direct result of the covered "property damage". *See*, *Assurance Co. of America v. Lucas Waterproofing, Inc.*, 581 F. Supp. 2d 1201 (S.D. Fla. 2008) (under Florida law, attorney fees and costs that an insured becomes obligated to pay because of a contractual or statutory provision, which are attributable to claims that would be covered by the policy if the claimant prevails, constitute damages because of "property damage" within the meaning of a CGL policy). Thus, because Sun City's claim included that damage to the Atrium building's connection points, Sun City's attendant statutory/contractual claim for attorney's fees and costs (including the cost of its engineering investigation) are covered damages.

Moreover, and as demonstrated in its moving papers, JBD offers unrefuted proof that it, as opposed to its surety, funded the entire Sun City settlement. Dkts. 62-1, ¶¶ 46-50, 74-2, ¶¶ 4-6 [Exhibit "A"]. This fact is a telling one. Generally, and by operation of that Florida law that governs performance bonds, a surety is only obligated to repair or replace the principal's faulty or defective construction, whereas the CGL insurer is generally only liable for personal injury and property

damage that *results from* the faulty or defective construction. If JBD's surety funded the settlement under the operative performance bond, it would have been paying for the defective construction itself. *See generally, Auto Owners Insurance Co. v. Travelers Casualty & Surety, supra,* at 1264. The fact that the surety did not pay for those damages sued upon, and JBD did, squarely supports JBD's indemnity claim.

In its moving papers, and of the twenty-three affirmative defenses raised by MCC in this matter, MCC cites to only one exclusion in response to JBD's "indemnity" claim: the "your work" exclusion. Dkts. 61, 67. MCC argues, without the benefit of any actual evidence or undisputed engineering evaluation, that all of the "damages" sued upon in the Sun City Litigation are wholly within this exclusion.[9] MCC's argument is squarely contradicted by that information

[9] In making this argument, MCC relies upon this Court's decision in *Amerisure Mutual Insurance Co. v. Auchter Co.*, 673 F. 3d 1294 (11th Cir. 2012). Although JBD is mindful of this Court's analysis in *Auchter*, that decision is inapposite to the resolution of the "indemnity" questions currently before this Court. *Auchter* centered upon a property owner's suit against a general contractor for those damages resulting from a defective roofing system, and, specifically, loose concrete tiles. *Auchter, supra,* at 1296. That decision, however, was grounded upon two undisputed and established facts: (i) the suing property owner did not allege that the roof tiles damaged any other property or part of the project; and (ii) the "cause" of the failed roof system was, by a "preponderance of the evidence", defective installation. *Id.*, at 1297. Unlike *Auchter*, the District Court's decision in this case was not grounded upon these types of established facts. First, JBD demonstrated that Sun City's claim centered upon physical damage to other property, separate and apart from the Fitness Center components. Second, the issue of "causation" is still unresolved; that is, there has been no showing, by a

contained within the Record, which clearly references physical damage to the Atrium building's connection points. Dkts. 62-6 [Exhibits "H" and "I"], pp. 1, 8; 62-12 [Exhibit "K"], p. 32. MCC offers absolutely no evidence that suggests the absence of damage to the Atrium building at these connection points. Not only does this lack of evidence demonstrates its failure to carry its burden of proof on this point, but, at the very least, demonstrates a genuine issue of material fact. Any unresolved issues of fact warrant this court's reversal of the summary judgment. *See, Assurance Co. of America v. Lucas Waterproofing Co., Inc., supra,* at 1209 (genuine issue of material fact as to how much of underlying judgment against insured subcontractor was attributable to repairing damage to other parts of condominium buildings caused by its defective work, as opposed to repairing defective work itself, precluded summary judgment).

Likewise, the fundamental issue of "causation" that informs this exclusion has yet to be litigated in this case; that is, only that damage to JBD's work that arises out of JBD's work is barred by the exclusion. *Id.*, at 1211 (as applied to the insured, the court opined, "the significance of this distinction is that in LWC's case, the meaning of "your work" is limited to the waterproofing. This limitation affects the application of exclusion (l) because only damage to LWC's work that arises out of LWC's work is barred by the exclusion. Therefore, coverage of

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"preponderance of the evidence", that the physical damage at issue was wholly damage to JBD's work that arises out of JBD's work.

damage to other parts of the subject property aside from the waterproofing work performed by LWC is not barred by exclusion (l)). Specifically, MCC offers no undisputed proof that the physical damage to the Fitness Center was, in fact, solely caused to and/or caused by JBD's "work" (without the presence of any other intervening, concurrent, efficient, proximate, antecedent, and/or subsequent causes or agents, acting in concert or independently of each other). *See*, *Koikos v. Travelers Insurance Co.*, 849 So. 2d 263 (Fla. 2003) (wherein the court adopts the "cause theory", which focuses on the independent *immediate* acts that give rise to the injuries). As demonstrated by the Record, the question of "causation" has yet to be determined; the various engineering consultants have yet to determine what damage, if any, to JBD's "work" was, in fact, caused to and/or by JBD's work, as opposed to manufacturing defects or design flaws. Dkts. 61-1, ¶¶ 24-25; 62-6 [Exhibit "H"], pp. 2-3; 62-12 [Exhibit "J"], p. 1.

CONCLUSION

For the reasons expressed above, JBD respectfully submits that the Final Judgment appealed from should be reversed and the case remanded with instructions to the District Court to grant JBD's Motion for Summary Judgment on the legal questions raised therein, with the Parties to proceed to a jury trial on JBD's "consequential damages" claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7) and Eleventh Circuit Rule 28-1 for a brief produced with a proportionally spaced font. This brief was prepared using Microsoft Word 2007 in Times New Roman 14 point font. The length of this brief is 11,059 words.

Dated: March 1, 2013

/s/ Gregory L. Evans
An Attorney for Plaintiff-Appellant J.B.D. Construction, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this March 1, 2013, I have served one copy of the foregoing Initial Brief of Plaintiff-Appellant J.B.D. Construction, Inc. via e-filing and U.S. mail on each of individuals listed on the attached CERTIFICATE OF SERVICE LIST.

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