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

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

GEORGE A. VAKA
GREGORY L. EVANS
VAKA LAW GROUP, P.L.
777 S. Harbour Island Blvd., Ste. 300
Tampa, Florida 33602
813.549.1799 Telephone
813.549.1790 Facsimile

JOHN H. RAINS, III
John H. Rains, III, P.A.
501 E. Kennedy Blvd., Ste. 750
Tampa, Florida 33602
813.221.2777 Telephone
813.221.3737 Facsimile

Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(Continued)

CASES

TABLE OF AUTHORITIES
(Continued)

CASES

TABLE OF AUTHORITIES
(Continued)

CASES

Other:

ARGUMENT IN REPLY

JBD's position on appeal is a straightforward one. The District Court erred in entering a final summary judgment for MCC, and that judgment should be reversed on two grounds.

First, the Sun City Counterclaim unequivocally triggered MCC's *duty of defen*se. MCC's admitted failure to defend JBD was an undisputed breach of the MCC Policy, for which JBD is itself entitled to a partial summary judgment. JBD's acceptance of MCC's partial payment of $5,717.77 did not cure the breach. On this claim alone, JBD is entitled to a trial for the balance of its consequential damages.

Second, the District Court erred in concluding as a matter of law that MCC had no duty to indemnify JBD for those amounts paid to settle the underlying litigation. Specifically, MCC failed to prove, as a matter of undisputed fact, that the actual physical damage at issue in the Sun City litigation wholly concerned the Fitness Center itself and/or that such damage is entirely within the MCC Policy's Subcontractor Exclusion. Accordingly, the District Court's ruling upon this issue should be reversed.

I. THE SUN CITY COUNTERCLAIM TRIGGERED MCC'S DUTY OF DEFENSE, AND MCC'S ADMITTED FAILURE TO DEFEND JBD CONSTITUTES A BREACH OF THE MCC POLICY.

MCC's entire coverage argument focuses exclusively upon the Fitness Center, and the Fitness Center alone. From this perspective, MCC centers its "no coverage" position upon two assumptions:

(i) Sun City only sought recovery for those damages to the Fitness Center itself due to defective installation of the roof, windows and doors; and

(ii) JBD has not identified any record evidence of any damages other than damages arising out of JBD's work, and/or the work of JBD's subcontractors.

See, Ans. Br., at pp. 18, 20, 25. Relying upon these "assumptions", MCC then concludes that JBD's claim fails to satisfy the MCC's Policy's "property damage" trigger and/or is otherwise within the "Damage to Work Performed by Subcontractors Exclusion" (hereinafter the "Subcontractor Exclusion"). Both assumptions, however, are squarely contradicted by those facts contained within this Court's Record. Moreover, in asserting this "no coverage" position, MCC draws no distinction between that physical damage *alleged* in the Sun City counterclaim (which turns upon a *duty of defense* analysis) and those physical damages that were actually at issue at the time of the underlying settlement (which

turns upon a *duty to indemnify* analysis).[1] Under either analysis, MCC's position is untenable.

A. The Sun City Counterclaim triggered MCC's defense obligation.

Turning to the *duty of defense* question, MCC's argument gives short shrift to that document that governs this Court's resolution of this issue – the Sun City Counterclaim. While MCC elected to dedicate its time and page space to accuse JBD of engaging in "rhetoric" and "taking poetic license", it glossed over those facts contained within this Court's Record. The Sun City Counterclaim explicitly and unequivocally refers to "damage" to "other property", "interior of the property", and "other building components and materials". Dkt. 62-17 [Exhibit "1", ¶¶ 16, 20], at pp. 20-21. The first of these allegations first appear in Count II, in which Sun City claims damages caused by JBD's alleged violation of § 553.84 *Fla. Stat.* As stressed in JBD's Initial Brief, one of the statutory bases for imposing liability upon the contractor is evidence of *damage to property other than the building at issue*. *See generally*, § 553.84 *Fla. Stat.; Cohen v. Hartley Brothers Construction, Inc.*, 940 So. 2d 1251 (Fla. 1st DCA 2006). This allegation, in and of itself, triggered MCC's contractual duty of defense and is determinative of the *duty of defense* question. However, other facts appearing within this Court's Record (which are neither addressed nor refuted by MCC in this appeal) amply

[1] The "indemnity" question is addressed in Section III herein.

demonstrate that this particular allegation concerns third-party property damage. In particular, the District Court may have failed to appreciate two undisputed facts that are critical to this entire question: (i) JBD's construction was limited to the assembly of a Fitness Center "addition" that (ii) was physically attached to a pre-existing Atrium building that was outside the scope of the Parties' construction contract. Dkts. 62-2, 62-3 [Exhibit "A"], 62-6 [Exhibit "I"], at p. 7; 62-12 [Exhibits "J" and "K"], at pp. 1, 9. Sun City's resulting claim undisputedly included that physical damage to the Atrium building attached and tied-in to the east side of the Fitness Center structure. The Parties' representatives and engineering consultants documented numerous leaks in this "transition" area of the joined buildings. Sun City's "Remediation Estimate" also referenced the repair costs for this damaged area. Dkts. 62-6 [Exhibits "H" and "I"], at pp. 1, 8; 62-12 [Exhibit "K"], at p. 32; 62-13 [Exhibit "K"], at p. 11; 62-15 [Exhibit "Q"], at p. 19.

Likewise, and in addition to the Atrium, the Sun City Counterclaim's reference to "other property" could have been directed to the fitness equipment and other personal property located within the Fitness Center (non-Project components). Sun City's earliest documented water leaks post-date the Fitness Center's "substantial completion" in January 2008. As Sun City representatives mapped the leak locations, they utilized "equipment layout" diagrams that identified their proximity to treadmills, free weight areas, and weight-training

machines. Dkts. 61-1, at ¶¶ 18, 19; 62-3 [Exhibit "D"], at p. 46; 62-4 [Exhibit "E"], at pp. 17-18. Finally, just like Count II, Sun City's additional reference to "damages to the interior of the property, other building components and materials" in Count III (paragraph no. 20) concerns the same non-Project property, i.e., the Atrium's transition points and the fitness equipment.

Rather than provide its own analysis of the Sun City Counterclaim under the "eight corners" rule, MCC chose to build its "no coverage" position upon the District Court's erroneous conclusion that this claim concerned no property other than the Fitness Center itself. In arguing this position, MCC blurs the bright-line distinction between a Florida liability insurer's "duty to defend", which is distinct from, and broader than, the insurer's subsequent "duty to indemnify" an insured for those damages ultimately proven and assessed. The "actual facts" are wholly irrelevant to this *duty of defense* question. *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); *Colony Ins. Co. v. Barnes*, 410 F. Supp. 2d 1137 (N.D. Fla. 2005).These *duty of defense* principles not only mandate this Court's reversal of the District Court's ruling upon this issue, but, further, warrant this Court's finding that JBD is itself entitled to a summary judgment on this question.

B. MCC's admitted failure to defend JBD was an undisputed breach of the MCC Policy.

MCC does not, and cannot, dispute its failure to carry through on its defense obligation to JBD. On May 6, 2009 JBD tendered the Sun City Litigation to MCC for a defense and indemnification.[2] Dkts. 62-1, ¶ 38; 62-17, ¶ 18. MCC, through its testifying corporate representative, acknowledged this defense obligation. Dkt. 75, p. 11:13-18. MCC agreed that when it typically provides such defense to its insured, MCC assumes responsibility for (i) the appointment and payment of defense counsel, and (ii) attendant investigation costs, including engineering expenses. *Id.*, at pp. 8:15-9:1, and 12:11-13:2. MCC confirmed that JBD's request notwithstanding, no such defense was provided at any point in time from the date that it first acknowledged receipt of the Sun City Litigation (May 12, 2009) through July 15, 2009 (the settlement date). Dkts. 62-17, ¶ 19; 62-1, ¶ 42.

In this particular instance, and based upon that information contained within this Court's Record, MCC's defense obligation arose no later than May 12, 2009. Because the Sun City Counterclaim was never amended, MCC's contractual duty

[2] In at least two places in its brief, MCC mentions that JBD waited over six months before tendering the Sun City Counterclaim to MCC for defense. *See,* Ans. Br., at pp. 7, 32. Such fact is absolutely irrelevant to this *duty of defense* question, as JBD only seeks those damages incurred subsequent to the date of tender. MCC seems to suggest that it has a "late notice" defense, although never raised or preserved. *See*, Dkts. 34; 62-15 [Exhibit "O"], at pp. 10-17. For MCC to preserve this defense, it would have to comply with Florida's Claims Administration Statute, § 627.426(2) *Fla. Stat. See generally, AIU Insurance Co. v. Block Marina Investment, Inc.*, 544 So. 2d 998 (Fla. 1989).

was triggered upon receipt of this pleading and was continuing in nature. *See, Coblentz v. American Surety Co. of New York,* 416 F. 2d 1059 (5th Cir. 1969) (under Florida law, duty of an insurer to defend its insured is continuing in nature; the existence of the obligation arises and must be determined by the claims alleged by the pleadings). In light of *Coblentz* (together with that body of decisional law governing the trigger of the insured's contractual duty, as cited by JBD in the Initial Brief), MCC's failure to take any action through July 15, 2009 constituted a clear breach of MCC's continuing *duty of defense.* Moreover, JBD, as the non-breaching party, was excused from further performance under the MCC Policy. *See generally, 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).

II. JBD'S ACCEPTANCE OF MCC' $5,717.77 PARTIAL PAYMENT DID NOT CURE MCC'S BREACH OF THE POLICY; THUS, JBD IS ENTITLED TO PURSUE ITS CONSEQUENTAL DAMAGES CLAIM.

MCC challenges JBD's "consequential damages" claim on two bases, both of which fail as a matter of law. First, MCC observes that "…there can be no recovery for consequential damages resulting from the failure to defend an *uncovered* claim." Ans. Br., at p. 29 (emphasis applied). Although JBD certainly agrees with that legal premise, it has no application to the facts before this Court. This appeal centers upon allegations of a potentially covered claim, which is the

only requirement for the trigger of MCC's contractual *duty of defense*. Second, MCC suggests that JBD's acceptance of MCC's $5,717.77 payment constituted an "accord and satisfaction", thereby barring JBD's claim for breach. *Id.*, at 30. While JBD recognizes the existence of this legal doctrine, it is inapposite in this case. MCC clearly recognizes that it has no application, as it acknowledged the District Court's rejection of MCC's "accord and satisfaction" defense. *See*, Dkt. 108, at 42; Ans. Br., at p. 3.

A. The District Court rejected MCC's "accord and satisfaction" argument, which does not apply in this particular instance.

MCC obviously wants a second bite at the same apple. MCC attempts to resurrect an argument rejected by Judge Kovachevich in her October 25, 2012 Order:

> MCC argues that MCC has paid J.B.D. for its defense. MCC argues that J.B.D.'s acceptance constitutes an accord and satisfaction. J.B.D. disputes that MCC's payment was tendered on the express condition that it be deemed complete payment. The Court has otherwise determined that MCC did not breach the duty to defend, but notes that J.B.D. did not accept the payment on the condition that it be deemed complete payment. MCC did not provide a defense to J.B.D. at the time that the Counterclaim was filed. ….The Court **denies** MCC's Motion for Summary Judgment as to this issue.

See, Dkt. 108, at 42. MCC itself clearly appreciated the District Court's ruling, as it asserted that it "…erred on this issue…" Ans. Br., at p. 3. Although it was fully aware of the District Court's rejection of its "accord and satisfaction" argument, it filed no cross-appeal on this issue.

MCC's attempt to inject into this appeal its previously-rejected "accord and satisfaction" argument is simply inappropriate. Although a party may raise any argument in support of a judgment, a party who has not appealed may not bring an argument in opposition to a judgment or attack the judgment in any respect, *United States v. American Ry. Express Co.*, 265 U.S. 452, 435-36, 44 S. Ct. 560, 564-68, L. Ed. 1087 (1924), or "hitch a ride on his adversary's notice of appeal" to enlarge his rights under the judgment or diminish those of the opposing party." *Lawhorn v. Allen*, 519 F.3d 1272, 1285, n. 20 (11th Cir. 2008); *Campbell v. Wainwright*, 726 F.2d 702, 704 (11th Cir. 1984); *T.D.S., Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1528 n. 5 (11th Cir. 1985). By failing to file a cross-appeal on this particular issue, MCC now wants to "hitch a ride" in this proceeding.

Even if MCC had properly preserved the "accord and satisfaction" issue for appeal, the Record squarely supports Judge Kovachevich's rejection of MCC's argument. On one point JBD and MCC can certainly agree: an accord and satisfaction results as a matter of law when an offeree accepts a payment which is tendered only on the express condition that its receipt is to be deemed a complete satisfaction of a disputed claim. *See, Hannah v. James A. Ryder Corp.*, 380 So.2d 507, 509-10 (Fla. 3rd DCA 1980) (citations omitted).

Hannah, together with those cases that endorse those principles set forth in *Hannah*, squarely support JBD's position that "accord and satisfaction" simply

does not apply here. First and foremost, neither MCC nor JBD evinced any intent that the $5,717.77 payment was being tendered only on the express condition that its receipt would be a complete satisfaction of a disputed claim. MCC's October 12, 2010 "tender" letter set no "express condition" upon JBD's acceptance. Dkts. 62-17, ¶ 30; 62-18, [Exhibit "9"], at p. 83. JBD, in fact, evinced its clear intent that it was unwilling to accept the check without the ability to pursue its consequential damages claim. On October 28, 2010, JBD acknowledged receipt of the payment; however, Attorney Rains inquired whether the check could be negotiated and treated as a "partial payment" towards JBD's claimed damages. Dkts. 62-17, at ¶ 33; 62-18 [Exhibit "10"], at pp. 85-86. MCC responded to this inquiry on November 29, 2010 by telling Attorney Rains that it "…placed no restrictions with regards to negotiation of the reimbursement check…" 62-18 [Exhibit "11"], at p. 87. MCC's "no restrictions" letter renders wholly irrelevant its observation that "JBD did not, at any time before April 2012, challenge or ever mention any purported inadequacy or insufficiency in the amount of defense fees and costs".[3]

[3] As set forth in its moving papers, and separate and apart from its unilateral decision to reduce Attorney Rains's fee billings by $5,000.00 on the front-end, JBD amply demonstrated that MCC's post-deductible calculation of those fees owed to Attorney Rains for May 2009 was only $659.97, $102.03 short of those amounts actually invoiced by Attorney Rains for that month. Moreover, MCC failed to pay interest on these invoices (which had been billed to JBD over one year earlier). Moreover, MCC did not include in its "legal expense" payment those additional costs charged to JBD by SLK (attorney's fees) and FORCON (engineering evaluation). *See*, Dkt. 62-17, at ¶¶ 20 – 34. MCC does not dispute that

See, Ans. Br., at p.31. Such fact is legally insignificant: JBD took no affirmative steps to challenge or question any aspect of MCC's October 12, 2010 tender because it did not have to. MCC made it absolutely clear that it placed "no restrictions" on the check. Likewise, the letters do not address, or otherwise request JBD's agreement with, MCC's front-end decision to apply the $5,000.00 Policy Deductible to Attorney Rains's invoices.[4]

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it failed to pay JBD for these amounts over and above its $5,717.77 partial payment.

[4] In its Second Amended Complaint, JBD sought the District Court's declaration of the Parties' rights and responsibilities under the MCC Policy. *See*, Dkt. 18. Concerning the Deductible Liability Insurance Endorsement (the "Policy Deductible"), JBD renews its position that it simply does not apply to MCC's unilateral, after-the-fact decision to reduce Attorney Rains's bills in October 2010. Those amounts subject to the Policy Deductible include **"Allocated Loss Expenses"**, which are defined as those "…expenses *incurred by the company* in defense or settlement of claims (emphasis applied)". In light of this policy definition, JBD respectfully submits that the Policy Deductible simply does not apply. Attorney Rains's bills were not "expenses incurred by the company" in the course of the defense or settlement of the Sun City Litigation – they were incurred and paid by JBD. To trigger the Policy Deductible in the first instance, MCC would have had to, prior to its application, incur and allocate the expenses in question. By way of example, had MCC appointed defense counsel and/or commissioned an engineering evaluation on JBD's behalf in May 2009, it, rather than JBD, would have incurred those expenses. MCC would then, and only then, allocate them to the Policy Deductible. MCC's argument that the Policy Deductible should be applied retroactively to convert non-incurred amounts to incurred expenses renders this particular definition superfluous, or, at best, ambiguous. It is well-settled that any ambiguity in a policy provision, either written or as applied, is to be construed in favor of coverage. *See generally, Swire Pacific Holdings, Inc. v. Zurich Insurance Co.*, 845 So. 2d 161 (Fla. 2003). Under these facts, as applied to JBD's expenses, the Policy Deductible never came into play, and, therefore, should not be applied.

JBD's acceptance of the $5,717.77 check is aligned with those reported decisions wherein Florida Courts refuse to apply the "accord and satisfaction" doctrine to an insured's simple act of accepting and negotiating an insurer's tendered check. *See generally, Pino v. Union Bankers Insurance Co.*, 627 So. 2d 535 (Fla. 3d DCA 1993); *St. Mary's Hospital, Inc. v. Schocoff*, 725 So. 2d 454 (Fla. 4th DCA 1999). Accordingly, MCC's "accord and satisfaction" argument fails as a matter of law.

B. JBD's entitlement to pursue its claim for consequential damages.

Separate and apart from its "accord and satisfaction" argument, MCC also challenges JBD's right to pursue its consequential damages claim. In its Initial Brief, JBD identified those damages incurred post-tender: (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 identifying these "damage" categories, and as presented in its moving papers to the District Court, JBD acknowledged that the exact amount of the consequential damages has yet to be calculated. *See*, Dkt. 62. JBD recognizes that the exact type and amount of these consequential damages are questions for the trier of fact. *See generally, Action Nissan, Inc. v. Hyundai Motor America*, 617 F. Supp. 2d 1177 (M.D. Fla. 2008) ("so long as plaintiff has produced some evidence of its injury, the factual determination of damages is one

for the jury"; where plaintiff provided evidence of damages, jury question on the issue raised and court would not grant summary judgment); *Wareing Through Wareing v. U.S.*, 943 F. Supp. 1504 (S.D. Fla. 1996) (determination of damages is primarily a factual matter). *See also, Fisher Island Holdings, LLC v. Cohen*, 983 So. 2d 1203 (Fla. 3d DCA 2008) (it is in the province of the jury to determine the amount of damages to be awarded to an aggrieved party); *Medinis v. Swan*, 955 So. 2d 595 (Fla. 2d DCA 2007) (in a jury trial, it is the duty of the jury, not the judge, to make factual findings on damages); *Kaine v. Government Employees Insurance Co.*, 735 So. 2d 599 (Fla. 3d DCA 1999) (jury is sole judge of factual issues, including damages).

On appeal, and JBD's *prima facie* proffer notwithstanding, MCC suggests that this Court reject JBD's right to pursue its damages claim as a matter of law. MCC advances this argument knowing full well that neither the District Court nor the jury ever considered, evaluated or weighed JBD's proffer on these claims. JBD merely requests the opportunity to act upon that remedy recognized by Florida courts: if an insurer fails to provide an "adequate defense", it breaches its contractual duty and may be held liable for *all* damages naturally flowing from the breach. *See, Roger Kennedy Construction, Inc. v. Amerisure Insurance Co.*, 506 F. Supp. 2d 1185 (M.D. Fla. 2007) (emphasis applied), citing, *Carrousel*

Concessions, Inc. v. Fla. Ins. Guar. Ass'n, 483 So. 2d 513, 516 (Fla. 3d DCA 1986).

For each category of damage identified by JBD in its moving papers and Initial Brief, JBD proffered that *prima facie* evidence supporting this claim:

JBD's post-tender legal fees and costs in the Sun City Litigation. JBD offered undisputed proof that in the early summer of 2009, and finding itself in the position of having to fund its own defense and investigation, JBD not only had to pay for Attorney Rains's services, but was also forced to bear the cost of those legal and engineering services provided by SLK and FORCON. These defense and investigation costs were significant, and clearly exceeded MCC's "Legal Expenses" check of $5,717.77. JBD's decision to fund its own defense and investigation was the direct result of MCC's admitted failure to defend. *See generally*, Dkts. 62-1, ¶ 44; 62-17, ¶ 20. As argued by JBD in its Initial Brief, these types of expenses are clearly recoverable under Florida law. *See*, Init. Br., at pp. 29-31; *Roger Kennedy Construction, Inc., supra,* at 1195.

***The Sun City Center Litigation settlement*[5].** JBD also proffered evidence that the funding of its own defense in the *Sun City* Litigation drew down upon its

[5] In its Answer Brief, MCC posits that JBD is seeking to recover the full amount of the settlement, even though it recovered $100,000.00 from its two subcontractors. *See,* Ans. Br., at 34. In making this statement, MCC seems to suggest that JBD is somehow positioning itself to "double dip" or engineer a "windfall" in this case. JBD has no such intention - it only wants to be made whole on this aspect of its

financial reserves. When JBD's surety learned of these inadequate reserves, and with no assurance that the *Sun City* Litigation would be resolved any time soon, it decided that it would no longer issue performance or payment bonds for JBD's future construction work. Facing this impaired bonding capacity, JBD was unable to qualify for (or even bid) those projects that required performance bonds. Faced with this financial fallout, and with no end in sight, JBD was forced into the $181,750.94 settlement with Sun City. *See generally,* Dkts. 62-1, 62-16 through 62-21. JBD's decision to fund the settlement was the direct result of MCC's failure to defend, and those amounts necessary to fund the settlement are recoverable. *Id; Hagen v. Aetna Cas. & Sur. Co.,* 675 So. 2d 963 (Fla. 5th DCA), *rev. den.,* 683 So. 2d 483 (Fla. 1996)(when an insurer denies a claim and refuses to defend, the insured can take whatever steps necessary to protect itself from a claim); *Kopelowitz v. Home Ins. Co.,* 977 F. Supp. 1179 (S.D. Fla. 1997)(in those instances where the insurer breaches the duty of defense, the insured can take control of the case, settle it, and then sue the insurance company for the damages

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damages claim, up to and including the amount of the settlement. At this juncture of the proceedings below, there has been no demonstrated nexus between the Sun City settlement and those amounts received from the subcontractors. Stated another way, MCC has not demonstrated that JBD's request for indemnity benefits for third-party property damage from MCC has anything to do with the subcontractors' work on the Fitness Center components. Even if a nexus is ultimately proven, the $100,000.00 "credit" would have to be further reduced by JBD's legal expenses (attorney's fees and costs) in prosecuting its recovery of that amount. This entire issue raises unresolved questions of fact.

incurred in settling the action); *MCO Environmental, Inc. v. Agricultural Excess & Surplus Ins. Co.*, 689 So. 2d 1114 (Fla. 3d DCA 1997) ("the damages incurred by the insured in settling or litigating the case are not limited solely to attorney's fees because the insurer becomes liable for all damages that flow naturally from the breach"; "consequently, on remand, [insured] will be permitted to prove what reasonable costs and attorney's fees that it incurred in its defense and also the amount of any collateral damages that resulted from the breach"); *Caldwell v. Allstate Ins. Co.*, 453 So. 2d 1187 (Fla. 1st DCA 1984); *North American Van Lines, Inc. v. Lexington Ins. Co.*, 678 So. 2d 1325 (Fla. 4th DCA 1996).

The impairment to JBD's bonding capacity. Finally, JBD proffered evidence that MCC's failure to defend ultimately resulted in a quantifiable reduction in JBD's book net worth. JBD presented such evidence through the sworn testimony of JBD's principal, surety representative, surety agent, underlying defense counsel, accountant, and largest recurring client. *See*, 62-1, 62-16 through 62-21. Moreover, that testimony provided by the surety agent and MCC's corporate representative further established that the impairment to JBD's bonding capacity was a foreseeable consequence – from each Party's perspective - of MCC's failure to defend. JBD confirmed MCC's acknowledgment that it sells CGL coverage and performance bonds to the construction industry. *See*, Dkts. 74-1, at pp. 150:4-151:12; 62-19, at ¶¶ 5-8. Because it wears both the "surety hat" and

the "CGL insurer" hat in the marketplace, MCC is especially and uniquely qualified to understand that a critical reduction in a contractor's operating capital necessarily reduces the contractor's bonding capacity, and that such reduction could be the disastrous result of the liability insurer's abandonment of its insured at the defense table.

With respect to the reduced book net worth component of its claim, JBD's evidence satisfies those elements necessary to state a cause of action under Florida law. *See, Crain Automotive Group v. J&M Graphics*, 427 So. 2d 300, 301 (Fla. 3d DCA 1983). MCC argues that JBD, in this particular instance, is barred from recovering these damages as a matter of law because the impairment to JBD's bonding capacity was not "within the contemplation of the parties at the time of contract formation". Ans. Br., at p. 38.

In making this argument, MCC primarily relies upon the Florida Middle District's decision in *Essex Builders Group, Inc. v. Amerisure Insurance Co.*, 485 F. Supp. 2d 1302 (M.D. Fla. 2007). Not only are those facts at issue in *Essex* distinguishable from those at issue here, but the *Essex* court's discussion of those legal principles governing this issue actually support JBD's position that it can proceed to trial on this aspect of the claim. In fact, Judge Conway rejected the notion that those consequential damages resulting from a contractor's loss of bonding capacity can *never* be recovered. *See, Essex*, 485 F. Supp. 2d 1302, at

1306. Citing to *Travelers Insurance Co. v. Wells*, 633 So. 2d 457 (Fla. 5th DCA 1993), Judge Conway stated that, "in fact, there is Florida decisional authority suggesting that in appropriate circumstances, an insured may recover consequential damages when its insurer's breach of contract causes the insured's business to fail. *Id.*, at 1306-07. In adopting a case-by-case approach, Judge Conway analyzed Essex's "impairment" claim against its CGL insurers. Essex presented testimony from its principal, surety, and a second non-party surety that established Essex's recognition of the "impairment" dilemma that could follow in the wake of a CGL insurer's coverage denial. *Id.*, at 1307. While Judge Conway agreed that such evidence may show that the "impairment" consequence was no secret to *Essex*, there was no evidence that Essex's CGL insurers "…ever contemplated at the time of contracting that a denial of a third-party claim against the CGL policies would result in Essex losing bonding capacity and failing as a business". *Id.* Judge Conway noted that *Essex* might have established these things through the depositions of the CGL insurer's representatives or through an expert witness; however, *Essex* presented no actual evidence in that case. *Id.*, at 1308.

Because it has presented that evidence demonstrating the causal connection between MCC's breach and the resulting reduction in JBD's book net worth, it should now be evaluated by the factfinder at the district court level. *See generally*, *Pullum v. Regency Contractors, Inc.*, 473 So. 2d 824 (Fla. 1st DCA 1985) (amount

of lost profits and costs incurred by builder was question for jury in breach of construction contract suit); *Norelus v. Denny's Inc.*, 628 F.3d 1270, 1293 (11th Cir. 2010) (as everyone knows, appellate courts may not make fact findings); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1306-07 (11th Cir. 2006) (appellate courts must constantly have in mind that their function is not to decide factual issues "*de novo*" (quotation marks and alterations omitted)); *United States v. Banks*, 347 F.3d 1266, 1271 (11th Cir. 2003) (a court of appeals is not a fact finding body); *Didie v. Howes*, 988 F.2d 1097, 1104 (11th Cir. 1993) (we, however, are not factfinders).

III. MCC FAILED TO CARRY ITS BURDEN OF PROOF TO DEMONSTRATE THAT IT OWED NO INDEMNITY BENEFITS TO JBD AS A MATTER OF LAW.

In evaluating the Parties' moving papers, the District Court also considered whether the "actual disputed facts" involved property damage within the MCC Policy's coverage. The District Court ultimately concluded that to the extent that JBD sought indemnity for the repair of the Fitness Center's roof, doors and windows, MCC had no duty to indemnify JBD as a matter of law. *See*, Dkt. 108, at pp. 39-42. The District Court centered its conclusions upon two separate premises, both of which are either inaccurate and/or otherwise turn upon unresolved issues of fact.

Evidence of physical damage to the pre-existing Atrium building. First, the District Court based its conclusion upon an apparent finding that the only physical damage at issue in the Sun City litigation was the Fitness Center itself. As previously noted, the Fitness Center was not a stand-alone structure; rather, the Fitness Center was new construction attached to the west end of the pre-existing "Atrium" building. The construction contract contemplated the joining of the newly-constructed Fitness Center (JBD's project work) and the Atrium building (pre-existing property). Dkts. 62-1, at ¶¶ 7-10; 62-2, 62-3 [Exhibit "A"], 62-6 [Exhibit "I"], at p. 7; 62-12 [Exhibits "J" and "K"], at pp. 1, 9. The Parties' documented water intrusion points included the transition area(s) between the two buildings. Dkt. 62-15 [Exhibit "L"), at p. 2. At least two of the consulting engineering firms confirmed leaks in these areas. Dkts. 62-12 [Exhibit "K"], at p. 32; 62-6 [Exhibits "H" and "I"], at pp. 1, 8. Such damages were clearly at issue in the resulting litigation, as Sun City's Remediation Estimate included the transition connections from the Fitness Center to the Atrium Dkt. 62-13 [Exhibit "K"], p. 11. The damage to the Atrium in these "transition" areas clearly satisfies the MCC Policy's trigger for third-party "property damage". *See, Auto Owners Ins. Co., v. Tripp Construction, Inc.*, 737 So. 2d 600 (Fla. 3rd DCA 1999). Moreover, such damages are clearly outside the scope of the Subcontractor Exclusion. *See*

generally, *United States Fire Insurance Co. v. J.S.U.B, Inc.*, 979 So. 2d 871 (Fla. 2007).

Because the negotiated settlement included within its scope the physical damage to the Atrium building, (covered "property damage" that is otherwise outside the scope of the Subcontractor Exclusion), Sun City's attendant claim for statutory/contractual attorney's fees and investigation costs would likewise be covered, as such damages are a direct result of litigating the damage to the Atrium building. *See*, *Assurance Co. of America v. Lucas Waterproofing Co., Inc.*, 581 F. Supp. 2d 1201 (S.D. Fla. 2008).[6]

"Causation" remains a material unresolved fact issue. Given the District Court's erroneous conclusion that the physical damage at issue was only to the Fitness Center itself, it never addressed the issue of whether MCC carried its burden of proof in demonstrating that the actual physical damage(s) extant as of July 15, 2009 were wholly within the Subcontractor Exclusion. Without regard to

[6] With respect to Sun City's attorney's fees, MCC notes that the underlying settlement agreement provided that each party was to pay its own fees and costs. *See*, Ans. Br., at p. 36, n. 5. MCC's observation raises other unresolved questions of fact: whether the parties intended this "attorney's fee" provision to apply to those fees that otherwise qualified as compensatory damages under § 553.84 *Fla. Stat.*, and, therefore, subsumed within the parties' settlement prior to the preparation of the release. Moreover, the underlying settlement agreement did not address those amounts expended for Sun City's engineering evaluations and studies in the course of the underlying claim (pre-litigation or otherwise), or, for that matter, whether the parties' use of the term "costs" referred to taxable litigation costs.

the Record evidence and the conflicting engineering evaluations, MCC merely adopts the District Court's assumption that all of the damages negotiated and resolved in the July 15, 2009 settlement were entirely within the Subcontractor Exclusion. Specifically, and separate and apart from any analysis of that physical damage to the Atrium, 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 in the construction materials or inherent design flaws. Dkts. 61-1, ¶¶ 24-25; 62-6 [Exhibit "H"], pp. 2-3; 62-12 [Exhibit "J"], p. 1. *See also, Assurance Co. of America v. Lucas Waterproofing Co., Inc., supra,* at 1211. Given the unresolved issue of causation, MCC failed to meet its burden of establishing that the Subcontractor Exclusion wholly applies to all of Sun City's documented physical damage. *See, Auto Owners Ins. Co. v. Travelers Casualty & Surety Co.*, 227 F. Supp. 2d 1248,

1258 (M.D. Fla. 2002). MCC's insistence that the Subcontractor 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.

CONCLUSION

For the reasons expressed in both its Initial and Reply Briefs, 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 *duty of defense* question, with the Parties to proceed to a jury trial on JBD's "consequential damages" claim.

Respectfully submitted,

/s/ *Gregory L. Evans*
George A. Vaka, Esquire
Gregory L. Evans, Esquire
VAKA LAW GROUP, P.L.
777 South Harbour Island Blvd, Ste. 300
Tampa, Florida 33602
Phone: (813) 549-1799
Fax: (813) 549-1790
gvaka@vakalaw.com
gevans@vakalaw.com

John H. Rains, III, P.A.
501 E. Kennedy Blvd., Ste. 750
Tampa, Florida 33602
Telephone: (813) 221-2777
Facsimile: (813)221-3737
jrains@johnrains.com

Attorneys for Plaintiff-Appellant
J.B.D. Construction, Inc.

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 6,966 words.

Dated: June 20, 2013

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this June 20, 2013, I have served one copy of the foregoing Reply 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.

/s/ *Gregory L. Evans*
George A. Vaka, Esquire
Gregory L. Evans, Esquire
Brandon R. Christian, Esquire
VAKA LAW GROUP, P.L.
777 South Harbour Island Boulevard
Suite 300
Tampa, Florida 33602
Phone: (813) 549-1799
Fax: (813) 549-1790
gvaka@vakalaw.com
gevans@vakalaw.com

John H. Rains, III, P.A.
501 E. Kennedy Blvd., Ste. 750
Tampa, Florida 33602
Telephone: (813) 221-2777
Facsimile: (813)221-3737
jrains@johnrains.com

Attorneys for Plaintiff-Appellant
J.B.D. Construction, Inc.

CERTIFICATE OF SERVICE LIST

Edward Sylvester, Esquire
Ronald L. Kammer, Esquire
Maureen G. Pearcy, Esquire
Hinshaw & Culbertson, LLP
2525 Ponce de Leon Boulevard
Suite 400
Miami, Florida 33134-6044
Telephone: (305) 358-7747
Facsimile: (305) 577-1063
esylvester@hinshawlaw.com
rkammer@hinshawlaw.com
mpearcy@hinshawlaw.com

Attorneys for Appellee-Defendant
Mid-Continent Casualty Insurance Co.