No. 13-10138-F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

J.B.D. CONSTRUCTION, INC.,

Plaintiff-Appellant,

vs.

MID-CONTINENT CASUALTY COMPANY,

Defendant-Appellee,

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

BRIEF OF DEFENDANT-APPELLEE MID-CONTINENT CASUALTY COMPANY

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Eleventh Circuit Case No. 13-10138-F

J.B.D. Constr. Co. v. Mid-Continent Cas. Co.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned certifies, pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-2, that certificate of interested persons and corporate disclosure statement contained in J.B.D. Construction, Inc.'s initial brief is a complete list of all individuals and entities known or believed to have an interest in the outcome of this case.

Dated: May 8, 2013

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By: /s/ Maureen G. Pearcy

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STATEMENT REGARDING ORAL ARGUMENT

The appellee Mid-Continent Casualty Company ("MCC") does not believe that oral argument would be instructive. This case involves the determination of whether a commercial general liability policy affords coverage for alleged damages resulting from defective construction of a fitness center pursuant to a contractual agreement. Florida law regarding the duty to indemnify is well-settled and involves comparison of the actual facts to the plain policy language. This can easily be resolved from a review of the paper record which identifies the precise bases for the parties' respective positions. Appellant has not identified an basis to support oral argument. It is not warranted.

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STATEMENT OF JURISDICTION

Mid-Continent Casualty Company adopts appellant's jurisdictional statement and further states that this Court has jurisdiction to review the final order pursuant to Federal Rules of Appellate Procedure 3(a)(1) and 4(a)(1)(A).

STATEMENT OF THE ISSUES

1. Whether the district court correctly found that MCC had no duty to indemnify appellant J.B.D. Construction, Inc. ("JBD") in the underlying crossclaim by virtue of the policy's "damage to work performed by subcontractors" exclusion

2. Whether the district court also properly found MCC has no duty to indemnify because the actual facts fall outside the policy definition of "property damage."

3. Whether JBD's acceptance and cashing of MCC's tender for the defense of the underlying counterclaim prior to bringing this declaratory action precludes any breach of contract claim on the duty to defend.

4. Whether the policy precludes coverage for the alleged consequential damages sought by JBD.

STATEMENT OF THE CASE

A. Introduction

This insurance coverage action concerns whether a commercial general liability ("CGL") policy affords coverage for alleged damages resulting from defective work performed by the insured and its subcontractors in constructing a fitness center. The district court correctly concluded that the policy's broad "damage to work performed by a subcontractor" exclusion precluded any duty to indemnify the insured for the underlying suit. The district court also properly concluded that the alleged damages fell outside the policy definition of "property damage." The finding of no duty to indemnify was correct and should be affirmed.

Because payment for the defense fees and costs was tendered and accepted without objection prior to commencement of this coverage action, there can be no breach of the duty to defend and there can be no recovery for consequential damages. While the district court erred on this issue, it reached the correct outcome – JBD is not entitled to any recovery.

B. Course of Proceedings and Disposition in the Court Below

This case involves an insurance coverage dispute between Mid-Continent Casualty Company ("MCC"), and its insured J.B.D. Construction, Inc. ("JBD") (Doc 1, 18, 34). JBD sued MCC seeking insurance coverage for a counterclaim Sun City Center Community Association, Inc. ("Sun City") brought against JBD (Doc 1, 18). MCC counterclaimed for declaratory relief (Doc 34). On cross-

motions for summary judgment, the district court found MCC had neither a duty to defend nor a duty to indemnify JBD for the Sun City suit (Doc 59, 61, 62, 67, 70, 72, 73, 108). JBD timely appealed the final judgment (Doc 116).

C. Statement of the Facts

In its fact section, JBD makes several assertions without any record reference. (Br at 3-6, 16). For clarity, MCC is identifying, as concisely as possible, those factual issues pertinent to both the duty to defend and the duty to indemnify, while attempting to not repeat information conveyed via the initial brief.

1. The Sun City Litigation with JBD

In October 2008, Sun City filed a counterclaim against JBD construction (Doc 62-17 – Pg 17-23). Sun City's counterclaim stemmed from problems and alleged damage Sun City claimed after JBD constructed a fitness center pursuant to a contractual agreement between those two parties (Doc 62-17 – Pg 18-21). In the counterclaim, Sun City asserted claims for breach of contract, breach of statutory duty to comply with Florida building codes, and negligence (Doc 62-17 – Pg 18-21). All of the counts reference the contractual agreement to build the fitness center (Doc 62-17 – Pg 18-21). All of the counts allege defective construction work was performed by JBD and subcontractors hired by JBD (Doc 62-17 – Pg 19-21). Specifically, in the breach of contract count, Sun City alleged:

> 9. JBD failed to fulfill its contractual obligations and duties and materially breached the contract in one or more of the following respects:

b. Failing to furnish at all times adequately competent and/or skilled workers to perform necessary work on accordance with the requirements of the contract documents at the project;

e. Failing to perform the work on a good and workmanlike manner;

f. Failing to correct or otherwise remedy deficient work on the Project;

(Doc 62-17 – Pg 18-19). Sun City alleged the following damages: "costs associated with delays in completion of the Project, costs to identify defective work, costs to correct defectively performed work at the project, and additional costs associated with the Project" (Doc 621-17 – Pg 19).

In the building code violations count, Sun City also alleged defects and deficiencies in the work performed by JBD and its subcontractors (Doc 62-17 – Pg 20). Sun City asserted "this defective and deficient work has caused damage to other building components and materials" (Doc 62-17 – Pg 20). Sun City sought damages for "the repair of the defects and deficiencies and damages caused there by 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 funds through the employment of legal counsel" (Doc 62-17 – Pg 20).

Finally, in the negligence count, Sun City again identifies that JBD was the general contractor for construction of the "Health Center building project" and that

the "building and improvements were constructed with defects and deficiencies" (Doc 62-17 – Pg 21). Sun City further alleges that JBD's breaches "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" (Doc 62-17 – Pg 21). Sun City seeks damages for "investigation and remediation of defective and deficient conditions" (Doc 62-17 – Pg 21).

Before the trial court, JBD did not dispute, the following factual statements (among others) pertinent to MCC's summary judgment motion:

- To effect the construction of the Fitness Center, JBD retained, and ultimately oversaw the services provided by, a number of subcontractors and material suppliers, including, but not limited to, Professional Glass, Inc. ("PGI") and Willis General Welding, Inc. ("WGW"). (Doc 18 – Pg 3). Each of these subcontractors worked upon the Sun City Center's Change Order Components. (Doc 18 – Pg 3).
- Following construction, Sun City's newly-opened Fitness Center sustained physical damage to Sun City's Change Order Components (Doc 18 – Pg 3).

(Doc 72 – Pg 1). As identified in the initial brief, the "Change Order Components" consisted of portions of the fitness center structure: "a pre-engineered, manufactured building shell (roof and wall panels), slab concrete, insuralation, building block and rubber flooring" (Br at 3; Doc 62-3 – Pg 34-45).

1. MCC's Payment for the Sun City Defense and JBD's Acceptance Prior to this Coverage Action

As identified in the initial brief, JBD did not tender the Sun City counterclaim to MCC until May 6, 2009, more than six months after JBD was served (Br at 9; Doc 18-1 – Pg 75-76). As further acknowledged by JBD, MCC tendered payment for defense of the Sun City counterclaim from the date of the May 2009 tender through completion, minus the $5000 policy deductible, to JBD on October 12, 2010 (Br at 9, 12; Doc 67-2 – Pg 67-2 – Pg 2-4). JBD cashed that check without ever disputing or raising any issue regarding the amount of the defense fees and costs (Doc 62-18 – Pg 85-88; Doc 67-1 – Pg 2, 4). The only issue JBD raised, prior to cashing the check, was that it continued to seek full payment for the underlying settlement (Doc 62-18 – Pg 86). MCC responded that the check was intended to cover the incurred costs of $10,717.77 less JBD Construction, Inc.'s $5000 deductible for the defense cost/erxpenses incurred by JBD Construction, Inc. from the time of tender of [the underlying suit] to MCC, until the time of completion of the release and dismissal" (Doc 62-18 – Pg 87). The check cleared on December 8, 2010 (Doc 67-1 – Pg 2, 4). On January 11, 2011,

over a month after it cashed the check for defense costs and fees, JBD filed its coverage suit against MCC (Doc 1-2 – Pg 2; Doc 1-3 – Pg 3-4).

In response to MCC's summary judgment, JBD, for the first time, submitted the affidavit of Mr. Rains, JBD's defense attorney in the Sun City litigation, purporting to offer previously undisclosed testimony (Doc 62-17 – Pg 1-12; Doc 67 – Pg 15-16).[1] In that submission, Mr. Rains identified for the first time that MCC's tender was approximately $100 short (Doc 62-17 – Pg 10, ¶31). However, the undisputed evidence shows that Mr. Rains accepted and cashed the check and never questioned the amount of the defense fees and costs before bringing this coverage action (Doc 1-3 – Pg 1; Doc 67-1 – Pg 1-4). t

There is absolutely nothing in the record to support Mr. Rain's self-serving statement that he "noted and questioned MCC's calculation" regarding the fees and costs or that he ever conveyed those "questions" to MCC (Doc 62-17 – Pg 13-99; Doc 67 – Pg 2-3). Rather, JBD's own evidence shows that MCC offered a slightly lower amount for defense fees and costs in both July and August 2010 (Doc 62-18 – Pg 4, 54). In fact, MCC was unaware of any purported miscalculation in the amount of fees and costs until it received JBD's summary judgment motion, in

[1] In light of the time for MCC to respond to the summary judgment motion, MCC was precluded from deposing Mr. Rains prior to responding (Doc 67 – Pg 2). The district court never ruled on MCC's motion for leave to supplement its response to address the new testimony (Doc 67 – Pg 17-19).

April 2012 (Doc 67 – Pg 3). JBD's own evidence further shows that as late as August 2010, MCC was still attempting to investigate the claim, seeking information and materials from JBD regarding the Sun City counterclaim and alleged damages (Doc 67-18 – Pg 50).

2. The MCC Policies

As identified in the initial brief, MCC issued two CGL policies to JBD that are at issue here (Br at 8; Doc 34-3, 34-4). In addition to the insuring agreement (set forth in the initial brief), the policies[2] contained the following pertinent provisions:

> **SECTION I – COVERAGES**
>
> **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **SECTION V – DEFINITIONS**
>
> *** * ***
>
> **16.** "Products-completed operations hazard":
>
> **a.** Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> **(1)** Products that are still in your physical possession; or
>
> **(2)** Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

[2] MCC will use the term "policy" to refer to the two policies issued.

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;

(2) The existence of tools, uninstalled equipment or abandoned or unused materials; or

(3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products completed operations are subject to the General Aggregate Limit.

17. "Property Damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or;

b. Loss of use of tangible property that is not physically injury. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it."

* * *

22. "Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

(2) The providing of or failure to provide warnings or instructions.

(Doc 5 – Pg 2; Doc 36 – Pg 2). The policy further includes the following endorsement:

EXCLUSION - DAMAGE TO WORK PERFORMED BY SUBCONTRACTORS ON YOUR BEHALF

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion **I.** of **Section I - Coverage A - Bodily Injury And Property Damage Liability** is replaced by the following:

2. Exclusions

This insurance does not apply to:

l. Damage To Your Work

> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

(Doc 5- Pg 2; Doc 36 – Pg 2).

3. The Coverage Litigation

JBD sued MCC in this coverage litigation, and MCC asserted a counterclaim (Doc 18, 34). On October 25, 2012, the district court ruled on the parties' cross-motions for summary judgment (Doc 108). The district court aptly recognized that "CGL policies are intended to cover property damage caused by the completed product, but not for replacement or repairs of the product" (Doc 108 – Pg 26-27 (citing *LaMarche v. Shelby Mut. Ins. Co.*, 390 So. 2d 325 (Fla. 1980)). The court then looked to recent Florida Supreme Court precedent as guidance (Doc 108 – Pg 27(citing *United States Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla. 2007); *Auto-Owners Ins. Co. v. Pozzi Windows Co.*, 984 So. 2d 1241 (Fla. 2008)).

In its analysis, the court initially identified: "The scope of J.B.D.'s work in the 'construction of the health center building with related and appurtenant improvements to an existing structure ('the Project')" (Doc 108 Pg 33). The court next noted that, upon receipt of the counterclaim, JBD notified its surety (Doc 108 – Pg 34). The court went on to discuss the function of a suretyship which serves to ensure that a contracting party performs its duties in conformance with the terms and conditions of the contract (Doc 108 – Pg 34). The court continued: "The Counterclaim in this case includes allegations that J.B.D. failed to furnish

adequately competent and skilled workers, and failed to properly supervise the subcontractors and others who performed the work J.B.D. contracted to perform, who in turn failed to carry out the work in a workmanlike manner" (Doc 108 – Pg 35).

Next the court considered the policy language in comparison to the Sun City counterclaim and concluded: "The alleged defective installation of roof, windows and doors may have damaged other components of the building outside of the work performed by the subcontractors, but the 'other property' was included within the scope of work of J.B.D., who contracted to construct the whole building" (Doc 108 – Pg 37). As an aside, the court noted that there was no explanation offered for JBD's more than six month delay in tendering the counterclaim to MCC and that the effect of such delayed notice "is not clear" (Doc 108- Pg 37).

On the duty to indemnify, the district court identified that JBD subcontracted with Professional Glass, Inc. and Willis General Welding (Doc 108 – Pg 38). Professional Glass installed the windows and doors while Willis erected the building, including the roof (Doc 108 – Pg 38). The court considered the settlement agreement JBD and Sun City entered which expressly identifies that the claims are both doubtful and disputed and payment does not constitute an admission of liability by JBD (Doc 108 – Pg 38-39). Further the settlement provides that each party is to bear their own fees and costs (Doc 108 – Pg 39). The

MCC policy only affords indemnification for "sums that the insured becomes legally obligated to pay as damages because of . . . property damage to which this insurance applies" (Doc 108 – Pg 39). Costs to repair defectively installed roof, doors, and windows does not fall within the policy definition of "property damage" (Doc 108 – Pg 39).

The court recognized that the "property damage observed by J.B.D. includes only the damage to other components of the Fitness Center: 'rust on the steel, peeling of paint and mortar material on the block on the inside of the building, discoloration of the stucco, and stucco popping off the building on the inside" (Doc 108 – Pg39). Further, the court found all of the alleged property damage "is post-completion and post-attempted repair, and coverage would fall within the 'products completed operations hazard.'" (Doc 108 – Pg 39). The court reasoned, "the completed operation is the construction of the Fitness Center" (Doc 108 – Pg 40). The court looked to this Court's opinion in *Amerisure Mut. Ins. Co. v. Auchter Co.*, 673 F.3d 1294 (11th Cir. 2012), in concluding the products completed operations hazard definition precludes any duty to indemnify (Doc 108 – Pg 40). Finally, the court held the damage to work performed by subcontractors exclusion precluded any duty to indemnify to the extent any damages with the definition of "property damage" were alleged (Doc 108 – Pg 41-42).

On December 11, 2012, the district court entered final judgment in MCC's favor (Doc 115). JBD timely appealed on January 8, 2013 (Doc 118).

D. Standard Of Review

MCC agrees that a *de novo* standard of review governs. *Admiral Ins. Co. v. Feit Mgmt. Co.*, 321 F.3d 1326, 1328 (11th Cir. 2003). MCC further agrees that Florida law governs this diversity action involving real property. *LaFarge Corp. v. Travelers Indem. Co.*, 118 F.3d 1511, 1515 (11th Cir. 1997) (when considering CGL insurance coverage involving real property, a Florida court will apply law of state where property is located).

SUMMARY OF ARGUMENT

Sun City's counterclaim is premised in alleged defective and deficient construction of the fitness center, specifically issues with respect to installation of doors, windows, and the roof. All of the allegedly defective work was completed by subcontractors JBD hired. All of the purported damages are to the building itself, the precise project for which JBD was hired. Under this Court's and Florida Supreme Court precedent, there is no coverage by virtue of the policy's broad damage to work performed by subcontractor exclusion and the policy's definition of "property damage." The trial court correctly found no duty to indemnify exists.

JBD's reliance on self-serving affidavits containing previously undisclosed information along with taking poetic license with the record evidence in an effort to create coverage, is unavailing. The facts establish JBD was hired to build the entire fitness center and that problems ensued resulting in damages to the building itself. JBD waited more than six months to tender the defense to MCC. Ultimately, MCC paid JBD, minus the policy deductible. JBD accepted that payment without ever raising any issue regarding the amount of defense fees and costs. It was not until its summary judgment filings that JBD first claimed the amount tendered was approximately $100 less than the defense fees and costs incurred from the date of tender through settlement.

JBD's argument that MCC cannot apply the deductible is in direct contravention of Florida law. If MCC entirely denied any duty to defend, this coverage dispute would still be governed by the terms and conditions of the policy. That law does not change where the insurer actually tenders payment for the defense after settlement of the underlying suit and before any coverage action.

Florida law prohibits consideration of a bad faith claim absent a finding of coverage. JBD ignores this basic concept in essentially attempting to seek bad faith damages cloaked as "consequential damages." JBD's position is not well taken as decades of Florida jurisprudence prohibits such a result.

Based upon the forgoing, JBD is not entitled to any recovery.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND MCC HAD NO DUTY TO INDEMNIFY JBD FOR THE SUN CITY COUNTERCLAIM

Before the district court, MCC did not challenge whether the Sun City counterclaim alleges an "occurrence" and did not raise the duty to defend in its summary judgment papers. MCC likewise does not challenge those here. MCC maintains on appeal that the district court's ruling was correct because the policy's broad damage to work performed by subcontractors on your behalf exclusion and the policy definition of "property damage" preclude any duty to indemnify.

A. The Sun City Counterclaim Falls Within the Policy's Damage to Work Performed by a Subcontractor Exclusion Precluding Any Duty to Indemnify

While JBD's brief is replete with rhetoric on the issue of what damages Sun City suffered, it 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. JBD attempts to parse out the component parts of the fitness center that Sun City purchased prior to construction, but disregards that those were actually parts of the precise building JBD was constructing. As the district court aptly noted: "The scope of J.B.D.'s work is the 'construction of the health center building with related and appurtenant improvements to an existing structure" (Doc 108 – Pg 33). Accordingly, irrespective of whether this Court finds "property damage" existed

under the actual facts, the policy's Damage to Work Performed by Subcontractors Exclusion (the "subcontractor exclusion") precludes any coverage.

The policy's subcontractor endorsement clearly and plainly identifies that there is no coverage for "'property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'" (Doc 34-3 – Pg 34; Doc 34-4 – Pg 42). The policy further defines "your work" to include "work or operations performed by you [JBD] or on your behalf [JBD's subcontractors]; and … [m]aterials, parts or equipment furnished in connection with such work or operations" (Doc 34-3 – Pg 26; 34-4 – Pg 35). Finally, the policy defines "products-completed operations hazard" to encompass "'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work'" with several exceptions that are not pertinent here (Doc 34-3 – Pg 25; Doc 34-4 – Pg 34). When these policy provisions are considered as a whole, there is only one conclusion – there is no coverage for the Sun City counterclaim.

The Florida Supreme Court's *J.S.U.B.* opinion is instructive. 979 So. 2d 871. In that case, unlike here, the policy contained a subcontractor exception to the damage to your work exclusion. Thus the exclusion did not apply. *Id.* at 891. The court noted: "Moreover, if the insurer decides that this is a risk it does not want to insure, it can clearly amend the policy to exclude coverage, as can be done simply

by either eliminating the subcontractor exception or adding a breach of contract exclusion." *Id.* The MCC policy does just that as it contains no subcontractor exception and goes a step further by expressly excluding damage to work performed by subcontractors on JBD's behalf. That is precisely what the actual facts showed – Sun City sought to recover for damage to the fitness center itself due to defective installation of the roof, windows and doors. The undisputed evidence is that JBD hired two subcontractors to complete that work. The plain language of the endorsement treats work performed by JBD and worked performed by its subcontractors on its behalf as one and the same. The Sun City counterclaim falls squarely within this exclusion. *Auchter*, 673 F.3d at 1310 (faulty workmanship to one part of home that causes damage to other parts of home are not covered where policy contains a "your work" exclusion, unless the subcontractor exception applies); *Assurance Co. of Amer. v. Lucas Waterproofing Co., Inc.* 581 F. Supp. 2d 1201, 1209-10 (S.D. Fla. 2008) (noting that in the *J.S.U.B.* case, the insured contractor would not have been covered, but for the subcontractor exception to the "your work" exclusion, because the damage to the entire home caused by the subcontractor's defective soil compaction would have been encompassed within the general contractor's work (the home itself)); *cf., Miranda Constr. v. Mid-Continent Cas. Co.*, 763 F. Supp. 2d 1336, 1340 (S.D. Fla. 2010) ("your work" exclusion precluded coverage where "the claim for damages

are related solely to the home itself and [the insured's] defective construction of the same"). This conclusion is also consistent with the broad "arising out of language" contained in the subcontractor exclusion. *Taurus Holdings, Inc. v. U.S.F. & G Co.*, 913 So. 2d 528, 539-40 (Fla. 2005) (finding term "arising out of" is broader in meaning than the term "caused by" and means, originating in, having origin in, growing out of, incidental to or in connection with; term implies some causal connection or relationship, but does not mean proximate cause).

While MCC did not find any Florida cases considering this relatively new exclusion, courts outside of Florida have enforced it as written. *See, e.g., VRV Dev. L.P. v. Mid-Continent Cas. Co.*, 630 F.3d 451, 455 n.5 (5th Cir. 2011) (affirming summary judgment based on subcontractor exclusion where damages allegedly resulted from defectively built retaining walls erected by subcontractors); *Builders Mut. Ins. Co. v. Wingard Properties, Inc.*, 2010 WL 3069544, *10, 12, 14 (D. S.C. July 1, 2010) (holding endorsement eliminated coverage for "'[p]roperty damage to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard'" and complaint only alleged damage to contractor's work or work done on contractor's behalf); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 12 (Tex. 2007) (recognizing this endorsement eliminates the subcontractor exception to the your work exclusion); *Haskins Const., Inc. v. Mid-Continent Cas. Co.*, CV-10-163-BLG-RFC, 2011 WL 5325734 (D. Mont.

2011) (applying subcontractor exclusion to preclude coverage "consistent with the principle that CGL policies are not intended to cover the faulty work of an insured"); *Grinnell Mut. Reinsurance Co. v. Wollak Const., Inc.*, CIV 10-350 RHK/LIB, 2010 WL 4121906 (D. Minn. 2010) (where all damages claimed "arose out of" faulty work in performing construction contract, such damage "is not the type of risk CGL coverage has traditionally protected against" and finding exclusion precluded coverage).

As a result of the broad language of this exclusion, the district court correctly found that there was no duty to defend JBD for the Sun City counterclaim which was couched entirely in damages arising out of work by JBD and subcontractors it hired in construction of the fitness center. The subcontractor exclusion precludes coverage for the Sun City counterclaim. MCC has no duty to indemnify JBD.

B. There Is No Coverage for the Underlying Suit Because Sun City's Alleged Damages Do Not Constitute "Property Damage"

The policy affords coverage for "property damage" defined as "physical injury to tangible property, including all resulting loss of use" of the property (Doc 34-3 – Pg 25; Doc 34-4 – Pg 34). JBD takes the position that unidentified damages to unidentified component parts of the fitness center, which Sun City purchased prior to the construction, constitutes "property damage" (Br at 16, 26-27, 37). It also speculates regarding "potential and/or actual" damages to fitness equipment

without record support (Br at 20, 27, 37). JBD is wrong under this Court's recent precedent. *Auchter*, 673 F.3d 1294.

In *Auchter*, this Court provided a detailed analysis of recent Florida Supreme Court precedent as set forth in *J.S.U.B.*, 979 So. 2d 871, and *Pozzi*, 984 So. 2d 1241. 673 F.3d at 1300-06. *Auchter* involved a contract to construct an inn and conference center with Auchter to serve as the general contractor. 673 SF.3d at 1295. Auchter entered into a subcontract with Register to install the inn's roof. *Id.* Notably, the owner purchased the roofing tiles prior to installation of the tiles. *Id.* at 1296. After the roof was completed, several of the tiles became dislodged. *Id.* at 1296. Ultimately several hurricane went through the area resulting in additional damages including loose roof tiles hitting and cracking other tiles. *Id.* The owner sued Auchter "for defectively installing the roof." *Id.* The owner claimed damage to the roof itself and loss profits due to inability to use the inn during repairs. *Id.* at 1297.

This Court ruled that the damages fell outside the policy definition of "property damage." *Id.* at 1300, 1307. In reaching this conclusion, this Court explained: "'If there is no damage beyond the faulty workmanship or defective work, then there may be no resulting 'property damage.'" *Id.* at 1304 (quoting *J.S.U.B.*, 979 at 889). Thus, "[c]laims solely for 'the costs of repairing and replacing the actual defects' in … construction' are not covered under CGL

policies." *Auchter*, 763 F.3d at 1304 (quoting *J.S.U.B.*, 979 So. 2dt at 889-90). Simply put, there must be physical injury to some other tangible property besides the contractor's work to constitute property damage. *Auchter*, 763 F.3d at 1305-07.

The Court further offered the following succinct analysis:

> Amelia [owner] paid Auchter to construct a building with a roof; due to Auchter's subcontractor's faulty workmanship in installing the roof's tiles, Amelia did not receive the roof for which it paid. Based on the premise, as Amerisure argued at the summary judgment hearing, "The reason [Auchter] had to replace [the roof] is because [Amelia] didn't get what [it] paid for." This is not a claim for "property damage."

Id. at 1307 n.19. This Court went on to note, that the roofing tiles, which the owner purchased prior to the construction, "are not the relevant component in this case. They are simply some of the raw materials from which this particular roof was made. Rather, the relevant component in this case is the Inn's entire roof itself." *Id.* at 1308. The owner was seeking simply to obtain a nondefective roof, and thus there was no property damage. *Id.*

Here, as in *Auchter*, Sun City was seeking to have the fitness center, as a whole, brought into conformity with the construction contracts.[3] Thus, as in

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[3] Sun City also sought diminution in property value in count II of its counterclaim. However, diminution in property value is not "property damage" as defined in the policy. *Key Custom Homes, Inc. v. Mid-Continent Cas. Co.*, 450 F. Supp. 2d 1311, 1317-18 (M.D. Fla. 2006) (finding property damage did not apply to alleged economic losses); *Lazzaro Oil Co. v. Columbia Cas. Co.*, 683 F. Supp. 777, 780 (M.D. Fla. 1988); *Old Republic*

Auchter, the individual components of the fitness center, like the individual roof tiles, are nothing more than the raw materials used in the fitness center. However, JBD's work was construction of the completed fitness center. Because all Sun City sought was to remedy the damages to the fitness center itself, there is simply no "property damage" under this Court's precedent. As in *Auchter*, Sun City sought "to secure the [fitness center] that [JBD] should have installed in the first instance" and its counterclaim is nothing more than a "'claim for the cost of repairing the subcontractor's defective work.'" 673 F.3d at 1307 (quoting *J.S.U.B.*, 979 So. 2d at 890).

Rather that look to this Court's recent precedent, JBD cites to two cases applying Florida law which predate both *J.S.U.B.* and *Pozzi* (Br at 28, 37) (citing *Trizec Prop. Inc. v. Biltmore Constr. Co., Inc.*, 767 F.2d 810 (11th Cir. 1985), and *Auto-Owners v. Tripp Constr., Inc.*, 737 So. 2d 600 (Fla. 3d DCA 1999)). *Tripp* still recognizes the basic concept that governs here, i.e., a CGL policy does not afford coverage for repair of defective workmanship. 737 So. 2d at 601. To the extent *Tripp* stands for the proposition that damage to other parts of the building that JBD contracted to build fall within the policy, it conflicts with *J.S.U.B.*, *Pozzi*, and *Auchter* (as outlined in detail above), and is properly rejected.

Ins. Co. v. West Flagler Assoc., Ltd., 419 So. 2d 1174, 1177-78 (Fla. 3d DCA 1982).

This Court's opinion in *Trizec*, 767 F2d 810, simply does not apply under the facts here. In *Trizec*, Decks was a subcontractor hired to install a roof deck on a shopping mall. *Id.* at 811. After installation, the owner alleged defects in the deck due to improper work resulting in damage to roof membrane, roof control joints, expansion joints, rusting fixtures, and leaks in the walls and flashings. *Id.* at 812. Because these damages all fell outside the subcontractor's scope of work, "property damage" under Deck's policy was implicated and there was a duty to defend. *Id.* at 811, 813. *Trizec* case neither resolves the duty to indemnify nor addresses any liability of the general contractor for construction of the mall. It is inapposite.

Other cases JBD relies upon are equally inapplicable under the facts here (Br at 28-29, 37); *Amerisure Mut. Ins. Co. v. Summit Contractors, Inc.*, No. 8:11-CV-77-T-17TGW, 2012 WL 716884 (M.D. Fla. Feb. 29, 2012) (on duty to defend, holding umbrella policy not implicated where underlying policies not exhausted where suit alleged damage to contents of condominium units, i.e., personal property of individual unit owners); *Federated Nat'l Ins. Co. v. Maryland Cas. Co.*, No. 8:12-cv-1286-T-30EAJ, 2012 WL 5955008 (M.D. Fla. Nov. 28, 2012) (in subrogation and indemnity action between two insurers there was issue of whether subcontractor's insurance applied where complaint alleged damages outside the scope of that subcontractor's work); *Mid-Continent Cas. Co. v. Clean Seas Co.*,

Inc., No. 3:06-cv-518-J-32MCR, 2009 WL 812072 (M.D. Fla. Mar. 27, 2009) (manufacturer of allegedly defective paint sued by distributors and sellers where boats allegedly damaged by product).[4]

JBD further cites to the Florida Supreme Court's *Pozzi* opinion which was discussed extensively by this Court in *Auchter*. In *Pozzi*, the insurer paid the homeowner for damage to their personal property inside the home after windows installed by the insured leaked. 984 So. 2d at 1244. The court considered whether "property damage" was alleged and in doing so identified a "critical distinction" between the cost to repair or replace defective work from the cost to repair damage caused by a defective product (the windows). *Id.* at 1243. The court then looked to *J.S.U.B.* and explained: "In *J.S.U.B.*, we recognized that there is a difference between a claim for the costs of repairing or removing defective work, which is not a claim for 'property damage,' and a claim for the costs of repairing damage caused by the defective work, which is a claim for 'property damage.'" *Id.* at 1248

[4] JBD's citation to cases outside of Florida regarding speculative remediation damages is equally unavailing (Br at 37 n. 8) (citing *Leebov v. United States Fid. & Guar. Co.*, 165 A.2d 82, 83 (Pa. 1960) (damages related to suit by a property owner of an adjacent property damages when digging on construction site began); *Glen Falls Ins. Co. v. Donmac Golf Shaping Co., Inc.*, 417 S.E.2d 197, 198 (Ga. Ct. App. 1992) (damages for golf course built on federally protected wetlands without permit and court noted that "developer seeks recovery for damages over and above the scope of the benefits it contracted for").

(quoting *J.S.U.B.*, 979 So. 2d at 889). Where the claim is for faulty workmanship or materials only, there is no "property damage" under the policy. *Id*. Ultimately, the *Pozzi* court reasoned that "the mere inclusion of a defective component, such as a defective window or the defective installation of a window, does not constitute property damage *unless that defective component results in physical injury to some other tangible property.*" *Id*. at 1248 (emphasis added); *see also West Orange Lumber Co., Inc. v. Indiana Lumbermens Mut. Ins. Co.*, 898 So. 2d 1147, 1148 (Fla. 5th DCA 2005) (holding the cost of removing and replacing the wrong grade of cedar installed by a subcontractor was not property damage).

Thus, *Pozzi* provides clear guidance that defective work, by itself, does not constitute property damage unless that defective component results in physical injury to other property, i.e., personal property. JBD argues here that Sun City's purchase of the some of the damaged component parts used in the project makes those component parts "personal property" and within the policy's "property damage" provision. However, as identified above, this Court's opinion in *Auchter* establishes that JBD is wrong.

Rather than fully address *Auchter*, JBD relegates the opinion to a footnote and then simply points again to its nebulous "physical damage to other property" refrain scattered throughout its brief and the likewise unsupported statement that the issue of causation of the alleged damages is unresolved (Br at 39-40 n. 9). The

causation argument ignores the undisputed premise of the entire Sun City litigation – that JBD entered into a contract to build the entire fitness center, not a component, and that included the roof, windows, and doors. There is simply nothing in the record to support JBD's eleventh hour "causation" argument.

The record is clear that Sun City sought to obtain a completed fitness center clear of defective construction. Under *Auchter*, that does not constitute property damage. The suit falls outside the insuring agreement. There is no duty to indemnify.

II. BECAUSE THERE WAS NO BREACH BY MCC, THE DEDUCTIBLE APPLIES AND JBD CANNOT RECOVER CONSEQUENTIAL DAMAGES

A. JBD Was Paid Its Defense Costs and Fees and Has No Claim for a Breach of the Duty to Defend

JBD argues that MCC breached its duty to defend and then concludes that it is entitled to the consequential damages in the form of lost profits due to alleged impaired bonding capacity, as well as other alleged damages (Br at 29-33). JBD's argument is wrong on both counts.

At the outset, MCC points out that there can be no recovery for consequential damages resulting from the failure to defend an uncovered claim. *Tire Kingdom Inc. v. First Southern Ins. Co.*, 573 So. 2d 885, 887 (Fla. 3d DCA 1990) (where insurer improperly failed to defend, remanded to determine defense fees and costs incurred "as a result of [the] refusal to defend"); *Keller Indus., Inc.*

v. Employers Mut. Liab. Ins. Co. of Wisconsin, 429 So.2d 779, 780 (Fla. 3d DCA 1983) (holding, "an unjustified failure to defend does not require the insurer to pay a settlement where no coverage exists"). Thus, affirmance of the district court's findings on the other coverage issues negates any need to consider JBD's requested consequential damages. Additionally, MCC submits that its payment and JBD's cashing of the defense fees and costs check without ever asserting the amount was less than the recoverable fees and costs constitutes an accord and satisfaction, precluding any claim for breach.

In Florida, "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." *Hannah v. James A. Ryder Corp.*, 380 So. 2d 507, 509-10 (Fla. 3d DCA 1980) (citations omitted). Moreover, "[i]t is also the common law rule that when one cashes a check received under such circumstances, he may not avoid the effect of that action." *Id.*

The facts here are a clear example of the doctrine of accord and satisfaction as borne out by JBD's own evidence. On October 14, 2010, MCC tendered payment for defense fees and costs minus the deductible complete with a summary of what the payment included (Doc 67-2 – Pg 1, 3). On December 8, 2010, JBD cashed the check and the funds cleared (Doc 67-1 – Pg 2, 4). Before cashing the

check, the only reservation JBD made was with respect to its right to seek recovery of the total underlying settlement amount. 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. JBD now relies on its April 2012 affirmation regarding a purported dispute as a basis to preclude application of this doctrine. In support, JBD cites *St. Mary's Hosp., Inc. v. Schocoff*, 725 So. 2d 454 (Fla. 4th DCA 1999), and *Pino v. Union Bankers Ins. Co.*, 627 So. 2d 535 (Fla. 3d DCA 1993) in a footnote (Br at 34 n. 7). In *St. Mary's*, the court pointed out the general rule regarding accord and satisfaction and found it did not apply to those facts because there was nothing before the court evidencing that acceptance of the check was an agreement with the insurer's position. 725 So. 2d at 456. In *Pino*, the court found a unilateral rescission of a policy could not constitute an accord and satisfaction. 627 So. 2d at 537.

In contrast, here, the evidence is that MCC expressly identified the amount it tendered was to cover defense fees and costs incurred in the Sun City litigation. Upon receipt of the check, JBD did not dispute the defense fees and costs but instead requested to reserve its right to seek recovery of the underlying judgment. At no time prior to April 2012, did JBD assert that the amount of defense fees and costs was anything other that what was tendered in October 2010 (minus the deductible). Again, JBD's authority does not support its tenuous position.

In a related argument, JBD asserts that MCC was precluded from applying the policy deductible where MCC did not immediately step in and defend JBD upon tender in May 2009 (Br at 34-35). Again, JBD relies on general law regarding breach but does not identify anything establishing a breach by MCC under the facts here (Br at 34-35 and cases cited). Instead, JBD asks this Court to takes its assumption as an established fact.

This Court should not lose sight of the pertinent facts. JBD waited over six months to tender the claim. MCC promptly issued a reservation of rights and commenced investigation which investigation was continuing in August 2010 as MCC still did not have documentation to support the alleged damages, including things such as remediation costs. MCC ultimately paid the defense fees and costs incurred from the tender up through the settlement, minus the policy deductible. At no time from its cashing that check through institution of this suit, did JBD challenge the amount of the defense fees and costs (Doc 62-18 – Pg 87-88). Finally, and most importantly, it was not until April 2012, a year and a half after receiving the check and over a year after filing suit, that JBD for the first time asserted that the defense fees and costs payment was insufficient by approximately $100 (Doc 62-17 – Pg 10, ¶31). JBD's argument simply disregards these crucial facts.

JBD also ignores the basic tenet that settlement of the underlying action alone does not establish coverage, even where the insurer wholly denies the claim. *Steil v. Florida Physicians' Ins. Reciprocal*, 448 So. 2d 589, 592 (Fla. 2d DCA

1984) (noting general rule that nothing may be recovered against insurer unless settlement amount is reasonable and settlement itself is not tainted by bad faith, fraud or collusion). While coverage is decided by the terms and conditions of the policy, JBD asks this Court to accept its positions on faith, throw out the policy provisions with which it disagrees, and enforce others selectively.

Its argument has no support in Florida law as shown by one of its own cases. *Rolyn Cos., Inc. v. R&J Sales of Texas, Inc.*, 671 F. Supp. 2d 1314, 1328 (S.D. Fla. 2009) (where there is no wrongful refusal to defend, the insured's voluntary payment cannot be recovered against insurer). In *Rolyn*, the court reasoned that there was no wrongful denial of the defense even though the insurer"took over a year to investigate the damages." *Id.*at 1329. Likewise here, simply because MCC was continuing to investigate, particularly where it still did not have information supporting the alleged damages covered by the settlement agreement, there simply was no breach.

Florida bad faith law was created specifically to address the situation where an insurer improperly denies coverage. *See, e.g., Wachovia Ins. Services, Inc. v. Toomey*, 994 So.2d 980, 989 (Fla. 2008) (explaining the nature of purpose of bad faith litigation). Rather than follow that established route, JBD attempts to circumvent decades of Florida jurisprudence by essentially asserting a bad faith claim here, where the only court ruling is that there is neither a duty to defend nor a duty to indemnify JBD. It's position should be squarely rejected.

JBD's acceptance and cashing of the check in late 2010, without ever questioning the fees and costs amount constitutes an accord and satisfaction on the duty to defend as a matter of law. Thus, MCC did not breach its duty to defend and the inquiry stops there. The deductible was properly applied and JBD is not entitled to consequential damages, or any other damages.

B. JBD Is Not Entitled to Recover Consequential Damages

Even if this Court were to find a breach of the duty to defend, that alone does not entitle JBD to the consequential damages it seeks. JBD has not identified any authority or factual basis to support its position in light of the facts here. MCC further notes that JBD is seeking to recover the full amount of the settlement, even though it admittedly recovered $100,000 from its two subcontractors (Doc 108 – Pg 24).

JBD relies on several cases for its broad argument that a breach by an insurer entitles the insure "to recover all damages naturally flowing from the breach." (Br at 29). JBD's cases are all distinguishable. *See Travelers Indem. Co. of Ill. v. Royal Oak Enter., Inc.*, 429 F. Supp. 2d 1265 (M.D. Fla. 2004) (considering motion to dismiss and citing general rule but not providing any discussion of what an insured can recover); *Carrousel Concessions, Inc. v. Fla. Ins. Guar. Ass'n*, 483 So. 2d 513 (Fla. 3d DCA 1986) (stating general rule in reversing summary judgment for FIGA but likewise containing no discussion of

what can be recovered); *Gallagher v. DuPont*, 918 So. 2d 342 (Fla. 1st DCA 2005) (insured brought garnishment and mandamus action after The Fund withdrew defense when insured died and was substituted by estate while not discussing any details of what damages can be recovered); *Thomas v. Western World Ins. Co.*, 343 So. 2d 1298 (Fla. 2d DCA 1977) (no mention of anything that could be recovered beyond the judgment itself).

JBD further asserts that it can recover these "consequential damages" because it has the right to take any steps necessary to protect itself from a claim (Br at 30). Of the two cases it cites, one found no duty to defend or indemnify, *Hagen v. Aetna Cas. & Sur. Co.*, 675 So. 2d 963 (Fla. 5th DCA 1996) (automobile exclusion in a CGL policy precluded coverage), while the other found a fact question existed as to when the insurer's duty to reimburse for defense fees commenced where the insured delayed six months in tendering the suit, *Nationwide Mut. Ins. Co. v. Beville*¸ 825 So. 2d 999 (Fla. 4th DCA 2002) (finding Nationwide could not rely on late notice defense for failure to comply with Florida's Claims Administration Statute issue with no discussion of consequential damages). As one federal court noted, the *Beville* holding "deviates from the trend in Florida law." *Travelers Indem. Co. of Ill. v. Royal Oak Enter., Inc.*, 344 F.Supp.2d 1358, 1370 (M.D. Fla. 2004). That court recognized, "where an insurer wrongfully refuses to provide any defense at all, the insurer is liable for the

reasonable attorney's fees and other expenses incurred in defending the action as damages for the breach." *Id.*at 1369-70. Thus, even if there was a breach of the duty to defend, which there was not, at most, JBD would be entitled to its defense fees and costs that it was paid in October 2010.[5]

JBD also cites to several cases for the general concept that attorneys fees and costs in defending the underlying suit can be recovered when an insurer breaches (Br at 31) (citing *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F. 2d 1520 (11th Cir. 1985) (involving first party property policy where fire claim made, insurer suspected arson and jury found insurer engaged in bad faith refusal to pay), and *Florida Ins. Guar. Ass'n, Inc. v. All the Way With Bill Vernay*, 864 So. 2d 1126 (Fla. 2d DCA 2003) (insurer liability for defense fees and costs in underlying suit as result of breach). While MCC does not disagree with the basic concepts set forth, none of those cases support JBD's request for the consequential damages it seeks.

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[5] JBD's statements regarding recovery of Sun City's defense fees and costs is wholly irrelevant (Br at 38). The settlement agreement provides that each party was to pay its own fees and costs (Doc 85-1 – Pg 72-82). Further, a Florida appellate court recently criticized the *Lucas Waterproofing*, 581 F. Supp. 2d 1201, case that JBD cites stating it "does not accurately reflect the state of Florida law." *GEICO Gen. Ins. Co. v. Williams*, No. 4D11–3144, 2013 WL 1442157, at *7 (Fla. 4th DCA Apr. 10, 2013) (Gross, J., concurring).

The only case JBD cites that appears to actually support its argument is factually inapposite. In *Travelers Ins. Co. v. D.J. Wells*, 633 So.2d 457 (Fla. 4th DCA 1993), a jury awarded consequential damages, including lost profits, against the insurer and insurance agent when a mill closed down after its worker's compensation policy was cancelled. It was the unique facts of that case that permitted the recovery of consequential damages. As the same appellate court explained in a more recent opinion: "[T]he insurance agent and the insurer were fully aware that the workers compensation insurance was required for the insured to legally maintain a business in Florida and that without it, the insured would likely have to shut down its operations." *Commercial Ins. Consultants, Inc. v. Frenz Enterprises, Inc.*, 696 So.2d 871, 873 (Fla. 5th DCA 1997). The court continued:

> In the instant case, insurance was not essentially required for Frenz to legally maintain a business, and whether the dredge was immediately replaceable, whether the dredge was needed immediately to finish a job begun by Frenz, whether the dredge could be salvaged in a timely manner for Frenz to complete the job, whether Frenz's contract to perform services had a pressing completion date and whether Frenz was financially solvent to complete the job after the loss of the dredge, are matters not normally known by an insurance agent. In the absence of some unique facts such as those present in Travelers, we find the claim asserted for lost profits in this case to be too speculative, and not "reasonably foreseeable at the time the insurance contract was entered into and breached."

Id. (citing *Travelers*, 633 So. 2d at 462). Here, JBD seeks to recover consequential damages due to its alleged impaired bonding and allegedly resulting loss of

business profits. As in *Frenz*, the JBD's alleged consequential damages are far too speculative and thus could not have been reasonably foreseeable at the time the CGL policy was issued.

Illustrative of this point is *Essex Builders Group, Inc. v. Amerisure Ins. Co.*, 485 F. Supp. 2d 1302 (M.D. Fla. 2007). Unlike JBD's cases, *Essex* involved facts nearly identical to those presented here. The insured sought to recover for alleged bond impairment which "'severely impaired and/or destroyed' its business." *Id.* at 1305. The insured claimed these damages resulted from its insurer's failure to pay a claim. *Id.* The court first recognized that Florida law permits recovery of consequential damages but that such recovery is strictly limited to those damages "within the contemplation of the parties at the time of contract formation." *Id.* at 1306. Additionally, "a litigant who fails to establish such a connection cannot recover consequential damages." *Id.*

The *Essex* court further explained:

> To recover damages for lost profits in a breach of contract action, a party must prove a breach of contract, that the party actually sustained a loss as a proximate result of that breach, that the loss was or should have been within the reasonable contemplation of the parties, and that the loss alleged was not remote, continent, or conjectural and the damages were reasonably certain.

485 F. Supp. 2d at 1306 (quoting *Frenz Enters., Inc. v. Port Everglades*, 746 So. 2d 498, 504 (Fla. 4th DCA 1999)). The court then considered the damages Essex claimed and opined:

> Essex's position really boils down to this: what was common knowledge to those associated with corporate surety bonding necessarily was universally understood among those writing CGL policies. This is too great a leap of faith to withstand intellectual scrutiny. Supposition is not the same as reasonable inference, and speculation cannot substitute for evidence.

Id. at 1307. The court found that Essex "has presented no evidence" that its insurer "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.*

With respect to the failure of proof, the court stated:

> Similarly, Essex has failed to present any evidence that it was universally understood in the CGL insurance industry that a refusal to pay an underlying claim such as this would necessarily result in a loss of a building contractor's bonding eligibility, and, proceeding yet another step, that a loss of bonding capacity would necessarily (or even likely) lead to severe damage to or destruction of an insured's construction business.

Id. The court concluded: "The consequential damages Essex seeks are wholly distinct from the sums the Defendants are contractually obligated to pay under the CGL policies (assuming coverage and liability on the part of the insured)." *Id.* at 1311.

Like Essex, JBD "has presented no actual evidence" of the purported knowledge by MCC (not a subsidiary, parent or related entity) or that the parties contemplated such damages when MCC issued the CGL policies at issue here (Br at 32-33). Instead, all JBD has offered are affidavits, which do nothing more that

summarily assert that JBD's bonding capacity was impaired resulting in a reduction in its "book net worth" (Br at 32-33). The only attempt JBD makes to show that any of these purported damages were known to MCC is by stating that MCC sells insurance products and performance bonds (Br at 33). JBD then makes its own leap of faith and asks this Court to jump along with it and assume that the two entities involve the same individuals, making decisions regarding both CGL policies and performance bonds. Like Essex, JBD has not provided an evidence to support its argument and its position should be squarely rejected.

CONCLUSION

Sun City hired JBD to construct the entire fitness center. Sun City's purchase of prefabricated parts that were used in the project does not alter this Court's analysis. JBD's work was the fitness center itself. Sun City's damages fall outside the policy's definition of "property damage." Even if this Court were to presume, contrary to the actual facts, that Sun City sought "property damages," the policy's broad subcontractor exclusion precludes coverage. There is no duty to indemnify.

Further, MCC paid JBD for its defense costs and fees incurred in defending the Sun City counterclaim from the date of tender to the conclusion, minus the deductible. JBD accepted and cashed that check. Over a month later JBD brought this coverage action. However, it was not until approximately two years after

accepting payment that JBD first alleged a deficiency in the amount paid. The facts of this case do not support a finding of any breach of the duty to defend. Rather, JBD's acceptance of the payment constitutes an accord and satisfaction. Because there was no breach, JBD cannot recover its alleged consequential damages. Even if there was a breach, JBD's argument regarding recovery of consequential damages turns Florida law on its head. JBD has not made any showing that would permit it to recover lost profits from impaired bonding capacity under the facts here. Affirmance is proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 9,006 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii) according to the word count function of Word 2006. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this document was electronically filed on May 8, 2013 via the Court's CM/ECF system and which will send a notice of electronic filing to the following: George A. Vaka, Esq. and Gregory L. Evans, Esq., Vaka Law Group, P.L., 777 South Harbour Island Boulevard, Suite 300, Tampa, Florida 33602, *counsel for appellants*; and John H. Rains, III, Esq., John H. Rains III, P.A., 501 E. Kennedy Boulevard, Suite 750, Tampa, Florida 33602, *co-counsel for appellants*.

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