

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT  
IN AND FOR FLAGLER COUNTY, FLORIDA

CITY OF PALM COAST, a Florida  
governmental entity,

Plaintiff,

CASE NO.: 2022 CA 000773

v.

BBI CONSTRUCTION MANAGEMENT, INC,  
a Florida profit corporation; NO FAULT LLC, a  
foreign limited liability company, S&ME, INC.,  
a foreign profit corporation, and WESTFIELD  
INSURANCE COMPANY, NY, a foreign profit  
company,

Defendants.

**DEFENDANT, S&ME, INC.'S ANSWER AND AFFIRMATIVE DEFENSES TO  
PLAINTIFF'S COMPLAINT**

**COMES NOW**, Defendant, S&ME, INC. ("S&ME"), by and through its undersigned  
counsel, and files this Answer and Affirmative Defenses to Plaintiff, City of Palm Coast's  
Complaint, and states:

**PARTIES, JURISDICTION, AND VENUE**

1. Admitted for jurisdictional purposes only; otherwise, denied.
2. Admitted.
3. Without knowledge; therefore, denied.
4. Without knowledge; therefore, denied.
5. Admitted.
6. Without knowledge; therefore, denied.
7. Admitted for jurisdictional purposes only.



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## FACTUAL BACKGROUND

8. Without knowledge; therefore, denied.

9. Admitted.

10. Admitted.

11. Admitted that S&ME and Plaintiff entered into an agreement for the Project, the terms and conditions of which speak for themselves. Otherwise, denied.

12. Without knowledge regarding the purpose(s) for which Plaintiff entered into any agreement with any other party. The terms and conditions of the agreements attached to Plaintiff's Complaint speak for themselves. Otherwise, denied.

13. Without knowledge regarding the purpose(s) for which Plaintiff entered into any agreement with any other party. The terms and conditions of the agreements attached to Plaintiff's Complaint speak for themselves. Otherwise, denied.

14. Without knowledge; therefore, denied.

15. Without knowledge regarding the purpose(s) for which BBI entered into any agreement with any other party. The terms and conditions of the agreements attached to Plaintiff's Complaint speak for themselves. Otherwise, denied.

16. Denied that the poured-in-place ("PIP") deck surfacing installed at the Splash Pad is "S&ME's design." S&ME's design deliverables for the Project speak for themselves. Otherwise, denied.

17. Admitted as to the design intent. Otherwise, without knowledge; therefore denied.

18. Admitted as to the design intent. Otherwise, without knowledge; therefore denied.

19. Admitted as to the design intent. Otherwise, without knowledge; therefore denied.

20. Without knowledge; therefore, denied.

21. Admitted that Plaintiff notified S&ME of alleged issues at the Splash Pad. Otherwise, denied.

22. Without knowledge; therefore, denied.

23. Without knowledge; therefore, denied.

24. Denied.

25. Denied.

26. Without knowledge; therefore, denied.

27. Plaintiff's Notice of Claim directed to S&ME and attached to Plaintiff's Complaint within Composite Exhibit "E" speaks for itself. Otherwise, without knowledge; therefore, denied.

28. Denied.

29. Without knowledge; therefore, denied.

30. Denied as set forth in S&ME's Affirmative Defenses.

**COUNT I – BREACH OF CONTRACT (BBI) THROUGH COUNT VIII – BREACH OF FLORIDA BUILDING CODE (NO FAULT)**

31-78. The allegations contained within Counts I through VIII of Plaintiff's Complaint are not directed to S&ME and, therefore, do not require a response from S&ME. However, to the extent such allegations are deemed to purport to impose liability upon S&ME or to otherwise require any response from it, then S&ME denies each such allegation in full and demands strict proof thereof.

**COUNT IX – BREACH OF CONTRACT AGAINST S&ME**

79. S&ME incorporates and realleges its responses to Paragraphs 1-30 of Plaintiff's Complaint, above, as if fully set forth herein.

80. Admitted that S&ME and Plaintiff entered into an agreement for the Project, the terms and conditions of which speak for themselves. Otherwise, denied.

81. Admitted that S&ME and Plaintiff entered into an agreement for the Project, the terms and conditions of which speak for themselves. Otherwise, denied.

82. Denied.

83. Denied.

84. Denied.

**WHEREFORE**, Defendant, S&ME, INC. respectfully requests that this Court enter an Order dismissing all claims alleged against it with prejudice, awarding it reasonable attorney's fees pursuant to the contract between the parties, costs and disbursements incurred in this action, and such further relief as the Court deems just and proper.

**COUNT X – BREACH OF EXPRESS WARRANTY AGAINST S&ME**

85. S&ME incorporates and realleges its responses to Paragraphs 1-30 of Plaintiff's Complaint, above, as if fully set forth herein.

86. Admitted that S&ME and Plaintiff entered into an agreement for the Project, the terms and conditions of which speak for themselves. Otherwise, denied.

87. Admitted that S&ME and Plaintiff entered into an agreement for the Project, the terms and conditions of which speak for themselves. Otherwise, denied.

88. Admitted that S&ME and Plaintiff entered into an agreement for the Project, the terms and conditions of which speak for themselves. Otherwise, denied.

89. Denied.

90. Denied.

91. Denied.

**WHEREFORE**, Defendant, S&ME, INC. respectfully requests that this Court enter an Order dismissing all claims alleged against it with prejudice, awarding it reasonable attorney's fees pursuant to the contract between the parties, costs and disbursements incurred in this action, and such further relief as the Court deems just and proper.

**COUNT XI – CONTRACTUAL INDEMNITY AGAINST S&ME**

92. S&ME incorporates and realleges its responses to Paragraphs 1-30 of Plaintiff's Complaint, above, as if fully set forth herein.

93. Admitted that S&ME and Plaintiff entered into an agreement for the Project, the terms and conditions of which speak for themselves. Otherwise, denied.

94. Admitted that S&ME and Plaintiff entered into an agreement for the Project, the terms and conditions of which speak for themselves. Otherwise, denied.

95. Denied.

**WHEREFORE**, Defendant, S&ME, INC. respectfully requests that this Court enter an Order dismissing all claims alleged against it with prejudice, awarding it reasonable attorney's fees pursuant to the contract between the parties, costs and disbursements incurred in this action, and such further relief as the Court deems just and proper.

**COUNT XII – PROFESSIONAL NEGLIGENCE AGAINST S&ME**

96. S&ME incorporates and realleges its responses to Paragraphs 1-30 of Plaintiff's Complaint, above, as if fully set forth herein.

97. Admitted that S&ME and Plaintiff entered into an agreement for the Project, the terms and conditions of which speak for themselves. Otherwise, denied.

98. Admitted that S&ME and Plaintiff entered into an agreement for the Project, the terms and conditions of which speak for themselves. Otherwise, denied.

99. Admitted that S&ME and Plaintiff entered into an agreement for the Project, the terms and conditions of which speak for themselves. Otherwise, denied.

100. Admitted that S&ME and Plaintiff entered into an agreement for the Project, the terms and conditions of which speak for themselves. Otherwise, denied.

101. Denied to the extent relating to any service rendered or obligation by or on behalf of S&ME for the Project. Otherwise, without knowledge; therefore, denied.

102. Denied.

103. Denied.

104. Denied.

105. Denied.

106. Denied.

**WHEREFORE**, Defendant, S&ME, INC. respectfully requests that this Court enter an Order dismissing all claims alleged against it with prejudice, awarding its costs and disbursements incurred in this action, and such further relief as the Court deems just and proper.

**COUNT XIII – BREACH OF FLORIDA BUILDING CODE AGAINST S&ME**

107. S&ME incorporates and realleges its responses to Paragraphs 1-30 of Plaintiff's Complaint, above, as if fully set forth herein.

108. Denied.

109. Denied.

110. Denied.

111. Denied.

112. Denied.

113. Denied.

**WHEREFORE**, Defendant, S&ME, INC. respectfully requests that this Court enter an Order dismissing all claims alleged against it with prejudice, awarding its costs and disbursements incurred in this action, and such further relief as the Court deems just and proper.

#### **COUNT XIV – BREACH OF BOND AGAINST WESTFIELD**

114. The allegations contained within Count XIV Plaintiff's Complaint are not directed to S&ME and, therefore, do not require a response from S&ME. However, to the extent such allegations are deemed to purport to impose liability upon S&ME or to otherwise require any response from it, then S&ME denies each such allegation in full and demands strict proof thereof.

#### **AFFIRMATIVE DEFENSES**

##### **FIRST AFFIRMATIVE DEFENSE**

The damages alleged by Plaintiff were the unforeseeable result of intervening and superseding causes over which S&ME had no domain or control, including, but not limited to operation of the Splash Pad water system before the PIP cured, improper construction means and methods, and improperly treating the water for the system with higher concentrations of chemicals than called for in product literature.

## **SECOND AFFIRMATIVE DEFENSE**

To the extent that Plaintiff's own acts and/or omissions caused or contributed to the damages complained of, any cause of action against S&ME should be barred, or alternatively, any damages or recovery should be reduced in proportion to the acts, omissions and/or proportionate share of the responsibility of the Plaintiff for causing and/or contributing to the alleged damages.

## **THIRD AFFIRMATIVE DEFENSE**

To the extent that non-parties to this action were at fault in causing or contributing to the damages described in the Complaint, S&ME is entitled to an apportionment of fault and limitation of damages pursuant to §768.81, *Fla. Stat.*, including but not limited to Plaintiff, BBI, BBI's subcontractors and suppliers, No Fault, No Fault's subcontractors and suppliers, Playsafe Surfacing, LLC, and the building department having jurisdiction over the Project. S&ME incorporates herein all *Fabre* defendants named by the other parties in this action, and further reserves the right to supplement this affirmative defense as discovery progresses.

## **FOURTH AFFIRMATIVE DEFENSE**

Plaintiff's recovery should be reduced, in whole or in part, to the extent of any collateral sources of recovery available to Plaintiff, including any amounts received from others arising out of or related to the same claims being alleged against S&ME in this action. S&ME further states that it is entitled to a setoff for any payments Plaintiff has received or may receive for the damages alleged in the Complaint from any collateral sources that do not have a right of subrogation.



#### **FIFTH AFFIRMATIVE DEFENSE**

Plaintiff's alleged damages include "first costs" and costs associated with betterment, and S&ME cannot be held liable for such first costs and betterment costs.

#### **SIXTH AFFIRMATIVE DEFENSE**

Plaintiff is barred from recovering against S&ME to the extent that it has failed to mitigate its losses or damages.

#### **SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred in whole or in part by the doctrine set forth in *Slavin v. Kay*, 108 So. 2d 462 (Fla. 1959), and its progeny, due to, among other things, Plaintiff's inspection, approval, acceptance, and payment pertaining to S&ME's services.

#### **EIGHTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred to the extent that its alleged damages are speculative, excessive, remote, contingent, prospective, uncertain, improbable, not reasonably ascertainable, were unforeseeable, were not within the contemplation of the parties or their respective contracts at the time they were entered or otherwise, and not logically, naturally, probably, or proximately flowing from any alleged breach thereof, e.g., Plaintiff's alleged loss of use, and lost profits.

#### **NINTH AFFIRMATIVE DEFENSE**

Plaintiff is barred from recovering any damages which constitute economic waste, e.g., to the extent Plaintiff may implement a more expensive and functionally different system than that originally designed and constructed for the Project. See, *Grossman Holdings, Ltd. v. Hourihan*, 414 So. 2d 1037 (Fla. 1982).

#### **TENTH AFFIRMATIVE DEFENSE**

Plaintiff's claim for negligence against S&ME fails to state a cause of action because it has failed to allege the existence of a duty that is independent and separate from any duty created under any contract between the parties.

#### **ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's claim for breach of warranty against S&ME fails to state a cause of action because Florida law does not recognize a cause of action for breach of warranty against an engineer or design professional.

#### **TWELFTH AFFIRMATIVE DEFENSE**

Plaintiff's claim for contractual indemnity against S&ME fails to state a cause of action because such contractual provision does not apply to direct claims asserted by Plaintiff against S&ME, and does not give rise to an independent cause of action.

#### **THIRTEENTH AFFIRMATIVE DEFENSE**

S&ME references and incorporates by reference all affirmative defenses pled by any other party in this action to the extent such defenses may apply to any claims asserted against S&ME.

#### **RESERVATION OF RIGHTS TO SUPPLEMENT DEFENSES**

The facts having not been fully developed in this litigation, S&ME hereby expressly reserves its rights to affirmatively plead any additional defenses which may become applicable to it in this action in the future.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 29<sup>th</sup> day of December, 2022, a true and correct copy of the foregoing was filed via the Florida Courts E-Filing Portal, which will deliver electronic copies of this filing to the designated e-mail addresses for all counsel of record pursuant to Fla. R. Jud. Admin. 2.516.

**Unofficial Document**

**BAIRD LAW, PLLC**

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