

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

CITY OF PALM COAST, a Florida governmental
entity;

CASE NO.: 2022-CA-000773

Plaintiff,

v.

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

Defendants.

Unofficial Document

NO FAULT, LLC'S ANSWER AND AFFIRMATIVE DEFENSES

Defendant, NO FAULT, LLC. ("No Fault"), timely responds to Plaintiff, CITY OF PALM COAST's, ("Palm Coast") Complaint dated November 29, 2022, and states:

PARTIES, JURISDICTION, AND VENUE

1. Admitted for jurisdictional purposes only.
2. Admitted.
3. Without knowledge.
4. Admitted that No Fault is licensed to do business in the state of Florida
5. Without knowledge.
6. Without knowledge.
7. Admitted for jurisdictional purposes.

FACTUAL BACKGROUND

8. Without knowledge.
9. Without knowledge.

10. Without knowledge.

11. Without knowledge as to the purpose of any agreement Palm Coast may have entered into with any other party. The document attached as Exhibit A to Palm Coast's pleading speaks for itself.

12. Without knowledge as to the purpose of any agreement Palm Coast may have entered into with any other party. The document attached as Exhibit B to Palm Coast's pleading speaks for itself.

13. Exhibit B speaks for itself, otherwise without knowledge.

14. The document attached as Exhibit C to Palm Coast's pleading speaks for itself.

15. Denied that the document attached to Exhibit D to Palm Coast's pleading stands for the premise asserted in paragraph 15.

16. Denies as Palm Coast presents an overly simplistic description of the splash pad system.

17. Without knowledge.

18. Without knowledge.

19. Without knowledge.

20. Without knowledge.

21. Without knowledge as to the allegations in this paragraph and its subparts.

22. Without knowledge.

23. Without knowledge.

24. Without knowledge as to alleged efforts to "follow up with [the] involved parties.

Denied to the extent the allegations in this paragraph state, suggest, or imply that No Fault's work was deficient or that No Fault failed to commit to perform any repairs.

25. Without knowledge as to the alleged deficiencies in scopes of work performed by others. Denied to the extent the allegations in this paragraph state, suggest, or imply that No Fault's work was deficient.

26. Without knowledge.

27. The Notice of Claim addressed to No Fault and attached to Palm Coast's pleading as part of Composite Exhibit E speaks for itself. Without knowledge as to the remaining Notices of Claim that are part of the Composite Exhibit E.

28. Denied.

29. Without knowledge as to Plaintiff's arrangement with counsel.

30. Denied as more fully stated in No Fault's affirmative defenses.

COUNT I – BREACH OF CONTRACT (BBI)

The allegations in Paragraphs 31-36, including all subparts, do not pertain to No Fault and therefore, No Fault is not required to answer. However, to the extent that any allegations contained in these paragraphs are deemed to be directed to No Fault, then No Fault denies the same and demands strict proof thereof.

COUNT II – BREACH OF EXPRESS WARRANTIES (BBI)

The allegations in Paragraphs 37-44, including all subparts, do not pertain to No Fault and therefore, No Fault is not required to answer. However, to the extent that any allegations contained in these paragraphs are deemed to be directed to No Fault, then No Fault denies the same and demands strict proof thereof.

COUNT III – NEGLIGENCE (BBI)

The allegations in Paragraphs 45-49, including all subparts, do not pertain to No Fault and therefore, No Fault is not required to answer. However, to the extent that any allegations contained

in these paragraphs are deemed to be directed to No Fault, then No Fault denies the same and demands strict proof thereof.

COUNT IV – BREACH OF FLORIDA BUILDING CODE (BBI)

The allegations in Paragraphs 50-56, including all subparts, do not pertain to No Fault and therefore, No Fault is not required to answer. However, to the extent that any allegations contained in these paragraphs are deemed to be directed to No Fault, then No Fault denies the same and demands strict proof thereof.

COUNT V – BREACH OF EXPRESS WARRANTIES (NO FAULT)

57. No Fault realleges its responses to Paragraphs 1-30 as though fully set forth herein.

58. Denied.

59. Denied.

60. Denied to the extent this allegation imposes obligations on No Fault inconsistent with Florida law or contract.

61. Denied.

62. Denied.

COUNT VI – CONTRACTUAL INDEMNITY (NO FAULT)

63. No Fault realleges its responses to Paragraphs 1-30 as though fully set forth herein.

64. Denied.

65. Denied.

66. Denied.

COUNT VII – NEGLIGENCE (NO FAULT)

67. No Fault realleges its responses to Paragraphs 1-30 as though fully set forth herein.

68. Denied as phrased.

69. Denied to the extent this allegation imposes a duty inconsistent with Florida law or contract.

70. Denied.

71. Denied.

COUNT VIII – BREACH OF FLORIDA BUILDING CODE (NO FAULT)

72. No Fault realleges its responses to Paragraphs 1-30 as though fully set forth herein.

73. Denied.

74. Denied as phrased.

75. Denied.

76. Denied.

77. Denied.

78. Denied.

COUNT IX – BREACH OF CONTRACT (S&ME)

The allegations in Paragraphs 79-84, including all subparts, do not pertain to No Fault and therefore, No Fault is not required to answer. However, to the extent that any allegations contained in these paragraphs are deemed to be directed to No Fault, then No Fault denies the same and demands strict proof thereof.

COUNT X – BREACH OF EXPRESS WARRANTY (S&ME)

The allegations in Paragraphs 85-91, including all subparts, do not pertain to No Fault and therefore, No Fault is not required to answer. However, to the extent that any allegations contained in these paragraphs are deemed to be directed to No Fault, then No Fault denies the same and demands strict proof thereof.

COUNT XI – CONTRACTUAL INDEMNITY (S&ME)

The allegations in Paragraphs 92-95, including all subparts, do not pertain to No Fault and therefore, No Fault is not required to answer. However, to the extent that any allegations contained in these paragraphs are deemed to be directed to No Fault, then No Fault denies the same and demands strict proof thereof.

COUNT XII – PROFESSIONAL NEGLIGENCE (S&ME)

The allegations in Paragraphs 96-106, including all subparts, do not pertain to No Fault and therefore, No Fault is not required to answer. However, to the extent that any allegations contained in these paragraphs are deemed to be directed to No Fault, then No Fault denies the same and demands strict proof thereof.

COUNT XIII – BREACH OF FLORIDA BUILDING CODE (S&ME)

The allegations in Paragraphs 107-113, including all subparts, do not pertain to No Fault and therefore, No Fault is not required to answer. However, to the extent that any allegations contained in these paragraphs are deemed to be directed to No Fault, then No Fault denies the same and demands strict proof thereof.

COUNT XIV – BREACH OF BOND (WESTFIELD)

The allegations in Paragraphs 114-127, including all subparts, do not pertain to No Fault and therefore, No Fault is not required to answer. However, to the extent that any allegations contained in these paragraphs are deemed to be directed to No Fault, then No Fault denies the same and demands strict proof thereof.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Some or all of the damages alleged by Palm Coast are the result of its own failure or the failures of those hired by Palm Coast to properly maintain the subject property, as a result any

damages sought should be reduced accordingly. For example, improperly treating water in the Splash Pad system, including but not limited to chlorine in concentrations higher than specified in No Fault literature, or the use of improper cleaning techniques and / or chemicals.

SECOND AFFIRMATIVE DEFENSE

Palm Coast's damages are due in whole or in part to intervening and/or superseding acts or events and No Fault is not liable for same including, but not limited to, premature use of the water / splash pad system before the PIP sufficiently cured, improper design or construction of the drainage and water systems, which caused the PIP material to be submerged for prolonged periods of time, subsequent entities performing work after No Fault including, but not limited to, tests conducted by BBI and/or Palm Coast, and adjacent lawn maintenance performed by or on behalf of Palm Coast.

THIRD AFFIRMATIVE DEFENSE

The claims against No Fault are barred or must be reduced as Palm Coast has failed to mitigate its damages by refusing to permit No Fault and BBI to perform work at no cost to Palm Coast pursuant to the respective letters of commitment dated November 4, 2022.

FOURTH AFFIRMATIVE DEFENSE

To the extent that the repair of any damages proven by Palm Coast would result in economic waste, the same is barred under Florida law. Specifically, it would be economic waste to replace the PIP system at issue with a more expensive and functionally distinct product rather than allowing No Fault to reinstall the PIP system in accordance with the drawings and project specifications. Palm Coast's damages, if any, are restricted pursuant to the requirements set forth in the case of *Grossman Holdings Ltd. v. Hourihan*, 414 So. 2d 1037 (Fla. 1982), which provides that to the extent specific performance is economically wasteful, the proper measure of damages

is the difference in value between the project as constructed and the value of how it should have been constructed, measured by the date of delivery.

FIFTH AFFIRMATIVE DEFENSE

No Fault avers that the damages allegedly sustained by Palm Coast were proximately caused by the comparative fault of other persons or entities, regardless of whether they are parties to this action or not, including, but not necessarily limited to, the City of Palm Coast and its agents, BBI and all of its other subcontractors, product or material suppliers, design professionals, such as the architect and engineer of record associated with the Project, No Fault's subcontractor, Playsafe Surfacing, LLC, and the building department or authority with jurisdiction for the project. Pursuant to Florida Statute § 768.81 and *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993), No Fault is not liable for the comparative fault of these other persons or entities. No Fault further names and incorporates herein any and all other Fabre Defendants named by any other parties to this action, and also reserves the right to add additional Fabre Defendants as discovery continues.

SIXTH AFFIRMATIVE DEFENSE

No Fault performed its work in accordance with all applicable industry standards, in accordance with all applicable codes, and in accordance with the building plans and specifications, thus the claims against No Fault are barred by the doctrine set forth under *United States v. Spearin*, 248 U.S. 132 (1918) and its progeny.

SEVENTH AFFIRMATIVE DEFENSE

To the extent that any remediation repairs claimed by Palm Coast would be considered betterment, the Association is not entitled to any such alleged additional damages. See *Lochrane Engineering, Inc. v. Willingham Realgrowth Inv. Fund, Ltd*, 552 So. 2d 228 (Fla. 5th DCA 1989). Specifically, replacement of the No Fault PIP system with a functionally different system, including but not limited to Life Floor.

EIGHTH AFFIRMATIVE DEFENSE

No Fault is not responsible for any of Palm Coast's damages inasmuch as its work was completed and accepted. *Slavin v. Kay*, 108 So. 2d 462 (Fla. 1959). Here, the general contractor, BBI accepted and approved No Fault's work; therefore, liability is precluded under the *Slavin* Doctrine.

NINTH AFFIRMATIVE DEFENSE

Palm Coast is estopped from bringing claims against No Fault as all materials supplied by No Fault were accepted by BBI as part of fulfilling its obligation to Palm Coast under its contract attached as Exhibit B to Palm Coast's pleading (including but not limited to § 2 generally and § 2.3.2.12 of Palm Coast's A133 agreement with BBI) and/or the building department with jurisdiction for this purpose, either after actual inspection or reasonable opportunity to inspect the materials, and therefore any claim herein is barred by the operational law including the defense of waiver, estoppel, and laches.

TENTH AFFIRMATIVE DEFENSE

No Fault is not liable for any of Palm Coast's damages caused by parties and non-parties over whom No Fault did not possess any supervision, control, or responsibility. To the extent that any apportionment of liability or damages is necessary, No Fault affirmatively alleges that the provisions of Florida Statute § 768.81 and the interpreting case law are controlling. These parties and non-parties include but are not limited to other subcontractors hired by BBI to perform work on the Splash Pad (specifically subcontractors responsible for: formwork, concrete installation, plumbing design, plumbing installation, drainage design, drain installation, Splash Pad design, play feature installation and positioning, sculpted freshwater and marine plant and animal construction and/or installation), Palm Coast's maintenance department and/or any entity hired by or on behalf of Palm Coast to perform maintenance on the Splash Pad and related areas and

systems, including but not limited to Splash Pad surface areas, water treatment, and lawncare of the surrounding areas.

ELEVENTH AFFIRMATIVE DEFENSE

Palm Coast's claims are barred to the extent that the damages they claim 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 an alleged breach thereof. *See Christos N. Kritikos v. John T. Andersen*, 125 So. 3d 885, 887 (Fla. 4th DCA 2013).

TWELFTH AFFIRMATIVE DEFENSE

No Fault attests that any acts or omissions by No Fault were in no way the legal or proximate cause of any of Palm Coast's alleged damages.

THIRTEENTH AFFIRMATIVE DEFENSE

The negligence of Palm Coast, BBI, S&ME and/or entities hired by or on behalf of Palm Coast, BBI, and S&ME have contributed to and/or caused the damages alleged, including but not limited to failure to adequately account for the porous nature of the PIP material when designing slope, drainage, and water treatment capacity, failure supervise, monitor, organize, approve, and/or schedule testing, lack of appropriate maintenance, and/or misuse of the Splash Pad and surrounding areas.

FOURTEENTH AFFIRMATIVE DEFENSE

Palm Coast has waived claims for alleged defects related to the porous nature of the PIP material for which Palm Coast deliberately, specifically, and knowingly sought and obtained a waiver to use the PIP material specifically on the Splash Pad project.

FIFTEENTH AFFIRMATIVE DEFENSE

Palm Coast has waived claims for alleged defects that were apparent and/or obvious during testing and inspection prior to and/or immediately after accepting the Splash Pad from BBI, including but not limited to drainage issues, ponding water, water treatment capacity issues, and improperly installed and/or aligned spray features.

SIXTEENTH AFFIRMATIVE DEFENSE

Palm Coast has waived claims for alleged defects relating to the porous nature of the buffing material integrated into the PIP system to mitigate falls associated with the sculpted freshwater and marine plants and animals. The sculptures do not comply with rules, standards, and guidelines for climbable play apparatus, and there is no rule, standard, or guideline that requires fall attenuation material to be used in an aquatic play environment.

SEVENTEENTH AFFIRMATIVE DEFENSE

To the extent that No Fault's products have been altered, changed, destroyed, removed, or repaired by others, such actions void any warranties that might exist.

EIGHTEENTH AFFIRMATIVE DEFENSE

The Splash Pad architect of record was charged with a non-delegable duty to ensure that the design conformed with the applicable laws, regulations and building codes, as provided in *Atlantic National Bank of Jacksonville v. Modular Age, Inc.*, 363 So. 2d 1152 (Fla. 1st DCA 1978). To the extent the work and/or materials installed by No Fault did not meet the applicable building codes or good construction practices, such is and was the responsibility of the architect of record, and/or BBI. No Fault was required to follow the design specifications of the project architect as interpreted by BBI, and to the extent that Palm Coast and/or BBI now maintain that the design or the materials or their installation by No Fault did not comport with good construction practices or the applicable building codes, No Fault is not liable.

NINETEENTH AFFIRMATIVE DEFENSE

No Fault claims a setoff against any judgment or any payment paid or payable to Palm Coast from any collateral sources as that term is used in Florida Statute § 768.76, including insurance proceeds collected by Palm Coast from any party or non-party to the litigation.

TWENTIETH AFFIRMATIVE DEFENSE

Palm Coast's claims of negligence or assigned negligence are barred by the Economic Loss Doctrine, which "prohibits tort recovery when a product damages itself, causing economic loss but does not cause personal injury or damage to any property other than itself." *Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1246 (Fla. 1993).

TWENTY-FIRST AFFIRMATIVE DEFENSE

Pursuant to Florida Statute § 553.84, the required building permits, if any, were obtained, any local governments or public agencies with authority to enforce the Florida Building Code approved the plans, the construction project passed all required inspections under the code and there was no personal injury or damage to property other than the property that is the subject of the permits, plans, and inspections and, further, No Fault neither knew, nor should have known, that a violation existed and, therefore, this section of the Florida Statute does not apply.

TWENTY-SECOND AFFIRMATIVE DEFENSE

No Fault hereby adopts and incorporates herein all other affirmative defenses asserted by any other Defendant / Third-Party Defendant to the extent that such defenses also operate to affirmatively defend against No Fault's alleged liability, if any.

RESERVATION OF RIGHTS

No Fault reserves any and all rights to supplement its answer and affirmative defenses, as discovery is ongoing.

DEMAND FOR JURY TRIAL

No Fault demands trial by jury of all issues so triable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above and foregoing has been furnished by Electronic Mail, by filing through the Florida Courts E-Filing E-portal system, to the following parties on the attached service list (unless noticed by US Mail) on this 27th day of December, 2022.

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/s/ Angie M. Vandenberg

Jason R. Moyer, Esquire

Florida Bar No.: 0944041

Angie M. Vandenberg, Esquire

Florida Bar No.: 109607

Alexander R. Allred, Esquire

Florida Bar No.: 100892

MOYER LAW GROUP

770 Second Avenue South

St. Petersburg, FL 33701

Phone: (727) 310-2002

Fax: (727) 310-2003

Email: service-avandenberg@moyerlawgroup.com

Attorneys for No Fault LLC

City of Palm Coast v. BBI Construction Management, Inc.
Case No.: 2022 CA 000773
Service List

Counsel for City of Palm Coast

Trevor B. Arnold, Esquire
Nikki K. Bhavsar, Esquire
GrayRobinson, P.A.
301 E. Pine Street, Suite 1400
Orlando, FL 32801
Telephone: 407-843-8880

Trevor.arnold@gray-robinson.com
Nikki.bhavsar@gray-robinson.com
Ylana.palme@gray-robinson.com
liandaaosta@gray-robinson.com
pam.manning@gray-robinson.com

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