

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**BLACK BEAR CROSSING TOWN HOUSE  
ASSOCIATION, LLC, a West Virginia limited  
Liability company and on behalf of two (2)  
or more unit owners,**

**Plaintiffs,**

**v.**

**Circuit Court of Pocahontas County,  
West Virginia  
Civil Action No. 14-C-32 (RR)**

**BLACK BEAR CROSSING, LLC,  
GKS DEVELOPMENT, LLC,  
THOMAS C. SELLS, III, BRIAN KREIDER,  
MATTHEW GLOD, JAMISON DESIGN, LLC,  
TYGARTS VALLEY CONSTRUCTION, INC.,  
SLOPSIDE CONSTRUCTION, INC.,  
TINK'S COTTAGE CARE AT SNOWSHOE, LLC,  
and TREVE PAINTER,**

**Defendants**

**and**

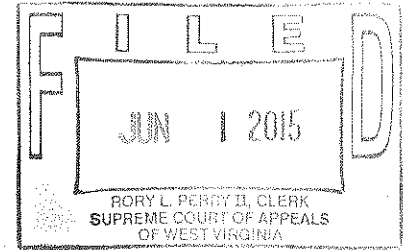
**BLACK BEAR CROSSING, LLC,  
GKS DEVELOPMENT, LLC,  
and TYGARTS VALLEY  
CONSTRUCTION, INC.,**

**Third-Party Plaintiffs,**

**v.**

**FIRST TRACTS REAL ESTATE, LLC,  
DAVID M. SIMMONS and PETER A. MONICO,  
Individually and as members of  
FIRST TRACTS REAL ESTATE, LLC,  
CAS STRUCTURAL ENGINEERING, INC.,  
CHAPMAN TECHNICAL GROUP, LTD.,  
LEON G. MALLOW SURVEY, INC.,  
DOUGLAS J. GRIMES d/b/a MILL RUN FARM,  
JD & JT GENERAL CONTRACTORS, LLC,  
TCC CONTRACTING SERVICES, LLC,**

**Third-Party Defendants.**



## JOINT MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION

COME NOW, Plaintiff, Black Bear Crossing Town House Association, LLC, Defendant/Third-Party Plaintiff Black Bear Crossing, LLC, Defendant/Third-Party Plaintiff GKS Development, LLC, Defendant Thomas C. Sells, III, Defendant Matthew Glod, Defendant Plaintiff Brian Kreider, Defendant/Third-Party Plaintiff Tygarts Valley Construction, Inc., Defendant Treve Painter, Defendant Tink's Cottage Care at Snowshoe, LLC, Defendant Slopeside Construction, Inc., Third-Party Defendant JD & JT General Contractors, Third-Party Defendant CAS Structural Engineering, Third-Party Defendant Chapman Technical Group, Third-Party Defendant Douglas J. Grimes d/b/a Mill Run Farm, Third-Party Defendant First Tracts Real Estate, LLC, Third-Party Defendant David M. Simmons, Third-Party Defendant Peter A. Monico, and Third-Party Defendant Leon G. Mallow Survey, Inc., by undersigned counsel, and hereby jointly move this Court to refer the above-captioned civil action to the Business Court Division of the West Virginia Circuit Courts. In support of their Joint Motion, the parties state as follows:

1. *West Virginia Code* §51-2-15 and Rule 29 of the *West Virginia Trial Court Rules* provide that civil actions which constitute "Business Litigation" are eligible for transfer to the specialized court docket of the West Virginia Business Court.

2. "Business Litigation" is defined by Rule 29 as a civil action in which:

- (1) The principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and
- (2) The dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable; and

- (3) The principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

W.Va. T.C.R. 29.04(a)(1)–(3).

3. Any party may seek a referral of “Business Litigation” to the Business Court Division by filing a Motion to Refer in the Supreme Court of Appeals of West Virginia. *See* W.Va. T.C.R. 29.06(a)(1).

4. The instant civil action is pending before the Circuit Court of Pocahontas County, West Virginia. The parties recognize that the filing of this Joint Motion to Refer shall not operate as a stay of the underlying civil action pending, unless otherwise ordered by Judge Richardson. There are no known related actions pending in West Virginia Circuit Courts. The docket sheet and copies of all pleadings filed are attached hereto as **Exhibit A**.

5. The instant civil action arises from the design and construction of condominium units, as well as common elements and limited common elements, for Plaintiff Black Bear Crossing Town House Association, LLC and its various member unit owners. [*See* Amend. Compl. at ¶ 1.] The condominium units are located at Snowshoe Mountain Resort in Pocahontas County, West Virginia. [*See id.*] Plaintiff Black Bear

Crossing Town House Association, LLC has filed an Amended Complaint against the Defendants, asserting the following claims: (1) breach of contract and implied covenant of good faith and fair dealing against Black Bear Crossing, LLC; (2) breach of implied warranty of habitability, fitness, and/or quality against Black Bear Crossing, LLC; (3) negligent development against Black Bear Crossing, LLC; (4) piercing the corporate veil of Black Bear Crossing, LLC, which the Amended Complaint alleges has a “unity of interest and ownership” with GKS Development, LLC and Thomas C. Sells, III, Brian Kreider, and Matthew Glod, as members of GKS Development, LLC; (4) negligence against Tygarts Valley Construction, Inc., Treve Painter, Slopeside Construction, Inc., and Tink’s Cottage Care at Snowshoe, LLC; (5) professional negligence against Jamison Design, LLC; and (6) joint venture. [*See generally* Amend. Compl.]

6. Defendants Black Bear Crossing, LLC, GKS Development, LLC, Thomas C. Sells, III, Brian Kreider, Matthew Glod, and Tygarts Valley Construction, Inc. have filed an Amended Third-Party Complaint arising from the same design and construction of the Black Bear condominium units. The Amended Third-Party Complaint asserts the following claims: (1) negligence, spoliation of evidence, contribution, and indemnification against First Tracts Real Estate, LLC, and the members of First Tracts Real Estate, LLC, David M. Simmons, and Peter A. Monico. [*See* Amended Third-Party Compl. at ¶¶ 16-50.]; (2) negligence, contribution, and indemnification against CAS Structural Engineering, Inc. [*See id.* at ¶¶ 51-60.]; (3) negligence, contribution, and indemnification against Chapman Technical Group, Ltd. [*See id.* at ¶¶ 61-70.]; (4) negligence, contribution, and indemnification against Leon G. Mallow Surveying, Inc. [*See id.* at ¶¶ 71-80.]; (5) negligence, contribution, and indemnification against Douglas J. Grimes d/b/a Mill Run Farm [*See id.* at ¶¶ 81-90.]; (6) negligence, contribution, and

indemnification against JD & JT General Contractors, LLC [*See id.* at ¶¶ 91-100.]; and (7) negligence, contribution, and indemnification against TCC Contracting Services, LLC [*See id.* at ¶¶ 101-114.]

7. Several of the Defendants and Third-Party Defendants have asserted counterclaims and cross-claims for indemnification and contribution for the claims asserted by the Plaintiff and Third-Party Plaintiffs. Defendants/Third-Party Plaintiffs Black Bear Crossing, LLC and GKS Development, LLC have filed a counterclaim against Plaintiff for spoliation of evidence. Defendant/Third-Party Plaintiff Tygarts Valley Construction also filed a counterclaim against Plaintiff asserting spoliation of evidence and breach of contract claims.

8. First, pursuant to W.Va. T.C.R. 29.04(a)(1), the “principal claims” stated by the parties involve “matters of significance to the transactions, operations, or governance between business entities;” namely, allegations of defective design, negligent construction, breach of contract, and poor workmanship between numerous developers, contractors, subcontractors, and designers of the condominium units and common areas made subject of the Amended Complaint. Notably, while individuals have been joined as Defendants and Third-Party Defendants to this suit, Trial Court Rule 29 does not exclude cases that include natural persons from the jurisdiction of the Business Court Division. Further, the individuals named in this action are joined either in their capacity as corporate representatives, or, if named individually, for claims involving their engagement in business transactions.

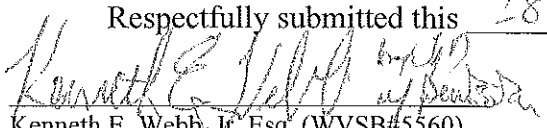
9. Second, pursuant to W.Va. T.C.R. 29.04(a)(2), the Business Court Division has jurisdiction over this action as this dispute presents complex commercial issues in which referral to the Business Court Division is likely to improve the

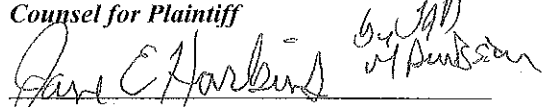
expectation of a fair and reasonable resolution of this controversy. Resolution of this controversy will require analysis of complex business relationships, interpretation of complex contracts, and commercial torts. Thus, resolution of the claims asserted in this action will benefit from familiarity with specialized commercial legal principals.

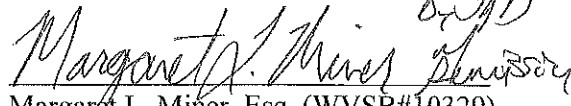
10. Finally, the Business Court Division has jurisdiction over this action since the parties and claims made subject of this dispute do not fall within any of the categorical exclusions defined by W.Va. T.C.R. 29.04(a)(3).

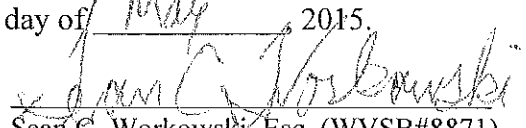
WHEREFORE, the parties request that the Chief Justice enter an order granting this Joint Motion to Refer and transfer the instant civil action to the Business Court Division.

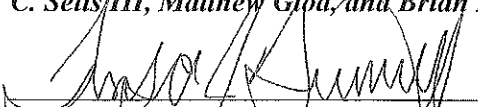
Respectfully submitted this 28<sup>th</sup> day of May, 2015.


  
Kenneth E. Webb, Jr., Esq. (WVSB#5560)  
Patrick C. Timony, Esq. (WVSB#11717)  
Bowles, Rice PLLC  
600 Quarrier Street  
P.O. Box 1386  
Charleston, WV 25325  
**Counsel for Plaintiff**

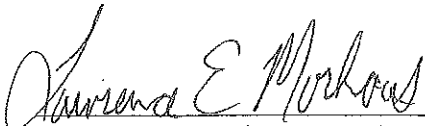
  
Jane E. Harkins, Esq. (WVSB#5951)  
Pullin, Fowler, Flanagan, Brown & Poe, PLLC  
600 Neville St, Suite 201  
Beckley, WV 25801  
**Counsel for Black Bear Crossing, LLC, GKS Development, LLC, Thomas C. Sells III, Matthew Glod, and Brian Kreider**

  
Margaret L. Miner, Esq. (WVSB#10329)  
Brian J. Warner, Esq. (WVSB#9372)  
Shuman, McCuskey & Slicer, P.L.L.C.  
1445 Stewartstown Road, Suite 200  
Morgantown, WV 26505  
**Counsel for Treve Painter, Tink's Cottage Care at Snowshoe, LLC, and Slopeside Construction, Inc.**

  
Sean C. Workowski, Esq. (WVSB#8871)  
Frith, Anderson & Peake, PC  
P.O. Box 1240  
Roanoke, VA 24006-1240  
**Counsel for GKS Development, LLC, Thomas C. Sells III, Matthew Glod, and Brian Kreider**

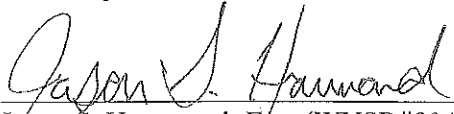
  
Teresa J. Dumire, Esq. (WVSB#8032)  
Shannon P. Smith, Esq. (WVSB#10300)  
Matthew D. Elshiaty, Esq. (WVSB#12535)  
Kay, Casto & Chaney PLLC  
1085 Van Voorhis Road, Suite 100  
Morgantown, WV 26505  
**Counsel for Tygarts Valley Construction, Inc.**

  
W. Randolph Fife, Esq. (WVSB#1197)  
Lauren P. Scott, Esq. (WVSB#11964)  
Steptoe & Johnson PLLC  
P. O. Box 1588  
Charleston, WV 25326-1588  
**Counsel for Chapman Technical Group**

*by JAD  
at Pennington*  


Lawrence E. Morhous, Esq. (WVSB#2633)  
Brewster, Morhous, Cameron, Caruth,  
Moore, Kersey & Stafford, PLLC  
P. O. Box 529  
Bluefield, WV 24701

**Counsel for JD & IT General Contractors**

*by JAD  
at Pennington*  


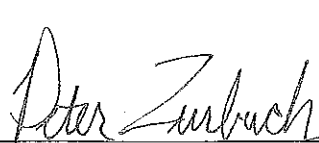
Jason S. Hammond, Esq. (WVSB#8042)  
Bailey & Wyant PLLC  
P.O. Box 3710  
Charleston, WV 25337-3710

**Counsel for CAS Structural Engineering**

*by JAD  
at Pennington*  

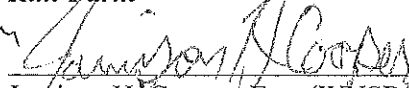

Shawn C. Gillispie, Esq. (WVSB#9015)  
Jessica Y. Whitmore, Esq. (WVSB#11519)  
Kesner & Kesner, PLLC  
112 Capitol Street  
P.O. Box 2587  
Charleston, WV 25329

**Counsel for First Tracts Real Estate, LLC;  
David M. Simmons and Peter A. Monico**

*by JAD  
at Pennington*  


Peter Zurbuch, Esq. (WVSB#5765)  
Robert C. Chenoweth, Esq. (WVSB#10498)  
Busch, Zurbuch & Thompson, PLLC  
P.O. Box 1819  
Elkins, WV 26241-1819

**Counsel for Douglas J. Grimes, d/b/a Mill  
Run Farm**

*by JAD  
at Pennington*  


Jamison H. Cooper, Esq. (WVSB#8043)  
Daniel C. Cooper, Esq. (WVSB#5476)  
Cooper Law Offices, PLLC  
240 W. Main Street  
Bridgeport, WV 26330

**Counsel for Leon G. Mallow  
Surveying, Inc.**

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**BLACK BEAR CROSSING TOWN HOUSE  
ASSOCIATION, LLC, a West Virginia limited  
Liability company and on behalf of two (2)  
or more unit owners,**

**Plaintiffs,**

**v.**

**Circuit Court of Pocahontas County,  
West Virginia  
Civil Action No. 14-C-32 (RR)**

**BLACK BEAR CROSSING, LLC, et al.**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 29<sup>th</sup> day of May, 2015, I served a copy of the **Joint Motion to Refer Case to the Business Court Division** (without attachments) upon all parties by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

Kenneth E. Webb, Jr., Esq.  
Patrick C. Timony, Esq.  
Bowles Rice LLP  
600 Quarrier Street  
P.O. Box 1386  
Charleston, WV 25325  
*Counsel for Plaintiff*

Jane E. Harkins, Esq.  
Pullin Fowler Flanagan Brown & Poe PLLC  
600 Neville St., Suite 201  
Beckley, WV 25801  
*Counsel for Black Bear Crossing, LLC,  
GKS Development, LLC, Thomas C. Sells,  
III, Brian Kreider, and Matthew Glod*

Sean C. Workowski, Esq.  
FRITH ANDERSON & PEAKE, PC  
P.O. Box 1240  
Roanoke, VA 24006-1240  
*Counsel for Defendants GKS Development,  
LLC, Thomas C. Sells, III, Brian Kreider,  
and Matthew Glod*

Margaret L. Miner, Esq.  
Shuman McCuskey & Slicer PLLC  
1445 Stewartstown Rd., Suite 200  
Morgantown, WV 26505  
*Counsel for Defendant Treve Painter,  
Slopeside Construction, Inc., and Tink's  
Cottage Care at Snowshoe, LLC*

Jamison Design LLC  
c/o Steve Jamison  
1591 Roanoke Rd, Suite B  
PO Box 524  
Daleville, VA 24083

Lawrence E. Morhous, Esq.  
Brewster, Morhous, Cameron, Caruth,  
Moore, Kersey & Stafford, PLLC  
PO Box 529  
Bluefield, WV 24701  
*Counsel for JD & JT General Contractors*

Jason S. Hammond, Esq.  
Bailey & Wyant PLLC  
PO Box 3710  
Charleston, WV 25337-3710  
*Counsel for CAS Structural Engineering*



Shawn C. Gillispie, Esq.  
Jessica Y. Whitmore, Esq.  
Kesner & Kesner, PLLC  
112 Capitol Street  
PO Box 2587  
Charleston, WV 25329  
***Counsel for First Tracts Real Estate, LLC,  
David M. Simmons, and Peter A. Monico***

W. Randolph Fife, Esq.  
Steptoe & Johnson PLLC  
PO Box 1588  
Charleston, WV 25326-1588  
***Counsel for Chapman Technical Group***

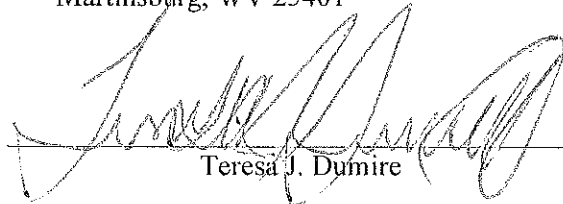
Peter G. Zurbuch, Esq.  
Robert C. Chenoweth, Esq.  
Busch, Zurbuch & Thompson, PLLC  
PO Box 1819  
Elkins, WV 26241  
***Counsel for Douglas J. Grimes, d/b/a  
Mill Run Farm***

Jamison H. Cooper, Esq. (WVSB#8043)  
Daniel C. Cooper, Esq. (WVSB#5476)  
Cooper Law Offices, PLLC  
240 West Main Street  
Bridgeport, WV 26330  
***Counsel for Leon G. Mallow Surveying,  
Inc.***

The Honorable Robert E. Richardson  
Judge of the Circuit Court of Pocahontas  
County  
Greenbrier County Courthouse  
200 N. Court Street  
Lewisburg, WV 24901

Pocahontas County Circuit Clerk's Office  
900 Tenth Avenue  
Marlinton, WV 24954

Business Court Division Central Office  
Berkeley County Judicial Center  
380 West South Street, Suite 2100  
Martinsburg, WV 25401



Teresa J. Dumire