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16-BCD-11

IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA

THE BOARD OF EDUCATION OF THE  
COUNTY OF HANCOCK, a statutory corporation,

Plaintiff,

v.

CIVIL ACTION NO. 16-C-76-W  
(Judge Ronald E. Wilson)

JAMES F. BALLER, SR., an individual,  
ROMIG ROOFING COMPANY, an Ohio  
Corporation, COLAIANNI CONSTRUCTION,  
INC., an Ohio Corporation, OHIO FARMER  
INSURANCE COMPANY, an Ohio Corporation,  
MCKINLEY & ASSOCIATES, INC., a West  
Virginia Corporation, ASC PROFILES, INC.,  
a Delaware Corporation,

Defendants.

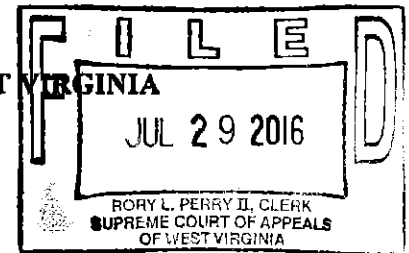
**DEFENDANTS' JOINT MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION**

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, the counsel for the Defendants James F. Baller, Sr., Colaianni Construction, Inc., Ohio Farmers Insurance Company, McKinley & Associates, Inc., and ASC Profiles, Inc. respectfully move this Court to refer the above-styled case to the Business Court Division.

The parties are unaware of any known related actions.

The nature of this action involves: (Please check all that apply)

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| <input checked="" type="checkbox"/> Breach of Contract;  | <input checked="" type="checkbox"/> Commercial Torts;   |
| <input type="checkbox"/> Sale or Purchase of Commercial Entity;  | <input checked="" type="checkbox"/> Insurance Coverage Disputes in Commercial Insurance Policies;   |
| <input type="checkbox"/> Sale or Purchase of Commercial Real Estate;                                     | <input checked="" type="checkbox"/> Professional Liability Claims in Connection with the Rendering of Professional Services to a Commercial Entity; |
| <input type="checkbox"/> Sale or Purchase of Commercial Products Covered by the Uniform Commercial Code; | <input type="checkbox"/> Anti-trust Actions between Commercial Entities;  |
| <input type="checkbox"/> Terms of a Commercial Lease;  | <input type="checkbox"/> Injunctive and Declaratory Relief Between Commercial Entities;   |
| <input type="checkbox"/> Commercial Non-consumer debts;  | <input type="checkbox"/> Liability of Shareholders, Directors, Officers, Partners, etc.;  |
| <input type="checkbox"/> Internal Affairs of a Commercial Entity;  |   |
| <input type="checkbox"/> Trade Secrets and Trademark Infringement;                                       |   |
| <input type="checkbox"/> Non-compete Agreements;   |   |
| <input type="checkbox"/> Intellectual Property, Securities, Technology Disputes;                         |   |



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|--|---|
| <input type="checkbox"/> Mergers, Consolidations, Sale of Assets,<br>Issuance of Debt, Equity and Like Interest; | <input type="checkbox"/> Internet, Electronic Commercial and<br>Biotechnology Disputes involving<br>Commercial Entities; or |
| <input type="checkbox"/> Shareholders Derivative Claims;   | <input type="checkbox"/> Other (Describe)   |
| <input type="checkbox"/> Commercial Bank Transactions;   |   |
| <input type="checkbox"/> Franchisees/Franchisors;  |   |

In support of this joint motion, counsel for the Defendants James F. Baller, Sr., Colaianne Construction, Inc., Ohio Farmers Insurance Company, McKinley & Associates, Inc., and ASC Profiles, Inc., believe that the above-styled action contains novel and/or complex issues for which specialized treatment will be helpful as more fully described herein.

**A. Basis for Request**

Plaintiff's Complaint alleges multiple legal claims against the numerous Defendants, including negligence, breach of contract, misrepresentation, unjust enrichment, fraud, fraudulent concealment, breach of fiduciary duties, conspiracy to commit negligent misrepresentation, breach of implied covenant of fair dealing, attorney fees, violation of the West Virginia Unfair Claims Practices Act, and declaratory actions brought against Ohio Farmers Insurance Company and Colaianne Construction.<sup>1</sup> All claims relate to the alleged negligent construction of a school in Hancock County, West Virginia in 2003-2004. Specifically, Plaintiff's claims principally center on the allegedly deficient installation of the roof of the Oak Glen Middle School. The issues presented will involve consideration and application of sophisticated architectural and engineering principles, as well as consideration and application of multiple complex and technical building design and construction practices. Accordingly, this case will require presentation and analysis of a great deal of complex scientific data and testimony from engineers, architects, and building professionals. Furthermore, due to the timing of this civil action, legal issues pertaining to time constraints afforded under the statute of repose, statutes of limitations,

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<sup>1</sup> The bad faith claim against Ohio Farmers Insurance Company and the declaratory judgment claims against Ohio Farmers Insurance Company and Colaianne Construction are commercial in nature, which are not barred by Trial Court Rule 29.04(a)(3). In addition, Ohio Farmers Insurance Company was the company that issued the surety performance bond to Colaianne Construction for the work performed on the school in 2003-2004,

contracts, performance bonds, and other applicable restrictions will be at issue. As a result, this case would benefit greatly from assignment to the Business Court.

In consideration of the limitations presented within Rule 29 of the West Virginia Trial Court Rules and some of the potential conflicts that may exist between the Rule and the numerous claims brought by Plaintiff against the multiple Defendants, the movants preemptively address those potential conflicts as follows:

1. The Claims Brought Against James F. Baller, Sr. Do Not Prevent Referral to the Business Litigation Division.

Defendant James F. Baller, Sr., has been made a party to this suit in his official capacity as Clerk of the Works for the Board of Education of the County of Hancock. Specifically, Plaintiff's Complaint provides that Mr. Baller was employed by Plaintiff to supervise the construction of the school at issue in this litigation. *See, e.g.*, Complaint, p. 9, ¶ 3. Due to the monetary scope of the Hancock County Middle School construction project, Mr. Baller's employment was presumably made pursuant to the Legislative Rules that control the School Building Authority's ("SBA") oversight of construction projects. *See* W. Va. Code St. R. § 164-4-3.

As a result of Mr. Baller's alleged negligent participation in the project at issue, Plaintiff has brought claims against him for breach of contract, negligence, and breach of fiduciary duties. *See* Compl., pp 9–12. When examining the limitations defined within Rule 29.04 of the West Virginia Trial Court Rules, important distinctions should be addressed.

Mr. Baller has not been made a party to this suit in his individual capacity. Rather, it is clear from Plaintiff's allegations that Mr. Baller's alleged tortious acts all stem from his role as the designated Clerk of the Works. Plaintiff's breach of contract claim brought against Mr. Baller stems directly from the Plaintiff's retention of Mr. Baller on April 2, 2003. *See* Compl. p. 9, ¶3. Moreover, the alleged breaches of contract relate directly to the employment terms entered into by the Mr. Baller and Plaintiff.

Further, Plaintiff's Complaint does not allege that Mr. Baller's alleged negligence occurred outside of the scope of his role as the contracted Clerk of the Works. To the contrary, Mr. Baller's perceived negligence stems directly from his alleged failure to supervise the completion of the project in a proper manner. *See* Compl. p. 10, ¶¶ 3–4. Likewise, Plaintiff's claim for breach of fiduciary duties is duplicative of the breach of contract and negligence causes of action brought against Mr. Baller. Ultimately, his role as the third-party supervisor of the construction project is at the heart of Plaintiff's allegations. In this regard, Mr. Baller's relationship to the project is akin to a third-party construction manager charged with overseeing the proper completion of a construction project.

For matters referred to the Business Court Division, the movants recognize that Trial Court Rule 29.04(a)(3) requires that the "principal claim or claims [of the civil action being referred] involve matters of significance to transactions, operations, or governance between business entities." W. Va. Trial Ct. R. 29.03. As an initial matter, as only one of the numerous Defendants named within Plaintiff's Complaint, it is apparent that the principal claim of this civil action is not focused upon the claims brought against Mr. Baller. Instead, Plaintiff's principal claim centers on the alleged breach of contract and negligence that purportedly occurred in the construction of the school project, and a fair reading of the Complaint makes clear that Mr. Baller is but one small ancillary piece in this complicated litigation.

Furthermore, under the circumstances in which Plaintiff has brought these specific claims against Mr. Baller, his role in the underlying project is no different than a sole proprietor or similarly situated third-party construction manager. Similar to the other Defendants named in its Complaint, Plaintiff alleges that the defective construction of the school project resulted in Mr. Baller breaching contractual and fiduciary duties. Moreover, the allegations brought against Mr. Baller are not related to an employee suit or an administrative dispute with government organizations as further prohibited under

Trial Court Rule 29.04(a)(3). Mr. Baller's alleged breaches are part and parcel with the alleged breaches of duty of the other named Defendants relative to the construction of the Oak Glen Middle School. As such, Mr. Baller's inclusion in this Motion to Refer Case to Business Court Division is wholly proper and appropriate under the Rules.

2. The Claims Brought Against ASC Profiles, Inc., Do Not Prevent Referral to the Business Litigation Division.

Defendant ASC Profiles, Inc. has been made a party to this suit for its role as the manufacturer of the metal roofing materials for the Oak Glen Middle School. *See* Compl., pp. 33–34. Specifically, Plaintiff has alleged the following:

The Defendant, ASC Profiles, Inc., was negligent in failing to train the employees of Romig Roofing Company with regard to the installation of the roof at the new Oak Glen Middle School, was negligent in the production of the metal roofing panels for the new Oak Glen Middle School in that they failed to produce continuous panel length rolling which would have run the distance of the roof without disturbance, was negligent in failing to use welded weather type curbs at the flashings and at all curb penetrations and was negligent in failing to train and do periodic inspection of the metal roofing as it was being installed at the new Oak Glen Middle School.

*See* Compl., p. 34, ¶ 3.

Of the numerous allegations quoted above, ASC Profiles' alleged negligent training, supervision, and inspection of the roof at issue are clearly aligned with the spirit of Rule 29 of the Trial Court Rules. As a whole, the claims raised against ASC Profiles are representative of the type of technical and complex issues involved in this civil action. In deference to the requirements of Rule 29.04, however, the movants recognize some of the claims brought against ASC Profiles could be interpreted to be in conflict with certain exclusions provided in the Rule.

Trial Court Rule 29.04(a)(3) provides that civil actions principally based on theories of products liability are not appropriately brought before the Business Court Division. Similar to the explanation provided regarding Mr. Baller, it must first be stated that any perceived products liability claims found

in Plaintiff's "Negligence of ASC Profiles, Inc." count are not the "principal claims" of this civil action. Throughout the allegations of negligence found in the paragraph quoted above, it is clear that the construction of the Oak Glen Middle School roof, and the relationships amongst all of the entities who took part in that construction, is centered on theories of breach of contract and negligence. As such, breach of contract and negligence represent the "principal claims" upon which Plaintiff seeks compensation in this matter.

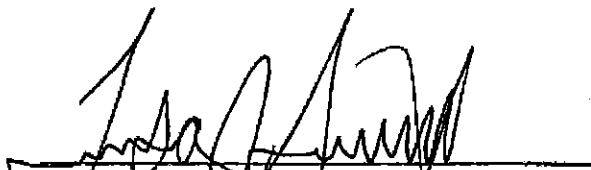
In addition, the nature of Plaintiff's alleged damages attributable to ASC Profiles cannot be pursued under a tort theory of liability. It has been established that, "[i]n West Virginia, property damage to defective products which result from a sudden calamitous event is recoverable under a strict liability cause of action. Damages which result merely because of a 'bad bargain' are outside the scope of strict liability." *Capitol Fuels, Inc. v. Clark Equip. Co.*, 181 W. Va. 258, 260, 382 S.E.2d 311, 313 (1989) (citing Syl. Pt. 3, *Star Furniture Co. v. Pulaski Furniture Co.*, 171 W. Va. 79, 297 S.E.2d 854 (1982)). Furthermore, when examining claims for relief very much in line with those made against ASC Profiles, the Supreme Court of Appeals of West Virginia has maintained that "while a strict liability tort claim may arise when a defective product causes injury, a party who suffers mere economic loss as a result of a defective product must turn to the Uniform Commercial Code to seek relief." *Basham v. Gen. Shale*, 180 W. Va. 526, 530, 377 S.E.2d 830, 834 (1988).

As a result of the alleged negligence of ASC Profiles, Plaintiff alleges it has "suffered property damage, and is required to incur the cost of repair and or replacement of the roof . . ." See Compl., p. 34, ¶ 4. In examining the Complaint as a whole, Plaintiff consistently alleges that the failures of the named Defendants caused Plaintiff to incur these same losses, i.e. damage to the roof at issue and replacement costs associated therewith. These damages are precisely the type of damages contemplated by the Court in *Star Furniture*, and because these damages constitute economic loss, principals of

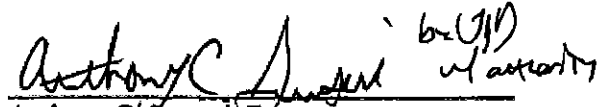
contract law, specifically as provided for by the UCC, are the appropriate measure of liability. Even at this early juncture, it is apparent that Plaintiff's claims of economic loss cannot be pursued in tort, and that the appropriate issues in this case will concern rights and remedies under the West Virginia Uniform Commercial Code and application of its statute of limitations provisions.

Ultimately, Plaintiff has claimed that the roof installed on the Oak Glen Middle School was defective and/or negligently installed. As a result, Plaintiff asserts claims against the manufacturer, the general contractor, the subcontractor, the Clerk of the Works, the designer, and the general contractor's bonding company involved in the construction of the project. The multiple parties and commercial entities, multiple theories and legal claims, and multiple technical issues provide for a complex claim. For these reasons, the movants believe that this matter is an appropriate civil action to be brought before the Business Court Division, and all parties involved would benefit from the specialization and expertise offered by the Court.

Respectfully submitted this 29<sup>th</sup> day of July, 2016.

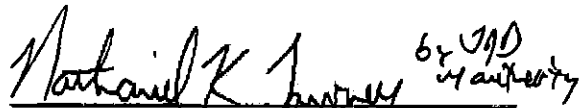


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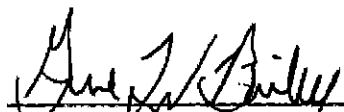
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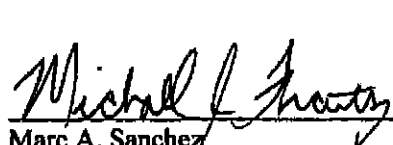
DEFENDANTS  
BY COUNSEL

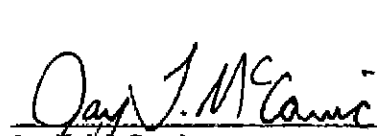


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**THE BOARD OF EDUCATION OF THE  
COUNTY OF HANCOCK, a statutory corporation,**

**Plaintiff,**

**v.**

**CIVIL ACTION NO. 16-C-76-W  
(Judge Ronald E. Wilson)**

**JAMES F. BALLER, SR., et al.**

**Defendants.**

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing Defendants' Joint Motion to Refer Case to the Business Court Division upon the parties on the 29<sup>th</sup> day of July, 2016, by mailing a true copy thereof by United States mail, postage prepaid, to the following counsel of record:

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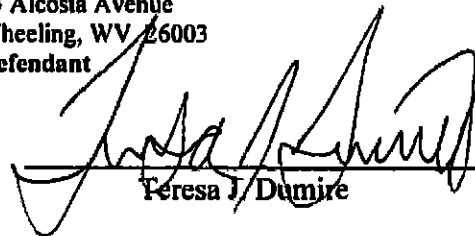
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