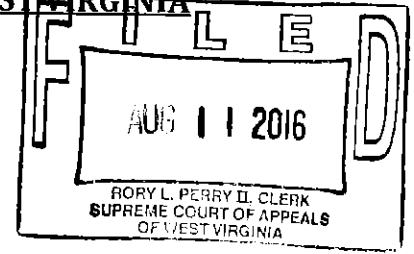


IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA

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

Plaintiff,



v.

**Case Number 16-C-76 W
Judge 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.

**PLAINTIFF'S REPLY MEMORANDUM TO "DEFENDANTS JOINT MOTION TO REFER
CASE TO THE BUSINESS COURT DIVISION"**

Now comes the Plaintiff, Board of Education of the County of Hancock, by and through its counsel, David F. Cross, and hereby files this Reply Memorandum to "Defendants Joint Motion to Refer Case to the Business Court Division" in accordance with Rule 29.06(a)(3) and Rule 29.06(a)(4) of the West Virginia Trial Court Rules and in this regard states as follows:

1. The Defendants have jointly moved this Honorable Court by motion filed on the 29th day of July, 2016, to have this civil action transferred from the Circuit Court of Hancock County to the Business Court in accordance with Rule 29 of the West Virginia Trial Court Rules.
2. Rule 29.04 is the definitional section related to business litigation and is the rule promulgated to determine whether civil actions should be transferred from the jurisdiction of the Circuit Court Judge to the Business Court Division.
3. Rule 29.04 provides in pertinent part as follows:
"For purposes of this Rule, the following definitions apply:
(a) "Business Litigation" – one or more pending actions in circuit court 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 suites; 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."
4. Therefore, in order for a case to be transferred to the Business Court under Trial Court Rule 29.04 the pending action in Circuit Court must meet the requirements set forth in subsection 1 and 2 and not involve a claim under subsection 3.
5. The motion filed by the Defendants must be denied in that the Defendants cannot meet the requirements set forth in Rule 29.04 in regard to the pending civil action. First, the principal claims of the Plaintiff do not involve matters of significance to the transactions, operations, or governance between business entities, as required under subsection 1. Second, the principal claims do not involve a dispute 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. Third, the Plaintiffs claims include the types of claims excluded from being transferred to Business Court under subsection 3 of the Rule.
6. The Plaintiff in this matter is the Hancock County Board of Education. The Hancock County Board of Education determined that the best interest of the citizens of Hancock County would be served by the construction of a new middle school known as the Oak Glen Middle School. The Hancock County Board of Education acquired the appropriate funding for the project. The Hancock County Board of Education contracted with McKinley & Associates, Inc, to serve as the engineer and architect for the project. The Hancock County Board of Education employed James F. Baller, Sr., as an independent contractor, to supervise the construction of the project for the Hancock County Board of Education and to serve as the Clerk of the Works. The Hancock County Board of Education obtained a performance and construction bond with Ohio Farmer Insurance Company.
7. The Hancock County Board of Education then bid the project and Colaianni Construction, Inc., was awarded the contract to construct the new school as a general contractor. Colaianni Construction, Inc., engaged other subcontractors to work on the project including Romig Roofing Company which was employed as a subcontractor to complete the roof on the project. ASC Profiles, Inc., was the manufacturer of the metal roofing which was negligently installed at the Oak Glen Middle School.
8. The claims set forth in the Plaintiff's Complaint are generally in three categories. The first category are negligence claims against separate parties for the negligent modification of the original design of the roof, negligence in the installation of the roof, negligence in the supervision of the installation of the roof. As a direct and

proximate result of these acts of negligence the roof was improperly installed, leaks, needs to be replaced, and the Oak Glen Middle School has property damage as a result of these negligent acts. The second category of claims asserted by the Plaintiff against the Defendants involve allegations of breach of contract. The third category of claims involve allegations of fraud, negligent misrepresentation, fraudulent concealment, conspiracy to commit negligent misrepresentation which claims allege that the Defendants jointly and in some cases severely made fraudulent misrepresentations to the Plaintiff concerning the roof, its condition, and the construction of the school.

9. There are also equitable claims asserted in this matter including a Petition for Specific Performance and claims for unjust enrichment. The Complaint also includes Petitions for Declaratory Judgment requesting that the Court make findings with respect to insurance coverage and causes of action against the bonding company for bad faith against the bonding company.
10. The claims asserted in the Plaintiff's Complaint do not involve matters of significance to the transactions, operations, or governance between business entities. This claim is primarily an everyday negligence and breach of contract claim.
11. The claims asserted in the Plaintiff's Complaint do not present 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. The Circuit Court Judge who is assigned the case certainly has the ability to address the legal issues presented in the pending matter.
12. There are claims asserted in the Complaint which are the type of claims excluded from being transferred under Rule 29.04 subsection 3. This Rule prohibits the transfer of cases to business court when the principal claim or claims involve consumer insurance coverage disputes, noncommercial 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. These types of claims are set forth in the Plaintiff's Complaint.

WHEREFORE, the Plaintiff prays that the Defendants Joint Motion to Transfer this civil action to Business Court be denied and that the Plaintiff be granted such other and further relief as the Court deems appropriate under the circumstances.

BOARD OF EDUCATION OF THE
COUNTY OF HANCOCK

By: David F. Cross
David F. Cross

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CERTIFICATE OF SERVICE

Service of the foregoing **PLAINTIFF'S REPLY MEMORANDUM TO "DEFENDANTS
JOINT MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION"** was served upon
the Defendants by mailing a true copy thereof to counsel of record:

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, on the 10th day of August, 2016.

David F. Cross
David F. Cross