

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

WEST VIRGINIA UNIVERSITY BOARD OF
GOVERNORS, a statutory corporation, for and
on behalf of West Virginia University

Plaintiff,

v.

CIVIL ACTION NO. 16-C-383

JACOBS FACILITIES, INC., a Missouri
business corporation, f/k/a Sverdrup
Facilities, Inc.; MOODY/NOLAN LTD.,
INC., an Ohio business corporation;
OVERLY MANUFACTURING
COMPANY, a Pennsylvania business
corporation, and DONALD M. MILLER
COMPANY, a Pennsylvania business
corporation,

Defendants.

DEFENDANT, DONALD M. MILLER, INC.'S, MOTION TO DISMISS
COUNTS II, III AND IV OF PLAINTIFF'S COMPLAINT

COMES NOW, Defendant, DONALD M. MILLER, INC., (incorrectly identified as Donald M. Miller Company), by counsel Jennifer Keadle Mason, Esquire and Clark Hill PLC, and files the within Motion and Brief in Support of Motion to Dismiss Counts II, III, and IV of Plaintiff's Complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure averring in support thereof as follows:

Statement of Facts

1. On or about July 18, 2016, Plaintiff, West Virginia University Board of Governors ("Plaintiff, WVU,"), filed a Complaint in Civil Action alleging various causes of action for recovery of damages related to a metal roof installed at the West Virginia University Student Recreation Center. *See Plaintiff's Complaint attached hereto as Exhibit "A".*

2. On April 22, 1998, Defendant, Jacob Facilities f/k/a Sverdrup Facilities ("Sverdrup") contracted with Plaintiff, WVU,, to serve as construction manager on the project. *See Exhibit "A."*
3. Defendant, Moody/Nolan Ltd., Inc., contracted with Plaintiff, WVU, to serve as the architect on the project. *See Exhibit "A."*
4. Defendant, Overly Manufacturing Company ("Overly") was the manufacturer of the metal roofing system. *See Exhibit "A."*
5. Defendant, Donald M. Miller, Inc. ("Miller") was subcontracted by "Sverdrup" to install the metal roofing system. *See Exhibit "A."*
6. The contract documents for the Student Recreation Center called for the design, manufacture and installation of a metal roofing system with a 30 year manufacturer's warranty. *See Exhibit "A."*
7. In its Complaint, Plaintiff, WVU, specifically references those contract documents, and specifically specification Section 07410, paragraph 1.06.A.1, which required the manufacturer to provide a thirty (30) year warranty against leakage of the metal roofing system. *See Exhibit "A."*
8. Plaintiff, WVU, alleges that during the fall of 2015, damage to the metal roof and roof leaks were discovered. *See Exhibit "A."*
9. After discovery of the problems with the metal roofing system, Plaintiff, WVU, asked "Overly" to replace the defective roofing system pursuant to the thirty (30) year anti-leak warranty. *See Exhibit "A."*
10. Plaintiff, WVU, alleges that "Overly" and all named-Defendants refused to honor the thirty (30) year anti-leak warranty.

11. Plaintiff, WVU, brings claims of negligence (Count II), breach of express warranty (Count III), and breach of implied warranty (Count IV) against Defendant "Miller."
12. Defendant "Miller" files the within Motion pursuant to West Virginia Rule of Civil Procedure 12(b)(6), asserting that: 1) Plaintiff's tort claim is barred by West Virginia's "gist of the action" doctrine; 2) Plaintiff has failed to allege any facts that support the existence of an express warranty by Defendant Miller; and 3) Plaintiff's claim for breach of implied warranty is barred by the West Virginia's Uniform Commercial Code four year statute of limitations.

Standard of Review

13. Rule 12(b)(6) of the West Virginia Rules of Civil Procedure "permits a party to file a motion in the circuit court, prior to filing an answer, to dismiss a claim for failure to state a cause of action." *Shaffer v. Charleston Area Med. Ctr.*, 199 W. Va. 428, 433, 485 S.E.2d 12, 17 (1997).
14. The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint. *Yoak v. Marshall Univ. Bd. of Governors*, 223 W. Va. 55, 59, 672 S.E.2d 191, 195 (2008) citing *Mandolidis v. Elkins Industries, Inc.*, 161 W.Va. 695, 717, 246 S.E.2d 907, 920 (1978).
15. A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits. *Id. citing State ex rel. McGraw v. Scott Runyan, Pontiac-Buick, Inc., supra*, 194 W.Va. at 776, 461 S.E.2d at 522.
16. When deciding a Rule 12(b)(6) motion to dismiss, the factual allegations must be construed in the light most favorable to the plaintiff. *Kessel v. Leavitt*, 204 W. Va. 95, 118, 511 S.E.2d 720, 743-44 (1998) citing *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996).

17. If it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, the motion to dismiss should be granted. *Id.* citing *Chapman v. Kane Transfer Company, [Inc.]*, 160 W. Va. 530, 236 S.E.2d 207 (1977) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80, 84 (1957)).

Argument

A. Plaintiff, WVU's, Tort Claim is Barred By the "Gist of the Action" Doctrine Because Any Duty Owed By Defendant Arises Through Contract.

18. Plaintiff, WVU, asserts that on September 30, 1999, "Miller" entered into a subcontract with "Sverdrup" wherein "Miller" agreed to perform roofing and architectural sheet metal work on the project. *See Exhibit "A", paragraph 47.*
19. Plaintiff, WVU, alleges that the subcontract incorporated by reference the drawings and specifications governing the work for the project, including the requirement that the building be covered by a thirty (30) year metal roofing system as provided in specification Section 07410; paragraph 1.06.A.1. *See Exhibit "A", paragraph 48.*
20. Plaintiff, WVU, alleges that Defendant "Miller" failed to provide a thirty (30) year metal roofing system in accordance with the project drawings and specifications, and that Defendant failed to properly install the metal roofing system including full width sheet cleats. *See Exhibit "A", paragraphs 49-51.* Although the contract doesn't require a 30 year system but instead requires a 30 year manufacturer's warranty, this allegation is not herein contested.
21. West Virginia's "gist of the action" doctrine bars recovery in tort when the duty that forms the basis of the asserted tort claim arises solely from a contractual relationship. *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976, 979 (4th Cir. 2015).

22. The "gist of the action" doctrine requires plaintiffs seeking relief in tort to identify a non-contractual duty breached by the alleged tortfeasor. *Id.* at 980-981 citing *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 746 S.E.2d 568, 577 (W. Va. 2013).
23. If the action is not maintainable without pleading and proving the contract, where the gist of the action is the breach of the contract, either by malfeasance or non-feasance, it is, in substance, an action on the contract, whatever may be the form of the pleading. *Id.* at 981 quoting *Cochran v. Appalachian Power Co.*, 162 W. Va. 86, 246 S.E.2d 624, 628 (W. Va. 1978).
24. Recovery in tort will be barred if any of the following facts are demonstrated: (1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim. *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 586, 746 S.E.2d 568, 577 (2013). *See also Dan Ryan Builders, supra*; *Covol Fuels No. 4, LLC v. Pinnacle Mining Co., LLC*, 785 F.3d 104, 115 (4th Cir. 2015); and *Rodgers v. Sw. Energy Co.*, Civil Action No. 5:16-cv-54, 2016 U.S. Dist. LEXIS 76574, at *9 (N.D.W. Va. June 13, 2016).
25. Plaintiff, WVU's, Complaint establishes that the alleged liability of Defendant "Miller" arises from the contractual relationship between the parties—i.e. the September 30, 1999 subcontract entered into between "Sverdrup" and "Miller" to perform roofing and architectural sheet metal work on the project.

26. Any alleged duty owed by Defendant "Miller" to Plaintiff, WVU, is grounded in the subcontract which allegedly incorporated the drawings and specifications of the project, including the requirement that that a metal roofing system with a 30 year manufacturer's warranty be installed. *See Rodgers, supra, at 9 quoting Gaddy*. In short, to determine whether a tort claim can be sustained separate from the breach of contract claim, the court must examine "whether the parties' obligations are defined by the terms of the contract."
27. There was no independent duty, outside the contract, that Defendant "Miller" owed to Plaintiff, WVU. *See Lockhart v. Airco Heating & Cooling*, 211 W. Va. 609, 614, 567 S.E.2d 619, 624 (2002) An action in tort will not arise for breach of contract unless the action in tort would arise independent of the existence of the contract.
28. Defendant "Miller" did not have any duty, except through the subcontract, to install the metal roofing system.
29. Because any alleged duty owed by Defendant "Miller" to Plaintiff, WVU, arises through the contract, Plaintiff, WVU's, tort claim is barred by the "gist of the action" doctrine. Accordingly, Plaintiff, WVU's, claim of negligence (Count II) should be dismissed with prejudice.
- B. Plaintiff, WVU, Has Not Alleged Any Facts That Support the Existence of An Express Warranty by Defendant "Miller".
30. Although Plaintiff, WVU, relies entirely on specification Section 07410 as the basis of its Complaint, Plaintiff, WVU, has failed to attach said specification. *See Specification Section 07410 attached here to as Exhibit "B."*
31. On a motion to dismiss, a court may consider, "in addition to the pleadings, documents annexed to it, and other materials fairly incorporated within it. This sometimes includes documents referred to in the complaint but not annexed to it." *Chesapeake Appalachia, L.L.C. v. Hickman*, 781 S.E.2d 198, 210 n.14 (W. Va. 2015) *citing* Franklin D. Cleckley,

Robin Jean Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(6) at 387 (4th Ed. 2012).

32. The complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference. *Forshey v. Jackson*, 222 W. Va. 743, 748, 671 S.E.2d 748, 753 (2008) citing *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002).
33. Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint. *Id.*
34. As it relates specifically to Defendant "Miller", Plaintiff, WVU, alleges that "Miller" "expressly agreed to provide a metal roofing system that would be free from leaks for a period of thirty (30) years, as specifically provided in specification section 07410, paragraph 1.06.A.1" See *Exhibit "A" paragraph 54.*
35. Specification Section 07410, paragraph 1.06.A.1, however, states that a "Panel manufacturer's 30 year warranty against leakage of the installed metal batten roofing system shall be provided." See *Exhibit "B."*
36. It is clear that the express warranty provided for in specification Section 07410, paragraph 1.06.A.1 applies only to the provision of a 30 year warranty from the panel manufacturer.
37. Plaintiff, WVU, admits a warranty was provided by the product manufacturer "Overly". See *allegations against them at Exhibit "A", paragraph 22.*
38. Plaintiff, WVU, does not allege that Defendant "Miller" is the panel manufacturer.
39. Plaintiff, WVU, specifically alleges that Defendant "Miller" was the installer of the metal roofing system. See *Exhibit "A", paragraph 14.*

40. The panel manufacturer is "Overly". *See Exhibit "A", paragraph 17.*
41. Because specification Section 07410, paragraph 1.06.A.1 is apparently the only contract document to identify or reference the 30 year manufacturer's warranty, and such express warranty applies only to the panel manufacturer, "Overly", Plaintiff, WVU, can prove no set of facts to support its claim against Defendant "Miller" as to breach of express warranty which would entitle it to relief.
42. As such, Plaintiff, WVU's, claim of breach of express warranty (Count III) should be dismissed with prejudice as to Defendant "Miller."
- C. Plaintiff, WVU's, Claim For Breach of Implied Warranty As To Defendant "Miller" is Barred by West Virginia's Uniform Commercial Code Four-Year Statute of Limitations.
43. Although the West Virginia Uniform Commercial Code (UCC) generally does not apply to construction contracts, *see Elkins Manor Assocs. v. Eleanor Concrete Works*, 183 W. Va. 501, 396 S.E.2d 463 (1990) , Plaintiff, WVU, has alleged breach of implied warranty fit for a particular purpose against Defendant "Miller". *See Exhibit "A", paragraph 60.*
44. Plaintiff, WVU, specifically alleges that Defendant impliedly agreed to provide a metal roofing system that was fit for a particular purpose i.e. that the roofing system would be free from leaks for a period of thirty (30) years; that Plaintiff, WVU, relied on that implied promise; and that Defendants "Miller" failed to provide a roofing system free from leaks for a period of thirty (30) years. *See Exhibit "A", paragraphs 60-62; See also Jones, Inc. v. W. A. Wiedebusch Plumbing & Heating Co.*, 157 W. Va. 257, 267, 201 S.E.2d 248, 254 (1973)(Elements of the warranty for fitness of purpose include: (1) The seller at the time of the contracting had reason to know the particular purpose for which the goods were required; (2) the reliance by the plaintiff as buyer upon the skill or

judgment of the seller to select suitable goods; and (3) that the goods were unfit for the particular purpose.)

45. A breach of warranty occurs when tender of delivery is made. W. Va. Code § 46-2-725(2).

46. After delivery is made, a warranty claim has a statute of limitations of four years, W. Va. Code § 46-2-725(1), except "where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance..." W. Va. Code § 46-2-725(2).

47. Plaintiff, WVU, alleges that Defendant "Miller" "impliedly agreed to provide a metal roofing system that was fit for a particular purpose..." *See Exhibit "A", paragraph 60.*

48. Plaintiff, WVU, alleges that the roofing work was completed by November 1, 2001. *See Exhibit "A", paragraph 66.*

49. Pursuant to W. Va. Code § 46-2-725(2), the statute of limitations on the implied warranty claim began to run on November 1, 2001 and lapsed four years later on November 1, 2005.

50. Therefore, Plaintiff, WVU's, claim for breach of implied warranty is barred by the statute of limitations.

51. Furthermore, for the exception to the statute of limitations to apply, a warranty must be explicit.

52. Any explicit claim that the metal roofing system would be free from leaks for a period of thirty (30) years would amount to an express warranty—not an implied warranty.

53. As such, Plaintiff, WVU's, claim for breach of implied warranty as to Defendant "Miller" is time barred as the four year statute of limitations has run.

Conclusion

Defendant "Miller" moves this Honorable Court to dismiss Plaintiff, WVU's, claims against Defendant "Miller" pursuant to West Virginia Rule of Civil Procedure 12(b)(6) because:

1) Plaintiff, WVU's, tort claim is barred by West Virginia's "gist of the action" doctrine; 2) Plaintiff, WVU, has failed to allege any facts that support the existence of an express warranty by Defendant "Miller"; and 3) Plaintiff, WVU's, claim for breach of implied warranty is barred by the West Virginia Uniform Commercial Code four year statute of limitations.

Based on the foregoing and pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, Plaintiff, WVU's, claims of negligence (Count II); breach of express warranty (Count III); and breach of implied warranty (Count IV) against Defendant Donald M. Miller, Inc. should be dismissed with prejudice.

WHEREFORE, Defendant, Donald M. Miller, Inc., respectfully requests that this Honorable Court grant its Motion to Dismiss and enter the Order of Court attached hereto.

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

WEST VIRGINIA UNIVERSITY BOARD OF
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Plaintiff,

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CIVIL ACTION NO. 16-C-383

JACOBS FACILITIES, INC., a Missouri
business corporation, f/k/a Sverdrup
Facilities, Inc.; MOODY/NOLAN LTD.,
INC., an Ohio business corporation;
OVERLY MANUFACTURING
COMPANY, a Pennsylvania business
corporation, and DONALD M. MILLER
COMPANY, a Pennsylvania business
corporation,

Defendants.

DEFENDANT DONALD M. MILLER, INC.'S BRIEF IN SUPPORT OF MOTION TO
DISMISS COUNTS II, III AND IV OF PLAINTIFF'S COMPLAINT

COMES NOW, Defendant DONALD M. MILLER, INC., (incorrectly identified as Donald
M. Miller Company), by counsel Jennifer Keadle Mason, Esquire and Clark Hill PLC, and files
the within Motion to Dismiss Counts II, III, and IV of Plaintiff's Complaint pursuant to Rule
12(b)(6) of the West Virginia Rules of Civil Procedure averring in support thereof as follows:

I. Statement of Facts

On or about July 18, 2016, Plaintiff, West Virginia University Board of Governors
("Plaintiff, WVU,"), filed a Complaint in Civil Action alleging various causes of action for
recovery of damages related to a metal roof installed at the West Virginia University Student
Recreation Center. *See Plaintiff, WVU's, Complaint attached hereto as Exhibit "A".* On April
22, 1998, Defendant, Jacob Facilities f/k/a Sverdrup Facilities ("Sverdrup") contracted with
Plaintiff, WVU, to serve as construction manager on the project. *See Exhibit "A."* Defendant,
Moody/Nolan Ltd., Inc., contracted with Plaintiff, WVU, to serve as the architect on the project.

See Exhibit "A." Defendant, Overly Manufacturing Company ("Overly") was the manufacturer of the metal roofing system. *See Exhibit "A."* Defendant, Donald M. Miller, Inc. ("Miller") was allegedly subcontracted by "Sverdrup" to install the metal roofing system. *See Exhibit "A."*

Allegedly, the contract documents for the Student Recreation Center called for the design, manufacture and installation of a metal roofing system with a 30 year manufacturer's warranty at the Student Recreation Center. *See Exhibit "A."* Plaintiff, WVU, specifically references specification Section 07410, paragraph 1.06.A.1 which required the manufacturer to provide a thirty (30) year warranty against leakage of the metal roofing system. *See Exhibit "A."*

Plaintiff, WVU, alleges that during the fall of 2015, damage to the metal roof and roof leaks were discovered. *See Exhibit "A."* After discovery of the problems with metal roofing system, Plaintiff, WVU, asked "Overly" to replace the defective roofing system pursuant to the thirty (30) year anti-leak warranty. *See Exhibit "A."* Plaintiff, WVU, alleges that "Overly" and all named-Defendants refused to honor the thirty (30) year anti-leak warranty.

Plaintiff, WVU, brings claims of negligence (Count II), breach of express warranty (Count III), and breach of implied warranty (Count IV) against Defendant "Miller". Defendant "Miller" files the within Motion pursuant to West Virginia Rule of Civil Procedure 12(b)(6), asserting that: 1) Plaintiff, WVU's, tort claim is barred by West Virginia's "gist of the action" doctrine; 2) Plaintiff, WVU, has failed to allege any facts that support the existence of an express warranty by Defendant "Miller"; and 3) Plaintiff, WVU's, claim for breach of implied warranty is barred by the West Virginia Uniform Commercial Code four year statute of limitations.

II. Standard of Review

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure “permits a party to file a motion in the circuit court, prior to filing an answer, to dismiss a claim for failure to state a cause of action.” *Shaffer v. Charleston Area Med. Ctr.*, 199 W. Va. 428, 433, 485 S.E.2d 12, 17 (1997). The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint. *Yoak v. Marshall Univ. Bd. of Governors*, 223 W. Va. 55, 59, 672 S.E.2d 191, 195 (2008) citing *Mandolidis v. Elkins Industries, Inc.*, 161 W. Va. 695, 717, 246 S.E.2d 907, 920 (1978). A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits. *Id.* citing *State ex rel. McGraw v. Scott Runyan, Pontiac-Buick, Inc., supra*, 194 W. Va. at 776, 461 S.E.2d at 522.

When deciding a Rule 12(b)(6) motion to dismiss, the factual allegations must be construed in the light most favorable to the Plaintiff, WVU. *Kessel v. Leavitt*, 204 W. Va. 95, 118, 511 S.E.2d 720, 743-44 (1998) citing *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996). If it appears beyond doubt that the Plaintiff, WVU, can prove no set of facts in support of his claim which would entitle him to relief, the motion to dismiss should be granted. *Id.* citing *Chapman v. Kane Transfer Company, [Inc.]*, 160 W. Va. 530, 236 S.E.2d 207 (1977) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80, 84 (1957)).

III. Argument

A. Plaintiff, WVU's, Tort Claim Is Barred By the “Gist of the Action” Doctrine Because Any Duty Owed By Defendant “Miller” Arises Through Contract.

Plaintiff, WVU, asserts that on September 30, 1999, Defendant “Miller” entered into a subcontract with “Sverdrup” wherein “Miller” agreed to perform roofing and architectural sheet metal work on the project. *See Exhibit “A”, paragraph 47*. Plaintiff, WVU, alleges that the subcontract incorporated by reference the drawings and specifications governing the work for the

project, including the requirement that the roofing system be covered by a thirty (30) year warranty as specified in Section 07410, paragraph 1.06.A.1. *See Exhibit "A", paragraph 48.* (A fire occurred at Defendants premises between the time of this work and the filing of Plaintiff, WVU's, Complaint. All documents related to this matter were destroyed. Therefore, this Defendant cannot presently confirm or deny said allegation. However, for purposes of the Motion, Defendant "Miller" presumes this to be true.) Plaintiff, WVU, alleges that Defendant "Miller" failed to provide a metal roofing system with a 30 year warranty in accordance with the project drawings and specifications, and that Defendant failed to properly install the metal roofing system including full width sheet cleats. *See Exhibit "A", paragraphs 49-51.*

West Virginia's "gist of the action" doctrine bars recovery in tort when the duty that forms the basis of the asserted tort claim arises solely from a contractual relationship. *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976, 979 (4th Cir. 2015). The "gist of the action" doctrine requires plaintiffs seeking relief in tort to identify a non-contractual duty breached by the alleged tortfeasor. *Id.* at 980-981 citing *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 746 S.E.2d 568, 577 (W. Va. 2013). If the action is not maintainable without pleading and proving the contract, where the gist of the action is the breach of the contract, either by malfeasance or non-feasance, it is, in substance, an action on the contract, whatever may be the form of the pleading. *Id.* at 981 quoting *Cochran v. Appalachian Power Co.*, 162 W. Va. 86, 246 S.E.2d 624, 628 (W. Va. 1978).

Recovery in tort will be barred if any of the following facts is demonstrated: (1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim. *Gaddy*

Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP, 231 W. Va. 577, 586, 746 S.E.2d 568, 577 (2013). See also *Dan Ryan Builders, supra*; *Covol Fuels No. 4, LLC v. Pinnacle Mining Co., LLC*, 785 F.3d 104, 115 (4th Cir. 2015); and *Rodgers v. Sw. Energy Co.*, Civil Action No. 5:16-cv-54, 2016 U.S. Dist. LEXIS 76574, at *9 (N.D.W. Va. June 13, 2016).

Plaintiff, WVU's, Complaint establishes that the alleged liability of Defendant "Miller" arises from the contractual relationship between the parties—i.e. the September 30, 1999 subcontract entered into between "Sverdrup" and "Miller" to perform roofing and architectural sheet metal work on the project. Any alleged duty owed by Defendant "Miller" to Plaintiff, WVU, is grounded in the subcontract which incorporated the drawings and specifications of the project including the requirement that that a metal roofing system with a 30 year manufacturer's warranty be installed. See *Rodgers, supra*, at 9 quoting *Gaddy*. In short, to determine whether a tort claim can be sustained separate from the breach of contract claim, the court must examine "whether the parties' obligations are defined by the terms of the contract." There was no independent duty, outside of the contract, that Defendant "Miller" owed to Plaintiff, WVU. See *Lockhart v. Airco Heating & Cooling*, 211 W. Va. 609, 614, 567 S.E.2d 619, 624 (2002). An action in tort will not arise for breach of contract unless the action in tort would arise independent of the existence of the contract. Defendant did not have any except through the subcontract to install the metal roofing system.

Because any alleged duty owed by Defendant "Miller" to Plaintiff, WVU, arises through the contract, Plaintiff, WVU's, tort claim is barred by the "gist of the action" doctrine. Accordingly, Plaintiff, WVU's, claim of negligence (Count II) against Defendant "Miller" should be dismissed with prejudice.

B. Plaintiff, WVU, Has Not Alleged Any Facts That Support the Existence of An Express Warranty by Defendant "Miller".

Apparently, the only contract document that discusses the requirement to provide a 30 year manufacturer's warranty is specification Section 07410. While Plaintiff, WVU, has referenced the document in its Complaint, Plaintiff, WVU, has failed to attach said specification. *See Specification Section 07410 attached here to as Exhibit "B."* However, on a motion to dismiss, a court may consider, "in addition to the pleadings, documents annexed to it, and other materials fairly incorporated within it. This sometimes includes documents referred to in the complaint but not annexed to it." *Chesapeake Appalachia, L.L.C. v. Hickman*, 781 S.E.2d 198, 210 n.14 (W. Va. 2015) *citing* Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(6) at 387 (4th Ed. 2012). The complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference. *Forshey v. Jackson*, 222 W. Va. 743, 748, 671 S.E.2d 748, 753 (2008) *citing* *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002). Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint. *Id.*

As it relates specifically to Defendant "Miller", Plaintiff, WVU, alleges that Defendant "Miller" "expressly agreed to provide a metal roofing system that would be free from leaks for a period of thirty (30) years, as specifically provided in specification section 07410, paragraph 1.06.A.1" *See Exhibit "A" paragraph 54*. Specification Section 07410, paragraph 1.06.A.1. [The specification actually requires the provision of a "Panel manufacturer's 30 year warranty against leakage of the installed metal batten roofing system." *See Exhibit "B."*]

By its clear terms, the express warranty provided for in specification Section 07410, paragraph 1.06.A.1 requires only the provision of a 30 year warranty from the panel

manufacturer. Plaintiff, WVU, admits a warranty was provided by the product manufacturer "Overly". *See allegations against them at Exhibit "A", paragraph 22.* Plaintiff, WVU, does not allege that Defendant "Miller" is the panel manufacturer. Plaintiff, WVU, specifically alleges that "Miller" was the installer of the metal roofing system. *See Exhibit "A", paragraph 14.* The panel manufacturer is "Overly". *See Exhibit "A", paragraph 17.*

Because apparently the only contract document that mentions the 30 year manufacturer's warranty is specification Section 07410, paragraph 1.06.A.1 and such express warranty applies only to the panel manufacturer, "Overly", Plaintiff, WVU, can prove no set of facts to support its claim against Defendant "Miller" which would entitle it to relief. As such, Plaintiff, WVU's, claim of breach of express warranty (Count III) as to Defendant "Miller" should be dismissed with prejudice.

C. Plaintiff, WVU's, Claim For Breach of Implied Warranty as to Defendant "Miller" is Barred by West Virginia's Uniform Commercial Code Four-Year Statute of Limitations

Although the West Virginia Uniform Commercial Code (UCC) generally does not apply to construction contracts, *see Elkins Manor Assocs. v. Eleanor Concrete Works*, 183 W. Va. 501, 396 S.E.2d 463 (1990), Plaintiff, WVU, has alleged breach of implied warranty fit for a particular purpose. *See Exhibit "A", paragraph 60.* Plaintiff, WVU, specifically alleges that Defendants impliedly agreed to provide a metal roofing system that was fit for a particular purpose i.e. that the roofing system would be free from leaks for a period of thirty (30) years; that Plaintiff, WVU, relied on that implied promise; and that Defendants failed to provide a roofing system free from leaks for a period of thirty (30) years. *See Exhibit "A", paragraphs 60-62; See also Jones, Inc. v. W. A. Wiedebusch Plumbing & Heating Co.*, 157 W. Va. 257, 267, 201 S.E.2d 248, 254 (1973) Elements of the warranty for fitness of purpose include: (1) The seller at the time of the contracting had reason to know the particular purpose for which the

goods were required; (2) the reliance by the plaintiff as buyer upon the skill or judgment of the seller to select suitable goods; and (3) that the goods were unfit for the particular purpose.

A breach of warranty occurs when tender of delivery is made. W. Va. Code § 46-2-725(2). After delivery is made, a warranty claim has a statute of limitations of four years, W. Va. Code § 46-2-725(1), except “where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance...” W. Va. Code § 46-2-725(2). Plaintiff, WVU, alleges that Defendant “Miller” “impliedly agreed to provide a metal roofing system that was fit for a particular purpose...” *See Exhibit “A”, paragraph 60*. Plaintiff, WVU, alleges that roofing work was completed by November 1, 2001. *See Exhibit “A”, paragraph 66*. Pursuant to W. Va. Code § 46-2-725(2), the statute of limitations on the implied warranty claim began to run on November 1, 2001 and lapsed four year later on November 1, 2005. Therefore, Plaintiff, WVU’s, claim for breach of implied warranty is barred by the statute of limitations.

Furthermore, for the exception to the statute of limitations to apply, a warranty must be explicit. Any explicit claim that the metal roofing system would be free from leaks for a period of thirty (30) years would amount to an express warranty—not an implied warranty. As such, Plaintiff, WVU’s, claim for breach of implied warranty as to Defendant “Miller” is time barred as the four year statute of limitations has run.

IV. Conclusion

Defendant “Miller” moves this Honorable Court to dismiss Plaintiff, WVU’s, claims against Defendant “Miller” pursuant to West Virginia Rule of Civil Procedure 12(b)(6) because: 1) Plaintiff, WVU’s, tort claim is barred by West Virginia’s “gist of the action” doctrine; 2) Plaintiff, WVU, has failed to alleged any facts that support the existence of an express warranty

by Defendant "Miller"; and 3) Plaintiff, WVU's, claim for breach of implied warranty is barred by the West Virginia's Uniform Commercial Code four year statute of limitations.

Based on the foregoing and pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, Plaintiff, WVU's, claims of negligence (Count II); breach of express warranty (Count III); and breach of implied warranty (Count IV) against Defendant Donald M. Miller, Inc. should be dismissed with prejudice.

WHEREFORE, Defendant, Donald M. Miller, Inc., respectfully requests that this Honorable Court grant its Motion to Dismiss and enter the Order of Court attached hereto.

Respectfully Submitted,



Jennifer K. Mason, Esquire
W.Va. Bar ID: 6616
Clark Hill PLC
1290 Suncrest Towne Centre
Morgantown, WV 26505
304-233-5599
Counsel for Defendant,
Donald M. Miller, Inc.

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

WEST VIRGINIA UNIVERSITY BOARD OF
GOVERNORS, a statutory corporation, for and
on behalf of West Virginia University

Plaintiff,

v.

CIVIL ACTION NO. 16-C-383

JACOBS FACILITIES, INC., a Missouri
business corporation, f/k/a Sverdrup
Facilities, Inc.; MOODY/NOLAN LTD.,
INC., an Ohio business corporation;
OVERLY MANUFACTURING
COMPANY, a Pennsylvania business
corporation, and DONALD M. MILLER
COMPANY, a Pennsylvania business
corporation,

Defendants.

ORDER OF COURT

AND NOW, this _____ day of _____, 2016, it is hereby ORDERED,
ADJUDGED, and DECREED that Defendant Donald M. Miller, Inc.'s (incorrectly identified as
Donald M. Miller Company) Motion to Dismiss is GRANTED and Plaintiff, WVU's, claims of
negligence (Count II); breach of express warranty (Count III); and breach of implied warranty
(Count IV) against Defendant Donald M. Miller, Inc. are hereby dismissed with prejudice.

J.

EXHIBIT "A"

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS,
a statutory corporation, for and on behalf of West Virginia
University,

Plaintiff,

v.

Civil Action No.: 16-C-383

JACOBS FACILITIES, INC., a Missouri
business corporation, f/k/a Sverdrup Facilities, Inc.;
MOODY/NOLAN LTD., INC., an Ohio business corporation,
OVERLY MANUFACTURING COMPANY,
a Pennsylvania business corporation, and
DONALD M. MILLER COMPANY, a Pennsylvania
business corporation,

Defendants.

COMPLAINT

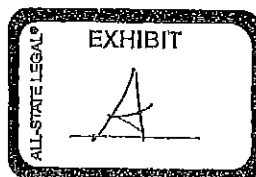
COMES NOW, Plaintiff, the West Virginia University Board of Governors, for
and on behalf of West Virginia University, by its counsel, and states as follows:

Nature of Action

1. This is an action alleging various causes of action for recovery of damages related to a metal roof installed at the West Virginia University Student Recreation Center. The contract plans and specifications used for the Student Recreation Center contained specific requirements for the manufacture and installation of the metal roof, including a thirty (30) year warranty against leakage as provided by specification section 07410, paragraph 1.06.A.1. During the fall of 2015, and well within the warranty period, significant damage to the metal roof was discovered during a routine maintenance inspection.

ORIGINAL DOCUMENT FILED
WITH CIRCUIT CLERK

7-18-16



The Parties

2. Plaintiff, the West Virginia University Board of Governors, is a statutory corporation pursuant to West Virginia Code § 18B-2A-1 et seq., that is the governing body with the mission of general supervision and control over the academic and business affairs of West Virginia University (hereinafter collectively referred to as the "University"). While the University resides in the State of West Virginia, as the alter ego of the State, it is not a citizen for purposes of diversity jurisdiction.

3. Defendant, Jacobs Facilities, Inc. ("Jacobs"), is a Missouri business corporation, formerly known as Sverdrup Facilities, Inc. (collectively "Sverdrup"), with its principal place of business located at 400 South Fourth Street, St. Louis, Missouri. Sverdrup CRSS is a division of Jacobs. Jacobs is a wholly owned subsidiary of Jacobs Engineering Group Inc.

4. Defendant, Moody/Nolan Ltd., Inc. ("Moody/Nolan"), is an Ohio business corporation with its principal place of business located at 1776 East Broad Street, Columbus, Ohio.

5. Defendant, Overly Manufacturing Company ("Overly"), is a Pennsylvania business corporation with its principal place of business located at 574 West Otterman Street, Greensburg, Pennsylvania.

6. Defendant, Donald M. Miller, Inc. ("Miller"), is a Pennsylvania business corporation with its principal place of business located at 3 Wood Street, Uniontown, Pennsylvania.

Jurisdiction and Venue

7. The roofing system giving rise to this action is located in Morgantown, Monongalia County, West Virginia.

8. This Court has jurisdiction over this action, personal jurisdiction over the parties named herein, and venue is proper in this Court.

Operative Facts

9. On April 22, 1998, the University contracted with Sverdrup to act as the Construction Manager and as a Constructor of a New Student Recreation Center to be located on the West Virginia University Evansdale Campus in Morgantown, West Virginia (the "Project").

10. The University contracted with Moody/Nolan who acted as the Project architect.

11. The scope of work, schematic designs and specifications for the Project included the design, manufacture and installation of a thirty (30) year metal roofing system on the Recreation Center.

12. Moody/Nolan designed the metal roofing system and developed specifications for a thirty (30) year metal roofing system that met its design intent.

13. Installation of the metal roofing system was contained in Sverdrup's scope of work.

14. In completing its scope of work related to the metal roofing system, Sverdrup submitted to the architect for approval a thirty (30) year metal roofing system manufactured by Overly and subcontracted with Miller to install the metal roofing system.

15. Project specifications under section 07410, paragraph 1.06.A, required that the metal roofing system include a thirty (30) year warranty against leakage from the panel manufacturer and include a twenty (20) year warranty against structural defect from the panel manufacturer.

16. Project specifications under section 07410, paragraphs 1.03.C. and 1.04.C, required the manufacturer of the metal roofing system to certify that the installer was qualified and approved by the manufacturer to install the specified roofing system.

17. Pursuant to the Project specifications, Overly, as the manufacturer, certified that Miller "... has proven the ability to install metal roofing systems in accordance with approved drawings and instructions" and, at the beginning of the installation of the metal roofing, Overly showed Miller how to install the metal roofing.

18. Pursuant to the Project specifications, Overly certified that "Manufacturing Company approves of this company [Miller] as the installer of the Batten Roofing System as specified for the project listed above [Student Recreation Center]."

19. Overly also certified that it would conduct a "final inspection" of the installation of the metal roofing system to make sure that Miller's work conformed to the Project requirements and design specifications prior to issuing the Warranty from Overly.

20. Periodically during the course of the Project, and particularly during the installation of the metal roofing system, Miller certified to Sverdrup, Sverdrup certified to Moody/Nolan, and Moody/Nolan certified to the University, that the installation of the metal roofing system had been completed in accordance with the contract documents.

21. Based upon the various certifications that the installation of the metal roofing system had been completed in accordance with the contract documents, the University approved payment for the installation of the metal roofing system.

22. When the installation of the metal roofing system had been completed, Overly performed a final inspection of the roofing system, determined that Miller's installation was performed in accordance with the contract documents and issued the 30-year Overly Warranty.

23. In April of 2015, representatives of the University notified that the metal roof was leaking over the pool equipment room.

24. In May and June of 2015, representatives of the University had a local roofing contractor, Kalkreuth Roofing & Sheet Metal, Inc. ("Kalkreuth"), and Overly inspect the area where the roof was leaking.

25. As a result of the June, 2015, roof inspection, Overly reported on June 11, 2015, that the roof leaks over the pool area were caused by the failure of Miller to properly install full width sheet cleats under the metal roofing.

26. As a result of the June, 2015, roof inspection, Overly recommended that the leaking sections of the roof be repaired by, *inter alia*, reinstalling the metal roofing with the full width sheet cleats.

27. In October of 2015, representatives of the University engaged Kalkreuth to complete the Overly-recommended roofing repairs over the pool area.

28. While preparing for the repair work, Kalkreuth noticed that other areas of the roof showed similar signs of failure.

29. In December of 2015, Kalkreuth and Overly inspected the entire metal roofing system.

30. As a result of roof inspection in December of 2015, Overly reported, by letter dated December 10, 2015, that roofing sheets were improperly anchored in place by machine screws rather than full width sheet cleats and Rawl fasteners.

31. Overly further reported that practically all of the metal roofing system lacked full width sheet cleats, which allowed uncontrolled movement of the roofing sheets due to thermal expansion and contraction and the effects of gravitational pull.

32. The roofing systems have been compromised with respect to two (2) of their primary functions: prevention of water entry and withstanding of wind uplift forces.

33. Damages resulting from the improper anchoring and uncontrolled movement of roofing sheets include, but are not limited to, the following:

- a. Opening of top and bottom roof sheet hooks, allowing undue wind pressure effects and precipitation to enter into the sub base below the metal;
- b. Tears in the metal;
- c. Torn and destroyed secondary water resistance sub base layering;
- d. Deterioration of the side rails of the roofing sheets and the side rails of the extruded batten bars;
- e. Damage to the batten caps and cap attachment fasteners;
- f. Stress to existing components; and,
- g. Further unrevealed damages.

34. As a result of the December, 2015, roofing inspection, Overly recommended that the entire metal roofing system be removed and reinstalled with the proper anchors.

35. After discovery of the problems with the metal roofing system, representatives of the University asked Overly to replace the defective roofing system pursuant to the thirty (30) year anti-leak warranty.

36. To date, Overly has refused to honor its warranty obligations to replace the metal roofing system.

37. After discovery of the problems with the metal roofing system, representatives of the University asked the named Defendants to replace the defective roofing system pursuant to the thirty (30) year anti-leak warranty.

38. To date, the named Defendants have refused to honor their warranty obligations to replace the metal roofing system.

39. As a direct, proximate and foreseeable result of the events complained of herein, the University has been damaged in an amount in excess of the jurisdictional limits of this Court.

COUNT I

(Breach of Contract Against Jacobs Facilities, Inc.)

40. The University incorporates herein by reference each and every allegation set forth in paragraphs 1 through 39 of this Complaint as though each and every allegation and paragraph were set forth herein verbatim.

41. On April 22, 1998, the University and Sverdrup entered into a contract for construction management and construction services for the Project.

42. The contract incorporated by reference the drawings and specifications governing the work for the Project, including the requirement that the building be covered by a thirty (30) year metal roofing system as provided in specification section 07410, paragraph 1.06.A.1.

43. In performing its work on the Project, Sverdrup, through one of its subcontractors, failed to provide thirty (30) year metal roofing system in accordance with the Project drawings and specifications and instead provided a roofing system that was deficient, did not in fact meet the requirements of the Project drawings and specifications and has now failed.

44. The failure of Sverdrup to provide a thirty (30) year metal roofing system in compliance with the Project drawings and specifications constitutes a breach of the April 22, 1998 agreement.

45. As a direct, proximate and foreseeable result of Sverdrup's breach of the April 22, 1998, agreement, the University has been damaged in an amount equal to the cost of repairing, replacing, and/or reinstalling the roofing system so as to provide the University with a roofing system that is free of defects and performs properly.

COUNT II

(Negligence Against Donald M. Miller Company)

46. The University incorporates herein by reference each and every allegation set forth in paragraphs 1 through 45 of this Complaint as though each and every allegation and paragraph were set forth herein verbatim.

47. On September 30, 1999, Miller entered into a subcontract with Sverdrup wherein Miller agreed to perform roofing and architectural sheet metal work on the Project.

48. The subcontract incorporated by reference the drawings and specifications governing the work for the Project, including the requirement that the building be covered by a thirty (30) year metal roofing system as provided in specification section 07410, paragraph 1.06.A.1.

49. In performing its work on the Project, Miller failed to provide a thirty (30) year metal roofing system in accordance with the Project drawings and specifications and instead

provided a roofing system that was deficient, did not in fact meet the requirements of the Project drawings and specifications and has now failed.

50. Specifically, Miller failed to properly install full width sheet cleats under the metal roofing as required by the Project drawings and specifications.

51. Miller's failure to properly install the metal roofing system constitutes negligence.

52. As a direct, proximate and foreseeable result of Miller's negligent work, the University has been damaged in an amount equal to the cost of repairing, replacing, and/or reinstalling the roofing system so as to provide the University with a roofing system that is free of defects and performs properly.

COUNT III

(Breach of Express Warranty Against All Defendants)

53. The University incorporates herein by reference each and every allegation set forth in paragraphs 1 through 52 of this Complaint as though each and every allegation and paragraph were set forth herein verbatim.

54. All of the named Defendants expressly agreed to provide a metal roofing system that would be free from leaks for a period of thirty (30) years, as specifically provided in specification section 07410, paragraph 1.06.A.1.

55. The University relied upon the express promise that the building would be covered by a metal roofing system with a leak free thirty (30) year warranty when it decided to enter into contracts regarding the Project.

56. In performing their work on the Project, the Defendants failed to provide a thirty (30) year metal roofing system in accordance with the Project drawings and specifications and instead provided a roofing system that was deficient, did not in fact meet the requirements of the Project drawings and specifications and has now failed.

57. The Defendants' failure to provide a thirty (30) year metal roofing system that was leak free for thirty (30) year constitutes a breach of an express warranty.

58. As a direct, proximate and foreseeable result of the Defendants' breach of an express warranty, the University has been damaged in an amount equal to the cost of repairing, replacing, and/or reinstalling the roofing system so as to provide the University with a roofing system that is free of defects and performs properly.

COUNT IV

(Breach of Implied Warranty Against All Defendants)

59. The University incorporates herein by reference each and every allegation set forth in paragraphs 1 through 58 of this Complaint as though each and every allegation and paragraph were set forth herein verbatim.

60. All of the named Defendants impliedly agreed to provide a metal roofing system that was fit for a particular purpose; namely, that the roofing system would be free from leaks for a period of thirty (30) years.

61. The University relied upon the implied promise that the building would be covered by a metal roofing system with a leak free thirty (30) year warranty when it decided to enter into contracts regarding the Project.

62. In performing their work on the Project, the defendants failed to provide a metal roofing system that was fit for a particular purpose -- namely, a roofing system free from leaks for a period of thirty (30) years -- and instead provided a roofing system that was deficient and did not in fact provide a leak free cover for the building for thirty (30) years.

63. The defendants' failure to provide a metal roofing system that was leak free for thirty (30) years constitutes a breach of an implied warranty.

64. As a direct, proximate and foreseeable result of the Defendants' breach of an implied warranty, the University has been damaged in an amount equal to the cost of repairing, replacing, and/or reinstalling the roofing system so as to provide the University with a roofing system that is free of defects and performs properly.

COUNT V

(Breach of Express Limited Warranty Against Overly)

65. The University incorporates herein by reference each and every allegation set forth in paragraphs 1 through 64 of this Complaint as though each and every allegation and paragraph were set forth herein verbatim.

66. At the conclusion of the roofing work by Miller and after an inspection of the Miller work by Overly, on November 1, 2001, Overly issued a thirty (30) year Limited Warranty to the University warranting the metal roofing system against leakage due to defects in workmanship.

67. Within the limited warranty period, the University noticed leaks in the metal roofing system and promptly notified Overly who inspected the leaks and confirmed that the leaks were due to defects in workmanship.

68. After discovery of the problems with the metal roofing system, representatives of the University asked Overly to replace the defective roofing system pursuant to the thirty (30) year anti-leak warranty.

69. To date, Overly has refused to honor its warranty obligations to replace the metal roofing system.

70. Under the express terms of the Overly Limited Warranty, Overly is liable to the University in an amount equal to the cost of repairing, replacing, and/or reinstalling the

roofing system so as to provide the University with a roofing system that is free of defects and performs properly.

COUNT VI

(Negligent Misrepresentation Against Overly)

71. The University incorporates herein by reference each and every allegation set forth in paragraphs 1 through 70 of this Complaint as though each and every allegation and paragraph were set forth herein verbatim.

72. As required by the Project specifications under section 07410, paragraphs 1.03.C. and 1.04.C., Overly represented to the University that Miller was a qualified installer of the Overly metal roofing system.

73. In a letter certifying to the University that Miller was a qualified installer of the Overly metal roofing system, Overly also represented to the University that it would inspect Miller's work for defects in workmanship prior to issuing the Overly Limited Warranty.

74. At the conclusion of the roofing work by Miller, Overly issued the Overly thirty (30) year Limited Warranty.

75. Overly made the foregoing affirmative representations to the University without any reasonable factual basis for the representation.

76. Based upon these representations, the University approved Miller as an installer of the Overly metal roofing system and the University approved payment applications that included Miller's work on the project.

77. As a direct, proximate and foreseeable result of the negligent misrepresentations of Overly, the University has been damaged in an amount equal to the cost of repairing, replacing, and/or reinstalling the roofing system so as to provide the University with a roofing system that is free of defects and performs properly.

COUNT VII

(Negligent Misrepresentation Against Sverdrup and Moody/Nolan)

78. The University incorporates herein by reference each and every allegation set forth in paragraphs 1 through 77 of this Complaint as though each and every allegation and paragraph were set forth herein verbatim.

79. Periodically during the course of the Project, and particularly during the installation of the metal roofing system, Miller certified to Sverdrup, Sverdrup certified to Moody/Nolan, and Moody/Nolan certified to the University, that the installation of the metal roofing system had been completed in a workmanlike manner and in accordance with the contract documents, including the plans and specifications.

80. Sverdrup and Moody/Nolan made the foregoing affirmative representations to the University without any reasonable factual basis for the representations.

81. Based upon the various certifications that the installation of the metal roofing system had been completed in a workmanlike manner and in accordance with the contract documents, including the plans and specifications, the University approved payment for the installation work.

82. As a direct, proximate and foreseeable result of the negligent misrepresentations of Sverdrup and Moody/Nolan, the University has been damaged in an amount equal to the cost of repairing, replacing, and/or reinstalling the roofing system so as to provide the University with a roofing system that is free of defects and performs properly.

WHEREFORE, the University respectfully requests that this Honorable Court:

(a) Enter a judgment in its favor against the defendants, jointly and severally, in an amount determined at trial for the repair and/or replacement of the metal roofing system;

(b) Award the University pre and post judgment interest, costs and expenses, including reasonable attorneys' fees, incurred in connection with this suit;

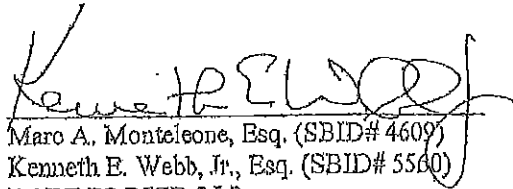
(c) Order that Overly specifically perform its Limited Warranty obligations;
and

(d) Award the University such other and further relief as is just and proper under the circumstances.

PLAINTIFF DEMANDS A TRAIL BY JURY.

WEST VIRGINIA UNIVERSITY BOARD
OF GOVERNORS, a statutory corporation,
for and on behalf of West Virginia
University,

By Counsel,

A handwritten signature in dark ink, appearing to read "Kenneth E. Webb, Jr.", is written over a horizontal line. The signature is stylized with a large initial "K" and a prominent "W".

Maro A. Monteleone, Esq. (SBID# 4609)

Kenneth E. Webb, Jr., Esq. (SBID# 5560)

BOWLES RICE, LLP

600 Quartier Street

Post Office Box 1386

Charleston, West Virginia 25325-1386

(304) 347-1100

EXHIBIT "B"

SECTION 07410

METAL ROOFING

PART 1 GENERAL

1.01 WORK INCLUDED

- A. Provide metal batten roofing system complete, including prefabricated roof sheets, batten bars, batten caps, fasteners, flashing, trim, gutters, snow guards and accessories as indicated and specified.

1.02 WORK SPECIFIED IN OTHER SECTIONS

- A. Nailable Roof Insulation: Section 07220.
- B. Sealant: 07900.
- C. Vapor Barrier (Natatorium): Section 07260.

1.03 QUALITY ASSURANCE

A. Reference Standards

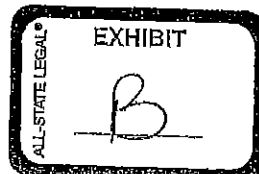
1. American Society for Testing and Materials (ASTM).
 - a. B209: Aluminum Alloys Sheet and Plate.
 - b. A792: Steel Sheet, Aluminum-Zinc Alloy Coated by the Hot-Dip Process, Structural Quality, minimum 50,000 psi yield strength in appropriate gage.
2. National Roofing Contractors Association (NRCA).
"The NRCA Construction Details".
3. Sheet Metal and Air Conditioning Contractors National Association (SMACNA).
"Architectural Sheet Metal Manual".
4. American Iron and Steel Institute
"Light Gage Cold-Formed Steel Design Manual".

B. Manufacturer Qualifications and Responsibilities

1. Minimum 10 years experience in architectural roofing; and roof panel supplied shall have been in use for a minimum 10 years.
2. Review and comment to Architect on shop drawings submitted.

C. Installer Qualifications

1. Approved and authorized by roofing manufacturer. Provide supervisory personnel trained by roofing manufacturer in the proper application of product with a minimum related experience of 10 years.



2. Minimum 5 years experience in sheet metal roofing with previous experience in comparable size projects.

D. Wind Uplift: Meet or exceed requirements of U.L. for Class 90 Wind Uplift Resistance.

E. Water Penetration: Provide panel system with no water penetration as defined in the test method when tested in accordance with ASTM E331 at an inward static pressure differential of 12.5 psf.

1.04 SUBMITTALS

A. Shop Drawings: Submit for all items in accordance with the General Conditions and Section 01332. Include the following:

1. Panel profile and gage.
2. Erection layout.
3. Special framing details.
4. Flashing details.

B. Samples: Submit minimum 9 inch long by full width sample showing finish, pattern, color, gage and profile.

C. Certification

1. Submit written evidence from manufacturer of roofing system that installer is approved by manufacturer for installation of specified roofing system.
2. Submit copies of production quality control test and written assurance from an officer of manufacturer that materials furnished for the project are the same type and dimension as that produced for tests.

1.05 HANDLING AND STORAGE

A. Exercise care so as not to damage or deform materials.

B. Stack on platforms or pallets and cover to protect from weather.

C. Provide anti-stick compound or ply on finished surfaces to protect finish. Compound or ply shall be readily removable type with no adverse effects on finish.

1.06 WARRANTY

A. Prior to completion of project, submit copies of the following:

1. Panel manufacturer's 30 year warranty against leakage of the installed metal batten roofing system.
2. Panel manufacturer's 20 year warranty against structural defects and corrosion.
3. See Section 05030.

1.07

SYSTEM PERFORMANCE REQUIREMENTS

- A. Design metal roof system to provide the following:
1. Continuous backup gutter channel for drainage of leakage and condensation to exterior.
 2. Independent movement of roof components consistent with a thermal range from -20 to +180 degrees F and consistent with anticipated movement of building structure.
 3. Provision for non-destructive selective removal and replacement of individual roof components.
 4. Provide batten system watertight without reliance on sealants or elastomeric membranes.
 5. Design flashing assemblies and gutter assemblies watertight without reliance on sealants or elastomeric membranes.
 6. Wind uplift resistance as determined by ANSI A58 analysis with a safety factor of 1.5.

PART 2 PRODUCTS

2.01 MATERIALS

- A. Roofing Sheets and Flashings: .040 gage, 3003-H14 alloy aluminum.
- B. Joints: Batten bars and caps. Approximately 1-3/4" high x 1-3/8" wide. Caps to overlap roofing sheet standing legs approximately 1".
1. Batten Bar: Continuous extruded aluminum bar engaged in continuous aluminum clip; provide with clamp nut spaced as recommended by roofing manufacturer.
 2. Batten Cap: .051 gage 6063-T5 aluminum.
 3. QVERLY Type B joint.
 4. Batten Spacing: 45-3/4". Provide tapered panels where indicated.
- C. Panel Length: As long as practicable.
- D. Fluoropolymer baked enamel finish with Kynar 500 (70%) resins by ELF ATOCHEM OF NORTH AMERICA INC. See Section 05030, Fluoropolymer Coatings.

2.02 ACCESSORIES

- A. Flashing, Trim and Accessories: Same material and finish as roofing panel. Gage of various components as designed by roofing manufacturer to meet design conditions encountered. Fabricate to profiles indicated.
- B. Batten Bar Fasteners: Stainless steel, type and length as recommended by roofing manufacturer for substrates encountered.
- C. Exposed Flashing Fasteners: #300 stainless steel round head machine screws.

D. Sealant used with the roofing shall be applied between surfaces during assembly with a minimum amount exposed on the completed installation.

1. Concealed sealant shall be a non-curing polyisobutylene tape of sufficient thickness to make full contact with both surfaces.
2. Exposed Sealant: Urethane elastomeric type with excellent weathering and sunlight resistance. See Section 07900.
 - a. Color: Match prefinished exterior metal.
 - b. Apply sealant in accordance with manufacturer's recommendations.

E. Roofing Felt Underlayment

1. Type: Asphalt-saturated felt. ASTM D4869, Type I.
2. Weight: 15 lbs per 100 square feet.
3. Size: 36 inch minimum roll width.

F. Eave Protection

1. Material: Polyethylene sheet backed rubberized asphalt membrane, 40 mils thick.
2. Properties
 - a. Tensile Strength - ASTM D1970: 40 lb/in. minimum.
 - b. Permeance - ASTM E96: 0.1 perms maximum.
 - c. Peel Adhesion - ASTM D903: 12 lbs/in. width
 - d. Elongation - ASTM D1970: 10% min.
3. Manufacturers: WIP 200 by MIRADRI; Bituthene Ice and Water Shield by W.R. GRACE; Polyken 640 Underlayment Membrane by POLYKEN TECHNOLOGIES; Polyguard Deck Guard by POLYGUARD PRODUCTS; Weather Watch by GAF; Winterguard by CERTAINTEED.

G. Snow Guards: Provide snow guards fabricated from aluminum shapes consisting of: U-shaped batten caps screwed to battens; mounting plates at each batten welded to batten caps; continuous snow guard angles bolted to mounting plates. Provide two (2) rows at each eave. Finish snow guards to match roof.

1. First Row: 18" above gutter.
2. Second Row: Halfway point to apex.

2.03 FABRICATION

A. Shop fabricate to the maximum extent practicable.

1. Brake-form to the indicated arrangement and profile with sharply defined lines and with braked shapes sharp and true. Seams, (battens,) ridges and other edges and corners are straight and well aligned.
2. Tolerances: Maximum 1/16" in 8' of length (non-accumulative) and maximum 3/8" in 40' or more.
3. Flat Planes: Free of wave, warp, buckle, oil canning or other deficiencies in appearance.
4. Battens: Straight, of uniform height and profile and without wave.

5. Lay out panels so cross seams, when required, will be made in the direction of flow with higher pans overlapping lower pans.
 - a. Provide special lock seam 1-3/4" wide at top and bottom of each roofing sheet.
 - b. Do not carry lock seam over the batten but notch so the sheet has a lap of 3-1/2" where seam turns up against the batten.
6. Cross Seams: Provide continuous sight line.
7. Gutters: Profile as indicated on drawings; approximately 9" x 9". Provide segmented at curved roofs. Short segment lengths to be utilized, as determined by manufacturer and approved by Architect.

2.05 MANUFACTURER AND DESIGN

- A. Basis of Design: Drawings and specifications are based on batten roof system manufactured by OVERLY MANUFACTURING COMPANY.
- B. Other Manufacturers: Systems designed and manufactured by MM SYSTEMS CORPORATION or equal are acceptable providing they meet the requirements specified herein. System MM SYSTEMS or other manufacturers must be approved during bidding.
- C. Design roofing system in accordance with the dimensions and general arrangements indicated on the drawings.

PART 3 EXECUTION

3.01 INSPECTION

- A. Before installation of panels, verify that the structure is ready to receive work. Check field dimensions and alignment of structural members to assure that the roof panels and flashing are straight and true.
- B. Notify Architect of conditions which may adversely affect the appearance of the installed roof; work on that location will not proceed until resolved by the Architect.

3.02 UNDERLAYMENT INSTALLATION

- A. Perimeter Underlayment
 1. Apply eave protection underlayment in accordance with manufacturer's instructions.
 2. Provide two (2) rows of eave protection, approximately 5'-9" wide. Continue to vertical surface (fascia) where indicated.
 3. Place around entire perimeter of roof.
- B. Roofing Felt
 1. Apply one layer of felt underlayment horizontal over entire roof surface, including surfaces receiving perimeter underlayment. Lap succeeding courses a minimum of 2 inches; end laps a minimum of 4 inches.

2. Secure felt underlayment to deck with roofing nails 1 inch in from edge and 12 inches o.c. Three rows per sheet width.
- 3.03 INSTALLATION
- A. Erect in accordance with Drawings, Shop Drawings and manufacturer's instructions under the direct supervision of an experienced sheet metal craftsman trained in application of metal roofing.
 - B. General
 1. Do not allow installed work of this section to be used as a storage space for other materials.
 2. Do not permit unnecessary walking on the finished roof. Require personnel to wear rubber-soled shoes when installing or walking on finished roof.
 - C. Erect panels true and to the slopes indicated on the drawings. Final appearance of the roof shall be visually flat, straight and free from defects, oilcans and dents.
 - D. Install all work so as to allow for thermal movement without distortion or elongation of fastener holes.
 - E. Installation Tolerance: Shim and align panel units within installed tolerance of 3/8" in 40' on level/plumb/slope and location/line as indicated, and within 1/8" offset of adjoining faces and of alignment of matching profiles.
- 3.04 FIELD TESTING
- A. Conduct 20 random fastener pull tests in areas designated by Architect. Submit test results for comparison to design requirements.
 - B. Block gutter drains, fill gutters with water, and allow water to stand for 24 hours. Repair gutters as required and retest until gutters are proven watertight.
- 3.05 DAMAGED PANELS
- A. Do not install panels that are bent, chipped, or otherwise damaged.
 - B. Refinish all abraded surfaces to match original finish, using materials and methods recommended by roofing manufacturer. Materials shall be fully compatible with the original finish system.
 - C. Repaired surfaces shall be uniform and free from variations in color and surface texture from that of adjacent, like surfaces.
 - D. If repaired sheet is not acceptable to the Architect, remove sheet and replace with a new sheet, at no additional cost to the Owner.

3.06

CLEAN UP

- A. Clean all roofing surfaces of dirt, grime, excess sealant and other surface blemishes.
- B. Remove from the site all excess material, shipping cartons debris and etc., related to the roofing work.

3.07

PROTECTION

- A. Protect installed panels from abuse by other trades.
- B. Installing Contractor shall advise General Contractor of any necessities for protection from the work of other trades.

END OF SECTION

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

WEST VIRGINIA UNIVERSITY BOARD
OF GOVERNORS for and on behalf of
WEST VIRGINIA UNIVERSITY,

v. Plaintiff,

CIVIL ACTION NO. 16-C-383

JACOBS FACILITIES, INC., a Missouri
business corporation f/k/a Sverdrup
Facilities, Inc.; MOODY/NOLAN LTD.,
INC., an Ohio business corporation,
OVERLY MANUFACTURING COMPANY,
A Pennsylvania business corporation; and
DONALD M. MILLER COMPANY, a
Pennsylvania business corporation.

Defendant.

CERTIFICATE OF SERVICE


The undersigned hereby certifies that a true and correct copy of the foregoing
DEFENDANT DONALD M. MILLER, INC.'s MOTION TO DISMISS COUNTS II, III
AND IV OF PLAINTIFF'S COMPLAINT be served by U.S. Mail, first class, postage prepaid,
this 16th day of September, 2016, as follows:

Marc A. Monteleone, Esquire
Kenneth E. Webb, Jr., Esquire
BOWLES RICE
600 Quarrier Street
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Charleston, WV 25325-1386
(Counsel for Plaintiff)

Samuel H. Simon, Esquire
HOUSTON HARBAUGH, P.C.
Three Gateway Center
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(Counsel for Defendant, Moody/
Nolan LTD., Inc.)

Carl L. Fletcher, Esquire
HENDRICKSON & LONG PLLC
214 Capitol Street
Charleston, WV 25301
(Counsel for Jacobs Facilities, Inc.)

Overly Manufacturing Company
574 West Otterman Street
Greensburg, PA 15601



Jennifer K. Mason, Esquire
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September 16, 2016

VIA U.S. MAIL

Jean Friend
Circuit Clerk
Monongalia County Justice Center
75 High Street, Suite 12
Morgantown WV 26505

Re: WVU BOG v. Jacobs Facilities, Inc., et al.
Circuit Court of Monongalia County, WV; Docket No. 16-C-383

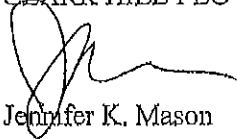
Dear Ms. Friend:

Enclosed for filing please find a *Motion to Dismiss Counts II, III and IV of Plaintiff's Complaint* along with a *Notice of Hearing* for the same, on behalf of Donald M. Miller, Inc. (incorrectly named as Donald M. Miller Company), in the above-referenced matter.

Please time-stamp the extra I.D. sheets for both documents and return them to me in the self-addressed stamped envelope. Thank you.

Very truly yours,

CLARK HILL PLC



Jennifer K. Mason

JKM/db

Enclosures

cc: Marc A. Monteleone Esquire
Carl L. Fletcher Esquire
Overly Manufacturing
The Honorable Russell M. Clawges, Jr.
(w/encl. via U.S. Mail)

SEP 21 '16