

IN THE CIRCUIT COURT OF McDOWELL COUNTY, WEST VIRGINIA

SWOPE CONSTRUCTION COMPANY,

Plaintiff,

v.

CIVIL ACTION NO.: 16-C-87-S
HONORABLE BOOKER T. STEPHENS

McDOWELL COUNTY BOARD OF
EDUCATION and MOUNTAINEER
CONTRACTORS, INC. and E.T.
BOGGESE, ARCHITECT, INC. and ZMM,
INC. and POTESA & ASSOCIATES,
INC., and THE THRASHER GROUP, INC.

Defendants.

**DEFENDANT MCDOWELL COUNTY BOARD OF EDUCATION'S ANSWER TO
PLAINTIFF'S COMPLAINT**

NOW Comes the Defendant, McDowell County Board of Education, by and through counsel, Chip E. Williams and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, and for its Answer to the Plaintiff's Complaint and states as follows:

1. This Defendant is informed, and upon such information believes, that the statements and allegations contained in numbered paragraph 1 of the Complaint are true, and admits the same upon such information and belief.

2. Denied as stated.

3. The allegations contained in numbered paragraph number 3 of the Plaintiff's Complaint do not pertain to this Defendant and therefore do not require a response by way of admission and/or denial. To the extent that a response is required by this Defendant, this Defendant is not informed and denies the allegations stated herein.

4. The allegations contained in numbered paragraph number 4 of the Plaintiff's Complaint do not pertain to this Defendant and therefore do not require a response by way of admission and/or denial. To the extent that a response is required by this Defendant, this Defendant is not

EXHIBIT

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and denies the allegations stated herein.

5. The allegations contained in numbered paragraph number 5 of the Plaintiff's Complaint do not pertain to this Defendant and therefore do not require a response by way of admission and/or denial. To the extent that a response is required by this Defendant, this Defendant is not informed and denies the allegations stated herein.

6. The allegations contained in numbered paragraph number 6 of the Plaintiff's Complaint do not pertain to this Defendant and therefore do not require a response by way of admission and/or denial. To the extent that a response is required by this Defendant, this Defendant is not informed and denies the allegations stated herein.

7. The allegations contained in numbered paragraph number 7 of the Plaintiff's Complaint do not pertain to this Defendant and therefore do not require a response by way of admission and/or denial. To the extent that a response is required by this Defendant, this Defendant is not informed and denies the allegations stated herein.

8. Denied as stated.

9. This Defendant denies the statements and allegations contained in numbered paragraph 9 of the Complaint.

10. This Defendant lacks knowledge or information sufficient to form a belief as to the truth of the statements and allegations contained in numbered paragraph 10 of the Complaint, and therefore denies the same and demands strict proof thereof.

11. To the extent that the allegations contained in numbered paragraph number 11 of Plaintiff's Complaint relate to this Defendant, they are denied and strict proof is demanded thereof.

12. To the extent that the allegations contained in numbered paragraph number 12 of Plaintiff's Complaint relate to this Defendant, they are denied and strict proof is demanded thereof.

13. To the extent that the allegations contained in numbered paragraph number 13 of Plaintiff's Complaint relates to this Defendant, they are denied and strict proof is demanded thereof.

14. To the extent that the allegations contained in numbered paragraph number 14 of Plaintiff's Complaint relates to this Defendant, they are denied and strict proof is demanded thereof.

15. To the extent that the allegations contained in numbered paragraph number 15 of Plaintiff's Complaint relates to this Defendant, they are denied and strict proof is demanded thereof.

16. To the extent that the allegations contained in numbered paragraph number 16 of Plaintiff's Complaint relates to this Defendant, they are denied and strict proof is demanded thereof.

17. To the extent that the allegations contained in numbered paragraph number 17 of Plaintiff's Complaint relates to this Defendant, they are denied and strict proof is demanded thereof.

18. To the extent that the allegations contained in numbered paragraph number 18 of Plaintiff's Complaint relates to this Defendant, they are denied and strict proof is demanded thereof.

19. To the extent that the allegations contained in numbered paragraph number 19 of Plaintiff's Complaint relates to this Defendant, they are denied and strict proof is demanded thereof.

20. To the extent that the allegations contained in numbered paragraph number 20 of Plaintiff's Complaint relates to this Defendant, they are denied and strict proof is demanded thereof.

21. To the extent that the allegations contained in numbered paragraph number 21 of Plaintiff's Complaint relates to this Defendant, they are denied and strict proof is demanded thereof.

22. To the extent that the allegations contained in numbered paragraph number 22 of Plaintiff's Complaint relates to this Defendant, they are denied and strict proof is demanded thereof.

COUNT ONE

(Breach of Contract against McDowell County BOE)

23. This Defendant hereby incorporates its responses to numbered paragraph number 1 through 22 of the Plaintiff's Complaint in response to numbered paragraph number 23 of the Plaintiff's Complaint.

24. This Defendant denies the statements and allegations contained in numbered paragraph 24 of the Complaint.

25. This Defendant denies the statements and allegations contained in numbered paragraph 25 of the Complaint.

26. This Defendant denies the statements and allegations contained in numbered paragraph 26 of the Complaint.

27. This Defendant denies the statements and allegations contained in numbered paragraph 27 of the Complaint.

28. This Defendant denies the statements and allegations contained in numbered paragraph 28 of the Complaint.

29. This Defendant admits the statements and allegations contained in numbered Paragraph 29 of the Complaint.

30. This Defendant denies the statements and allegations contained in numbered paragraph 30 of the Complaint.

31. This Defendant denies the statements and allegations contained in numbered paragraph 31 of the Complaint.

31a. This Defendant denies the statements and allegations contained in numbered paragraph 31a of the Complaint.

31b. This Defendant denies the statements and allegations contained in numbered paragraph 31b of the Complaint.

31c. This Defendant denies the statements and allegations contained in numbered paragraph 31c of the Complaint.

31d. This Defendant denies the statements and allegations contained in numbered paragraph 31d of the Complaint.

COUNT TWO

(Negligence claim against Defendants Mountaineer, Boggess, ZMM, Potesta and Thrasher)

32. This Defendant hereby incorporates its responses to numbered paragraph number 1 through

31 of the Plaintiff's Complaint in response to numbered paragraph number 32 of the Plaintiff's Complaint.

33. The allegations contained in numbered paragraph number 33 of the Plaintiff's Complaint do not pertain to this Defendant and therefore do not require a response by way of admission and/or denial. To the extent that a response is required by this Defendant, this Defendant is not informed and denies the allegations stated herein.

34. The allegations contained in numbered paragraph number 34 of the Plaintiff's Complaint do not pertain to this Defendant and therefore do not require a response by way of admission and/or denial. To the extent that a response is required by this Defendant, this Defendant is not informed and denies the allegations stated herein.

35. The allegations contained in numbered paragraph number 35 of the Plaintiff's Complaint do not pertain to this Defendant and therefore do not require a response by way of admission and/or denial. To the extent that a response is required by this Defendant, this Defendant is not informed and denies the allegations stated herein.

36. The allegations contained in numbered paragraph number 36 of the Plaintiff's Complaint do not pertain to this Defendant and therefore do not require a response by way of admission and/or denial. To the extent that a response is required by this Defendant, this Defendant is not informed and denies the allegations stated herein.

37. The allegations contained in numbered paragraph number 37 of the Plaintiff's Complaint do not pertain to this Defendant and therefore do not require a response by way of admission and/or denial. To the extent that a response is required by this Defendant, this Defendant is not informed and denies the allegations stated herein.

38. The allegations contained in numbered paragraph number 38 of the Plaintiff's Complaint do not pertain to this Defendant and therefore do not require a response by way of admission and/or denial. To the extent that a response is required by this Defendant, this Defendant is not informed

and denies the allegations stated herein.

39. The allegations contained in numbered paragraph number 39 of the Plaintiff's Complaint do not pertain to this Defendant and therefore do not require a response by way of admission and/or denial. To the extent that a response is required by this Defendant, this Defendant is not informed and denies the allegations stated herein.

39a. The allegations contained in numbered paragraph number 39a of the Plaintiff's Complaint do not pertain to this Defendant and therefore do not require a response by way of admission and/or denial. To the extent that a response is required by this Defendant, this Defendant is not informed and denies the allegations stated herein.

39b. The allegations contained in numbered paragraph number 39b of the Plaintiff's Complaint do not pertain to this Defendant and therefore do not require a response by way of admission and/or denial. To the extent that a response is required by this Defendant, this Defendant is not informed and denies the allegations stated herein.

39c. The allegations contained in numbered paragraph number 39c of the Plaintiff's Complaint do not pertain to this Defendant and therefore do not require a response by way of admission and/or denial. To the extent that a response is required by this Defendant, this Defendant is not informed and denies the allegations stated herein.

39d. The allegations contained in numbered paragraph number 39d of the Plaintiff's Complaint do not pertain to this Defendant and therefore do not require a response by way of admission and/or denial. To the extent that a response is required by this Defendant, this Defendant is not informed and denies the allegations stated herein.

COUNT THREE

(Negligent and/or intentional misrepresentation against Boggess and McDowell BOE)

40. This Defendant hereby incorporates its responses to numbered paragraph number 1 through 39 of the Plaintiff's Complaint in response to numbered paragraph number 40 of the Plaintiff's

Complaint.

41. To the extent that the allegations contained in numbered paragraph number 41 of the Plaintiff's Complaint relate to this Defendant, they are denied and strict proof is demanded thereof.

42. To the extent that the allegations contained in numbered paragraph number 42 of the Plaintiff's Complaint relate to this Defendant, they are denied and strict proof is demanded thereof.

43. To the extent that the allegations contained in numbered paragraph number 43 of the Plaintiff's Complaint relate to this Defendant, they are denied and strict proof is demanded thereof.

44. To the extent that the allegations contained in numbered paragraph number 44 of the Plaintiff's Complaint relate to this Defendant, they are denied and strict proof is demanded thereof.

45. To the extent that the allegations contained in numbered paragraph number 45 of the Plaintiff's Complaint relate to this Defendant, they are denied and strict proof is demanded thereof.

46. To the extent that the allegations contained in numbered paragraph number 46 of the Plaintiff's Complaint relate to this Defendant, they are denied and strict proof is demanded thereof.

47. To the extent that the allegations contained in numbered paragraph number 47 of the Plaintiff's Complaint relate to this Defendant, they are denied and strict proof is demanded thereof.

Wherefore A. To the extent that the allegations contained in wherefore paragraph a. of the Plaintiff's Complaint relate to this Defendant, they are denied and strict proof is demanded thereof.

Wherefore B. To the extent that the allegations contained in wherefore paragraph b. of the Plaintiff's Complaint relate to this Defendant, they are denied and strict proof is demanded thereof.

Wherefore C. To the extent that the allegations contained in wherefore paragraph c. of the Plaintiff's Complaint relate to this Defendant, they are denied and strict proof is demanded thereof.

Wherefore D. To the extent that the allegations contained in wherefore paragraph d. of the Plaintiff's Complaint relate to this Defendant, they are denied and strict proof is demanded thereof.

48. This Defendant denies any factual allegation not specifically admitted herein.

49. This Defendant denies that it is responsible for any of the damages sought for in the

wherefore clause, numbered paragraph or sub-paragraph of the Plaintiff's Complaint and demand strict proof thereof.

50. This Defendant demands a trial by jury on all issues so triable.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

That the Complaint fails to state claims or causes of action against the Board upon which relief can be granted and, therefore, said Complaint should be dismissed pursuant to Rule 12 of the West Virginia Rules of Civil Procedure.

SECOND DEFENSE

That venue in the Circuit Court of McDowell County, West Virginia, is or may be improper.

THIRD DEFENSE

That the Plaintiffs have failed to mitigate their damages.

FOURTH DEFENSE

That to the extent any of the following affirmative defenses are applicable, based upon the evidence adduced in this matter, this Defendant invokes the following defenses of comparative negligence, assumption of the risk, comparative assumption of the risk, act of god, estoppel, 'aches, res judicata, collateral estoppel, expiration of the statute of limitations, lack of personal jurisdiction, insufficient or improper service of process, and any other matter constituting an avoidance or affirmative defense.

FIFTH DEFENSE

That this Defendant hereby asserts and preserves the affirmative defenses of comparative negligence, assumption of the risk and comparative assumption of the risk.

SIXTH DEFENSE

That this Defendant asserts that the injuries and damages alleged by the Plaintiffs were the cause or result of Plaintiffs' comparative negligence and/or the intentional and/or negligent acts or omissions of third-parties other than the McDowell County Board of Education, who is free from

negligence or whose negligence, if any, does not equal or exceed the negligence of plaintiff and others.

SEVENTH DEFENSE

That this Defendant breached no duty at law owed to Plaintiffs.

EIGHTH DEFENSE

That this Defendant hereby raises and preserves each and every defense set forth in Rules 8, 9 and 12 of the West Virginia Rules of Civil Procedure, and further reserves the right to raise such additional defenses as may appear appropriate following further discovery and factual development in this case.

NINTH DEFENSE

That this Defendant is immune from suit or from certain claims alleged by the Plaintiffs pursuant to West Virginia Code § 29-12A-1, *et. seq.*

TENTH DEFENSE

That this Defendant specifically asserts all common law, statutory and Constitutional immunities afforded under State and Federal law, including, but not limited to, West Virginia Code §23-2-6 and §23-4-2(d).

ELEVENTH DEFENSE

That this Defendant hereby reserves the right to file additional affirmative defenses, cross-claims, and/or third-party actions if a sufficient factual basis is developed through continuing discovery and investigation.

TWELFTH DEFENSE

That this Defendant hereby asserts that the negligence or fault of another other than this Defendant was the sole proximate cause of the injuries and damages of which the Plaintiff complains.

THIRTEENTH DEFENSE

That the Plaintiff has failed to join or name indispensable parties necessary for the adjudication of this action.

FOURTEENTH DEFENSE

That this Defendant reserves the right to supplement its Answer and Affirmative Defenses as this case proceeds forward with discovery.

FIFTEENTH DEFENSE

The contract at issue is or may be unconscionable and therefore unenforceable as a matter of law.

SIXTEENTH DEFENSE

The Plaintiff breached or may have breached the terms of the contract that is subject of Plaintiff's Complaint.

SEVENTEENTH DEFENSE

This Defendant reserves the right to assert the defense of mistake.

EIGHTEENTH DEFENSE

This Defendant reserves the right to assert the defense of estoppel.

NINETEENTH DEFENSE

This Defendant reserves the right to assert that the contract at issue is ambiguous.

TWENTIETH DEFENSE

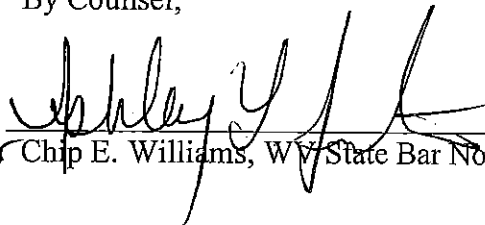
This Defendant reserves the right to assert that the Plaintiff changed the terms of the contract without consent.

TWENTY-FIRST DEFENSE

This Defendant reserves the right to compel arbitration.

WHEREFORE, the Defendant, McDowell County Board of Education, hereby respectfully prays that this Honorable Court dismiss the Plaintiff's Complaint with prejudice and that it be awarded its attorney's fees and costs expended in defending this lawsuit, and for such other and further relief as this Honorable Court deems just and proper.

MCDOWELL COUNTY BOARD OF EDUCATION
By Counsel,


for Chip E. Williams, WV State Bar No. 8116

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Defendants.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Defendants, does hereby certify on this 30th day of September, 2016, that a true copy of the foregoing "***DEFENDANT MCDOWELL COUNTY BOARD OF EDUCATION'S ANSWER TO PLAINTIFF'S COMPLAINT***" was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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Counsel for Plaintiff

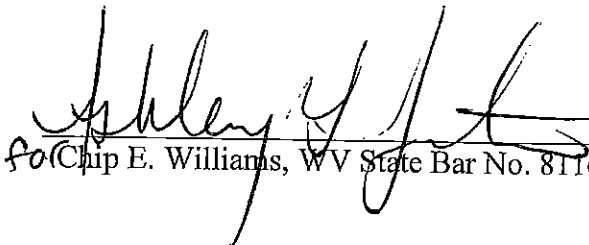
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