

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

SWOPE CONSTRUCTION COMPANY,

Plaintiff,

v.

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

Defendants.

Civil Action No. 16-C-87-S

**ANSWER, AFFIRMATIVE DEFENSES AND CROSS-CLAIMS  
OF DEFENDANT ZMM, INC.**

NOW COMES Defendant, ZMM, Inc., (hereinafter "ZMM, Inc."), by and through its undersigned counsel John B. Cromer, Esquire and files the following Answer and Affirmative Defenses to Plaintiff's Complaint and avers as follows:

1. To the best of ZMM's knowledge and belief, Paragraph 1 is admitted.
2. To the best of ZMM's knowledge and belief, Paragraph 2 is admitted. By way of further answer, it is admitted that Swope Construction Company ("Swope") was involved in the construction of the Iaeger/Panther Elementary School ("School") and any contract for the same speaks for itself.
3. To the best of ZMM's knowledge and belief, Paragraph 3 is admitted in part and denied in part. It is admitted that Mountaineer Contractors, Inc. ("Mountaineer") is a West Virginia corporation and a West Virginia licensed contractor. By way of further answer, it is admitted that Mountaineer performed work associated with the road relocation and site preparation project and any contract for the same speaks for itself. Any remaining allegations are denied.

EXHIBIT

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4. To the best of ZMM's knowledge and belief, Paragraph 4 is admitted in part and denied in part. It is admitted that ET Boggess, Architect, Inc. ("Boggess") is a West Virginia corporation with an office in Princeton, West Virginia and employs licensed architects. By way of further answer, it is admitted that Boggess was the architect of record for the School and any contract for the same speaks for itself. Any remaining allegations are denied.

5. It is admitted that ZMM is a West Virginia corporation with an office in Charleston, West Virginia. It is further admitted that ZMM has licensed engineers. Still by way of further answer, ZMM prepared the schematic design for the School and any contract for the same speaks for itself. ZMM was not the architect of record for the School project and had no contract or special relationship with Plaintiff for the School project. Any remaining allegations are denied.

6. To the best of ZMM's knowledge and belief, Paragraph 6 is admitted in part and denied in part. It is admitted that Potesta & Associates, Inc. ("Potesta") is a West Virginia corporation with an office in Charleston, West Virginia and employs licensed engineers. By way of further answer, it is admitted that Potesta performed work on the road relocation and site preparation project as well as the School and any contracts for the same speak for themselves. Any remaining allegations are denied.

7. To the best of ZMM's knowledge and belief, Paragraph 7 is admitted in part and denied in part. It is admitted that Thrasher Group, Inc. ("Thrasher") is a West Virginia corporation with an office in Bridgeport, West Virginia and employs licensed engineers. By way of further answer, it is admitted that Thrasher performed work associated with the road relocation and site preparation project and possibly the School and any contracts for the same speak for themselves. Any remaining allegations are denied.

8. To the best of ZMM's knowledge and information, Paragraph 8 is admitted.

9. Paragraph 9 sets forth conclusions of law to which no response is required. By way of further answer, to the extent a response may be required, ZMM is without sufficient knowledge

or information to form a belief as to the truth of the allegations contained within paragraph 9 of the Complaint. Thus, the allegations are denied. ZMM was not the architect of record for the School project.

10. Paragraph 10 sets forth conclusions of law to which no response is required. By way of further answer, to the extent a response may be required, ZMM is without sufficient knowledge or information to form a belief as to the truth of the allegations contained within paragraph 10 of the Complaint. Thus, the allegations are denied. Still by way of further answer, ZMM denies it is liable to any party for any sum whatsoever. ZMM was not the architect of record for the School project.

11. Paragraph 11 sets forth conclusions of law to which no response is required. By way of further answer, ZMM denies it is liable to any party for any sum whatsoever and, to the extent any response is required, the allegations are denied. Still by way of further answer, any contract referenced speaks for itself.

12. Paragraph 12 is directed to a party other than this Defendant. By way of further answer, paragraph 12 sets forth conclusions of law to which no response is required. Still, by way of further answer, to the best of ZMM's information and belief it is admitted that Mountaineer placed material as part of the road relocation and site preparation project that were larger than allowed by the specification. As for any remaining allegations, ZMM is without sufficient knowledge and information to form a belief as to the truth of the allegations contained within paragraph 12 of the Complaint. Thus, the allegations are denied.

13. Paragraph 13 is directed to a party other than this Defendant. By way of further answer, Paragraph 13 sets forth conclusions of law to which no response is required. Still, by way of further answer, ZMM denies it is liable to any party for any sum whatsoever and, to the extent any response is required, the allegations are denied. Any contract referenced speaks for itself.

14. Paragraph 14 is directed to a party other than this Defendant. Paragraph 14 sets forth conclusions of law to which no response is required. By way of further answer, Boggess did perform design services for the School project and any contract for the same speaks for itself. ZMM denies it is liable to any party for any sum whatsoever and, to the extent any further response is required, the allegations are denied.

15. Paragraph 15 is directed to a party other than this Defendant. Paragraph 15 sets forth conclusions of law to which no response is required. By way of further answer, ZMM denies it is liable to any party for any sum whatsoever and, to the extent any response is required, the allegations are denied. Still by way of further answer, any contract referenced speaks for itself.

16. Paragraph 16 sets forth conclusions of law to which no response is required. By way of further answer, ZMM denies it is liable to any party for any sum whatsoever and, to the extent any response is required, the allegations are denied. Still by way of further answer, any contract referenced speaks for itself. Still, by way of further answer, ZMM was not the architect of record for the School project in which Plaintiff was the contractor. ZMM performed master planning and budgeting as a consultant architect for the McDowell County Board of Education. Any remaining allegation are denied.

17. Paragraph 17 sets forth conclusions of law to which no response is required. By way of further answer, ZMM denies it is liable to any party for any sum whatsoever and, to the extent any response is required, the allegations are denied. Still by way of further answer, any contract referenced speaks for itself.

18. Paragraph 18 is directed to a party other than this Defendant. Paragraph 18 sets forth conclusions of law to which no response is required. By way of further answer, Potesta did engineering design services for the road relocation and site preparation project and any contract for the same speaks for itself. ZMM denies it is liable to any party for any sum whatsoever and, to the extent any further response is required, the allegations are denied.

19. Paragraph 19 is directed to a party other than this Defendant. Paragraph 19 sets forth conclusions of law to which no response is required. By way of further answer, Potesta did engineering design services for the School and any contract for the same speaks for itself. ZMM denies it is liable to any party for any sum whatsoever and, to the extent any further response is required, the allegations are denied.

20. Paragraph 20 is directed to a party other than this Defendant. Paragraph 20 sets forth conclusions of law to which no response is required. ZMM denies it is liable to any party for any sum whatsoever and, to the extent any further response is required, the allegations are denied.

21. Paragraph 21 is directed to a party other than this Defendant. Paragraph 21 sets forth conclusions of law to which no response is required. By way of further answer, Thrasher did provide services for the road relocation and site preparation project and any contract for the same speaks for itself. ZMM denies it is liable to any party for any sum whatsoever and, to the extent any further response is required, the allegations are denied.

22. Paragraph 22 is directed to a party other than this Defendant. Paragraph 22 sets forth conclusions of law to which no response is required. ZMM denies it is liable to any party for any sum whatsoever and, to the extent any further response is required, the allegations are denied.

#### COUNT I

23. Paragraph 23 of the Complaint is an incorporation paragraph, and as such, Defendant hereby incorporates all paragraphs of this Answer as though the same were fully set forth herein.

24. Paragraph 24 of the Complaint is not directed to ZMM and no response is required. To the extent a response is required, paragraph 24 states legal conclusions to which no response is

required. By way of further answer, ZMM, Inc. denies the averments in paragraph 24 and denies any and all liability for any sum whatsoever.

25. Paragraph 25 of the Complaint is not directed to ZMM and no response is required. To the extent a response is required, paragraph 25 states legal conclusions to which no response is required. By way of further answer, ZMM, Inc. denies the averments in paragraph 25 and denies any and all liability for any sum whatsoever.

26. Paragraph 26 of the Complaint is not directed to ZMM and no response is required. To the extent a response is required, paragraph 26 states legal conclusions to which no response is required. By way of further answer, ZMM, Inc. denies the averments in paragraph 26 and denies any and all liability for any sum whatsoever.

27. Paragraph 27 of the Complaint is not directed to ZMM and no response is required. To the extent a response is required, paragraph 27 states legal conclusions to which no response is required. By way of further answer, ZMM, Inc. denies the averments in paragraph 27 and denies any and all liability for any sum whatsoever.

28. Paragraph 28 of the Complaint is not directed to ZMM and no response is required. To the extent a response is required, paragraph 28 states legal conclusions to which no response is required. By way of further answer, ZMM, Inc. denies the averments in paragraph 28 and denies any and all liability for any sum whatsoever.

29. Paragraph 29 of the Complaint is not directed to ZMM and no response is required. To the extent a response is required, paragraph 29 states legal conclusions to which no response is required. By way of further answer, ZMM, Inc. denies the averments in paragraph 29 and denies any and all liability for any sum whatsoever.

30. Paragraph 30 of the Complaint is not directed to ZMM and no response is required. To the extent a response is required, paragraph 30 states legal conclusions to which no response is

required. By way of further answer, ZMM, Inc. denies the averments in paragraph 30 and denies any and all liability for any sum whatsoever.

31. Paragraph 31 of the Complaint is not directed to ZMM and no response is required. To the extent a response is required, paragraph 31 states legal conclusions to which no response is required. By way of further answer, ZMM, Inc. denies the averments in paragraph 31 and denies any and all liability for any sum whatsoever.

WHEREFORE, Defendant, ZMM, Inc., denies liability to any party for any sum whatsoever and respectfully request this Honorable Court to enter judgment in its favor and dismiss the Complaint.

**JURY TRIAL DEMANDED.**

#### COUNT II

32. Paragraph 32 of the Complaint is an incorporation paragraph, and as such, Defendant hereby incorporates all paragraphs of this Answer as though the same were fully set forth herein.

33. Paragraph 33 states legal conclusions to which no response is required. By way of further answer, ZMM, Inc. denies the averments in paragraph 33 and denies any and all liability for any sum whatsoever.

34. Paragraph 34 of the Complaint states legal conclusions to which no response is required. By way of further answer, ZMM, Inc. denies the averments in paragraph 34 and denies any and all liability for any sum whatsoever.

35. Paragraph 35 states legal conclusions to which no response is required. By way of further answer, ZMM, Inc. denies the averments in paragraph 35 and denies any and all liability for any sum whatsoever.

36. Paragraph 36 states legal conclusions to which no response is required. By way of further answer, ZMM, Inc. denies the averments in paragraph 36 and denies any and all liability for any sum whatsoever.

37. Paragraph 37 states legal conclusions to which no response is required. By way of further answer, ZMM, Inc. denies the averments in paragraph 37 and denies any and all liability for any sum whatsoever.

38. Paragraph 38 states legal conclusions to which no response is required. By way of further answer, ZMM, Inc. denies the averments in paragraph 38 and denies any and all liability for any sum whatsoever.

39. Paragraph 39 states legal conclusions to which no response is required. By way of further answer, ZMM, Inc. denies the averments in paragraph 39 and denies any and all liability for any sum whatsoever.

WHEREFORE, Defendant, ZMM, Inc., denies liability to any party for any sum whatsoever and respectfully request this Honorable Court to enter judgment in its favor and dismiss the Complaint.

**JURY TRIAL DEMANDED.**

COUNT III

40. Paragraph 40 of the Complaint is an incorporation paragraph, and as such, Defendant hereby incorporates all paragraphs of this Answer as though the same were fully set forth herein.

41. Paragraph 41 of the Complaint is not directed to ZMM and no response is required. By way of further answer, to the extent a response is required, ZMM is without sufficient knowledge or information to form a belief as to the truth of the allegations contained within paragraph 41 of the Complaint. Thus, the allegations are denied.



42. Paragraph 42 of the Complaint is not directed to ZMM and no response is required. By way of further answer, to the extent a response is required, ZMM is without sufficient knowledge or information to form a belief as to the truth of the allegations contained within paragraph 42 of the Complaint. Thus, the allegations are denied.

43. Paragraph 43 of the Complaint is not directed to ZMM and no response is required. By way of further answer, to the extent a response is required, ZMM is without sufficient knowledge or information to form a belief as to the truth of the allegations contained within paragraph 43 of the Complaint. Thus, the allegations are denied.

44. Paragraph 44 of the Complaint is not directed to ZMM and no response is required. By way of further answer, to the extent a response is required, ZMM is without sufficient knowledge or information to form a belief as to the truth of the allegations contained within paragraph 44 of the Complaint. Thus, the allegations are denied. Still, by way of further answer, paragraph 44 of the Complaint states legal conclusions to which no response is required.

45. Paragraph 45 of the Complaint is not directed to ZMM and no response is required. By way of further answer, to the extent a response is required, ZMM is without sufficient knowledge or information to form a belief as to the truth of the allegations contained within paragraph 45 of the Complaint. Thus, the allegations are denied. Still, by way of further answer, paragraph 45 of the Complaint states legal conclusions to which no response is required.

46. Paragraph 46 of the Complaint is not directed to ZMM and no response is required. By way of further answer, to the extent a response is required, ZMM is without sufficient knowledge or information to form a belief as to the truth of the allegations contained within paragraph 46 of the Complaint. Thus, the allegations are denied. Still, by way of further answer, paragraph 46 of the Complaint states legal conclusions to which no response is required.

47. Paragraph 47 of the Complaint is not directed to ZMM and no response is required. By way of further answer, to the extent a response is required, ZMM is without sufficient

knowledge or information to form a belief as to the truth of the allegations contained within paragraph 47 of the Complaint. Thus, the allegations are denied. Still, by way of further answer, paragraph 47 of the Complaint states legal conclusions to which no response is required.

WHEREFORE, Defendant, ZMM, Inc., denies liability to any party for any sum whatsoever and respectfully request this Honorable Court to enter judgment in its favor and dismiss the Complaint.

**JURY TRIAL DEMANDED.**

**AFFIRMATIVE DEFENSES**

48. The Complaint fails to state a claim upon which relief can be granted.

49. To the extent discovery reveals so, any claims against ZMM are barred by the applicable statute of limitations and/or statute of repose.

50. To the extent discovery reveals so, any claims against ZMM are barred by the doctrines of estoppel, waiver, and/or laches.

51. Any claims against ZMM are barred by the economic loss doctrine.

52. To the extent discovery reveals so, ZMM asserts affirmative defenses of comparative and contributory negligence and/or assumption of the risk.

53. Any purported injury or damages were caused by unforeseeable, superseding and/or intervening causes for which ZMM is not liable.

54. Any purported injury or damages, if any, were the result of the actions and/or omissions of others and no recovery can be had against ZMM.

55. ZMM denies any and all liability for any sum whatsoever.

56. ZMM did not breach a duty to Plaintiff.

57. ZMM had no contract with Plaintiff and was not in any special relationship with Plaintiff.

58. ZMM properly performed its services in accordance with the contract documents at issue and has no duty to Plaintiff as alleged in the Complaint.

59. ZMM's services were performed in accordance with the applicable standard of professional care.

60. To the extent discovery reveals so, ZMM asserts Plaintiff's damages may be barred or reduced for failing to mitigate its damages, if any.

61. ZMM denies Plaintiff is entitled to attorneys' fees as no contractual or statutory right for the same exists and the relief requested should be dismissed.

60. ZMM hereby raises and preserves each and every defense set forth in Rules 8, 9, and 12 of the W.Va. R.Civ.P. and further reserves the right to raise such additional defense as may appear appropriate following any discovery.

61. ZMM reserves the right to file any cross-claim, counter-claim or third-party claim as may appear appropriate following any discovery.

WHEREFORE, Defendant ZMM, Inc. respectfully requests that this Honorable Court issue an Order denying the relief requested by Plaintiff, dismissing Plaintiff's Complaint with prejudice, awarding Defendant, ZMM, Inc., its costs and expenses, including reasonable attorneys' fees in connection with this action, and any other and further relief that this Court deems appropriate.

**JURY TRIAL DEMANDED.**

CROSS-CLAIMS AGAINST ALL CO-DEFENDANTS

62. Solely for the purpose of these cross-claims, and while denying and not admitting any of the allegations in Plaintiff's Complaint (not otherwise admitted), ZMM incorporates herein those allegations against the co-defendants as though the same were fully set forth herein at length.

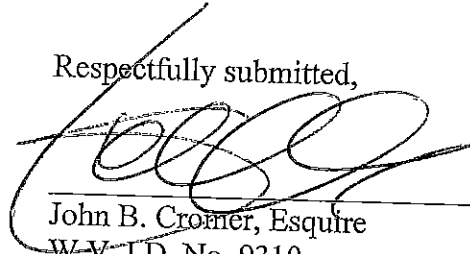
63. If it is determined that Plaintiff suffered damages and/or is entitled to recovery on its claims as against ZMM, which is specifically denied, then co-defendants are liable over to

ZMM for those damages, or are jointly liable with ZMM, and/or are liable for contribution and/or indemnity to ZMM.

WHEREFORE, ZMM, Inc. respectfully requests 1) judgment in its favor, together with costs; 2) judgment that, if there is any liability to Plaintiff, some or all of the co-defendants are solely liable to Plaintiffs; and 3) in the event that a verdict is recovered by Plaintiff against ZMM, Inc., ZMM may have judgment over and against some or all of the co-defendants by way of indemnification and/or contribution for the amount recovered by the Plaintiff against ZMM, together with costs.

**JURY TRIAL DEMANDED**

Respectfully submitted,



John B. Cromer, Esquire

W.V. I.D. No. 9310

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Attorneys for Defendant, ZMM, Inc.

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a true and correct copy of the within **ANSWER AFFIRMATIVE DEFENSES AND CROSS-CLAIMS** has been served upon all counsel and parties of record by United States First Class Mail, postage prepaid, this 31<sup>st</sup> day of August, 2016, addressed as follows:

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*Counsel for Plaintiff Swope Construction Company*

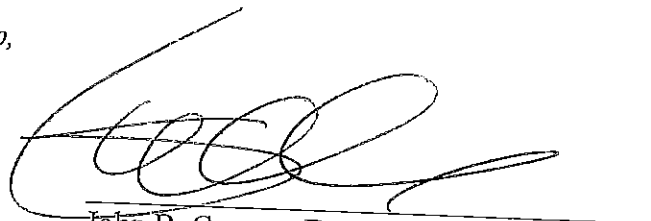
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