

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,
MOUNTAINEER CONTRACTORS, INC.,
E. T. BOGGESE, ARCHITECT, INC.,
ZMM, INC.,
POTESTA & ASSOCIATES, INC., and,
THE THRASHER GROUP, INC.,

Defendants.

**DEFENDANT THE THRASHER GROUP, INC.'S ANSWER TO COMPLAINT AND
CROSS-CLAIMS AGAINST ALL CO-DEFENDANTS**

COMES NOW DEFENDANT THE THRASHER GROUP, INC. (hereafter "Thrasher"),
by the undersigned counsel, and hereby answers Plaintiff's Complaint as follows:

FIRST AFFIRMATIVE DEFENSE

Plaintiff Swope Construction Company's ("Swope") Complaint fails to state a claim against Thrasher upon which relief can be granted and should be dismissed pursuant to West Virginia Rule of Civil Procedure 12(b)(6). For example, and without limitation, Thrasher owed no duty of care to Swope insofar as no contract exists between Swope and Thrasher, no special relationship exists between Swope and Thrasher, and Swope is seeking purely economic damages.

ANSWER

1. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 1 of the Complaint, and therefore denies the same.

2. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 2 of the Complaint, and therefore denies the same. Thrasher admits, however, that Swope participated in the construction of the subject Iaeger Elementary School ("School").

3. Thrasher admits that Mountaineer Contractors, Inc., performed work concerning the construction of the School. With respect to the remaining allegations contained in paragraph no. 3 of the Complaint, Thrasher is without sufficient knowledge or information to admit or deny such allegations, and therefore denies the same.

4. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 4 of the Complaint, and therefore denies the same.

5. Upon information and belief, Thrasher admits that ZMM, Inc. performed work concerning the School. Thrasher is without sufficient knowledge or information to admit or deny the remaining allegations contained in paragraph no. 5 of the Complaint, and therefore denies the same.

6. Upon information and belief, Thrasher admits that Potesta and Associates, Inc. performed work concerning the School. Thrasher is without sufficient knowledge or information to admit or deny the remaining allegations contained in paragraph no. 6 of the Complaint, and therefore denies the same.

7. Thrasher denies that it is a licensed West Virginia engineer. Thrasher states that it employs, among others, licensed West Virginia engineers. Thrasher admits the remaining allegations contained in paragraph no. 7 of the Complaint.

8. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 8 of the Complaint, and therefore denies the same.

9. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 9 of the Complaint, and therefore denies the same.

10. Thrasher denies that it is guilty of wrongful and actionable conduct which proximately caused the harm complained of by Swope. Thrasher is without sufficient knowledge or information to admit or deny the remaining allegations contained in paragraph no. 10 of the Complaint, and therefore denies the same.

11. Thrasher denies that it is guilty of any wrongful and actionable conduct which proximately caused harm to Swope, and further denies that Swope is entitled to recover any damages from Thrasher. With respect the allegations asserted in paragraph no. 11 against other defendants, Thrasher is without sufficient knowledge or information to admit or deny such allegations, and therefore denies the same. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 11 of the Complaint concerning the terms of Swope alleged contract, and therefore denies the same.

12. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 12 of the Complaint, and therefore denies the same.

13. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 13 of the Complaint, and therefore denies the same.

14. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 14 of the Complaint, and therefore denies the same.

15. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 15 of the Complaint, and therefore denies the same.

16. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 16 of the Complaint, and therefore denies the same.

17. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 17 of the Complaint, and therefore denies the same.

18. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 18 of the Complaint, and therefore denies the same.

19. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 19 of the Complaint, and therefore denies the same.

20. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 20 of the Complaint, and therefore denies the same.

21. Thrasher admits that it provided compaction testing services for Mountaineer with respect to the School project. Thrasher denies all other allegations contained in paragraph no. 21 of the Complaint.

22. Thrasher denies the allegations contained in paragraph no. 22 of the Complaint.

Count One

23. Thrasher incorporates by reference its responses to paragraphs no. 1-22 of the Complaint set forth above.

24. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 24 of the Complaint, and therefore denies the same.

25. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 25 of the Complaint, and therefore denies the same.

26. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 26 of the Complaint, and therefore denies the same.

27. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 27 of the Complaint, and therefore denies the same.

28. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 28 of the Complaint, and therefore denies the same.

29. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 29 of the Complaint, and therefore denies the same.

30. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 30 of the Complaint, and therefore denies the same.

31. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 31 of the Complaint, and therefore denies the same.

Count Two

32. Thrasher incorporates by reference its responses to paragraphs no. 1-31 of the Complaint set forth above.

33. Thrasher denies the allegations contained in paragraph no. 33 of the Complaint to the extent they are directed to it, and is without sufficient knowledge or information to admit or deny the allegations concerning other defendants.

34. Thrasher denies the allegations contained in paragraph no. 34 of the Complaint to the extent they are directed to it, and is without sufficient knowledge or information to admit or deny the allegations concerning other defendants.

35. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 35 of the Complaint, and therefore denies the same.

36. Thrasher denies the allegations contained in paragraph no. 36 of the Complaint to the extent they are directed to it, and is without sufficient knowledge or information to admit or deny the allegations concerning other defendants.

37. Paragraph no. 37 of the Complaint calls for a legal conclusion, and accordingly, no response is required. To the extent a response is deemed necessary, Thrasher denies the allegations contained in paragraph no. 37 of the Complaint to the extent they are directed to it, and is without sufficient knowledge or information to admit or deny the allegations concerning other defendants.

38. Thrasher denies the allegations contained in paragraph no. 38 of the Complaint to the extent they are directed to it, and is without sufficient knowledge or information to admit or deny the allegations concerning other defendants.

39. Thrasher denies the allegations contained in paragraph no. 39 of the Complaint to the extent they are directed to it, and is without sufficient knowledge or information to admit or deny the allegations concerning other defendants.

Count Three

40. Thrasher incorporates by reference its responses to paragraphs no. 1-39 of the Complaint set forth above.

41. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 41 of the Complaint, and therefore denies the same.

42. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 42 of the Complaint, and therefore denies the same.

43. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 43 of the Complaint, and therefore denies the same.

44. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 44 of the Complaint, and therefore denies the same.

45. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 45 of the Complaint, and therefore denies the same.

46. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 46 of the Complaint, and therefore denies the same.

47. Thrasher is without sufficient knowledge or information to admit or deny the allegations contained in paragraph no. 47 of the Complaint, and therefore denies the same.

SECOND AFFIRMATIVE DEFENSE

Thrasher denies each and every allegation in the Complaint not specifically admitted herein.

THIRD AFFIRMATIVE DEFENSE

All of Thrasher's services performed with respect to the School project were performed in accordance with the applicable standard of professional care.

FOURTH AFFIRMATIVE DEFENSE

Thrasher is not guilty of any breach of duty or negligence which proximately caused or contributed to Swope's claimed injuries and damages, if any.

FIFTH AFFIRMATIVE DEFENSE

Swope's injuries and damages, if any, were caused by persons, entities, or forces other than Thrasher and/or over whom Thrasher exercised no control.

SIXTH AFFIRMATIVE DEFENSE

Under the doctrine of comparative negligence, Thrasher is entitled to an allocation of fault, if any, among all parties, persons, and entities and is not responsible for the negligence or fault of others.

SEVENTH AFFIRMATIVE DEFENSE

Thrasher, not being fully advised of all the circumstances surrounding the allegations set forth in the Complaint, reserves unto itself the affirmative defense that the claims of Swope are or may be barred by the doctrine of assumption of the risk, and/or the assumption of the risk doctrine will serve to diminish any award of damages which ultimately may be assessed.

EIGHTH AFFIRMATIVE DEFENSE

Thrasher, not being fully advised of all the circumstances surrounding the allegations set forth in the Complaint, reserves unto itself the affirmative defense that the claims of Swope are or may be barred by its failure to mitigate its damages, if any.

NINTH AFFIRMATIVE DEFENSE

Thrasher, not being fully advised of all the circumstances surrounding the allegations set forth in the Complaint, reserves unto itself the affirmative defense that the claims of Swope are or may be barred by the statutes of limitations applicable to its claims.

TENTH AFFIRMATIVE DEFENSE

Thrasher denies that this action is one in which attorneys' fees can be properly awarded and, therefore, affirmatively moves that Swope's claims seeking payment of attorneys' fees be dismissed.

ELEVENTH AFFIRMATIVE DEFENSE

All affirmative defenses available and envisioned by and through West Virginia law are hereby incorporated and reserved.

TWELTH AFFIRMATIVE DEFENSE

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

WHEREFORE, Thrasher respectfully requests that the Court dismiss Swope's claims against it, with prejudice, and award it such other relief as the Court deems just and proper.

CROSS-CLAIMS AGAINST ALL CO-DEFENDANTS

NOW COMES Defendant The Thrasher Group, Inc. ("Thrasher"), by its counsel, and hereby asserts the following cross-claims against all co-defendants as follows:

1. Thrasher hereby incorporates by reference the allegations of Plaintiff's Complaint, as if restated herein, solely for the purpose of asserting these cross-claims and without admitting any of the allegations set forth in Plaintiff's Complaint not specifically admitted in its Answer.

Cross-claim Count I – Implied Indemnity Against All Co-Defendants

2. Thrasher hereby incorporates by reference paragraph no. 1 of its cross-claims as if restated herein.

3. Thrasher submits that it is free from negligence, and accordingly, it is or may be entitled to indemnity from all or some of the co-defendants for any judgment amount awarded against it in this action.

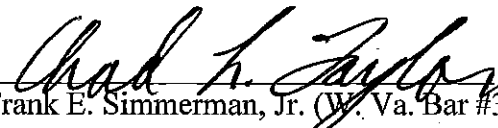
Cross-claim Count II – Contribution Against All Co-Defendants

4. Thrasher incorporates by reference paragraphs no. 1-3 of its cross-claims as if restated herein.

5. In the event judgment is entered against it in this action in favor of Plaintiff, Thrasher is or may be entitled to contribution from all or some co-defendants for any amounts paid by Thrasher to Plaintiff which exceed the amount of damages corresponding to the proportionate percentage of fault attributable to Thrasher.

WHEREFORE, Thrasher states that it is not liable to Plaintiff for any of the damages alleged in the Complaint. Nonetheless, in the event judgment is awarded Plaintiff against Thrasher, Thrasher demands contribution and indemnification for any and all sums adjudged against it from its co-defendants in this action.

Respectfully submitted,
Defendant The Thrasher Group, Inc.,
By Counsel:


Frank E. Simmerman, Jr. (W. Va. Bar #3403)
fes@simmermanlaw.com
Chad L. Taylor (W. Va. Bar #10564)
clt@simmermanlaw.com
Frank E. Simmerman, III (W. Va. Bar #11589)
trey@simmermanlaw.com
SIMMERMAN LAW OFFICE, PLLC
254 East Main Street
Clarksburg, West Virginia 26301
Phone: (304) 623-4900
Fax: (304) 623-4906

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,
MOUNTAINEER CONTRACTORS, INC.,
E.T. BOGGESS, ARCHITECT, INC.,
ZMM, INC.,
POTESTA & ASSOCIATES, INC., and,
THE THRASHER GROUP, INC.,

Defendants.

CERTIFICATE OF SERVICE

I, Chad L. Taylor, do hereby certify that I served the foregoing **DEFENDANT THE THRASHER GROUP, INC.'S ANSWER TO COMPLAINT AND CROSS-CLAIMS AGAINST ALL CO-DEFENDANTS** this 23rd day of August, 2016, via U.S. Mail, postage prepaid, addressed to the following:

C. William Davis, Esq.
Richardson & Davis, PLLC
P.O. Box 1778
Bluefield, WV 24701
Counsel for Plaintiff Swope Construction Company

John B. Cromer, Esq.
Burke Cromer Cremonese, LLC
517 Court Place
Pittsburgh, PA 15219
Counsel for Defendant ZMM, Inc.

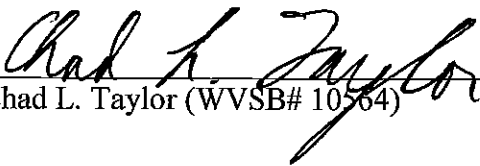
Samuel H. Simon, Esq.
Houston Harbaugh, P.C.
Three Gateway Center
401 Liberty Avenue, 22nd Floor
Pittsburgh, PA 15222-1005
Counsel for Defendant Potesta & Associates, Inc.

Robert H. Sweeney, Jr., Esq.
Jenkins Fenstermaker, PLLC
325 8th Street
Huntington, WV 25726
Counsel for Defendant E.T. Boggess Architects, Inc.

Debra A. Bowers, Esq.
Kay Casto & Chaney, PLLC
1085 Van Voorhis Road, Suite 100
Morgantown, WV 26505
*Counsel for Defendant Mountaineer
Contractors, Inc.*

McDowell County Board of Education
30 Central Avenue
Welch, WV 24801

Steven D. Hedges, Esq.
Higgins Benjamin, PLLC
301 N. Elm Street, Suite 800
Greensboro, NC 27401
*Counsel for Plaintiff Swope Construction
Company*


Chad L. Taylor (WVSB# 10564)

CIVIL CASE INFORMATION STATEMENT
CIVIL CASES

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

I. CASE STYLE:

Plaintiff:

Case # 16-C-87-S

SWOPE CONSTRUCTION COMPANY

Judge Stephens

vs.

Defendants:

Days to
Answer

Type of Service

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

PLAINTIFFS: Swope Construction Company	CASE NUMBER: 16-C-87-S
DEFENDANTS: McDowell County Board of Ed., et al.	

II. TYPE OF CASE:

TORTS	OTHER CIVIL	
<input type="checkbox"/> Asbestos	<input type="checkbox"/> Adoption	<input type="checkbox"/> Appeal from Magistrate Court
<input type="checkbox"/> Professional Malpractice	<input checked="" type="checkbox"/> Contract	<input type="checkbox"/> Petition for Modification of Magistrate Sentence
<input type="checkbox"/> Personal Injury	<input type="checkbox"/> Real Property	<input type="checkbox"/> Miscellaneous Civil
<input type="checkbox"/> Product Liability	<input type="checkbox"/> Mental Health	<input type="checkbox"/> Other
<input type="checkbox"/> Other Tort	<input type="checkbox"/> Appeal of Administrative Agency	<input type="checkbox"/> Fraud and Conversion

III. JURY DEMAND ☒ Yes ☐ No

CASE WILL BE READY FOR TRIAL BY (MONTH/YEAR): 12 / 2017

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY OR AGE? ☐ YES ☒ NO

- ☐ Wheelchair accessible hearing room and other facilities
- ☐ Interpreter or other auxiliary aid for the hearing impaired
- ☐ Reader or other auxiliary aid for the visually impaired
- ☐ Spokesperson or other auxiliary aid for the speech impaired
- ☐ Other: Unknown at this time

Attorney Name: Chad L. Taylor

Representing:

Firm: SIMMERMAN LAW OFFICE, PLLC

☐ Plaintiffs ☒ Defendant The Thrasher Group, Inc.

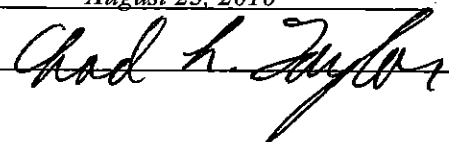
Address: 254 East Main Street, Clarksburg, WV 26301

☐ Cross-Complainant ☐ Cross-Defendant

Telephone: (304) 623-4900

Dated: August 23, 2016

Signature:



☐ Pro Se

CASE 16-C-87

MCDOWELL

PAGE 0001

SWOPE CONSTRUCTION COMPANY VS. MCDOWELL CO. BOE

LINE DATE ACTION

1 07/28/16 COMPLAINT FILED SUMMONS ISSUED, SUMMONS AND COMPLAINT GIVEN
2 BACK TO COUNSEL FOR SERVICE THROUGH SOS WITH 30 DAYS TO ANSWER
3 AS TO:
4 MCDOWELL CO. BOE-
5 MOUNTAINEER CONTRACTORS, INC.- ACCEPTED BY SEC. OF STATE 8/2/16
6 E.T. BOGGESS, ARCHITECT, INC.- ACCEPTED BY SEC. OF STATE 8/2/16
7 ZMM INC.- ACCEPTED BY SEC. OF STATE 8/2/16
8 POTESTA & ASSOCIATES, INC- ACCEPTED BY SEC. OF STATE 8/2/16
9 THE THRASHER GROUP, INC- ACCEPTED BY SEC. OF STATE 8/2/16
10 08/22/16 NOTICE OF APPEARANCE AND BONA FIDE DEFENSE ON BEHALF OF ZMM
11 W/CERT OF SERVICE
12 08/26/16 DEFENDANT THE THRASHER GROUP ANSWER TO COMPLAINT AND CROSS
13 CLAIMS AGAINST CO DEFENDANTS. (SIMMERMAN LAW OFFICE)
14 08/31/16 NOTICE APPEARANCE AND BONA FIDE DEFENSE WITH CERTIFICATE OF
15 SERVICE FILED.
16 09/01/16 ANSWER, AFFIRMATIVE DEFENSES AND CROSS-CLAIMS OF DEFENDANT ZMM,
17 INC. WITH CERTIFICATE OF SERVICE FILED.
18 09/01/16 ANSWER TO SWOPE CONSTRUCTION COMPANY'S COMPLAINT WITH
19 CERTIFICATE OF SERVICE FILED.
20 09/06/16 ANSWER AND MOTION TO DISMISS ON BEHALF OF E. T. BOGGESS
21 ARCHITECT, INC. WITH CERTIFICATE OF SERVICE FILED.
22 09/12/16 ANSWER AND CROSS-CLAIM OF DEFENDANT MOUNTAINEER CONTRACTORS, INC
23 WITH CERTIFICATE OF SERVICE FILED.
24 09/12/16 VERIFICATION FOR THE ANSWER AND CROSS-CLAIM OF DEFENDANT,
25 MOUNTAINEER CONTRACTORS, INC. FILED.
26 09/12/16 NOTICE OF APPEARANCE ON BEHALF OF DEFENDANT, MOUNTAINEER
27 CONTRACTORS, INC. WITH CERTIFICATE OF SERVICE FILED BY KAY CASTO
28 & CHANEY, PLLC.
29 09/12/16 DEFENDANT'S MOUNTAINEER CONTRACTORS, INC. ANSWER TO DEFENDANT'S
30 ZMM, INC. CROSS-CLAIM WITH CERTIFICATE OF SERVICE FILED.
31 09/14/16 ANSWER ON BEHALF OF DEFENDANT E. T. BOGGESS, ARCHITECT, INC. TO
32 DEFENDANT THE THRASHER GROUP, INC.'S CROSS-CLAIMS AGAINST ALL
33 CO-DEFENDANTS WITH CERTIFICATE OF SERVICE FILED.
34 09/15/16 DEFENDANT THE THRASHER GROUP INC'S ANSWER TO CROSS CLAIM OF
35 MOUNTAINEER CONTRACTORS W/CERTIFICATE OF SERVICE
36 09/15/16 DEFENDANT THRASHER GROUP INC ANSWER CROSS CLAIMS ZMM INC W/CERT
37 09/15/16 DEFENDANT THRASHER GROUP INC ANSWER CROSS CLAIM POTESA AND
38 ASSOCIATES W/CERTIFICATE OF SERVICE
39 09/16/16 ANSWER AND AFFIRMATIVE DEFENSES TO DEFENDANT THRASHER GROUP
40 IN CROSS CLAIMS AGAINST ALL CO DEFENDANTS
41 09/20/16 DEFENDANT POTESTA & ASSOCIATES, INC.'S ANSWER AND AFFIRMATIVE
42 DEFENSES TO DEFENDANT MOUNTAINEER CONTRACTORS, INC.'S CROSS-
43 CLAIMS AGAINST ALL CO-DEFENDANTS WITH CERTIFICATE OF SERVICE
44 FILED.
45 09/20/16 DEFENDANT POTESTA & ASSOCIATES, INC.'S ANSWER AND AFFIRMATIVE
46 DEFENSES TO DEFENDANT ZMM, INC.'S CROSS-CLAIMS AGAINST ALL CO-
47 DEFENDANTS WITH CERTIFICATE OF SERVICE FILED.
48 10/03/16 CERTIFICATE OF SERVICE FOR DEFENDANT THE THRASHER GROUP, INC.'S
49 FIRST SET OF COMBINED DISCOVERY REQUESTS TO PLAINTIFF SWOPE
50 CONSTRUCTION COMPANY FILED.

EXHIBIT

8

SWOPE CONSTRUCTION COMPANY VS. MCDOWELL CO. BOE

LINE DATE ACTION

51 10/05/16 DEFENDANT MCDOWELL COUNTY BOARD OF EDUCATIONS ANSWERS TO
52 PLAINTIFFS COMPLAINT FILED