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February 3, 2015

Connie Carr
Pocahontas County Circuit Court
900-C 10th Avenue
Marlinton, WV 24954

RE: *Black Bear Crossing Town House Assoc v Black Bear Crossing LLC et al*
Civil Action No. 14-C-32(RR)

Dear Ms. Carr:

Enclosed you will find the following pleadings for filing in the above referenced civil action:

1. *Answer, Affirmative Defenses of Defendants, Black Bear Crossing, LLC, GKS Development, LLC; Thomas C. Sells, III; Brian Kreider and Matthew Glod – AND – Counterclaim and Cross-Claims of Defendants Black Bear Crossing, LLC; GKS Development, LLC – AND – Motion to Dismiss Thomas C. Sells, III; Brian Kreider, Matthew Glod and GKS Development, LLC, Individually and as Members of GKS Development, LLC and Black Bear Crossing, LLC;*
2. *Third Party Complaint Against First Tracts Real Estate, LLC; David M. Simmons and Peter A. Monico, Individually and as Members of First Tracts Real Estate, LLC; CAS Structural Engineering, Inc., Chapman Technical Group, LTD.; Leon G. Mallow Surveying, inc.; Douglas J. Grimes d/b/a Mills Run Farm and JD & JT General Contractors, LLC;*
3. Summons' for the Third Party Complaint; (3 copies each)
4. Check for \$220 for a filing fee and additional charges
5. Check to the WV Secretary of State in the amount of \$80.00.

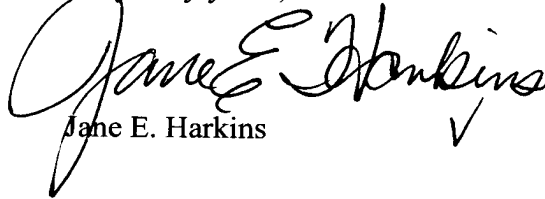
Please return to me the Summons' marked for individual Service. Should you have any questions or concerns, please do not hesitate to contact me. Thank you for your assistance in this matter.

Pocahontas County
CIRCUIT/FAMILY COURT

RECEIVED 2/5/15
by: CMC/CPB

Connie Carr
February 3, 2015
Page 2

Very truly yours,


Jane E. Harkins

JEH/vlc

Enclosure(s)

cc: Sean Workowski, Esquire
Teresa Dumire, Esquire
Margaret Miner, Esquire
Kenneth Webb, Esquire
Barbara Keefer, Esquire
Jamison Design, LCC
Slopeside Construction, Inc.,
Tink's Cottage Care at Snowshoe, LLC

RESPONSIVE PLEADING
Case Information Statement
(Two copies to be filed with pleading)

PLAINTIFF: BLACK BEAR CROSSING TOWNHOUSE ASSOCIATION, LLC

CASE NUMBER: 13-C-710-H

DEFENDANTS: BLACK BEAR CROSSING, LLC, GKS DEVELOPMENT, LLC, THOMAS C. SELLS, III, BRIAN KREIDER, MATTHEW GLOD, JAMISON DESIGN, LCC, TYGARTS VALLEY CONSTRUCTION, INC., SLOPESIDE CONSTRUCTION, INC., TINK'S COTTAGE CARE AT SNOWSHOE, LLC, TREVE PAINTER.

- [X] **Answer filed by Defendant Black Bear Crossing, LLC, GKS Development, LLC, Thomas C. Sells, III, Brian Kreider and Matthew Glod on 02/03/15.**
- [X] **Rule 12 (To Dismiss) Motion filed by Defendants Thomas C. Sells, III, Brian Kreider and Matthew Glod on 02/03/15**
- [X] **Counterclaim filed by Defendant Black Bear Crossing, LLC and GKS Development, LLC against Plaintiff Black Bear Townhouse Association on 02/03/15.**
- [X] **Crossclaim filed by Defendant Black Bear Crossing, LLC and GKS Development, LLC against Defendants Jamison Design, LLC, Slopeside Construction, Inc., Tink's Cottage Care at Snowshoe, LLC, Treve Painter on 02/03/15.**
- [X] **Crossclaim filed by Defendant Black Bear Crossing, LLC and GKS Development, LLC against Defendants Tygarts Valley Construction on 02/03/15**
- [] Plaintiff _____ reply to counterclaim of Defendant _____ on _____.
- [] Defendant _____ answer to cross-claim of Defendant _____ on _____.

Attorney Name: Jane E. Harkins (WV State Bar #5951)

Firm: Pullin, Fowler, Flanagan, Brown & Poe, PLLC

Address: 600 Neville Street, Suite 201

Beckley, WV 25801

&

POCAHONTAS COUNTY
CIRCUIT/FAMILY COURT
RECEIVED 2/5/15
by: CMC/CDB

Sean C. Workowski (WV State Bar #8871)

Frith, Anderson & Peake, PC

29 Franklin Road, Box 1240

Roanoke, Virginia, 24006-1240

Telephone: 304-254-9300 – Jane E. Harkins

Dated: 02/03/15

Representing ☐ Plaintiff

☒ Defendant - **Black Bear Crossing, LLC, GKS Development, LLC, Thomas C. Sells, III, Brian Kreider and Matthew Glod**

☐ Other (Identify) - _____


Signature

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

**BLACK BEAR CROSSING TOWNHOUSE
ASSOCIATION, LLC, a West Virginia
Limited Liability Company and on behalf of
two (2) or more unit owners,**

Plaintiff,

v.

CIVIL ACTION NO.: 14-C-32-RR

**BLACK BEAR CROSSING, LLC,
a terminated West Virginia limited liability
company; GKS DEVELOPMENT, LLC a
foreign corporation; THOMAS C. SELLS,
III; BRIAN KREIDER; MATTHEW
GLOD; JAMISON DESIGN, LLC, a
foreign Corporation; TYGARTS VALLEY
CONSTRUCTION, INC., a West Virginia
corporation, SLOPESIDE
CONSTRUCTION, INC., a terminated
West Virginia corporation, TINK'S
COTTAGE CARE AT SNOWSHOE, LLC,
a West Virginia limited liability company,
and TREVE PAINTER,**

Defendants.

**ANSWER, AFFIRMATIVE DEFENSES OF DEFENDANTS, BLACK
BEAR CROSSING, LLC; GKS DEVELOPMENT, LLC;
THOMAS C. SELLS, III; BRIAN KREIDER, AND MATTHEW GLOD**

AND

**COUNTERCLAIM AND CROSS-CLAIMS OF DEFENDANTS
BLACK BEAR CROSSING, LLC; GKS DEVELOPMENT, LLC**

AND

**MOTION TO DISMISS THOMAS C. SELLS, III; BRIAN KREIDER, MATTHEW
GLOD, AND GKS DEVELOPMENT, LLC, INDIVIDUALLY AND AS
MEMBERS OF GKS DEVELOPMENT, LLC AND BLACK BEAR CROSSING, LLC**

ANSWER

Now come Defendants, Black Bear Crossing; LLC; GKS Development, LLC; Thomas C. Sells, III; Brian Kreider and Matthew Glod, by and through their counsel, Jane E. Harkins and Sean C. Workowski, in response to the Amended Complaint served upon them, and provide the following:

1. Paragraph No. 1 of Plaintiff's Amended Complaint calls for legal conclusions to which no responses are required. However, to the extent that Paragraph No. 1 contains allegations against these Defendants which require a response, same are denied and strict proof thereof is demanded.

2. These Defendants admit the allegations set forth in Paragraph No. 2 of Plaintiff's Amended Complaint.

3-4. These Defendants deny the allegations set forth in Paragraph Nos. 3 and 4 of Plaintiff's Amended Complaint.

5. These Defendants admit the allegations set forth in Paragraph No. 5 of Plaintiff's Amended Complaint.

6-8. These Defendants deny the allegations set forth in Paragraph Nos. 6, 7 and 8 of Plaintiff's Amended Complaint.

9-14. These Defendants lack sufficient information to enable them to admit or to deny the allegations set forth in Paragraph Nos. 9, 10, 11, 12 13 and 14 of Plaintiff's Amended Complaint.

15. Paragraph No. 15 of Plaintiff's Amended Complaint calls for legal conclusions to which no responses are required. However, to the extent that Paragraph No. 15 contains

allegations against these Defendants which require a response, same are denied and strict proof thereof is demanded.

16. These Defendants admit the allegations set forth in Paragraph No. 16 of Plaintiff's Amended Complaint.

17. These Defendants deny the allegations set forth in Paragraph No. 17 of Plaintiff's Amended Complaint.

18-19. These Defendants admit the allegations set forth in Paragraph Nos. 18 and 19 of Plaintiff's Amended Complaint.

20. These Defendants deny the allegations set forth in Paragraph No. 19 of Plaintiff's Amended Complaint.

21. These Defendants admit the allegations set forth in Paragraph No. 21 of Plaintiff's Amended Complaint.

22. These Defendants admit that Jamison Design was charged with developing thermal and moisture protections for the common elements, limited common elements and condominium units at Black Bear Crossing, as alleged in Paragraph No. 22 of Plaintiff's Amended Complaint, but they deny that was all that Jamison Designs was charged with doing at Black Bear Crossing.

23. These Defendants deny the allegations set forth in Paragraph No. 19 of Plaintiff's Amended Complaint.

24. On information and belief, these Defendants admit the allegations set forth in Paragraph No. 24 of Plaintiff's Amended Complaint.

25-29. These Defendants lack sufficient information to enable them to admit or to deny the allegations set forth in Paragraph Nos. 25, 26, 27, 28 and 29 of Plaintiff's Amended Complaint.

30-31. These Defendants deny the allegations set forth in Paragraph Nos. 30 and 31 of Plaintiff's Amended Complaint.

32. These Defendants lack sufficient information to enable them to admit or to deny the allegations set forth in Paragraph No. 32 of Plaintiff's Amended Complaint.

33. These Defendants deny the allegations set forth in Paragraph No. 33 of Plaintiff's Amended Complaint.

34-36. Paragraph Nos. 34 and 35 of Plaintiff's Amended Complaint call for legal conclusions to which no responses are required. Furthermore, the Declaration described in Paragraph Nos. 34, 35 and 36 speaks for itself. However, to the extent that Paragraph Nos. 34, 35 and 36 contain allegations against these Defendants which require responses, same are denied and strict proof thereof is demanded.

37-45. These Defendants deny the allegations set forth in Paragraph Nos. 37, 38, 39, 40, 41, 42, 43, 44 and 45 of Plaintiff's Amended Complaint.

**Count 1 – Breach of Contract and Implied Covenant
of Good Faith and Fair Dealing against BBC, LLC**

46. These Defendants incorporate by reference their responses to Paragraph Nos. 1 through 45 as if set forth in full hereinafter.

47-48. These Defendants deny the allegations set forth in Paragraph Nos. 47 and 48 of Plaintiff's Amended Complaint.

49. The First Tracts Real Estate Purchase Agreements described in Paragraph No. 49 speak for themselves. These Defendants otherwise deny the allegations set forth in Paragraph No. 49 of Plaintiff's Amended Complaint.

50-52. These Defendants deny the allegations set forth in Paragraph Nos. 50, 51 and 52 of Plaintiff's Amended Complaint.

**Count II – Breach of Implied Warranty of
Habitability, Fitness and/or Quality against BBC, LLC**

53. These Defendants incorporate by reference their responses to Paragraph Nos. 1 through 52 as if set forth in full hereinafter.

54-55. Paragraph Nos. 54 and 55 of Plaintiff's Amended Complaint call for legal conclusions to which no responses are required. However, to the extent that Paragraph Nos. 54 and 55 contains allegations against these Defendants which require a response, same are denied and strict proof thereof is demanded.

56. These Defendants deny the allegations set forth in Paragraph No. 56 of Plaintiff's Amended Complaint.

Count III – Negligent Development against BBC, LLC

57. These Defendants incorporate by reference their responses to Paragraph Nos. 1 through 56 as if set forth in full hereinafter.

58-59. Paragraph Nos. 58 and 59 of Plaintiff's Amended Complaint call for legal conclusions to which no responses are required. However, to the extent that Paragraph Nos. 58 and 59 contains allegations against these Defendants which require a response, same are denied and strict proof thereof is demanded.

60-61. These Defendants deny the allegations set forth in Paragraph Nos. 60 and 61 of Plaintiff's Amended Complaint.

Count IV – Piercing the Corporate Veil of BBC, LLC

62. These Defendants incorporate by reference their responses to Paragraph Nos. 1 through 61 as if set forth in full hereinafter.

63. Paragraph No. 63 of Plaintiff's Amended Complaint calls for legal conclusions to which no responses are required. However, to the extent that Paragraph No. 63 contains allegations against these Defendants which require a response, same are denied and strict proof thereof is demanded.

64-69. These Defendants deny the allegations set forth in Paragraph Nos. 64, 65, 66, 67, 68 and 69 of Plaintiff's Amended Complaint.

Count V – Negligence against Tygarts, Mr. Painter, Slopeside and Tink's Cottage Care

70. These Defendants incorporate by reference their responses to Paragraph Nos. 1 through 69 as if set forth in full hereinafter.

71. These Defendants deny the allegations set forth in Paragraph No. 71 of Plaintiff's Amended Complaint.

72-73. Paragraph Nos. 72 and 73 of Plaintiff's Amended Complaint do not contain allegations against these Defendants to which responses are required. Furthermore, Paragraph Nos. 72 and 73 call for legal conclusions to which no responses are required. However, to the extent that Paragraph Nos. 72 and 73 contain allegations against these Defendants which require a response, same are denied and strict proof thereof is demanded.

74. These Defendants deny the allegations set forth in Paragraph No. 74 of Plaintiff's Amended Complaint.

Count VI – Professional Negligence against Jamison Design

75. These Defendants incorporate by reference their responses to Paragraph Nos. 1 through 74 as if set forth in full hereinafter.

76-77. Paragraph Nos. 76 and 77 of Plaintiff's Amended Complaint do not contain allegations against these Defendants to which responses are required. Furthermore, Paragraph Nos. 76 and 77 call for legal conclusions to which no responses are required. However, to the extent that Paragraph Nos. 76 and 77 contain allegations against these Defendants which require a response, same are denied and strict proof thereof is demanded.

78. These Defendants deny the allegations set forth in Paragraph No. 78 of Plaintiff's Amended Complaint.

COUNT VII – Joint Venture

79. These Defendants incorporate by reference their responses to Paragraph Nos. 1 through 78 as if set forth in full hereinafter.

80-82. These Defendants deny the allegations set forth in Paragraph Nos. 80, 81 and 82 of Plaintiff's Amended Complaint.

83. These Defendants deny any and all allegations not specifically admitted and demand strict proof of all allegations against them.

WHEREFORE, these Defendants deny Plaintiff's plea for relief and demand that the Amended Complaint be dismissed and that they be awarded its costs, including attorney's fees, expended in defense of this matter and all other relief to which they may be entitled.

AFFIRMATIVE DEFENSES

1. Damages claimed by Plaintiff may have been caused by those other than these Defendants, and these Defendants hereby assert and/or reserve unto themselves the defenses that the injuries and damages alleged to have been sustained by Plaintiff, if any, were directly and proximately caused by the acts or omissions of persons or entities which are parties to this civil action, have not been joined to this civil action, and/or are unknown to these Defendants.

2. These Defendants, not being fully advised as to all the facts and circumstances surrounding Plaintiff's claims, assert and reserve unto themselves all defenses constituting an avoidance or affirmative defense which discovery may deem appropriate as permitted by Rule 8c, Rule 12, and any other relevant Rule of the W.Va. Rules of Civil Procedure.

3. Plaintiff's Amended Complaint, as it relates to these Defendants, fails to state a cause of action upon which relief can be granted, and therefore must be dismissed.

4. These Defendants assert such other affirmative defenses as may be available to them, including, but not limited to, statute of limitations, statute of frauds, doctrine of laches, failure of consideration and privity.

5. These Defendants assert that Plaintiff's injuries and damages, if any, were and are the result of Plaintiff's own negligence, including but not limited to its failure to inspect, failure to exercise due care, and failure to maintain, and such negligence was the proximate and intervening cause of any injury sustained.

6. Plaintiff is itself guilty of negligently and/or intentionally spoliating evidence.

7. These Defendants are entitled to adverse instructions arising from Plaintiff's negligent spoliation of evidence.

8. Plaintiff is liable to these Defendants in tort for its intentional spoliation of evidence.

9. These Defendants incorporate in their Answer to the Amended Complaint, by reference, any other special defenses plead by other defendants or parties which may be joined in this civil action. Further, these Defendants reserve the right to assert any or all applicable affirmative defenses which discovery may reveal to be appropriate.

10. These Defendants reserve the right to join any person or entity or corporation as a third-party defendant in this matter.

11. These Defendants hereby assert and/or reserve unto themselves, the defense that any damages or injuries to Plaintiff, if any, were the proximate result of preexisting and/or subsequent injuries or conditions of Plaintiff.

12. These Defendants were not guilty of any negligence or breach of duty, or any other allegation which Plaintiff claims was a direct and proximate cause of Plaintiff's alleged injuries or damages.

13. These Defendants assert that any injury suffered by Plaintiff was the result of the actions, inactions, or negligence of others, which operate as an intervening cause, and are not the result of any action of these Defendants.

14. Plaintiff has failed to mitigate its damages, and to the extent thereof, is barred from recovery.

15. These Defendants did not breach any duty owed to Plaintiff, and therefore, they are not liable under any theories of negligence, gross negligence, or willful conduct. These

Defendants further assert and reserve as a defense that they owed no duty to Plaintiff under the allegations set forth in Plaintiff's Amended Complaint.

16. These Defendants reserve the right to amend their Answer, if appropriate, after full investigation and discovery.

17. These Defendants are not guilty of any intentional, willful, malicious or outrageous act or acts which proximately caused or contributed to the damages allegedly sustained by Plaintiff.

18. Plaintiff's Amended Complaint and the causes of action set forth therein are barred by applicable Statutes of Limitation.

19. Plaintiff has enjoyed accord and satisfaction of its claims.

20. These Defendants are not guilty of negligence in their development of Black Bear Crossing.

21. There is no "unity of interest and ownership" between these Defendants.

22. At all times in relation to the development of Black Bear Crossing, the corporate Defendants were appropriately capitalized.

23. These Defendants at all times acted properly with the respect to the corporate forms at issue in this case.

24. Injustice and inequity will result if any corporate veils are pierced.

25. These Defendants, in all manners, complied with the requirements of West Virginia's Uniform Common Interest Ownership Act (2005, *as amended*).

26. The causes of action and claims set forth in Plaintiff's Amended Complaint exceed those permissible under West Virginia's Uniform Common Interest Ownership Act (2005, *as amended*).

27. Plaintiffs itself has violated the terms of the West Virginia Uniform Common Interest Ownership Act (2005, *as amended*).

28. The conduct, injuries and damages alleged by Plaintiff, if proven (and specifically denied by these Defendants), are solely the liabilities of the corporate Defendants and are not the personal liabilities of Thomas C. Sells, III; Brian Kreider, Matthew Glod and GKS..

29. Thomas C. Sells, II; Brian Kreider, Matthew Glod and GKS, are not personally liable for any liability of the corporate Defendants of which they are Members and/or Managers (the allegations of which are specifically denied).

30. Thomas C. Sells, III; Brian Kreider, Matthew Glod and GKS, cannot be held personally liable for any failures on the part of either corporate Defendant to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its businesses.

31. The Articles of Incorporation or Organization of GKS and BBC, repectively, do not contain any provision stating that all or specified Members and/or Managers of either company are liable in their capacity as Members for all or specified liabilities of the company.

32. No Member and/or Manager of either GKS or BBC has consented in writing to the adoption of any provision stating that all or specified Members and/or Managers of either company are liable in their capacity as Members and/or Managers for all or specified liabilities of the company.

33. There does not exist between the individual Defendants and the corporate Defendants herein such a unity of interest and ownership that the separate personalities of either corporation and of their respective Members and/or Managers no longer exist.

**CROSS-CLAIM OF BLACK BEAR CROSSING, LLC;
AND GKS DEVELOPMENT, LLC, AGAINST JAMISON
DESIGN, LLC; SLOPESIDE CONSTRUCTION, INC.; TINK'S
COTTAGE CARE AT SNOWSHOE, LLC; AND TREVE PAINTER**

COME NOW, Defendants Black Bear Crossing, LLC; and GKS Development, LLC ("these Defendants"), and assert a Cross-Claim against Defendants Jamison Design, LLC; Slopeside Construction, Inc.; Tink's Cottage Care at Snowshoe, LLC; and Treve Painter:

1. These Defendants have been named as Defendants in this civil action filed by Black Bear Crossing Town House Association, LLC, seeking damages for the alleged negligent design and construction associated with the Development known as Black Bear Crossing. These Defendants have denied any and all liability for such claims.

2. To the extent these Defendants are found legally responsible for any of said damages, they hereby assert a claim for comparative contribution and/or indemnification from the above-referenced co-Defendants in this civil action to the extent their actions or commissions caused said damages.

WHEREFORE, these Defendants respectfully request this Court issue judgment against the above-referenced co-Defendants to the extent that these Defendants are found liable to Plaintiff for comparative contribution and/or implied indemnification from said co-Defendants.

**CROSS-CLAIM OF BLACK BEAR CROSSING, LLC;
AND GKS DEVELOPMENT, LLC, AGAINST
TYGARTS VALLEY CONSTRUCTION, INC.**

COME NOW, Defendants Black Bear Crossing, LLC; and GKS Development, LLC (collectively, "these Defendants"), and hereby assert a Cross-Claim against Defendant Tygarts Valley Construction, Inc. ("TVC"), as follows:

1. These Defendants have been named as Defendants in this civil action filed by Black Bear Crossing Town House Association, LLC, seeking damages for the alleged negligent design and construction associated with the Development known as Black Bear Crossing. These Defendants have denied any and all liability for such claims.
2. In Aug. 2007, GKS entered into separate contracts with TVC to be its general contractor for Bldgs. 1, 2, 3, and 4 and to perform or facilitate all needed construction services; in Nov. 2008, GKS contracted with TVC for Bldg. 6, and in Nov. 2010, GKS contracted with TVC for Bldg. 7, for the same responsibilities.
3. In Jan. 2008, GKS conveyed all interest in Black Bear Crossing to BBC. After the property conveyance, BBC, as Successor Developer and Declarant in Charge, continued the relationship and contractual terms with TVC.
4. Said contracts contain indemnification language protecting these Defendants from claims such as those asserted by Plaintiff and entitling these Defendants to express indemnification from TVC against Plaintiff's claims.
5. To the further extent these Defendants are found legally responsible for any of said damages, they hereby assert a claim for comparative contribution and/or express and implied

indemnification from TVC in this civil action to the extent their actions or commissions caused said damages.

WHEREFORE, these Defendants respectfully request this Court issue judgment against Tygarts Valley Construction, Inc. under its contracts with these Defendants and, to the extent that they is are found liable to Plaintiff, for comparative contribution and/or implied indemnification.

**COUNTERCLAIM OF DEFENDANTS BLACK BEAR CROSSING, LLC;
AND GKS DEVELOPMENT, LLC, AGAINST PLAINTIFF,
BLACK BEAR CROSSING TOWN HOUSE ASSOCIATION, LLC**

COME NOW, Defendants Black Bear Crossing, LLC; and GKS Development, LLC (collectively, “these Defendants”) and hereby assert a Counterclaim against Plaintiff, Black Bear Crossing Town House Association, LLC (“HOA”), as follows:

1. These Defendants have been named as Defendants in this civil action filed by Plaintiff, seeking damages purportedly arising from the alleged negligent design and construction associated with the Development known as Black Bear Crossing. These Defendants have denied any and all liability for such claims.
2. These Defendants are advised that, within 2013 and 2014, before and after the initial Complaint was filed in this matter in Aug. 2014, the HOA undertook repair work on the allegedly injured common areas of the Development, as well as to individual units, before these Defendants were able to investigate the nature and extent of the HOA’s complaints about them.
3. The areas of the Development on which the HOA secured repair work was wholly within its control and ownership, and only the HOA or its agents could have authorized the extent of work done.

4. The HOA knew that the areas on which work was done would be the subject of and needed for litigation.

5. The HOA had a duty to preserve evidence which has been made the subject of its claims against these Defendants.

6. As the result of the HOA's work, these Defendants have been substantially prejudiced, as they have been deprived of the opportunity to inspect, investigate and ascertain the nature and extent, and the legitimacy, of the HOA's purported injuries and damages, and to mount appropriate defenses thereto.

7. As it had a duty to preserve evidence of the subject of its claims against these Defendants, the HOA's spoliation was intentional.

8. Alternatively, the HOA's spoliation of evidence was at the very least negligent, as it knew or should have known that the areas it was having repaired would be the subject of its impending litigation or was the subject of its recently-filed civil action against these Defendants.

WHEREFORE, these Defendants demand judgment against Plaintiff arising from its spoliation of evidence, together with all relief to which these Defendants may be entitled.

**Motion to Dismiss of Defendants, Thomas C. Sells, III;
Brian Kreider, Matthew Glod and GKS Development, LLC**

COME NOW Defendants, Thomas C. Sells, III; Brian Kreider, Matthew Glod, and GKS Development, LLC, pursuant to Rule 12(b)(6) of the W.Va. Rules of Civil Procedure, and hereby submit this Motion to Dismiss and authority in support thereof.

Plaintiff has filed an Amended Complaint against Black Bear Crossing, LLC ("BBC, LLC"), and its Members, Thomas C. Sells, III; Brian Kreider, Matthew Glod, and GKS

Development, LLC, and against GKS Development, LLC (“GKS”), and its Members, Thomas C. Sells, III; Brian Kreider, and Matthew Glod. See Amended Complaint, attached hereto as Exhibit 1. Plaintiff asserts the following causes of action against these Defendants: (1) Breach of contract and implied covenant of good faith and fair dealing against BBC, LLC; (2) Breach of implied warranty of habitability, fitness and/or quality against BBC, LLC; (3) Negligent development against BBC, LLC; (4) Piercing the Corporate Veil of BBC, LLC; and (5) Joint Venture. Exhibit 1.

I. LEGAL ARGUMENT

A. Standard of Law

Rule 12(b)(6) of the W.Va. Rules of Civil Procedure is the basis for a Motion to Dismiss for Plaintiff’s “failure to state a claim upon which relief can be granted.” A trial court may dismiss a pleading for failure to state a claim upon which relief may be granted, pursuant to subdivision (b)(6) of this Rule. The purpose of a Motion to Dismiss under subdivision (b)(6) is to test the formal sufficiency of the Complaint. Collia v. McJunkin, 178 W.Va. 158, 358 S.E.2d 242, *cert. denied*, 484 U.S. 944, 108 S.Ct. 330 (1987).

A Motion to Dismiss under subdivision (b)(6) of this Rule is intended to weed out unfounded suits. Harrison v. Davis, 197 W.Va. 651, 478 S.E.2d 104 (1996). The singular purpose of a motion under subdivision (b)(6) is to seek a determination of whether the Plaintiff is entitled to offer evidence to support the claims made in the Complaint. Dimon v. Mansy, 198 W.Va. 40, 479 S.E.2d 339 (1996). The effect of a Motion to Dismiss for failure to state a claim upon which relief can be granted is to challenge the sufficiency of the Complaint in each action

on that ground and to prevent questions of law which may be considered and reviewed upon certificate. Kisner v. Fiori, 151 W.Va. 850, 157 S.E.2d 238 (1967).

- B. Plaintiff's claims against the individual Defendants must be dismissed because Members and Managers of limited liability companies and corporations are not personally liable for liabilities of the company solely by reason of being or acting as a Member or Manager.**

The Amended Complaint filed by Plaintiff lists Thomas C. Sells, III; Brian Kreider, Matthew Glod, and GKS Development, LLC, as Defendants in their individual capacities; however, it fails to support a cause of action against them because the only specific allegation against them is that they were members of BBC, LLC and/or GKS at the time of the acts or omissions alleged by Plaintiff.

Pursuant to West Virginia Code § 31B-3-303, as construed by *Kubican v. The Tavern, LLC*, 232 W.Va. 268, 752 S.E.2d 299 (2013), Members and Managers of limited liability companies are not personally liable for liabilities of the company solely by reason of being or acting as a Member or Manager. West Virginia Code § 31B-3-303, states as follows:

- (a) Except as otherwise provided in subsection (c) of this section, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, are solely the debts, obligations and liabilities of the company. **A member or manager is not personally liable for a debt, obligation or liability of the company solely by reason of being or acting as a member or manager.** (emphasis added)
- (b) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.
- (c) All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations or liabilities of the company if:

- (1) A provision to that effect is contained in the articles of organization; and
- (2) A member so liable has consented in writing to the adoption of the provision or to be bound by the provision.

As our Supreme Court has recognized, the express purpose of incorporation is to limit the liability of Members and Managers. *Laya v. Erin Homes, Inc.*, 177 W.Va. 343, 346, 352 S.E.2d 93, 97 (1986). “Indeed, courts of every jurisdiction have recognized the legitimacy of incorporating to avoid personal liability. Consequently, something more than the shareholders’ desire to avoid personal liability must exist to justify piercing the corporate veil.” *Id.*

Further guidance can be obtained from other pronouncements of the Court, to wit: “A director or an officer of a corporation does not incur personal liability for its torts merely by reason of his official character unless he has participated in or sanctioned the tortious acts; and a director who is not a party to a wrongful act is not ... liable for such acts committed by other persons.” *Cato v. Silling*, 137 W.Va. 694, 717, 73 S.E.2d 731, 745 (1952). “[A]n officer of a corporation may be personally liable for the tortious acts of the corporation, including fraud, if the officer participated in, approved of, sanctioned, or ratified such acts.” *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W.Va. 468, 473, 425 S.E.2d 144, 149 (1992).

In *Kubican v. The Tavern, LLC, infra.*, at Syllabus Point 7, the Supreme Court of Appeals of West Virginia essentially extended these policies to limited liability companies, specifically construing W.Va. §31B-3-303 as follows:

To pierce the veil of a limited liability company in order to impose personal liability on its member(s) or manager(s), it must be established that (1) there exists such unity of interest and ownership that the separate personalities of the business and of the individual member(s) or manager(s) no longer exist and (2) fraud, injustice, or an inequitable result would occur if the veil is not

pierced. This is a fact driven analysis that must be applied on a case-by-case basis, and, pursuant to W.Va. Code §31-B-3-303(b) (1996) (Repl. Vol. 2009), the failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business may not be a ground for imposing personal liability on the member(s) or manager(s) of the company.

Plaintiff has not made any specific allegations that Defendants Thomas C. Sells, III; Brian Kreider, Matthew Glod, or GKS participated in, ratified or sanctioned any tortious act that would subject them to individual liability. The mere fact that Defendants Thomas C. Sells, III; Brian Kreider, Matthew Glod, and GKS were members of GKS and/or BBC, LLC at the time of the alleged tortious acts Plaintiff complains of, is insufficient as a matter of law to hold them liable in their individual capacities. And, to the extent that these Defendants may have been lax in observing the usual company formalities or requirements relating to the exercise of company powers or management of business (any allegations of which are denied), which observations are now claimed by Plaintiff to have the constitute an actionable unity of interest or ownership, Plaintiff may not rely on this claim alone as grounds for imposing personal liability on Defendants Thomas C. Sells, III; Brian Kreider, Matthew Glod, and GKS.

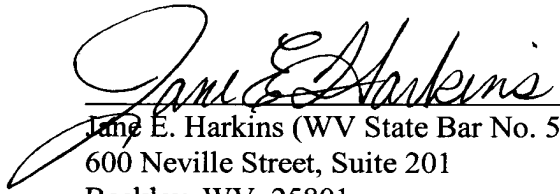
II. CONCLUSION

WHEREFORE, for all the foregoing reasons, Defendants Thomas C. Sells, III; Brian Kreider, Matthew Glod, and GKS, individually, respectfully request this Honorable Court to grant their Motion to Dismiss Plaintiff's Amended Complaint.

**BLACK BEAR DEVELOPMENT, LLC; GKS
DEVELOPMENT, LLC; THOMAS C. SELLS,
III; BRIAN KRIEDER AND MATTHEW GLOD**

By Counsel

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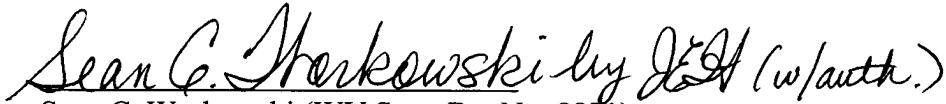
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IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

BLACK BEAR CROSSING TOWN
HOUSE ASSOCIATION, LLC A West
Virginia limited Liability company and on
behalf of two or more unit owners,

Plaintiff,

v.

CIVIL ACTION NO.: 14-C-32(RR)
HON. ROBERT RICHARDSON

BLACK BEAR CROSSING, LLC
A terminated West Virginia limited liability
company, GKS Development, LLC a foreign
corporation, THOMAS C. SELLS,
III; BRIAN KREIDER; MATTHEW
GLOD; JAMISON DESIGN, LLC, a
Foreign Corporation; TYGARTS VALLEY
CONSTRUCTION, INC., a West Virginia
Corporation, SLOPESIDE
CONSTRUCTION, INC., a terminated
West Virginia coporation, TINK'S
COTTAGE CARE AT SNOWSHOE, LLC,
a West Virginia limited liability company,
and TREVE PAINTER,

Defendants.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Defendants, does hereby certify on this 3rd day of February, 2015, that a true copy of the foregoing " Answer, Affirmative Defenses of Defendants, Black Bear Crossing, LLC, GKS Development, LLC; Thomas C. Sells, III; Brian Kreider and Matthew Glod – AND – Counterclaim and Cross-Claims of Defendants Black Bear Crossing, LLC; GKS Development, LLC – AND – Motion to Dismiss Thomas C. Sells, III; Brian Kreider, Matthew Glod and GKS Development, LLC, Individually and as Members of GKS Development,

LLC and Black Bear Crossing, LCC;" was served upon all counsel of record by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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c/o Steve Jamison
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P.O. Box 524
Daleville, Virginia 24083

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P.O. Box 1
Slatyfork, WV 26291

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c/o Treve Painter
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CIRCUIT/FAMILY COURT
POCAHONTAS COUNTY, W.VA.

Filed in this office this the 5th day
of February, 2015
Connie M. Carr, Clerk

By: Cindy D. Beverage, Deputy