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Connie M. Carr, Clerk  
Circuit Court of Pocahontas County  
900-C 10th Avenue  
Marlinton, WV 24854

March 23, 2015

**Re: Black Bear Crossing, LLC v. CAS Structural Engineering  
Pocahontas County, West Virginia  
Civil Action No.: 14-C-32  
Our File No.: 1670-2**

Dear :

Please cause the enclosed "Third-Party Defendant CAS Structural Engineering, Inc.'s Motion to Dismiss" and "Third-Party Defendant CAS Structural Engineering, Inc.'s Memorandum of Law in Support of Motion to Dismiss" to be placed in the appropriate Court file. The attorneys of record have been served with a copy of the same.

If you have any questions, please feel free to call.

Very truly yours,

Samantha Mullins  
Legal Assistant

/sm

Enclosures

cc: Honorable Robert E. Richardson  
Jane E. Harkins  
Sean C. Workowski  
Teresa J. Dumire  
Kenneth E. Webb, Jr.  
Margaret Lewis Miner  
Lawrence E. Morhous  
Jamison Design, LLC

RECEIVED  
2015 MAR 25 P 2:54  
CIRCUIT/FAMILY COURT  
POCAHONTAS COUNTY, WV

**IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA**

**BLACK BEAR CROSSING TOWN HOUSE  
ASSOCIATION, LLC, a West Virginia limited  
liability company an on behalf of two (2) or  
more owners,**

**Plaintiff,**

**v.**

**Civil Action No. 14-C-32(RR)  
Honorable Robert E. Richardson**

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

**Defendants,**

**and**

**BLACK BEAR CROSSING, LLC, GKS  
DEVELOPMENT, LLC, THOMAS C. SELLS,  
III, BRIAN KRIEDER, MATTHEW GLOD and  
TYGARTS VALLEY CONSTRUCTION, INC.,**

**Third-Party Plaintiffs,**

**v.**

**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 MILL RUN  
FARM, JD & JT GENERAL CONTRACTORS,  
LLC and TCC CONTRACTING SERVICES,  
LLC,**


**Third-Party Defendants.**

**THIRD-PARTY DEFENDANT CAS STRUCTURAL  
ENGINEERING, INC.'S MOTION TO DISMISS**

**COMES NOW** Third-Party Defendant CAS Structural Engineering, Inc., (hereinafter "CAS") through counsel, Jason S. Hammond, James W. Marshall, III and the law firm of Bailey & Wyant, PLLC, and pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure* moves the Court to dismiss Defendant/Third-Party Plaintiff Black Bear Crossing, LLC, GKS Development, LLC, Thomas C. Sells, III, Brian Krieder, Matthew Glod and Tygarts Valley Construction, Inc.'s Amended Third Party Complaint against CAS Structural Engineering, Inc. ("CAS") with prejudice for expiration of the applicable statutes of limitations. In support of its motion, Third-Party Defendant CAS incorporates as if fully set forth herein the contemporaneously filed Memorandum of Law in Support of its Motion to Dismiss.

**WHEREFORE**, for the forgoing reasons Third-Party Defendant CAS Structural Engineering, Inc. moves this Honorable Court to dismiss the Amended Third Party Complaint against it with prejudice and for such further relief as the Court deems just and proper.

**CAS Structural Engineering, Inc.,  
By Counsel,**



---

**Jason S. Hammond (WV Bar #8042)  
James W. Marshall, III (WV Bar #10677)  
BAILEY & WYANT, PLLC  
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Post Office Box 3710  
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(304) 345-4222**

**IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA**

**Black Bear Crossing Town House  
Association, LLC, a West Virginia limited  
liability company an on behalf of two (2)  
or more owners,**

**Plaintiff,**

**v.**

**Civil Action No. 14-C-32  
Honorable Robert E. Richardson**

**BLACK BEAR CROSSING, LLC,  
GKS DEVELPOMENT, LLC,  
THOMAS C. SELLS, III, BRIAN  
KREIDER, MATTHEW GLOD,  
JAMISON DESIGN, LLC, TYGARTS  
VALLEY CONSTRUCTION, INC.,  
SLOPESLIDE CONSTRUCTION, INC.,  
TINK'S COTTAGE CARE AT  
SNOWSHOE, LLC, and TREVE  
PAINTER,**

**Defendants,**

**and**

**BLACK BEAR CROSSING, LLC,  
GKS DEVELPOMENT, LLC,  
THOMAS C. SELLS, III,  
BRIAN KREIDER, MATTHEW GLOD  
and TYGARTS VALLEY  
CONSTRUCTION, INC.,**

**Third-Party Defendants,**

**v.**

**FIRST TRACTS REAL ESTATE, LLC,  
DAVID M. SIMMONS and PETER A.  
MONICO, individually and as members of  
FIRST TRACTS REAL ESTATE, LLC,  
CAS STRUCTUAL ENGINEERING,  
INC., CHAPMAN TECHNICAL GROUP,  
LTD. LEON G. MALLOW SURVEYING,  
INC., DOUGLAS J. GRIMES d/b/a MILL**

**RUN FARM, and JD & JT GENERAL  
CONTRACTORS, LLC,**

**Third-Party Defendants.**

**THIRD-PARTY DEFENDANT CAS STRUCTURAL ENGINEERING, INC.'S  
MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

**COMES NOW** Third-Party Defendant CAS Structural Engineering, Inc., (hereinafter “CAS”) through counsel, Jason S. Hammond, James W. Marshall, III and the law firm of Bailey & Wyant, PLLC, and pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*, hereby move this Court to enter an Order dismissing the Amended Third Party Complaint against Third-Party Defendant CAS Structural Engineering, Inc. In support of thereof, CAS Structural Engineering, Inc. states as follows:

**I. FACTUAL BACKGROUND**

Plaintiff Black Bear Crossing Town House Association, LLC (hereinafter “HOA”) commenced this action by filing its Complaint on August 13, 2014 and its Amended Complaint on January 9, 2015. Plaintiff is seeking incidental and consequential damages from the first-party Defendants Black Bear Crossing, LLC, GKS Development, LLC, Thomas C. Sells, III, Brian Kreider, Matthew Glod, Jamison Design, LLC, Tygarts Valley Construction, Inc., Slopeside Construction, Inc., Tink’s Cottage Care at Snowshoe, LLC and Treve Painter based upon breach of contract, breach of implied warranty, negligent development and negligence. *See* Amended Complaint at ¶ 1. Specifically, the HOA alleges that in or about January 2008 Defendant Black Bear Crossing, LLC (hereinafter “BBC, LLC”) obtained a deed to a parcel of land situated at Snowshoe Mountain Resort from Defendant GKS Developments for the development of Black Bear Crossing, a common interest ownership community. *See* Amended Complaint at ¶ 20. BBC, LLC contracted with Defendant Tygarts Valley Construction, Inc. (hereinafter “TVC”) to

construct the units at Black Bear Crossing according to the plans of Defendant Jamison Design. *See* Amended Complaint at ¶ 23. Sometime in 2008 First Tracts Real Estate began negotiating purchase agreements between potential condominium owners and BBC, LLC for condominium units at Black Bear Crossing. *See* Amended Complaint at ¶ 31. Subsequently in 2008, the first unit owners moved in and began residing in the condominium units. *See* Amended Complaint at ¶ 32. By declaration effective June 2, 2008, BBC, LLC formed a Homeowner's Association which was authorized to institute litigation on behalf of unit owners on matters affecting the common interest of the community. *See* Amended Complaint at ¶ 33-36. In its Amended Complaint the HOA alleges the first-party Defendants are liable for defective design, negligent construction and poor workmanship of common elements, limited common elements and/or the condominium units. *See* Amended Complaint at ¶ 1.

On March 9, 2015 Defendants/Third-Party Plaintiffs Black Bear Crossing, LLC, GKS Development, LLC, Thomas C. Sells, III, Brian Krieder, Matthew Glod and Tygarts Valley Construction, Inc. (collectively "Third-Party Plaintiffs") filed their Amended Third-Party Complaint against CAS and others. Third-Party Plaintiffs allege that in 2008 or 2009, nearly six to seven years ago, the Developer Defendant/Third Party Plaintiff and Defendant/Third Party Plaintiff TVC began receiving complaints from the HOA and individual unit owners about various problems in the common areas or in individual units in Black Bear Crossing. *See* Amended Third-Party Complaint at ¶ 27. Around 2013 and 2014, repairs began on the allegedly damaged common areas at Black Bear Crossing as well as two individual units. *See* Amended Third-Party Complaint at ¶ 38.

Third-Party Plaintiffs allege that Third-Party Defendant CAS was retained by TVC to perform structural engineering on Building 6 of Black Bear Crossing, which CAS specifically

denies. *See* Amended Third-Party Complaint at ¶ 52. Regardless, all work performed by CAS at Black Bear Crossing was from June through August 2008. *See* Amended Third-Party Complaint at ¶ 53. Third-Party Plaintiffs allege that if the HOA proves that there are structural defects in Building 6, then the proximate cause of those structural defects is the negligence of CAS. *See* Amended Third-Party Complaint at ¶ 58. As stated more fully above, the negligence allegations against CAS are brought more than two (2) years after Third Party Plaintiffs Developer and TVC began receiving complaints from the HOA and individual owners about problems in the common areas and individual units. Additionally, the Third Party Plaintiffs have not asserted a claim for breach of contract. However, assuming *arguendo* that such a claim existed, any contract between CAS and TVC consisted of an oral agreement for work performed more than five (5) years ago. As such, the statute of limitations has expired and these claims against CAS should be dismissed with prejudice.

## **II. LEGAL STANDARD**

A motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is a means of testing the formal sufficiency of a complaint. *See Collia v. McJunkin*, 178 W.Va. 158, 358 S.E.2d 242 (1987), *cert. denied*, 484 U.S. 944, 108 S.Ct. 303 (1987); *Mandolitis v. Elkins Industries, Inc.*, 161 W.Va. 695, 717, 246 S.E.2d 907, 920 (1978)(superseded in part by statute *see Gallapoo v. WalMart Stores*, 197 W. Va. 172, 475 S.E.2d 172 (1996)). A motion to dismiss enables a court to weed out unfounded suits. *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104 (1996). The primary purpose of a motion to dismiss is to seek a determination of whether the plaintiff is entitled to offer evidence in support of the claims made in the complaint. *Dimon v. Mansey*, 177 W.Va. 50, 52, 479 S.E.2d 339 (1996). Although a motion to dismiss for failure to state a claim is viewed with disfavor, if a plaintiffs'

complaint states no cause of action upon which relief might be granted, then the defendants' motion to dismiss should be granted. *See Fass v. Newsco Well Services, Ltd.*, 350 S.E.2d 562, 564 (1986). In this matter, the claims raised against CAS in the Amended Third Party Complaint fall outside the applicable statute of limitations. As such, the third party claims against CAS should be dismissed with prejudice.

### III. LAW AND ARGUMENT

The Amended Third Party Complaint should be dismissed against CAS pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure* for failure to state a claim upon which relief may be granted because, based on the face of the pleadings, the Third Party Plaintiff's claims against CAS are barred by the applicable statute of limitations. "The ultimate purpose of statutes of limitations is to require the institution of the cause of action within a reasonable time." *Purdue v. Hess*, 199 W.Va. 299, 484 S.E. 2d 182, 186 (1987). The West Virginia Supreme Court of Appeals has embraced the United States Supreme Court's view that statutes of limitations "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Donley v. Bracken*, 192 W.Va. 383, 387, 452 S.E. 2d 699, 703 (1994) (quoting, *United States v. Kubrick*, 444 U.S. 111, 117 (1979)).

Under West Virginia law, claims of negligence such as those brought by the Third Party Plaintiffs against CAS, are governed by a two-year statute of limitations. *See, W.Va. Code* §55-2-12. Additionally, even though the Third Party Plaintiffs have not specifically pled a breach of contract claim, oral contracts, such as the one that would be at issue in this matter, are governed by the five-year statute of limitations. *See, W.Va. Code* §55-2-6. "The plaintiff or his attorney bears the responsibility to see that an action is properly and timely instituted." Syl. Pt. 4, *Stevens*



*v. Saunders*, 159 W.Va 179 (1975). “The ultimate purpose of statutes of limitations is to require the institution of a cause of action within a reasonable time.” Syl. Pt. 2, *Perdue v. Hess*, 199 W.Va. 299 (1997). “Exceptions in statutes of limitations are strictly enforced and the enumeration by the Legislature of specific exceptions by implication excludes all others.” Syl. Pt. 3, *Hoge v. Blair*, 105 W.Va. 29 (1928). “The object of statutes of limitations is to compel the bringing of an action within a reasonable time.” *Johnson v. Nedeff*, 192 W.Va. 260, 266 (1994). “Statutes of limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception.” *Id* at 263. “It has been widely held that such exceptions are strictly construed and are not enlarged by the courts upon considerations of apparent hardship.” *Id*. “Defendants have the right to rely on the certainty the statute provides, and adoption of the rule plaintiff urges (expansion of the time limit) would destroy that certainty.” *Id* at 265. “By strictly enforcing statutes of limitations, we are both recognizing and adhering to the legislative intent underlying such provisions.” *Id*.

Here, the statute of limitations began to run when the HOA and/or property owners began to notice deficiencies in the construction and expired two years later. According to the Amended Third Party Complaint, the Developer and TVC began receiving complaints regarding the deficiencies from the HOA and property owners approximately six to seven years ago. There is no reason to toll the statute as against CAS as Third Party Plaintiffs specifically allege the HOA and/or property owners first became aware of the alleged negligent construction and design as early as 2008. As such, the Third Party Plaintiff’s negligence claims against CAS were not filed until after the statute of limitations had expired.

Additionally, assuming the Third Party Plaintiffs raised a claim for breach of contract, the statute of limitations began to run when CAS was retained to perform work at Black Bear

Crossing in 2008. No written agreement existed between CAS and TVC, nor any another Third Party Plaintiff. An agreement between CAS to perform work at Black Bear Crossing was oral in nature and thus governed by a 5-year statute of limitations. Thus, the statute of limitations has expired for any claim brought under the oral agreement for work by CAS at Black Bear Crossing in 2008.

Finally, *W.Va. Code* §55-2-6a is a statute of repose that is not applicable to this matter. This section states:

No action, whether in contract or in tort, for indemnity or otherwise, nor any action for contribution or indemnity to recover damages for any deficiency in the planning, design, surveying, observation or supervision of any construction or the actual construction of any improvement to real property, or, to recover damages for any injury to real or personal property, or, for an injury to a person or for bodily injury or wrongful death arising out of the defective or unsafe condition of any improvement to real property, may be brought more than ten years after the performance or furnishing of such services or construction...

The purpose of this section is to set an arbitrary time period after which no actions, whether contract or tort, may be initiated against architects and builders. Preexisting statutes of limitation for both contract and tort actions continue to operate within this outside limit. *Shirkey v. Mackey*, 399 S.E.2d 868 (W. Va. 1990), overruled in part, *Neal v. Marion*, 664 S.E.2d 721 (W. Va. 2008); *Gibson v. West Virginia Dep't of Hwys.*, 406 S.E.2d 440 (W. Va. 1991). This section limits the time period in which a suit may be filed for deficiencies in the planning, design, or supervision of construction of an improvement to real property to ten years, which period commences on the date the improvement is occupied or accepted by the owner of the real property, whichever occurs first. *Stone v. United Eng'g*, 475 S.E.2d 439 (W. Va. 1996). Consequently, third party claims against CAS must be dismissed as time barred.

#### IV. CONCLUSION

**WHEREFORE**, based upon the foregoing, CAS Structural Engineering, Inc. prays this

Court will enter an Order dismissing this action and all claims advanced against it, with prejudice, as well as grant them all other relief deemed just and proper.



**CAS Structural Engineering, Inc.,  
By Counsel,**

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**Jason S. Hammond (WV Bar #8042)  
James W. Marshall, III (WV Bar #10677)  
BAILEY & WYANT, PLLC  
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**IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA**

**Black Bear Crossing Town House  
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**v.**

**Civil Action No. 14-C-32  
Honorable Robert E. Richardson**

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GKS DEVELPOMENT, LLC,  
THOMAS C. SELLS, III, BRIAN  
KREIDER, MATTHEW GLOD,  
JAMISON DESIGN, LLC, TYGARTS  
VALLEY CONSTRUCTION, INC.,  
SLOPESLIDE CONSTRUCTION, INC.,  
TINK'S COTTAGE CARE AT  
SNOWSHOE, LLC, and TREVE  
PAINTER,**

**Defendants,**

**and**

**BLACK BEAR CROSSING, LLC,  
GKS DEVELPOMENT, LLC,  
THOMAS C. SELLS, III,  
BRIAN KREIDER, MATTHEW GLOD  
and TYGARTS VALLEY  
CONSTRUCTION, INC.,**

**Third-Party Defendants,**

**v.**

**FIRST TRACTS REAL ESTATE, LLC,  
DAVID M. SIMMONS and PETER A.  
MONICO, individually and as members of  
FIRST TRACTS REAL ESTATE, LLC,  
CAS STRUCTUAL ENGINEERING,  
INC., CHAPMAN TECHNICAL GROUP,  
LTD. LEON G. MALLOW SURVEYING,  
INC., DOUGLAS J. GRIMES d/b/a MILL**

**RUN FARM, and JD & JT GENERAL  
CONTRACTORS, LLC,**

**Third-Party Defendants.**

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of foregoing **"Third-Party Defendant CAS Structural Engineering, Inc.'s Motion to Dismiss and Memorandum of Law in Support of Motion to Dismiss"** was served upon the following parties by U.S. Mail on this day, March 23, 2015:

Jane E. Harkins  
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Beckley, WV 25801  
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Thomas C. Sells, III, Brian Kreider, and Matthew Glod*

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Thomas C. Sells, III, Brian Kreider, and Mathew Glod*

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**T: (304) 345-4222**  
**F: (304) 343-3133**

**CIRCUIT/FAMILY COURT**  
**POCAHONTAS COUNTY, W.VA.**  
Filed in this office this the 25<sup>th</sup> day  
of March, 2015  
Connie M. Carr, Clerk  
By Cimly D. Beverage Deputy