

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE
COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO. 2021-015089-CA-43

In Re:

CHAMPLAIN TOWERS SOUTH COLLAPSE
LITIGATION

**MOTION TO AUTHORIZE TOWN AS A PARTICIPANT UNDER THE PROTOCOL
FOR INSPECTION, DOCUMENTATION, AND STORAGE OF COMPONENTS,
REMNANTS, AND DEBRIS OF THE CHAMPLAIN TOWERS COLLAPSE**

The Town of Surfside (“Town”) hereby files this motion to allow the Town to participate in on-site testing and in support, states as follows:

1. As the Court is aware, the Receiver has been working with the parties and with the Town regarding invasive on-site testing protocols.

2. The Receiver has advised the Town that the “Proposed Joint Protocol for Testing and Material Sampling – Collapse Site” (“Protocol”) will be presented to the Court shortly for approval seeking an Order Approving Protocol for Inspection, Documentation, and Storage of Components, Remnants, and Debris of The Champlain Towers South Collapse.

3. The Protocol defines a Participant as:

A party or entity authorized or defined by the Order Approving Protocol for Inspection, Documentation, and Storage of Components, Remnants, and Debris of The Champlain Towers South Collapse. Non-parties to the Court matter at issue shall not be considered Participants unless authorized by the Court.

4. Although the Town is not currently a “party,” the Town must be permitted to participate in the testing as set forth in the Protocol.

5. The Town has received no less than 19 Notices of Claim (“Claims”) filed pursuant to Section 768.28, Fla. Stat., indicating the intention of parties to sue the Town. The most recent notice was received from a potential plaintiff on November 29, 2021.

6. Pursuant to Section 768.28, Fla. Stat., the Town is statutorily afforded an opportunity to investigate the Claims for six (6) months before it can be sued and joined as a party due to the time restrictions of Section 768.28, Fla. Stat. *See Metropolitan Dade County v. Reyes*, 688 So. 2d 311, 313 (Fla. 1996) (holding that the purpose of the notice requirements of Section 768.28, Fla. Stat., is “to give the appropriate public bodies an opportunity to investigate all claims”); *Rumler v. Dep’t of Corrections*, 546 F. Supp. 2d 1334, 1344 (M.D. Fla. 2008) (holding that notices under Section 768.28, Fla. Stat., ensure that appropriate agencies “...will be given the opportunity to investigate the claim and either provide or deny a remedy...”).

7. The Town’s opportunity to investigate the Claims continues until at least December 24, 2021. The Town cannot be joined as a party until after that date at the earliest.

8. As contemplated by Section 768.28, Fla. Stat., the Town needs an opportunity to investigate the Claims to allow the Town to make a determination in good faith as to whether the Claims have merit prior to the commencement of litigation. *See Maynard v. State Dept. of Corrections*, 864 So. 2d 1232, 1233-34 (Fla. 1st DCA 2004) (finding materially deficient presuit notice where the purpose of Section 768.28, Fla. Stat., was frustrated by lack of information necessary to “giv[e] the appropriate entities an opportunity to investigate and time to respond”); *Aitcheson v. Florida Dept. of Highway Safety and motor Vehicles*, 117 So. 2d 854,856-57 (Fla. 4th DCA 2013) (noting that part of the purpose of Section 768.28, Fla. Stat., is to provide appropriate agencies “time to investigate and respond” to claims) (citing *Cunningham v. Florida Dept. of Children and Families*, 782 So. 2d 913, 915 (Fla. 1st DCA 2001)).

9. The Town previously participated in the initial non-invasive site testing protocol. At no time was the exclusion of the Town from future testing raised; in fact, the Town was advised by the Receiver and his counsel that the Town would have access to the site for further invasive testing along with other parties.

10. The on-site activities set forth in the Protocol are of critical importance to the Town's investigation of the Claims because of the unique site conditions and the inability to reproduce destructive testing at specific locations once conducted.

11. As the Court is aware, the Town has hired a nationally respected structural and forensic engineering firm KCE Structural Engineers, PC, and its principal engineer with 55 years of experience, Allyn Kilsheimer. Mr. Kilsheimer has been intimately involved with the collapse since shortly after it occurred. He has worked with the Receiver, government agencies, and other parties regarding the site stability at various times and in various circumstances, and in evaluating all potential causes of the building's collapse. Further, he has advised the Receiver (at the Receiver's request) on, and coordinated preparation of, the site for on-site inspections and testing, partially at the Town's expense.

12. Mr. Kilsheimer was the first expert consultant to propose a fully developed protocol for sampling and testing of on-site materials and circulated it among experts and plaintiffs and defendants' counsel to begin to understand the scope of the activities required for a full investigation of the collapse. He and his team were allowed on-site prior to the west wall bracing, and for the October 25-29, 2021 non-destructive observational and measurement period, and has shared with the Receiver all raw data from those observations and measurements as requested by the Receiver, including but not limited to survey results, lidar-mounted drone scans, lidar scans,

GPR (ground penetrating radar) x-ray of encapsulated reinforcing steel, and non-destructive testing of reinforcing steel in situ as well as sampling of waters captured on-site.

13. Mr. Kilsheimer has further been consulted in connection with bracing efforts along the west wall and regarding site drainage. The Town assisted with both efforts, paying for and coordinating the initial pump set-up for drainage, and lending its stormwater well to assist with site drainage.

14. The Protocol is based in part on the initial protocol provided by Mr. Kilsheimer, provided to the Receiver and many of the parties' experts in October 2021. Further, Mr. Kilsheimer has reviewed at least three previous drafts of the Protocol and provided extensive comments. At all times prior to the final draft of the Protocol circulated on December 10, 2021, the Town and Mr. Kilsheimer were to be included in on-site sampling and testing under the terms of the Protocol.

15. As Mr. Kilsheimer can advise the Court, it is not enough for him to simply examine samples gathered from the destructive testing. He must be present on the site to participate with the other experts with regard to the on-site decisions needed to be made at that time.

16. In addition, there are many kinds of testing that require Mr. Kilsheimer's presence on the site and cannot be performed simply on samples. Such testing includes vibration, resistivity, seismic logging, site classification of soil and rock, pile coring, concrete chipping ("In Situ Testing"), as well as understanding the "as constructed" conditions of slabs, columns, etc. This list is simply some of many tests and on-site condition analyses that requires the Town's expert to be on site and allowed to actively participate.

17. The on-site activities set forth in the Protocol will involve destructive testing such that future testing of the same materials at the specific locations allowed under the Protocol will

not be possible. Preservation of samples for future defendants is insufficient due to limited sample size, uncertainty in where samples are taken, sample degradation, and the wealth of data that can only be obtained through In Situ Testing.

18. If the Town is not permitted to participate in the destructive testing in accord with the Protocol, the Town may be unable to conduct an investigation into the Claims in accordance with the purposes of Section 768.28, Fla. Stat., and the Town's potential defenses in a subsequent suit may be prejudiced and jeopardized due to spoliation of evidence. *See DePuy, Inc. v. Eckes*, 427 So. 2d 306,308 (Fla. 3d DCA 1983) (holding that alteration of evidence by Defendant that prevented Plaintiff's expert from conducting tests constituted spoliation of evidence); *Rumler*, 546 F. Supp 2d at 1344 (noting that Section 768.28, Fla. Stat., provides appropriate agencies an opportunity to investigate all claims in order to either provide or deny a remedy).

19. The Court has recognized the Town as a potential defendant *and* as an interested governmental agency, and has treated it as such with respect to site access. At the August 4, 2021, status hearing, in response to Town Mayor Charles Burkett's request for Mr. Kilsheimer to have access to the site in order to determine the cause of the collapse and the potential impact to adjoining buildings, this Court recognized the importance of Mr. Kilsheimer's access to the site and stated as follows:

everybody will have an opportunity to get in and do the investigations they need . . . So if [Mr. Kilsheimer] is ready to go, the only thing we need is to conclude a protocol order that you will participate in, or your lawyers will participate in more accurately, because as you know, *I have to make sure there are no spoliation issues* . . . Now having said that, we obviously have to balance the need to preserve this evidence and avoid spoliation issues with the urgency the you [Mayor Burkett] bring to this court, that being, are there other structures and other people who might be in danger. I assume from what I've read, and from what I've seen, that people who live in these adjoining buildings have hired engineers and other expert to go in and at least opine as to the structural integrity of those buildings to give them to give them some degree of comfort. But I know they cannot get all of the comfort they need until this question is closed and these issues of causation are

explored, and I can assure you and your constituents that I have directed my Receiver on multiple occasions to coordinate with class counsel, defense counsel set, and everybody else and get me a testing and inspection protocol immediately . . . I expect to be in a few weeks, and *once that is done, those engineers and experts, including Mr. Kilsheimer, will have the court's authority under an appropriate order to go in and do all the examinations and testing they need so they can opine on what the cause of this tragic occurrence actually was and make sure if that cause impacts other buildings or might impact other buildings, appropriate remedial action will be taken.* So you have my assurance that this, again, is not business as usual and that these issues will be dealt with with dispatch.

Transcript of August 4, 2021, hearing, pages 60-63 (emphasis added).

20. In addition to being a potential party to this litigation, the Town has an independent public and governmental interest, as well as a moral obligation, to determine what caused this tragedy within the borders of the municipality to ensure the life safety, health, and welfare of all residents. The Town Commission authorized Mr. Kilsheimer's hiring to investigate the cause(s) of the collapse. The Town authorized substantial funds to be used in connection with the investigation and testing.

21. Due to its municipal powers and obligations, this Court has previously recognized the importance of determining causation for the benefit of all victims and residents, and assured the Town that its expert would be afforded access to the site for sampling and testing.

22. For all of these reasons, the Town asks the Court to include it in the on-site invasive testing as though it were a full party to the existing litigation and in its governmental capacity.

WHEREFORE, the Town respectfully requests an order granting its motion and permitting the Town to participate in all on-site invasive testing in accordance with the agreed upon protocol.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Motion was served via the Florida Courts E-Filing Portal on all listed on the portal's service list, this 13th day of December, 2021.

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