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

COMPLEX BUSINESS DIVISION
CASE NO. 2021-015089-CA-01
Section CA: 43 Judge Michael Hanzman

IN RE:

CHAMPLAIN TOWERS SOUTH
COLLAPSE LITIGATION

_____/

**NV5'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED CLASS ACTION COMPLAINT OR, IN THE ALTERNATIVE, MOTION FOR A MORE DEFINITE STATEMENT**

NV5 Inc., pursuant to Rules 1.110 and 1.140 of the Florida Rules of Civil Procedure and other applicable law moves this Court for an order dismissing Plaintiffs' Second Amended Class Action Complaint ("Complaint") and as support states:

**SUMMARY OF THE ARGUMENT**

One wonders why NV5 is named as a Defendant in this action. Plaintiffs' Complaint tells the story of the construction of a condominium next door to Champlain Towers South ("CTS") Eighty-Seven Park (the "Project"), including allegations showing that NV5 met the standard of care owed to its client, Terra.[1] right. Plaintiffs' allege that NV5 issued reports full of warnings to Terra about the risk that vibrations, dewatering, and other construction activities at the Project, which Plaintiffs accurately allege had the ultimate decision-making authority regarding all construction activities at the Project.

[1] NV5's client was 8701 Collins Development, LLC; however, Plaintiffs group 8701 Collins Development, LLC, Terra Group, LLC, and Terra World Investments, LLC together as the "Terra." Because this is a motion to dismiss, NV5 will adopt the terms as defined in Plaintiffs' Complaint.

After accurately describing how NV5 met the duty of care owed to its client by warning Terra regarding how certain construction activities could impact CTS and providing alternative approaches to Terra' for consideration, Plaintiffs suspend logic and allege that NV5 failed to heed its own warnings. As a result, Plaintiffs allege that NV5 breached a duty owed to the residents of CTS and should be held not only liable, but strictly liable, for decisions made by and construction activities performed by Terra and others involved in the design and construction of the Project.

The pleading is replete with allegations that the "Terra Defendants, JMA, NV5 and DeSimone" acted in concert to damage the CTS structure, imperiling the safety of its occupants. *See, for example,* Pls.' Compl. Paras. 149 through 152 and 155 through 157. Without a factual basis and without plainly identifying the legal theory, Plaintiffs sweep all defendants into a civil conspiracy.

Incredibly, Plaintiffs claim that NV5 "pushed the luxury project forward, prioritized corporate profits over safety, by deciding to use driven sheet piles instead of an alternative approach that would produce less vibration, failing to perform vibration monitoring on the soil compaction, and failing to monitor the dewatering. How any of those decisions were under the control of NV5 is a mystery

Plaintiffs make no attempt to explain the basis for the fantastical assumption that a consultant who owns no interest in the property or the project, much less a controlling interest in the development entities or the contractors, has any control over the decision-making process of when and how site and vertical construction proceed. This Court has repeatedly cautioned counsel to pursue only meritorious or "real" claims. This loose,

factually-deficient attempt at pleading a civil conspiracy labelled professional negligence is neither.

Plaintiffs fail to state a cause of action for negligence against NV5 because, as a matter of law, NV5 owed a duty of care to its client, Terra, not the residents of CTS or the general public to educate it about the risks of construction vibrations to CTS, alternative strategies to reduce or avoid them and to report on the vibrations that it was hired to monitor and **only** the vibrations it was hired to monitor.

Plaintiffs fail to state a cause of action against NV5 for strict liability for the same reason and because Plaintiffs accurately allege that NV5 did not perform any ultrahazardous activity during the Project that would give rise to strict liability. Instead, without explanation, NV5 is magically transformed into a consultant with final decision-making authority, despite the allegations to the contrary. As such, Plaintiffs' Complaint should be dismissed against NV5.

## I. Plaintiffs Fail to State a Cause of Action against NV5 for Negligence Because The Allegations of Plaintiffs' Complaint Show That NV5 Did Not Breach Any Duty of Care NV5 May Have Owed to Plaintiffs. Instead, the Complaint Shows That NV5 Did Everything Right.

Plaintiffs allege that NV5 was the "geotechnical engineer and inspector" for the Project. Pls.' Compl. Para. 18. In that role, they allege that NV5 performed "a geotechnical study and rendere[ed] the report that section 1803 of the Florida Building Code required" and "perform[ed] an extensive and thorough pre-construction survey of CTS." Pls.' Compl. Paras. 72 and 201. Plaintiffs do *not* allege that NV5 performed any vibration monitoring, alleging, instead, that "NV5 hired Geosonics to perform vibration monitoring only for some


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(but not all) sheet piles installed along the north perimeter of the project." Pls.' Compl. Para. 112.

Regarding NV5's report, Plaintiffs admit that the "NV5 Report contained critical findings and recommendations regarding potentially destructive effects that the development of Eighty-Seven Park would have on the adjacent CTS and NV5 provided it to Terra, JMA, and DeSimone." Pls.' Compl. Para. 74. Plaintiffs go on to admit that "the NV5 Report warned Terra that vibrations caused during site preparation and foundation work and dewatering activities would damage CTS's foundation and property if precautions were not taken." Pls.' Compl. Para. 75.

Regarding pile driving, specifically, the subheading of the "Ultrahazardous Sheet Pile Driving at Eighty-Seven Park Damaged CTS" section of Plaintiffs' Complaint alleges that "**Defendants Ignored NV5 Warnings and Used Sheet Pile Driving**." Pls.' Compl. 26 (emphasis removed from section heading; emphasis in original in section subheading). Throughout this section, Plaintiffs' allege that NV5

- "made recommendations regarding the different types of based excavation support systems and methods that could be utilized" (Para. 88);
- "explicitly alerted Terra, JMA, and DeSimone, [that there] was the inherent risk that '[s]heets installed by vibratory driving can cause damaging vibrations to adjacent properties and structures'" (Para. 90);
- "informed Terra, JMA, and DeSimone that tangent and secant pile walls were '[p]ractically vibration free'" (Para. 92);


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- "informed Terra, JMA, and DeSimone that the DSM wall method of basement excavation support was '[p]ractically vibration-free] and '[w]ell-suited for site subsurface conditions'" (Para. 93);
- "specifically told Terra, JMA, and DeSimone that all viable methods of basement excavation support systems were 'practically vibration free,' except for the sheet pile system" (Para. 95);
- "informed Terra and JMA that the 'intent is to have a technician on site to monitor vibrations in real time as close to the adjacent property as possible'" something that Plaintiffs allege was changed to selective monitoring by others. (Paras. 104-105); and
- "informed Terra, JMA, and DeSimone that vibratory sheet pile driving was not necessary in the first place, as there were other suitable, alternative methods of basement excavation support available." (Para. 150).

Regarding aspects of construction performed by others, specifically soil compaction and dewatering, Plaintiffs' admissions regarding NV5 meeting any duty of care that might exist continue. Regarding soil compaction, Plaintiffs allege that the "NV5's April 2015 report explicitly informed Terra, JMA, and DeSimone that '[t]he vibrations produced by the operation of the compactor should be monitored for potential adverse effect on adjacent existing structures, pavements, and utilities." Pls.' Compl. Para. 154. They go on to allege that the "NV5 Report explicitly informed Terra, JMA, and DeSimone that vibrations emitted during vibratory sheet pile driving and vibration-producing

compaction activities could cause damage to adjacent building, including CTS, if the vibrations were not property monitored and controlled." Pls.' Compl. Para. 165.

Regarding dewatering, Plaintiffs admit that the "NV5 Report explicitly warned Terra, JMA, and DeSimone, that '[d]uring dewatering the adjacent properties must be monitored for adverse impacts from dewatering drawdown. The potential for adverse impacts from dewatering is especially heightened where the peaty layer exists." Pls.' Compl. Para. 169. Strangely, Plaintiffs later add NV5 to the group of Defendants that failed to "monitor the dewatering procedures," which the Plaintiffs describe as "inexcusable since the April 2015 NV5 Report warned them that their failure to adequately monitor dewatering would have disastrous effects on CTS." Pls.' Compl. Para. 183.

By doing so, Plaintiffs allege a duty created by omission for a service that NV5 never contracted to provide. A professional consultant's duty to its client does not spring into existence from the notion that the client could have hired the consultant to provide more or different services. The duty to the client controls the duty to third-parties with whom the consultant has no privity. If there is no duty to the client, there can be no duty to third-parties because both duties originate from the contractual promises or voluntary performance of services outside of the contract.

Regarding the pre-construction survey of CTS, Plaintiffs again allege that NV5 met any applicable standard of care, admitting that "NV5 conducted an extensive survey of CTS and meticulously documented every area of pre-existing damages, including the smallest of hairline stucco fractures." Pls.' Compl. Para. 204. Plaintiffs go on to admit that the "NV5 pre-construction survey left no stone unturned, taking hundreds of photographs

of the entire exterior of CTS and the basement parking garage. NV5 thoroughly documented every observable defect or area of damages that existed . . . and presented the finding of the pre-construction survey in a report . . . addressed to Terra . . . ."

Plaintiffs' allegations regarding NV5's role as a geotechnical engineer and inspector for the Project are not allegations evidencing that NV5 did something wrong; **instead, they are allegations admitting that NV5 did everything right**. This begs the question: Why is NV5 a Defendant in this action?

Plaintiffs allege that the "Terra entities were the owners, developers, and managers of the Eighty-Seven Park construction/development project **and had final supervisory authority over all decision-making related to the project**." Pls.' Compl. Para. 328 (emphasis added). In their negligence claim against NV5, Plaintiffs contradict their allegation regarding Terra' final supervisory authority over all decision-making and oddly allege that "NV5 ignored its own warnings and allowed dangerous work to proceed on the Eighty-Seven Park project, despite the harm it was inflecting on CTS." Pls.' Compl. Para. 384 (emphasis added). Unsurprisingly, Plaintiffs fail to allege how NV5, a consulting engineer hired by Terra, could stop its client (or anyone else) from doing anything related to the Project when Terra owned, developed, and managed the Project, obtained a permit for the construction from the Authority Having Jurisdiction, was prosecuting work within the parameters of the permit, and "had final supervisory authority over all decision-making related to the project." Pls.' Compl. Para. 328.

In their negligence claim against NV5, Plaintiffs also allege that NV5 should have recommended "the safest methods of basement excavation support that were practically

vibration free and that would not have had a negative structural impact on CTS." Pls.' Compl. Para. 391. In doing so, Plaintiffs' contradict and ignore other allegations in which they allege that NV5 did exactly that. Similarly, Plaintiffs allege that "NV5 failed to appropriately monitor and control the risks associated with dewatering, site compaction, pile driving, and excavation procedures" and "failed to undertake appropriate and necessary measures to analyze and ensure that the Eighty-Seven Park construction activities were not negatively impacting CTS," ignoring (again) their allegations that it was Terra, not NV5, that had final supervisory authority over all decision-making related to the Project and their allegations that NV5 did not perform any vibration monitoring at the Project. Pls.' Compl. Paras. 112, 328.

Speaking of Plaintiffs allegations regarding the vibration monitoring data produced by Geosonics, which serve as a basis of virtually all their claims against the Defendants, the allegations are not accurate. Using bold and italics to emphasize the statement, Plaintiffs allege that "***29 out of 36 vibration readings taken [80.6 percent] exceeded the allowable threshold of 0.5 inches per second***"; however, there are 105 vibration readings on the Geosonics data, and only 43 (or 41 percent) exceeded the 0.5 per second threshold selected by the Defendants as the threshold for this project. By describing the Geosonics data in this clever way, Plaintiffs have disguised the actual number of exceedances and **almost doubled** the percentage of vibration readings exceeding the threshold by alleging "more than 80%" to form the basis of the remainder of their allegations against NV5 and the other Defendants. (*See, e.g.*, Para. 120).


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Plaintiffs erroneous characterization of the vibration readings continues in Paragraph 123 when they claim that "28 [out of 36] vibration readings [77.8 percent] exceeded the allowable limit" after March 7, 2016, when the Geosonics data actually shows that 37 out of 90 vibration readings, 41.1 percent, exceeded the threshold. Moreover, if one gave Plaintiffs the benefit of the doubt regarding how they appear to be reading the Geosonics data (that is, by treating 3 readings as 1 if they are in the same row), only 25 exceeded the threshold.

Plaintiffs continue their contradictory allegations in Paragraph 124 where they allege that certain meeting minutes reflect "that Terra and JMA received numerous complaints from CTS owners and residents regarding the construction activities." When the meeting minutes are viewed, however, the residents were complaining about construction activities starting too early in the morning: "No work starts before 8:00 AM even though our neighbors at Champlain Towers continue to complain." (Para. 124, p. 42).

The meeting minutes referenced in Paragraph 24 also evidence that the Defendants, including, NV5, were performing quality assurance and quality control regarding vibration monitoring and doing exactly what they were supposed to do: adjusting based on high vibration readings. "ASAP predrilled this area, changed the frequency setting on the power head and are driving only one half of the pair of sheets at a time. This has dropped the readings back to the 4 range." Instead of alleging the Defendants have done something wrong, Plaintiffs allegations show that Defendants did


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exactly what they were supposed to do, and that the vibration monitoring served its purpose.

In Paragraph 125, again using bold and italics to draw attention, Plaintiff misrepresent that "[***t]here was no vibration monitoring performed for the final sheet pile installations at the north end of the project***," when the meeting minutes cited to support this allegation clearly state that the sheet piling will not be completed, that is, will not continue past the last date of vibration monitoring (March 14, 2016) as a result of an existing waterline not being capped. (Para. 124, p. 42).

Plaintiffs take liberties in Paragraph 126 when they cite an email communication discussing the water line and the sheet pile work in an email sent the same day as the date of the Meeting Minutes and allege that sheet pile work continued despite the unequivocal statement in the Meeting Minutes that it ceased on March 14, 2016, further evidenced by the fact that the last vibration readings in Plaintiffs' complaint are from March 14, 2016.

Importantly, the March 21, 2016, Meeting Minutes note that the March 7, 2016, Meeting Minutes were approved on March 14, 2016, two weeks later. Plaintiffs do not allege the minutes are false or inaccurate. Taken as true, the March 14, 2016 minutes, were drafted after March 14, 2016, and approved at the next OAC Meeting (#24), which took place a week later, on March 21, 2021, after the March 14, 2016, email discussions regarding sheet piling and the water line that resulting in the sheet pile work on the north side being discontinued after March 14, 2016. Revealing and noteworthy is the fact the Plaintiffs included a copy of the OAC Meeting Minutes from March 21, 2021, and

conveniently omitted the portion of the minutes that evidence the fact that the March 14, 2016, minutes were approved and accepted on that date. If the sheet pile driving continued past the last day or monitoring, March 14, 2016, the March 14, 2016, minutes stating unequivocally that the sheet pile driving was left incomplete because of the water line would not have been approved. (Para. 136, p. 47).

Plaintiffs acknowledge that the remaining allegations that Defendants continued sheet pile driving without vibration are disingenuous by including the word "likely" in Paragraph 127 when alleging that Defendants ceased "monitoring the vibrations because it would be best not to have a record of the extreme vibrations that would inevitably occur." They inclusion of the word "likely," the only one of its kind in the whole complaint, showcases that Plaintiffs cannot make the allegation in good faith without it.

Even if NV5 performed vibration monitoring, which Plaintiffs allege it *did not*, Plaintiffs' misleading allegations regarding the alleged breach of the Defendants' standard of care regarding the monitoring are negated by the exhibits that Plaintiffs embedded into their Complaint, which are part of the Complaint for all purposes. "[A]ny exhibit attached to a pleading shall be considered a part thereof for all purposes," Florida Rule of Civil Procedure 1.130(b), and that "[i]f an attached document negates the pleader's cause of action . . . the plain language of the document will control and may be the bases for a motion to dismiss." *Health Application Sys., Inc. v. Hartford Life & Accident Ins. Co*., 381 So. 2d 294, 297 (Fla. 1st DCA 1980). Because the allegations are negated by the exhibits, the Court is not required to accept those allegations as true—and it must not. *Hunt Ridge at Tall Pines, Inc. v. Hall,* 766 So.2d 399, 401 (Fla. 2d DCA 2000) ("Where

complaint allegations are contradicted by exhibits attached to the complaint, the plain meaning of the exhibits control and may be the basis for a motion to dismiss.").

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Therefore, Plaintiffs' Complaint should be dismissed.

**II. Plaintiffs' Complaint Should Be Dismissed Because the Services Provided by NV5 Related to the Project Were for the Sole Benefit of Terra and Did Not Create a Legal Duty Running from NV5 to the Residents of CTS.**

"While the supreme court has identified four general sources from which a duty may arise, here, a duty must arise from the fourth category-general facts of the case." *Gyongyosi v. Miller*, 80 So. 3d 1070, 1077–78 (Fla. 4th DCA 2012) (citing *Clay Elec. Coop., Inc. v. Johnson,* 873 So.2d 1182, 1185 (Fla.2003). As the Supreme Court has explained:

> [F]oreseeability relates to duty and proximate causation in different ways and to different ends. The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader "zone of risk" that poses a general threat of harm to others . . . [and] is a minimal threshold *legal*[1] requirement for opening the courthouse doors, whereas the latter is part of the much more specific *factual* requirement that must be proved to win the case once the courthouse doors are open. As is obvious, a defendant might be under a legal duty of care to a specific plaintiff, but still not be liable for negligence because proximate causation cannot be proven.

*McCain v. Florida Power Corp.,* 593 So. 2d 500, 502–03 (Fla. 1992). The focus of a zone or risk test should be on "the likelihood that a defendant's conduct will result in the type of injury suffered by the plaintiff." *Palm Beach–Broward Medical Imaging Center, Inc. v. Continental Grain Co.*, 715 So. 2d 343 (Fla. 4th DCA 1998). "This aspect of foreseeability requires a court to evaluate 'whether the type of negligent act involved in a particular case has so frequently previously resulted in the same type of injury or harm that 'in the field

of human experience' the same type of result may be expected again.'" *Id.* at 345 (quoting *Pinkerton–Hays Lumber Co. v. Pope*, 127 So.2d 441, 443 (Fla.1961)). "The absence of a foreseeable zone of risk means that the law imposes no legal duty on a defendant, and therefore defeats a negligence claim." *Biglen v. Fla. Power & Light Co.*, 910 So.2d 405, 408 (Fla. 4th DCA 2005).

The services performed by NV5 on the Project did not "foreseeably create[] a broader 'zone of risk' that pose[d] a general threat of harm to" to the Plaintiffs. *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992). Therefore, NV5 did not (and does not) owe the Plaintiffs a duty to lessen any risk or ensure that sufficient precautions were taken to protect the Plaintiffs from any harm that such a risk would pose, had one been created. *Sewell v. Racetrac Petro., Inc.*, 245 So. 3d 822 (Fla. 3d DCA 2017) (citing *McCain*, 593 So. 2d at 503).

The services provided by NV5 during the Project were for the sole benefit of Terra for purposes of assessing the risk of construction activities at the Project to adjacent buildings like CTS, warning Terrace Defendants regarding the effect certain construction activities could have on CTS, and providing alternatives for Terra' consideration. Plaintiffs allege that NV5 did exactly that throughout their Complaint. *See supra* § I.

Florida courts have found that the types of services provided by NV5 to Terra on the Project do not create a legal duty to third-parties like the Plaintiffs. For example, in *First Wisconsin Nat'l Bank of Milwaukee v. Roose*, Florida's Fourth District Court of Appeal considered a class of condominium owners' argument that a construction lender owed them a duty to protect their interests "by supervising the construction and

maintenance by the developer" to which the construction lender had loaned money in exchange for a mortgage on the property. 348 So. 2d 610, 611. In rejecting the owners' argument, the *Roose* court reasoned that it could not "impose a duty upon a mortgagee greater than the one established as a money lender and security holder." *Id.* The *Roose* court held that any inspections performed by the lender in conjunction with its security interest in the property were for the *sole benefit of the lender* and did not create a duty to the condominium owners to supervise the developer's construction and maintenance of the property. *Id.* The services performed by the lender in *Roose* are similar to those provided by NV5 in this case in that both the lender and NV5's services were performed for the benefit of specific entity, not a class of owners of the completed project, much less a class of owners of an adjacent. *Id.*

In support of their argument, the condominium owners in *Roose* relied on *A. R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973) ("*A.R. Moyer*"). In *A.R. Moyer*, Florida's Supreme Court addressed the following question certified by the United States Fifth Circuit Court of Appeals:

> Under Florida law, may a general contractor maintain a direct action against the supervising architect . . . for the general contractor's damages proximately caused by the negligence of the Architect . . . for said building project, where there is an absence of direct privity of contract between the parties?

*Id.* at 398. The Supreme Court held that, where the language of an architect's contract gives the architect the "power of economic life or death over the contractor," there is a close nexus between the parties giving rise to a common law duty such that a direct claim

for purely economic losses under a negligence theory may be maintained by the non-privity general contractor.[2] *Id.* at 401-03.

Nothing in NV5's contract with Terra transformed NV5 from an entity that provided specific geotechnical engineering consulting services to its client to a supervising design professional with legal duties running to non-privity plaintiffs seeking damages, whether a general contractor, a subcontractor, *or the residents of CTS*.

As discussed at length in *A.R. Moyer* and subsequent cases that have reaffirmed the limitation on design professionals' duties to non-privity third-parties seeking damages like the Plaintiffs, in the context of construction, the scope of services described in the applicable contract determines what duties are owed, and to whom. *A.R. Moyer,* 285 So. 2d, 397; *see, e.g., Moransais v. Heathman,* 744 So. 2d 973, 977 n.7 (Fla. 1999) (stating that the *A.R. Moyer* decision is limited to cases in which architect contracted for supervisory responsibilities over contractor); *Airport Rent-a-Car, Inc. v. Prevost Car, Inc.,* 660 So. 2d 628, 631 (Fla. 1995) (stating that the contractual provisions providing the architect with supervisory responsibility was the pivotal factor in the *A.R. Moyer* Court's decision); *Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc.,* 620 So. 2d 1244, 1248 n.9 (Fla. 1993) (limiting *A.R. Moyer* decision strictly to its facts); *First Florida Bank, N.A. v. Max Mitchell & Company,* 558 So.2d 9, 13 (Fla. 1990) (distinguishing *A.R. Moyer* and limiting it to its facts); *AFM Corp. v. Southern Bell &*

[2] Since 1973, Florida's Supreme Court has repeatedly reaffirmed *A.R. Moyer's* limitation on design professionals' tort liability to non-privity plaintiffs for purely economic losses. Time and time again, the Court has emphasized that *A.R. Moyer's* precedential value—that is, the expansion of tort liability to non-privity plaintiffs seeking economic damages—is strictly limited to the specific facts of that case. *See infra* Cases Cited.

*Telegraph Co.,* 515 So. 2d 180, 181 (Fla. 1987) (citing *A.R. Moyer* for the proposition that supervisory responsibilities vested in the architect by its contract carried with it a concurrent duty not to injure foreseeable parties who are not beneficiaries of the contract); *E.C. Goldman, Inc. v. A/R/C Associates, Inc.,* 543 So. 2d 1268, 1270 (Fla. 5th DCA 1989) (recognizing the *A.R. Moyer* decision is "still good law" and narrowly applying it to its facts); *Sandarac Association, Inc. v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349, 1354 (Fla. 2d DCA 1992) (stating that "this court now limits its application of *A.R. Moyer* to circumstances in which the defendant architect has supervisory powers over the plaintiff"), *overruled on other grounds by Stone's Throw Condominium Association, Inc. v. Sand Cove Apartment, Inc.,* 749 So. 2d 520 (Fla. 2d DCA 1999); and *Spancrete, Inc. v. Ronald E. Frazier & Associates, P.A.*, 630 So. 2d 1197 (Fla. 3d DCA 1994) (holding that a design professional owes no duty to subcontractors even when vested with vested with supervisory authority by contract).

The legal principle is not limited to *A.R. Moyer* and its progeny. For example, in *Public Health Trust v. George Hyman Construction Co.,* Florida's Third District Court of Appeal ("Third District") analyzed a contract where a plaintiff owner hired a design professional to "monitor" construction work on a project. 606 So. 2d 728, 730 (Fla. 3d DCA 1992). After the project was completed, the air conditioning system began to leak, and the owner sued the design professional. *Id.* The trial court granted summary judgment for the defendant design professional based on exculpatory language in the applicable contract. *Id.* The Third District reversed the trial court and reasoned: "In a proper factual situation, where it is demonstrated that the architect ignored his contractual duty to make

periodic visits to the site, liability could possibly lie regardless of such exonerating language." *Id*.

Similarly, in *Geer v. Bennett*, the Fourth District Court of Appeal ("Fourth District") reversed a final judgment entered in favor of a defendant architect in a concrete mason's lawsuit for personal injuries sustained after he fell from the second floor or a building under construction. 237 So. 2d 311 (Fla. 4th DCA 1970). The court performed a thoughtful analysis of a design professional's legal duty to others and noted:

> Although the question of an architect's liability for personal injury or death has not heretofore been determined in the State of Florida, law abounds in other jurisdictions to the effect that an architect **who plans and supervises construction work** as an independent contractor is under a duty to exercise ordinary care in the course thereof for the protection of any person who foreseeably and with reasonable certainty may be injured by his failure to do so.

*Id.* at 315. The court cited several cases from different jurisdictions that concerned "themselves with an architect's liability for negligent acts." *Id.* (citing *Erhart v. Hummonds*, 1960, 232 Ark. 133, 334 S.W.2d 869 (affirming judgment for plaintiffs against an architect in a wrongful death and person injury case where the architect's negligence caused or contributed to the accident, and the architect was contracted by the owner to prepare plans and supervise construction); *Montijo v. Swift*, 1963, 219 Cal.App.2d 351, 353, 33 Cal.Rptr. 133 (reversing a judgment notwithstanding the verdict for a design professional and ordering a new trial in a suit by a pedestrian for injuries sustained in a fall down a stairway at a bus depot against the design professional "who **planned and supervised** the renovation and the reconstruction of the stairway"); *Willner et al. v. Woodward*, 1959, 201 Va. 104, 109 S.E.2d 132 (reversing summary judgment for a design professional in

a construction defect case where the design professional was responsible for preparing plans, approving the plans of others, and supervising construction).

The case of *Recreational Design & Construction, Inc. v. Wiss, Janney Elstner & Associates, Inc.*, 2011 WL 5117163 (S.D. Fla. 2011), is a more recent case discussing whether an independent engineering firm hired as a consultant by a developer like Terra can be liable to a non-privity general contractor for professional negligence under Florida law. In this case, the City of North Miami Beach hired a contractor to perform all design and construction services for a water slide project. The City also hired a separate engineering firm to evaluate and perform inspections of the contractor's work. The engineering firm hired another engineering firm as a subconsultant to perform the engineering inspections. The subconsultant issued a report to the engineer that was provided to the city explaining that the water slide the contractor designed and started to construct was structurally unsafe. The report recommended repairs to be implemented on the slide. The city rejected the contractor's work based on the subconsultant's recommendation and required the contractor to implement the repairs before completing the work.

The contractor, instead of suing the city, sued the engineer and subconsultant for professional negligence to recover its costs in reconstructing the slide and implementing the repairs recommended to the city. Both the engineer and subconsultant moved to dismiss the contractor's complaint arguing that they did not owe a duty of care to the contractor; therefore, they could not be liable in negligence to the contractor as a matter

of law. The Southern District of Florida agreed with the engineer and subconsultant and dismissed the contractor's complaint with prejudice.

In doing so, it held that despite the allegations in the complaint regarding an engineer's broad duty, the factual allegations did not support a duty of care to a non-privity entity. In particular, there are no allegations that the defendants exercised decision-making authority over the contractor's responsibilities on the project; no allegations that the contractor and the defendants ever interacted with one another; no allegation otherwise establishing a close nexus between the contractor and the defendants; and no allegations that the agreement between the defendants and the city was made for the benefit of the contractor. The Court found that allegations that the defendants "were aware" that the plaintiff was the project contractor and that any advice on the project could "act to the detriment" of the contractor were unpersuasive to support a duty of care owed to the contractor.

The Southern District points to *McElvy, Jennewein, Stefany, Howard, Inc. v. Arlington Elec., Inc.,* 582 So. 2d 47 (Fla. 2d DCA 1991). In *McElvy*, the City of Tampa entered a construction contract with a general contractor, and the general contractor entered various subcontracts with electricians and suppliers. *Id.* at 48. The City of Tampa separately entered another contract with an architectural design firm, which was required to advise the city in interpreting and applying its design plans during construction on the project. *Id.* When one of the electrician subcontractors brought action against the architectural design firm for negligently interpreting certain provisions in the construction contract, the Second District Court of Appeals held that the architects had no duty toward

the electricians. The court held that the architects' only duty was toward the City of Tampa because the city alone was responsible for making decisions that would have an impact on the electricians. Because ultimate decision-making power and approval concerning the electrician's work on the project rested with the City of Tampa and not with the architects who advised the city, the *McElvy* court held that the architects did not enjoy the "power of economic life and death" over the electrician and therefore the nexus between architects and electricians was insufficient to impose a duty of care." *Id.* at 48-50. Similarly, NV5 did not have ultimate decision-making power or approval concerning any of the work on the Project that Plaintiffs allege negatively impacted CTS, causing or contributing to the collapse. That decision-making authority rested solely in the hands of Terra, *and Plaintiffs allege that fact*: Pls.' Compl. Para. 328.

The Southern District in further points to *E.C. Goldman, Inc. v. A/R/C Assoc., Inc.,* 543 So. 2d 1268 (Fla. 5th DCA 1989). In *E.C. Goldman, Inc.,* a school board entered a construction contract with a general contractor that hired several subcontractors to assist, including a roofing subcontractor. After the roofing subcontractor had completed his work on the project, the school board hired an independent consultant to evaluate the roof. *Id.* at 1269. When the consultant advised the school board to reject the roofing subcontractor's work, the roofing subcontractor filed action against the consultant, alleging that that the consultant owed him a duty because he "would foreseeably be harmed by [the consultant's] failure to exercise due diligence and reasonable care in performing . . . contractual obligations to the school board." *Id.* As noted by the Southern District Court's opinion, the "Fifth District Court of Appeal held that under these

circumstances, the consultant had no duty toward the roofing subcontractor and could not be liable for any negligence in evaluating the roof because the consultant was "outside the 'chain of construction.'" The court went on to note that the consultant "had nothing to do with the design or construction of the roof and was only hired to render an opinion to the school board as to the condition of the roof built by plaintiff." *Id.* at 1271-73.

The Southern District ultimately stressed that no duty of care could be owed by the engineer because the engineer "could not have held the power of economic life or death over the Plaintiff, and Defendants could not have found themselves with a sufficiently close nexus to the Plaintiff to owe Plaintiff a duty of care." Similarly, Plaintiffs do not allege that NV5 had ultimate decision-making authority when it came to heeding the warnings *that the Plaintiffs allege NV5 issued to Terra and others*. Likewise, they do not allege that NV5 had ultimate decision-making authority when it came to selecting what Plaintiffs describe as less destructive alternatives *that the Plaintiffs allege NV5 provided to Terra and others*. They do not make the allegations because there is no basis in fact to support them

In fact, it was the opposite. As an independent consultant hired by Terra solely for the benefit of Terra, NV5 did not have the ability to reject NV5's own warnings, select the use of a vibratory hammer despite NV5's own alternatives, monitor soil compaction vibrations or dewatering, or otherwise control the design or construction of the Project. Other entities may have owed duties to the Plaintiffs related to those issues; however, due to NV5's limited role as a geotechnical engineering consultant retained exclusively

by Terra for their exclusively benefit, NV5 did not owe the Plaintiffs any duty, as a matter of law.

In each of the cases discussed above, the scope of services specified by the applicable contract determined whether a duty was owed to a non-privity plaintiff seeking damages from a design professional. This is consistent with the general legal principle governing the determination of a legal duty in Florida; that is, "whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others." *McCain*, 593 So. 2d at 502 (Fla. 1992). In each of the cases, the court determined that a duty did not run from a defendant design professional, like NV5, to a non-privity plaintiff, like the Plaintiffs here, unless there were provisions in the design professional's contract that created a broader "zone of risk" that posed a general threat of harm to the non-privity plaintiff. It was the contractual duties ***that created*** the "zone of risk" which, in turn, triggered the general legal duty to either "lessen the risk or see that sufficient precautions [were] taken to protect others from the harm that the risk pose[d]." *Sewell v. Racetrac Petro., Inc.*, 43 Fla. L. Weekly D47 (Fla. 3d DCA December 27, 2017) (citing *McCain*, 593 So. 2d at 503).

Here, Plaintiffs allege that NV5's contractual duties to Terra included providing reports related to a geotechnical engineering analysis and pre-construction inspection. Plaintiffs do not allege that NV5 performed vibration monitoring or engaged in any of the construction activities that allegedly damaged CTS. *See supra* § I.

The Second District Court of Appeal case, *City of Tampa v. Thornton-Tomasetti, P.C.* ("*Thornton-Tomasetti*"), succinctly summarizes the state of the law governing the question before the Court:

> It is true that in limited circumstances, professionals can be held liable to noncontractual parties for economic damages arising from professional negligence. *See First Florida Bank, N.A. v. Max Mitchell & Co.*, 558 So. 2d 9 (Fla. 1990); *First American Title Ins. Co., Inc. v. First Title Service Co. of the Florida Keys, Inc.*, 457 So. 2d 467 (Fla. 1984); *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A.*, 467 So. 2d 315 (Fla. 3d DCA 1985). As these cases make clear, **liability is extended not to all who may be within the class of the foreseeably injured but only to distinct third parties whose reliance upon documents or information furnished by the professional constituted the "end and aim of the [underlying] transaction."** *See*, *e.g.*, *First American*, 457 So. 2d at 472 (property purchaser's reliance upon defective title negligently prepared by abstracter); *Max Mitchell*, 558 So. 2d at 11 (lender's reliance upon financial statement negligently prepared by borrower's accountant); *Lorraine*, 467 So. 2d at 319 (beneficiary's loss caused by attorney's negligent drafting of will for client). **The expansion of negligence law to protect economic interests not traditionally protected in tort has been applied to the construction industry, but in a restricted fashion.**

646 So. 2d 279, 281-82 (Fla. 2d DCA 1994).

When considering legal duties owed to non-privity plaintiffs seeking damages from design professionals, there is no legal duty when there is no "zone of risk," and there is no "zone of risk" in the absence of contractual duties that create one. NV5's contracts with Terra did not create a "zone of risk" that threatened the Association. The "end and aim of the [underlying] transactions," that is, the geotechnical engineering consulting services, were for the sole benefit of Terra. *Id.*

Therefore, NV5 does not owe the Plaintiffs a duty as a matter of law, and Plaintiffs' negligence claim against Plaintiffs should be dismissed.

**III. Plaintiffs Fail to State a Cause of Action against NV5 for Strict Liability Because NV5 Did Not Engage in an Inherently Dangerous Activity That Gives Rise to Strict Liability.**

Plaintiffs do not allege that NV5 engaged in pile driving activities[3] because NV5 did no such thing. Plaintiffs allege that NV5 was the "geotechnical engineer and inspector" for the Project. Pls.' Compl. Para. 18. In that role, they allege that NV5 performed "a geotechnical study and rendere[ed] the report that section 1803 of the Florida Building Code required" and "perform[ed] an extensive and thorough pre-construction survey of CTS." Pls.' Compl. Paras. 72 and 201. Performing geotechnical studies, writing reports, and inspecting buildings are not considered inherently dangerous activities under Florida law. *See infra* Case Cited.

Plaintiffs do *not* allege that NV5 performed any vibration monitoring, alleging, instead, that "NV5 hired Geosonics to perform vibration monitoring only for some (but not all) sheet piles installed along the north perimeter of the project." Pls.' Compl. Para. 112. Even if NV5 did perform vibration monitoring, however, monitoring vibrations is also not an inherently dangerous activity under Florida law. Because Plaintiffs fail to allege that NV5 engaged in an inherently dangerous activity, they fail to state a cause of action against NV5 for strict liability.

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[3] Pile driving is arguably an inherently dangerous activity. While NV5 does not concede this point, for purposes of this motion, NV5 will assume arguendo that pile driving is an inherently dangerous activity. This does not impact NV5's argument because Plaintiffs do not allege that NV5 engaged in pile driving activities.

> The conditions and activities to which the rule has been applied . . . include water collected in quantity in a dangerous place, or allowed to percolate; explosives or inflammable liquids stored in quantity in the midst of a city; blasting; pile driving; crop dusting; the fumigation of part of a building with cyanide gas; drilling oil wells or operating refineries in thickly settled communities; an excavation letting in the sea; factories emitting smoke, dust or noxious gases in the midst of a town; roofs so constructed as to shed snow into a highway; and a dangerous party wall.

*Cities Serv. Co. v. State*, 312 So. 2d 799, 801 (Fla. 2d DCA 1975). Clearly, writing reports, performing inspections, and monitoring vibrations (whether caused by construction activities or air traffic over a populated area) are not subject to the strict liability rule. Plaintiffs will likely argue that, because NV5 was involved in a construction project involving pile driving activities, which are abnormally dangerous, that they can state a cause of action against NV5 for strict liability. That is not the law in Florida.

For example, in *Hutchinson v. Capeletti Bros., Inc.*, the defendant appellee "**engaged in** pile-driving activity which damaged the residence of appellants." 397 So. 2d 952, 953 (Fla. 4th DCA 1981) (emphasis added). In reversing the trial court, which had entered final judgment after determining strict liability for the hazardous use of land was not recognized in Florida, the *Hutchinson* court reasoned:

> On balance, we find that while the damage-causing activity involved in this case has substantial value to the community it involves a high degree of risk of harm to the property of others. Thus, it is appropriate that the loss occasioned by that non-negligent activity be shifted to appellee construction company. It is a cost of doing business and we have no doubt that it is a cost which may be passed on to the ultimate user as well as a risk which may be insured against.

*Id.* at 953–54. The public policy behind strict liability, therefore, is to shift the risk of loss due to abnormally dangerous activities to the individual or entity engaged in the


**COLE, SCOTT & KISSANE, P.A.**
COLE, SCOTT & KISSANE BUILDING - 9150 SOUTH DADELAND BOULEVARD - SUITE 1400 - P.O. BOX 569015 - MIAMI, FLORIDA 33256 - (305) 350-5300 - (305) 373-2294 FAX

dangerous activity, who will then pass the cost on to the ultimate user and insure against the risk.

NV5 is engineering firm. Here, Plaintiffs allege that it was the geotechnical engineer and inspector and did *not* perform vibration monitoring. Even if NV5 did perform vibration monitoring, the result would not change. NV5 does not **engage in** pile driving activities or any abnormally dangerous activities during its business as an engineering firm. As such, it does not pass on risks associated with those activities to its end use (here, Terra) or insure against those risks. Plaintiffs cannot state a cause of action against NV5 unless they allege that NV5 engaged in pile driving activities, which Plaintiff cannot do in good faith (which is why they did not).

"To determine whether an activity is ultrahazardous, courts weigh the following factors:

> (1) whether the activity involves a high degree of risk of harm to the property of others; (2) whether the potential harm is likely to be great; (3) whether the risk can be eliminated by the exercise of reasonable care; (4) whether the activity is a matter of common usage; (5) whether the activity is inappropriate to the place where it is conducted; and (6) whether the activity has substantial value to the community.

*Coffie v. Florida Crystals Corp.*, 460 F. Supp. 3d 1297, 1312–13 (S.D. Fla. 2020) (quoting *Hutchinson*, 397 So. 2d at 953). Applying these factors to the services provided by NV5 to Terra on the Project (geotechnical survey and report, pre-construction survey and report, and (for the sake of argument) vibration monitoring) the Court should find that NV5 did not engage in any abnormally dangerous or ultrahazardous activities in conjunction with the Project.

Therefore, Plaintiffs claims against NV5 for strict liability should be dismissed.


**COLE, SCOTT & KISSANE, P.A.**
COLE, SCOTT & KISSANE BUILDING - 9150 SOUTH DADELAND BOULEVARD - SUITE 1400 - P.O. BOX 569015 - MIAMI, FLORIDA 33256 - (305) 350-5300 - (305) 373-2294 FAX

## CONCLUSION

WHEREFORE, Plaintiffs' Second Amended Class Action Complaint should be dismissed against NV5 Inc. for the reasons set forth in this motion.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 30, 2021, a true and correct copy of the foregoing has been furnished by electronic mail through the Florida Courts E-Filing Portal to all counsel of record.

COLE, SCOTT & KISSANE, P.A.
9150 S. Dadeland Boulevard, Suite 1400
Miami, FL 33156
Tel.: 305-350-5331
Fax: 305-373-2294
Email: George.Truit@csklegal
Email: Ryan.Charlson@csklegal.com

By: */s/ George R. Truitt*
GEORGE R. TRUITT
FBN: 963356
RYAN M. CHARLSON
FBN: 95033