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

COMPLEX BUSINESS
LITIGATION DIVISION

CLASS REPRESENTATION

CASE NO. 2021-015089 CA 01

IN RE: CHAMPLAIN TOWERS SOUTH
COLLAPSE LITIGATION
_____/

DEFENDANT JOHN MORIARTY & ASSOCIATES OF FLORIDA, INC.'S MOTION TO DISMISS AND/OR STRIKE CHAMPLAIN TOWERS SOUTH CONDOMINIUM ASSOCIATION'S CROSSCLAIMS

Defendant, JOHN MORIARTY & ASSOCIATES OF FLORIDA, INC. ("JMAF"), by and through its undersigned counsel and pursuant to Rule 1.140(b)(6),(f), hereby files its Motion to Dismiss and/or Strike Defendant Champlain Towers South Condominium Association, Inc.'s ("Association") Crossclaims for the reasons set forth below, and in support states as follows:

I. INTRODUCTION

1. On November 16, 2021, Plaintiffs' Class Lead Counsel filed their Consolidated Second Amended Class Action Complaint ("Complaint"), contending, *inter alia*, that the construction of Eighty-Seven Park ("87 Park"), which began in 2016 and was completed in 2020, contributed to and caused the tragic partial collapse of Champlain Towers South ("CTS"). Plaintiffs are the unit owners, residents, occupants and guests at CTS at the time of the collapse on June 24, 2021.

2. The Association was created in 1981 in accordance with Fla. Stat. Chapter 718 and performed those duties specified in the statutes and the Amended and Restated Declaration of Condominium of the Champlain Towers South condominium Association, Inc. ("Declaration"),

which is recorded in the Public Records of Miami-Dade County at Book 31420, Pg. 1165; the Amended and Restated Articles of Incorporation of the Champlain Towers South Condominium Association, Inc. ("Articles"), which are recorded in the Public Records at Book 31420, Pg. 1223; and the Amended and Restated By-Laws of the Champlain Towers South Condominium Association, Inc. ("By-Laws"), which are recorded in the Public records at Book 31420, Pg. 1230. The Declaration, Articles and By-Laws, and all prior versions thereof, are collectively referred to as the "Condominium Documents."

3. On December 30, 2021, the Association filed an Answer and Affirmative Defenses to Plaintiffs' Complaint along with Crossclaims against Defendants JMAF, Morabito Consultants, Inc. ("Morabito"); 8701 Collins Development, LLC, Terra Group, LLC, and Terra World Investments, LLC (collectively the "Terra Defendants"); NV5, Inc. ("NV5"); DeSimone Consulting Engineers, LLC ("DeSimone") and Becker & Poliakoff, P.A. ("Becker").

4. The Association's Crossclaims replicate most of the Plaintiffs' allegations, including use of the same photos and exhibits, against the 87 Park Defendants, which include the Developer/Owner of the neighboring condominium (8701 Collins Development and Terra), General Contractor (JMAF), Structural Engineer (DeSimone) and Geotechnical Engineer/Vibration Monitoring (NV5). The Association mimics the Plaintiffs' theme that the 87 Park Defendants ignored inherent risks, red flags and known damage to CTS purportedly caused by the construction of 87 Park, jeopardizing the lives, well-being and safety of CTS owners, residents, occupants and guests.

5. Since the Association's Crossclaims are largely a "cut and paste" of Plaintiffs' allegations, they have the same deficiencies as identified in JMAF's Motion to Dismiss Second Amended Complaint filed on Dec. 30, 2021 (DE #302).

6. In addition, the Association lacks standing to bring claims for wrongful death, personal injury and loss of personal property which inherently belong to the individual Plaintiffs, and not to the Association per Ch. 718.

7. While JMAF strongly believes that it in no way caused, even partially, the collapse of CTS, and that the collapse was caused by other factors unrelated to the construction of 87 Park, it will accept The Association's allegations as true for purposes of this Motion to Dismiss. However, the Court should again be made aware that certain critical allegations in the Crossclaim are in error, including but not limited to: (1) JMAF did not select or design the use of sheet piles or the foundation system; (2) ASAP Installations (JMAF's subcontractor) did not drive piles for 87 Park- they were auger cast piles drilled into the ground, a non-hazardous activity; and (3) dewatering was accomplished as directed by the Owner and its consultants.

8. The Crossclaim attempts to raise the same two causes of action against JMAF for negligence (Count X) and strict liability (Count XI) as raised by Plaintiffs. The Association alleges that JMAF was negligent in four areas stemming from the construction of 87 Park: (1) vibrations, (2) dewatering, (3) excavation and (4) water diversion. For vibrations, the Association addresses those allegedly generated by sheet pile driving and soil compaction activities at 87 Park. The dewatering process concerned removing and controlling the presence of groundwater and storm water to facilitate construction of the foundation for 87 Park. The excavation and water diversion referenced in the Crossclaim refer to the construction of a beach access walkway in a portion of what was formerly 87th Terrace separating CTS from the property where 87 Park was built. The Association alleges that JMAF and the 87 Park Defendants excavated against the CTS south foundational wall and sloped the walkway toward the CTS wall, leading to water intrusion.

9. With respect to strict liability, the Association focuses exclusively on the alleged sheet pile driving activity.

10. The Slavin doctrine is long-standing law in Florida, wherein a contractor cannot be liable to a third party for injuries sustained as a result of a patent defect in the construction after the project has been completed and accepted by the owner. Pursuant to Slavin v. Kay, 108 So. 2d 462 (Fla. 1958) and its progeny, JMAF's liability for negligence was cutoff after the dangerousness of the condition was obvious with the exercise of reasonable care ("patent") and the completion of the 87 Park construction, as alleged in the Crossclaim.

11. The public policy behind Slavin is that the burden of responsibility for correcting or remedying allegedly defective work should be placed upon the entity in possession which controls the environment, and after the contractor has completed the work, it is the owner which can discover and remedy any defects. Florida courts stress that the rule simply limits the class of defendants that a plaintiff can sue and does not act as an absolute bar to recovery by an injured party.

12. It is the controlling entity's intervening negligence in not correcting a patent defect under the Slavin doctrine that is said to have proximately caused the injury.

13. Thus, other than for sheet pile driving, which the Association contends falls under an exception for inherently dangerous activity, all of the other alleged construction activities clearly fail to raise a cause of action for negligence against JMAF.

14. Specifically concerning the installation of sheet piles by ASAP Installations, LLC ("ASAP") in 2016, used for basement excavation support at 87 Park, strict liability is limited to the kind of harm that makes the activity abnormally dangerous. Even assuming that sheet pile driving is abnormally dangerous, the Association failed to sufficiently allege a strict liability claim

because the collapse of CTS and resulting death of 98 people and the personal injuries of others was outside of the scope of the abnormal risk of harm.

15. The Association's attempt to raise negligence claims against JMAF, well after 87 Park was completed and occupied, on a host of various construction activities that allegedly were known or should have been known to have jeopardized CTS' structure, and the health and welfare of its residents and occupants, is the epitome of a Hail Mary- an act made in desperation with no reasonable chance of success. The dismissal or striking of these alleged breaches of duty will dramatically curtail the scope of the case against JMAF and reduce the areas of discovery, streamlining the litigation. As presently pled, the Association has specifically alleged numerous actions, or failures to act, by JMAF constituting negligence related to vibrations, dewatering, excavation and water diversion. Most, if not all, of these cannot be brought against the general contractor for injuries to third persons long after the construction work was completed and turned over to the owner.

16. Thus, the Association's Crossclaims should be dismissed for all of the reasons set forth in JMAF's Motion to Dismiss the Second Amended Complaint, and also because the Crossclaim exceeds the bounds of the Association's legislatively circumscribed authority. JMAF joins and adopts the standing argument raised in Defendant 8701 Collins Development, LLC's Motion to Dismiss CTS' Crossclaims.

II. KEY ALLEGATIONS RAISED IN THE ASSOCIATION'S CROSSCLAIMS

17. The Crossclaims are replete with allegations that serve to defeat the Association's negligence claim against JMAF, as they clearly establish that the defective work was patent,

meaning obvious to the Owner or what should've been obvious with the exercise of reasonable care. The following excerpts come directly from the Crossclaims[1].

18. "Eighty-Seven Park is a sprawling, 18-story luxury condominium building that was developed and constructed between 2015 and 2020." Crossclaim ("CC") at para. 67.

19. "[T]he Terra Defendants overtook 87th Terrace, expanding the 8701 Collins Property's footprint as much as possible, right up against the southern property foundation wall of CTS." CC at para. 94.

20. "Had the Terra Defendants not 'purchased' 87th Terrace from the City of Miami Beach, the construction of Eighty-Seven Park would have occurred approx. 60 to 70 feet away from CTS." CC at para. 96.

21. "As it happened, however, the Terra Defendants undertook excavation and construction of Eighty-Seven Park a mere ten feet from the exterior foundational wall and support columns of the CTS Building." CC at para. 97.

22. "In 2015, the Terra Defendants retained NV5 to perform a geotechnical study and to render the report that section 1803 of the Florida Building Code required ("NV5 Report"). The NV5 Report [dated April 17, 2015] contained critical findings and recommendations regarding potentially destructive effects that the development of Eighty-Seven Park would have on the adjacent CTS Building". CC at para. 102, 104.

23. "Given that the NV5 Report made numerous references to the dangers that vibrations associated with the construction of Eighty-Seven Park would pose to adjacent structures like CTS, there is no doubt that the Terra Defendants knew long before construction began that

[1] Due to the extreme length of the Crossclaims and the sheer volume of the allegations, this section is lengthy.

uncontrolled or unmonitored vibrations and ground disturbances would negatively impact CTS." CC at para. 109.

24. "In particular, the NV5 Report emphasized the potentially disastrous impact that site preparation and compaction procedures would have on adjacent existing structures, including the CTS Building if that work was not safely accomplished." CC at para. 110.

25. "The NV5 Report similarly cautioned that Eighty-Seven Park's foundation and basement garage construction required proper excavation, shoring, adequate lateral support, and preservation of subjacent support. The NV5 Report warned, '[p]articular attention should be paid to any deep excavations such as for the basement and elevator shafts and the potential impacts these could have on adjacent structures, especially where such excavations are close to project property lines.'" CC at para. 112 and 113.

26. "Further, 29 C.F.R. 1926.651(k)(1) required the Terra Defendants. JMA, NV5, and DeSimone, individually and collectively, to conduct '[d]aily inspections of excavations, the adjacent areas, and protective systems…for evidence of a situation that could result in possible cave-ins, indications of failure of protection systems, hazardous atmospheres, or other hazardous conditions." CC at para. 117.

27. "The Terra Defendants, JMAF, NV5 and DeSimone knew or should have known that they were individually and collectively responsible for ensuring Eighty-Seven Park site preparation work- including but not limited to excavation, shoring, compaction and dewatering- would preserve, rather than undermine, the CTS Building's structural integrity." CC at para. 120.

28. "Despite their knowledge of their responsibilities and the devastating toll of not meeting them, the Terra Defendants, JMA, NV5 and DeSimone ignored NV5's warnings and instructions, ignored OSHA's requirements, ignored the Florida Building Code, ignored CTS

resident warnings and complaints, and ignored what they could see happening during construction at the CTS property line. For the sake of greed, speed, or most likely both, the Terra Defendants, JMA, NV5, and DeSimone time and again defaulted to the least expensive, but most disruptive and most dangerous, practices for its Eighty-Seven Park site preparation work." CC at para. 122 and 123.

29. "Notably, the major disadvantage associated with driven sheet piles, to which NV5 explicitly alerted the Terra Defendants, JMA and DeSimone in the NV5 Report, was the inherent risk that '[s]heets installed by vibratory driving can cause damaging vibrations to adjacent properties and structures." CC at para. 130.

30. "The installation of sheet piles on the Eighty-Seven Park project occurred in early 2016…Throughout the entire installation process for every sheet pile, the large vibratory hammer and attached sheet piles emitted strong and dangerous vibrations." CC at para. 138 and 139.

31. "Defendant JMA hired subcontractor ASAP Installations, LLC to perform the sheet pile installation work." CC at para. 140.

32. "ASAP performed vibratory sheet pile driving around the perimeter of the Eighty-Seven Park project from approximately February 24, 2016 through March 28, 2016. The sheet piles were driven into the ground only about 10 feet away from the CTS Building's south foundation wall." CC at para. 141-142.

33. "The plan to monitor all sheet pile installations changed, however, when the Terra Defendants decided that instead of monitoring all sheet pile installations for dangerous vibrations, the installations would be selectively monitored- taking place only on some days and not continuously throughout those days." CC at para. 148.

34. "…The Terra Defendants' Curt Wyborny had decided that monitoring would occur only along the north line of the project." CC at para. 150.

35. "Instead of heeding the warnings from the April 17, 2015 NV5 Report concerning the dangers of unmonitored and uncontrolled vibrations caused by driving sheet piles with a vibratory hammer, the Terra Defendants, JMA, NV5 and DeSimone allowed the vast majority of sheet pile installation work to be completed with absolutely no vibration monitoring and no other measures in place to limit damaging vibrations, as monitoring took place on only some days and for only some parts of those days- even along the north wall of the project." CC at para. 151.

36. "Not only did installing interior sheet piles with the vibratory hammer cause vibrations that damaged the CTS Building, but removing interior sheet piles with the same vibratory hammer subjected the CTS Building to yet another round of the same damaging vibrations." CC at para. 154.

37. "NV5 explained in its March 28, 2016 Vibration Summary Report that, although vibration levels were never formally established for the Eighty-Seven Park project, industry standards dictated that vibrations of 0.5 inches per second can cause property damage. Thus, the Terra Defendants, JMA, NV5 and DeSimone established a vibration limit of 0.5 inches per second for the sheet pile installation." CC at para. 161-162.

38. "The Terra Defendants, JMA, NV5 and DeSimone failed to ensure that the vibrations produced during the sheet pile installation along the south CTS Buildings' south foundation wall remained below the 0.5 inches per second threshold they set." CC at para. 164.

39. "The GeoSonics data, subsequently incorporated into NV5's March 28, 2016 Vibration Summary Report, confirmed that during almost the entirety of the sheet pile installation along the south CTS foundation wall, the vibrations exceeded acceptable and safe levels. A

staggering 29 out of 36 vibration readings taken exceeded the allowable threshold of 0.5 inches per second." CC at para. 165-166.

40. "Even though more than 80% of the vibration readings taken confirmed that vibrations from driving the sheet piles exceeded safe and allowable limits, the Terra Defendants, JMA, NV5, and DeSimone continued their vibratory sheet pile installations. " CC at para. 167.

41. "Despite ASAP's attempts to pre-drill for the sheet pile installations and the confirmed knowledge of the Terra Defendants, JMA, NV5 and DeSimone that vibration readings along the south CTS foundation wall were exceeding safe and allowable limits, they allowed the vibratory sheet pile installation to continue producing vibrations at an unsafe level." CC at para. 169.

42. "Even after the March 7, 2016 meeting at which the Terra Defendants and JMA explicitly acknowledged the high vibration readings, 28 vibration readings exceeded the allowable limit. But the Terra Defendants, JMA, NV5 and DeSimone continued with vibratory pile driving anyway." CC at para. 170-171.

43. "The meeting minutes [dated March 14, 2016] also reflected that the Terra Defendants and JMA received numerous complaints from CTS owners and residents regarding the construction activities." CC at para. 175.

44. "The last day that any vibration monitoring was performed for sheet pile installation at the Eighty-Seven Park project was March 14, 2016." CC at para. 176.

45. "The Terra Defendants, JMA, NV5 and DeSimone did not perform any vibration monitoring for the remainder of the sheet pile installations along the north perimeter of the project and south CTS foundation wall despite their knowledge that vibrations were exceeding safe and

allowable limits and the vibrations would foreseeably cause damage to CTS' foundational structure, disregarding the health and safety of CTS residents and occupants." CC at para. 183.

46. "The Terra Defendants, JMA, NV5 and DeSimone also received notice directly from the Association and/or CTS owners, residents and occupants that vibrations being emitted during the vibratory sheet pile driving were damaging CTS." CC at para. 184.

47. "The Radulescu Family's March 17, 2016 email confirmed that the construction activities on the Eighty-Seven Park project, including the vibratory sheet pile driving, were causing noticeable damage to the CTS Building and that residents were afraid for their lives and property..." CC at para. 189.

48. "In response to the Radulescu Family's March 17, 2016 email, the Terra Defendants immediately retained lawyers and looped in their counsel." CC at para. 193.

49. "Meeting minutes from the weekly March 21, 2016 project meeting also confirm that the Terra Defendants had scheduled a meeting with CTS 'to address complaints by their residents.'" CC at para. 198.

50. "The vibration monitoring, which confirmed that vibrations were overwhelmingly exceeding the allowable and safe limit, immediately raised red flags for the Terra Defendants, JMA, NV5 and DeSimone…" CC at para. 199.

51. "While The Terra Defendants eagerly awaited the vibration report, which only confirmed what they knew as early as March 7- the vibrations caused by sheet pile driving exceeded safe and allowable limits…" CC at para. 202.

52. "Shortly following the realization that the vibratory sheet pile driving had caused damage to CTS, which the Terra Defendants were warned was a foreseeable outcome if they did not undertake appropriate vibration monitoring and control, the Terra Defendants' attorneys were

in discussion with CTS' attorneys to schedule inspections and estimates to 'quantify the cost of some of the mitigation items.'" CC at para. 203.

53. "Unfortunately, the Radulescu Family's March 17, 2016, email report of daily tremors and structural damage to CTS was neither unique nor uncommon. In fact, CTS owners, residents, and occupants voiced numerous complaints regarding the impact of Eighty-Seven Park construction was having on CTS." CC at para. 204-205.

54. "Even though the Terra Defendants, JMA, NV5 and DeSimone knew that the Eighty-Seven Park construction site was emitting dangerously high vibrations during vibratory sheet pile driving, and even though they knew neighbors had complained about the daily tremors and structural damage being done, the Terra Defendants, JMA, NV5, and DeSimone never performed more than a cursory inspection of the CTS Building following the vibratory sheet pile driving." CC at para. 208.

55. "Damage caused to the CTS Building during this vibratory sheet pile phase of the Eighty-Seven Park project became the subject of settlement discussions between the Association and the Terra Defendants." CC at para. 210.

56. "On May 7, 2019, after vibrations from the sheet pile driving had penetrated and damaged CTS and after numerous CTS residents had lodged complaints about that damage, the Terra Defendants sought a settlement agreement from the Association for 'any alleged nuisance or adverse impact claim.' That settlement agreement would, in part, provide the Terra Defendants with a 'broad form general release of all claims,' including claims for damage that the construction activity on the Eighty-Seven Park project did to CTS' property, in exchange for $200,000." CC at para. 211.

57. “Money motivated the Terra Defendants to advance the Eighty-Seven Park project at all costs, and those costs included 98 lives and 136 homes.” CC at para. 214.

58. “Soil compaction at Eighty-Seven Park also caused vibrations that damaged CTS.” CC at para. 218.

59. “Despite knowing that preparatory site compaction procedures would produce vibrations that could adversely affect adjacent structures, including the extremely close CTS Buildng, the Terra Defendants, JMA, NV5, and DeSimone performed no vibration monitoring during site compaction procedures.” CC at para. 220.

60. “The Terra Defendants, JMA, NV5 and DeSimone knew, or should have known, that a failure to monitor vibration levels appropriately and vigilantly to ensure safe preparatory site compaction procedures would expose the owners, residents, occupants, and guests of the CTS Building to an unreasonable and unacceptable risk of severe injury, death, and property loss.” CC at para. 221.

61. “The Terra Defendants, JMA, NV5 and DeSimone did not monitor vibration levels during these compaction procedures related to installation of the Silva Cell system on the Eighty-Seven Park construction site.” CC at para. 226.

62. “By 2019, the vibratory sheet pile driving on the Eighty-Seven Park construction project and other vibration and tremor-inducing activities, such as site compaction and excavation, had inflicted extensive damage on the CTS Building’s foundation structure.” CC at para. 229.

63. “The NV5 Report explicitly informed the Terra Defendants, JMA, and DeSimone that vibrations emitted during vibratory sheet pile driving and vibration-producing compaction activities could cause damage to adjacent buildings, including the CTS Building, if the vibrations were not properly monitored and controlled.” CC at para. 232.

64. “Drawing down the water table beneath a heavy structure was a hazard that was known, or should have been known, to the Terra Defendants, JMA, NV5 and DeSimone. The Terra Defendants, JMA, NV5, and DeSimone should have ensured against and monitored adverse impacts on CTS and the underlying water table that dewatering activities on the Eighty-Seven Park project site caused.” CC at para. 238-239.

65. “Despite the known risk of impacting the water table underlying CTS and despite the proximity of the point of discharge and deep dewatering drainage well to CTS, the Terra Defendants, JMA, NV5 and DeSimone did not monitor and/or failed to monitor adequately the impact of dewatering activities of the Eighty-Seven Park project on the CTS building.” CC at para. 244.

66. “The dewatering activities of the Terra Defendants, JMA, NV5 and DeSimone on the Eighty-Seven Park construction site caused both an asymmetric drawdown of the water table underlying the CTS Building and differential settlement, which resulted in excessive and dangerous structural stress and load re-distribution.” CC at para. 249.

67. “The Terra Defendants, JMA, NV5 and DeSimone failed to ’recharge’ the water table underlying CTS Building and thus failed to correct the differential settlement and asymmetric drawdown of the water table.” CC at para. 250.

68. “Photographs of damage occurring to the CTS Building’s south foundation wall from 2020 documented step cracking, a telltale sign that CTS suffered from differential settlement caused by Terra Defendants’ improper and unmonitored dewatering at Eighty Seven Park.” CC at para. 251.

69. “The CTS Building’s differential settlement caused by improper dewatering at Eighty-Seven Park damaged the CTS foundation and dramatically reduced its structural stability, contributing to the June 24, 2021 collapse.” CC at para. 252.

70. “The failure of the Terra Defendants, JMA, NV5, and DeSimone to monitor the dewatering procedures appropriately to ensure that the water table was not dangerously drawn down was inexcusable since the April, 2015 NV5 Report warned them that their failure to adequately monitor dewatering would have disastrous effects on the CTS Building.” CC at para. 253.

71. “In addition to damaging CTS by excessive vibrations and improper dewatering, the Terra Defendants, JMA, NV5 and DeSimone excavated and built the 87th Terrace footpath in a manner that damages CTS’ foundation wall in construction, then caused exponential damage over time as it diverted water away from Eighty-Seven Park and into the the CTS Building’s adjacent structural components.” CC at para. 254.

72. “In early 2019, the Terra Defendants, JMA, NV5 and DeSimone built the beach access walkway in place of the prior 87th Terrace and against the the CTS Building’s south foundation wall.” CC at para. 255.

73. “In overtaking 87th Terrace, excavating and re-grading the site, and constructing the 87th Terrace beach access walkway, the Terra Defendants, JMA, NV5, and DeSimone excavated against the CTS Building’s south foundation wall, causing it critical damage. Eighty-Seven Park’s excavation against the CTS Building’s south foundation wall exposed and caused extensive damage to the base of the CTS Building’s foundation wall.” CC at para. 258-259.

74. “Post-collapse photographs show that Eighty-Seven Park’s excavation for the 87th Terrace footpath penetrated the CTS Building’s foundation wall, leaving gaps and holes where

water intruded and saturated the CTS Building's structural elements in and beneath its pool deck." CC at para. 260.

75. "On January 23, 2019, Mara Chouela, a CTS resident and member of the Board emailed Town of Surfside Building Official Rosendo Prieto and complained, 'We are concerned that the construction next to Surfside is too close. The Terra project on Collins and 87 are digging too close to our property and we have concerns regarding the structure of our building." CC at para. 261.

76. "Due to the proximity of the north end of the Eighty-Seven Park construction project and the explicit warnings NV5 provided, the Terra Defendants, JMA, NV5 and DeSimone were obligated to ensure that excavating near and against the CTS Building would not damage the building during construction and would not damage it long-term by diverting water runoff away from Eighty-Seven Park and into the CTS Building's structural members." CC at para. 262.

77. However, the Terra Defendants, JMA, NV5, and DeSimone failed to ensure that excavations and construction along the CTS Building's south foundation wall would not damage the CTS Building's structural members. The damage that the Terra Defendants, JMA, NV5 and/or DeSimone caused along the CTS Building's south foundation wall had catastrophic consequences." CC at para. 263-264.

78. "CTS resident Jean Wodnicki confirmed the infiltration of water into the CTS Building's foundational structure and basement parking garage because of the improper construction of the beach access walkway. Ms. Wodnicki noted in an email to CTS' attorneys that 'every time it rains the water pours off the path, right into our (damaged) wall and then down to the garage, flooding it every time.'" CC at para. 266-267.

79. “The improper construction of the beach access walkway directly damaged the CTS foundation structure by causing water to infiltrate CTS.” CC at para. 268.

80. “In a December 29, 2020 report, Morabito detailed how Eighty-Seven Park construction also sloped the 87th Terrace footpath toward the the CTS Building’s foundation wall, diverting runoff from Eighty-Seven Park and into the CTS Building’s foundation wall, basement parking garage, and the critical structural members in them.” CC at para. 270.

81. “The water damage the Terra Defendants, JMA, NV5 and DeSimone caused resulted in the pool deck slab of the CTS Building separating from the CTS Building’s south foundation wall, which reduced the structural stability of the entire pool deck slab, as well as the CTS Building’s tower structure.” CC at para. 273.

82. “On January 14, 2016, NV5 conducted an extensive survey of the CTS Building and meticulously documented every area of pre-existing damage, including the smallest of hairline stucco fractures. The very purpose of the pre-construction survey was to document every observable defect or area of damage at the CTS Building, so that if a claim were made during or following the Eighty-Seven Park construction that the project had inflicted damage on the CTS Building, the Terra Defendants could determine whether the claim related to pre-existing damage.” CC at para. 277-278.

83. “The vast majority of the damage CTS owners, residents, occupants, and others documented during and after the construction of Eighty-Seven Park was not present in January, 2016 when NV5 conducted its pre-construction survey.” CC at para. 282.

84. “A comparison of the conditions documented in the January 2016 pre-construction survey with the 2018 and 2020 photographs Morabito took as part of the CTS Building’s 40-year

recertification inspection and analysis reveals the severe damage the Eighty-Seven Park construction project inflicted on the CTS Building." CC at para. 283.

85. "The Terra Defendants, JMA, NV5 and DeSimone's dangerous construction activities at Eighty-Seven Park substantially contributed to structural damage to the CTS Building, including but not limited to, dangerous and sporadically monitored vibrations, improper and unmonitored dewatering, excavation work that damaged the CTS Building's south foundation wall, and sloping 87th Terrace to divert runoff away from Eighty-Seven Park and into the CTS Building's structural components. The Terra Defendants, JMA, NV5, and DeSimone's dangerous construction activities at Eighty-Seven Park all combined to trigger, contribute to, accelerate, and result in the CTS Building's collapse." CC at para. 285-286.

III. LEGAL STANDARDS

86. In the time-honored standard for evaluating a motion to dismiss for failure to state a cause of action per Rule 1.140(b)(6), the court must accept all of the allegations in the complaint as true. Locker v. United Pharmaceutical Group, 46 So. 3d 1126, 1128 (Fla. 1st DCA 2010). Whether a complaint is sufficient to state a cause of action is an issue of law. Id.; Brewer v. Clerk of Circuit Court, Gadsden County, 720 So. 2d 620, 623 (Fla. 1st DCA 1998).

87. A party may properly file a motion to strike all or part of a pleading served by another party in a variety of situations. Pursuant to Rule 1.140(f), "[a] party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time." A common use of a motion to strike is to remove improper or irrelevant allegations in a pleading that is otherwise proper. Parrish & Yarnell, P.A. v. Spruce River Ventures, 180 So. 3d 1198, 1200 (Fla. 2d DCA 2015). A motion to strike tests the legal sufficiency of a claim. Id.;

Wilson v. Clark, 414 So, 2d 526, 528 (Fla. 1st DCA 1982) (motion to strike the allegations of undue influence in complaint was available remedy).

IV. ARGUMENT

A. JMAF Joins and Adopts Defendant 8701 Collins Development's Argument that the Association Lacks Standing to Sue for Unit Owners' Personal Injury and Personal Property Damage Claims

JMAF joins and adopts Defendant 8701 Collins Development's standing argument as detailed in their Motion to Dismiss the Association's Crossclaims. As 8701 Collins sets forth in further detail, the Association lacks standing to maintain any claim for the wrongful death of, or personal injury to, any of its individual members, and it similarly lacks standing to maintain any claim for damage to their respective personalty. Chapter 718, Florida's Condominium Act, legislatively authorizes the condominium form of property ownership and grants condominium associations certain limited rights to act on behalf of their members, including the right to sue and be sued in a representative capacity, but only when the Association is acting "on behalf of all unit owners concerning matters of common interest." See § 718.111(3), Fla. Stat. (emphasis added); see also Fla. R. Civ. P. 1.221 (a condominium association may "institute maintain, settle, or appeal actions or hearings in its name on behalf of all association members concerning matters of common interest, including, but not limited to: (1) the common property, area, or elements; (2) the roof or structural components of a building, or other improvements…")

The Association, therefore, may not advance individualized claims of wrongful death, personal injury or damage to personal property because all such claims are personal to the claimants and exceed the scope of the Association's narrow, legislatively circumscribed authority. See, e.g. Avila South Condominium Ass'n, Inc. v. Kappa Corp., 347 So. 2d 599 (Fla. 1977);

Akoya Condominium Ass'n, Inc. v. 3M Co., 2015 WL 12724122 (Fla. Cir. Ct. Aug. 3, 2015) (aff'd per curiam, 199 So. 3d 527); 2711 Hollywood Beach Condo Ass'n v. TRG Holiday, Ltd., 2018 WL 3371781 (Fla. Cir. Ct. 2018).

Separately, even if the Association could establish standing under Section 718.111(3) of the Condominium Act, it still could not maintain any action for wrongful death because only a decedent's personal representative has standing to advance such a claim under Florida's Wrongful Death Act. See Roughton v. R.J. Reynolds Tobacco Co., 129 So. 3d 1145, 1150 (Fla. 1st DCA 2013). "By statute, the personal representative is the only party with standing to bring a wrongful death action to recover damages for the benefit of the decedent's survivors and the estate." Id. (citing Wagner, Vaughan, McLaughlin & Brennan, P.A. v. Kennedy Law Group, 64 So. 3d 1187, 1191 (Fla. 2011)); see also Grape Leaf Capital, Inc. v. Lafontant, 316 So.3d 760, 761 n.1 (Fla. 3d DCA 2021)("wrongful death case can only be pursued by the personal representative for the benefit of the beneficiaries"); Kadlecik v. Haim, 79 So. 3d 892, 893 (Fla. 5th DCA 2012).

B. The Slavin Doctrine Precludes Liability Against JMAF For Negligence

Count X of the Crossclaim asserts a cause of action for negligence based on a wide array of construction activities that JMAF performed on the 87 Park project which allegedly caused the collapse of CTS. This included pile driving, site compaction, dewatering, excavation and construction of the beach access walkway. CC at para. 184, 249, 258, 268.

The Slavin doctrine was established by the Florida Supreme Court in 1959 and despite its age, remains good law in Florida despite the adoption of comparative negligence. Slavin v. Kay, 108 So. 2d 462 (Fla. 1958); Kala Investments v. Sklar, 538 So. 2d 909, 913 (Fla. 3d DCA 1989) (although the Slavin rule has its critics, it remains alive and well). Florida District Courts of Appeal and the Supreme Court have acknowledged and reaffirmed Slavin's vitality, which is necessary to

place the burden of responsibility for injuries to third parties on the entity that controls the environment when the injuries occur. The Slavin doctrine, which shields a contractor from liability for patent defects after the acceptance of a construction project by the owner, considers the respective liability of the owner and contractor for injuries to a third person for negligence of the contractor in the construction of improvements to real property. McIntosh v. Progressive Design & Engineering, 166 So. 2d 823, 828 (Fla. 4th DCA 2015).

"The Slavin doctrine was born of the need to limit a contractor's liability to third persons. '[A] contractor who performs work does not owe a duty to the whole world ... else the extent of his responsibility would be difficult to measure and a sensible man would hardly engage in the occupation under such conditions.'" McIntosh, at 828, citing Slavin, at 464. Under Slavin, "the liability of a contractor is cut off after the owner has accepted the work performed, if the alleged defect is a patent defect which the owner could have discovered and remedied." Fla. Dep't of Transp. v. Capeletti Bros., Inc., 743 So. 2d 150, 152 (Fla. 3d DCA 1999). The contractor may be liable to a third party where the defects are latent. Kala Investments, at 913. "Latent" is defined as "hidden from the knowledge as well as from the sight and ... not [discoverable] by the exercise of reasonable care." Id., citing Grall v. Risden, 167 So. 2d 610, 613 (Fla. 2d DCA 1964); see also Maas Bros., Inc. v. Bishop, 204 So. 2d 16 (Fla. 2d DCA 1967) (latent defect is one not discernible by the exercise of reasonable care). Of course, contractors may also be held liable to injured third parties while the construction is in progress or prior to acceptance of the premises by the owner. The Florida Supreme Court articulated the reason for the rule in Slavin:

> By occupying and resuming possession of the work the owner deprives the contractor of all opportunity to rectify his wrong. Before accepting the work as being in full compliance with the terms of the contract, he is presumed to have made a reasonably careful inspection thereof, and to know of its defects, and if he takes it in the defective condition, he accepts the defects and the negligence that caused them as his own, and thereafter stands forth as their author. When he accepts work that is in a dangerous condition, the immediate duty

> devolves upon him to make it safe, and if he fails to perform this duty, and a third person is injured, it is his negligence that is the proximate cause of the injury. His liability may be incurred either from his substitution for the contractor or from his neglect to repair. Id. at 606.

Other states follow the "foreseeability doctrine" or the "modern rule", which provide that a contractor is liable for injury or damage to a third person as a result of the condition of the work where it's reasonably foreseeable that a third person would be injured by such work due to the contractor's negligence or failure to disclose a known dangerous condition, despite completion of the work and acceptance by the owner. This "foreseeability" or "modern" rule expands the limits of liability on behalf of a contractor, which is contrary to the purpose behind Florida's ongoing application of the Slavin doctrine. See, e.g. AMCO Insurance co. v. Emery and Assoc., 926 F. Supp. 2s 634 (W.D. Pa. 2013); Coburn v. Lenox Homes, Inc., 378 A. 2d 599 (Conn. 1977).

Two requirements must be met before the Slavin doctrine will apply: (1) the defect must be patent, and (2) acceptance of the work by the owner. McIntosh, at 829; Valiente v. R.J. Baker & Co., 254 So. 3d 544 (Fla. 3d DCA 2018) ("if the owner accepts the contractor's work as complete and an alleged defect is patent, then the owner accepts the defects and the negligence that caused them as his own, and the contractor will no longer be liable for the patent defect"); FDOT v. Capeletti Bros., 743 So. 2d 150, 152 (Fla. 3d DCA 1999) ("the liability of a contractor is cut off after the owner has accepted the work performed if the alleged defect is a patent defect which the owner could have discovered and remedied"). In the instant case, both requirements are easily satisfied.

1. The Alleged Defects During the Construction of 87 Park Were Patent

The test for patency isn't whether or not the condition was obvious to the owner, but whether or not the dangerousness of the condition was obvious had the owner exercised reasonable care. McIntosh, at 829; Capeletti Bros., Inc., 743 So. 2d at 152; Brady v. State Paving Corp., 693

So. 2d 612, 613 (Fla. 4th DCA 1997) (the test under Slavin would not be whether the water itself was obvious, but rather whether the dangerous nature of such water was obvious). The issue of whether a defect is patent or latent is usually a jury question. Id.; Kala Investments, 538 So. 2d at 914. However, where the material facts are undisputed, then the alleged defects can be adjudicated to be patent as a matter of law on a motion to dismiss or summary judgment. See Alvarez v. DeAguirre, 395 So. 2d 213, 215 (Fla. 3d DCA 1981); Plaza v. Fisher Development, Inc., 971 So. 2d 918, 924-25 (Fla. 3d DCA 2007) (undisputed material facts demonstrate that, as a matter of law, the alleged defects were patent, and that the injury occurred after Fisher completed its work on the Pottery Barn store and Williams–Sonoma accepted Fisher's work).

In Alvarez, there were allegations in the fifth amended complaint that the owner "knew or should have known" of the existence of the defect. This allegation, accepted as being true, clearly placed the contractor within the general rule which frees him from the liability which would otherwise be imposed for injuries to third-party tenants resulting from latent defects. Id.

In the case at bar, the Association (mimicking the Plaintiffs) goes to great lengths to assert that the Terra Defendants, as the Owner/Developer, ignored multiple red flags, warnings, admonitions and evidence of damage to CTS over the years. The Owner was allegedly specifically warned by NV5 that the 87 Park project would negatively impact CTS. NV5 performed a pre-construction survey, established a vibration threshold and was monitoring the vibrations during sheet pile installation. There were 29 out of 36 readings which exceeded the 0.5 PPV threshold. The Terra Defendants also allegedly ignored OSHA requirements, Florida Building Code requirements, CTS' resident warnings and complaints about what they observed during the project. The Terra Defendants supposedly knew that vibrations were exceeding safe and allowable limits and would foreseeably cause damage to CTS' foundational structure.

As a matter of law, the allegations in the Crossclaim must be accepted as true for purposes of a motion to dismiss. Hence, the alleged defective or dangerous condition was patent, otherwise stated as a condition known or which should have been known to the owner had it exercised reasonable care. These construction activities included dangerous and sporadically monitored vibrations, improper and unmonitored dewatering, excavation work damaging CTS' south foundation wall, and sloping 87th Terrace to divert runoff into CTS' structural elements. CROSS-CL at para. 285-286.

2. The Developer/Owner Accepted the Work by JMAF

The second requirement is "acceptance" of the fully completed work. The reasoning behind this requirement is that at some point the contractor loses control over the work, and concomitantly loses any ability to alter or change it. If the defect is patent, "the owner is charged with knowledge of it, and the contractor is relieved of liability because it is the owner's intervening negligence in not correcting it which is the proximate cause of the injury." McIntosh, 166 So. 3d at 829. Courts recognize that the acceptance required from the owner to relieve the contractor of liability for injuries to third persons is a practical acceptance; formal acceptance is not required. Kendrick v. Middlesex Dev. Corp., 586 So. 2d 436 (Fla. 1st DCA 1991). "In essence, acceptance will move along the timeline of a construction project, passing to each entity maintaining control of the work. This application makes perfect sense. Once an entity completes its work, and that work is accepted, the burden of correcting patent defects shifts to the entity in control." McIntosh, at 830; Brady, 693 So. 2d at 613. Acceptance does not mean that the entire project has to be completed. McIntosh, at 830.

In McIntosh, a tragic and fatal auto accident occurred due to a faulty traffic light, and the plaintiff sued a company that designed the traffic signals for the intersection. The plaintiff's

accident reconstruction expert testified that the traffic signal design was the primary cause of the collision because the line of sight would give the driver the ability to focus on the second set of signals located farther out in the intersection, but not the first set of signals located just above the stop bar for people exiting the mobile home park. A mobile home park resident testified that a tree was located in the median at the mobile home park's entrance. The tree also caused a problem because it blocked the view of the first set of traffic signals. 166 So. 3d at 827.

The design company raised the Slavin doctrine as a defense, and Plaintiff argued it was inapplicable because there was no acceptance of the project by Broward County during the 90-day burn-in period, described as a contractor warranty period where the contractor maintained the traffic signals if something went wrong. Id. The plaintiff argued that acceptance did not occur because the burn-in period to allow the contractor to correct any errors had not ended, and Broward County had not taken over maintenance of the intersection. The design company responded that its work had been completed and accepted by FDOT months before the accident. As between the parties to this construction project, FDOT was the entity to whom the design company owed its duty, because it controlled "acceptance" of the design company's work. In turn, Broward County controlled acceptance of FDOT's work. At each step along the timeline, the party in control bore the burden of correcting patent defects because its control prevented anyone else from doing so. Id. at 830.

The appellate court in McIntosh affirmed a final judgment in favor of the design company. While the jury found the design company negligent, and the legal cause of the plaintiff's father's death, it also found the design was accepted and discoverable (or patent) by FDOT with the exercise of reasonable care. Id. at 830. Slavin applies to shield contractors, architects and design engineers from liability. "Slavin exists to limit the liability of contractors because 'it would be

unfair to continue to hold the contractor responsible for patent defects after the owner has accepted the improvement and undertaken its maintenance and repair.'" Id. at 830, citing Easterday, 518 So.2d at 261.

Although whether acceptance has occurred is also usually a question of fact for the jury, it has been established as a matter of law here. The Association alleges that the construction of 87 Park was concluded in 2020 (CC at para. 67). Further, temporary certificates of occupancy were issued to the Owner of 87 Park in November- December, 2019 by the City of Miami Beach Building Department and the units were turned over in the fourth quarter of 2019 for unit owners to move in. See composite Ex. A. The Court may take judicial notice of and consider public records when evaluating the sufficiency of a pleading on a motion to dismiss. Mills v. Ball, 372 So. 2d 497, 498 (Fla. 1st DCA 1979) (affirming dismissal order based on judicial notice of public records); Setai Hotel Acquisition, LLC v. Miami Beach Luxury Rentals, Inc., 2017 WL 3503371 at *7 (S.D. Fla. 2017) (taking judicial notice of condominium declaration and special warranty deed). As such, it is undisputed that acceptance of the project by the Owner occurred prior to the collapse on June 24, 2021.

3. The Dangerous Instrumentality Exception To Slavin Does Not Apply or Has Limited Application In The Instant Case

Under Slavin, there is an exception if the contactor was dealing with inherently dangerous elements. Foreline Security Corp. v. Scott, 871 So. 2d 906 (Fla. 5th DCA 2004). The reasoning is that some dangers are so obvious and inherent that public policy dictates that extending liability to both the contractor (who created the danger) and owner is warranted. The rule of non-liability doesn't apply where the plaintiff's injuries are caused by an inherently dangerous commodity or inherently dangerous condition created by the contractor before relinquishing control. Seitz v. Zac

Smith & Co., Inc., 500 So. 2d 706, 710 (Fla. 1st DCA 1987). Something which is inherently dangerous must be so imminently dangerous in kind as to imperil the life or limb of any person who uses it, or "a commodity burdened with a latent danger which derives from the very nature of the article itself." "Inherently dangerous" has also been said to mean a type of danger inhering in an instrumentality or condition itself at all times, requiring special precautions to be taken to prevent injury, and not a danger arising from mere casual or collateral negligence of others under particular circumstances. Id.

"While the phrase 'dangerous instrumentality' and 'inherently dangerous instrumentality' have often been used interchangeably, it should be remembered that they do not mean the same thing. While an automobile has long been held to be a dangerous instrumentality, it is not inherently dangerous in and of itself, rather it is dangerous only in its use and operation." Id. "The inherently dangerous commodity or condition exception often includes not only things imminently dangerous in kind, but also things not imminently dangerous in kind but rendered dangerous by defect. However, in the latter instance, the rule of non-liability still applies under Florida case law if the defect is patent and accepted by the owner." Id. As another example, gas is considered inherently dangerous because of its dangerous and explosive nature. Ed Ricke & Sons, Inc. v. Green, 609 So. 2d 504 (Fla. 1992). Thus, the Slavin rule would nor protect a contractor from liability if a gas water heater exploded causing injury because the gas in the heater is inherently dangerous. However, the hot water produced by a gas heater is not inherently dangerous and the contractor would be insulated from liability for injury caused by a standing pool of hot water created by it. Id.

In Seitz, the Escambia County School Board contracted with Zac Smith & Company, Inc. (contractor) to do certain construction work at Pine Forest High School and other schools. The

contract called for Smith to provide all labor, materials and equipment needed to perform the work which included the erection of numerous floodlight towers at the high school stadium. The tower is designed to be climbed by means of metal pegs which protrude from the tower at staggered intervals left and right. Because the tower was not assembled sequentially, there was a missing peg where mismatched sections of the tower had been improperly joined together. On the way down, a school board electrician lost his footing and balance when he stepped into the area of the missing peg and fell to the ground suffering severe injuries.

The Slavin doctrine was used to award summary judgment in favor of the contractor in Seitz. The floodlight tower was ruled to not be an inherently dangerous instrumentality, nor did the contractor leave the construction in an inherently dangerous condition. The tower itself was not inherently dangerous in kind, but instead it was the defect (the missing peg) which made the tower dangerous. This defect was open and obvious and accepted by the owner, and thus it was the school board's failure to make the pole safe that was the proximate cause of Seitz's injury. Id. at 711; see also Ed Ricke & Sons, at 507 (hot water, in and of itself, is not inherently dangerous and, consequently, the Slavin doctrine would apply to this case).

In the case at bar, none of the construction activities at 87 Park were inherently dangerous, as opposed to being rendered dangerous by defect or failed precautions. The Association alleged that the collapse was entirely preventable and could've been avoided by taking safety measures such as better monitoring and adjustment of vibrations, and using other mitigation methods. Hence, it was the Owner's failure to remedy the condition after acceptance of the project that is deemed to have proximately caused the injuries and deaths. We have found no Florida case law finding that dewatering, site compaction, excavation or water diversion is inherently dangerous. To the

contrary, use of an irrigation pump has been held not to create nor constitute a dangerous instrumentality. Johnson v. Bathey, 350 So. 2d 545. 546 (Fla. 2d DCA 1977).

The only activity which could even arguably be considered to be inherently dangerous was the alleged sheet pile driving. JMAF acknowledges that Hutchison v. Capeletti Bros, Inc., 397 So. 2d 952 (Fla. 4th DCA 1981) held that pile driving activity in the process of constructing a bridge could be considered ultrahazardous for purposes of imposing strict liability. Here, the sheet piles were not installed by driving them into the ground, but instead they were drilled auger cast piles which cause considerably less noise and vibration. Further, as will be more fully explored in the next section addressing strict liability, the high degree of risk created by pile driving (as alleged by The Association) is to neighboring property and not for personal injury or death.

In sum, the vast majority, if not all, of the alleged breaches of duty by JMAF during the construction project are barred by the Slavin doctrine. Responsibility for the allegedly defective conditions at the time of the collapse must be borne by the Owner pursuant to well-established Florida law, which absolved JMAF of liability to injured third parties once it completed and turned over the project to the Owner. Count X should be dismissed, or in the alternative, all allegations of negligence should be stricken against JMAF other than those which solely address sheet pile driving if it is considered an inherently dangerous instrumentality or condition subjecting JMAF to liability for the injuries and deaths suffered at CTS.

C. The Association Has Failed to State A Cause of Action for Strict Liability Against JMAF

In Count XI, the Association alleges that the sheet pile driving activity at 87 Park was ultrahazardous and abnormally dangerous, and as such, strict liability should apply. The

Association does not allege that any of the other allegedly negligent activity such as site compaction, dewatering, excavation or water diversion is abnormally dangerous.

Florida courts have adopted the doctrine of strict liability for ultrahazardous or abnormally dangerous activity. In Great Lakes Dredging and Dock Co. v. Sea Gull Operating Co., 460 So. 2d 510 (Fla. 3d DCA 1984), the court referenced and relied upon sections 519-520 of the Restatement of Torts. Section 520 defines an ultrahazardous activity as: (1) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (2) is not a matter of common usage. Id. at 512. In section 520, the following factors are said to be pertinent in determining whether an activity is abnormally dangerous:

> (a) Whether the activity involves a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) Whether the harm which may result from it is likely to be great;
>
> (c) Whether the risk cannot be eliminated by the exercise of reasonable care;
>
> (d) Whether the activity is not a matter of common usage;
>
> (e) Whether the activity is inappropriate to the place where it is carried on; and
>
> (f) The value of the activity to the community.
>
> Id. at 512-13.

Liability for engaging in such activity, in turn, "is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous." Id. at 513. Stated differently, "[t]he rule of strict liability ... applies only to harm that is within the scope of the abnormal risk that is the basis of the liability." Id. For example, the noise caused by non-negligent blasting activity, which frightens mink on a nearby mink farm to such an extent that they kill their young, does not render the blasting party liable for the loss of the mink; the damage suffered here is not the kind

of harm that is within the scope of the abnormal risk posed by blasting activity. Id.; see also Coffie v. Florida Crystals Corp., 460 F. Supp. 3d 1297 (S.D. Fla. 2020) (pollution or diminished property values caused by sugarcane burning isn't the type of harm that makes burning abnormally dangerous, such as for potential spread of fire to neighboring property); Great Lakes Dredging, 460 So. 2d at 513 (finding that excessive noise and resulting economic loss from canceled hotel reservations were entirely outside the abnormal risk of physical harm posed by the defendant's alleged ultrahazardous activity of rock crushing because the abnormal risk created was the potential of the machine to spew out loose rocks, topple over, cause ground tremors, or physically injure persons or property in the area

JMAF would argue that at least four of the factors favor that pile driving is not abnormally dangerous (see (c)-(f)). For example, a dangerous activity is not considered ultrahazardous where such danger can be reduced or eliminated by the exercise of reasonable care. See St. Cyr v. Flying J, Inc., 2006 WL 2175662 (M.D. Fla. 2006). In St. Cyr, it was held that the danger involved in the sale of propane can be eliminated by proper handling and dispensing procedures. Further, such activity is a matter of common usage, appropriate and of value to the community. As such, the Section 520 factors were easily satisfied by defendant and the motion to dismiss was granted. It was held that the activities do not rise to the level of ultrahazardous or abnormally dangerous in order to warrant strict liability. Id. at *3-4. Additionally, while the unloading of sulfuric acid is a dangerous enterprise, it is not an ultrahazardous activity. Baltodano v. CTL Distrib., Inc., 820 So. 2d 421 (Fla. 3d DCA 2002). The danger attendant to that activity can be eliminated by the use of proper handling procedures. Id. at 422.

JMAF is aware (and mentioned above) that Hutchison has found that sheet pile driving is considered abnormally dangerous for purposes of imposing strict liability. A contractor in the

process of constructing a bridge for FDOT conducted pile driving activities which damaged the residence of the Association. The Hutchison court found that while the damage-causing activity has substantial value to the community, it involves a high degree of risk of harm to the property of others and on balance, strict liability attaches for the hazardous use of land. 397 So. 2d at 953. However, the loss of lives and personal injuries are not the kind of harm within the scope of risk as defined by Hutchison (damage to property of others), and as such, are not covered by strict liability. Similarly, while blasting has been classified as an ultrahazardous activity subject to strict liability, the court limited the the Association' damages to property damage, finding that damages for emotional distress are unavailable in strict liability cases. Poole v. Lowell Dunn Co., 573 So. 2d 51 (Fla. 3d DCA 1990).

We found no case law that supports the proposition that the installation of auger cast piles at the site is ultrahazardous or abnormally dangerous. Thus, this activity should be solely governed by a negligence standard, and not strict liability.

It has been held contrary to public policy as well as good common sense to hold a contractor strictly liable when the defect is patent or known to the owner. In Chadbourne v. Vaughn, 491 So. 2d 551 (Fla. 1986), a motorist was killed when the car she was driving went out of control as it crossed a drop-off in the road. The plaintiff passenger filed suit against the contractor who repaved the County Road, on the theories of negligence, warranty, and strict liability. A few weeks prior to the accident, a county inspector had discovered that the southbound lane had eroded, creating a two inch drop-off in the pavement at the center of the road. The court held that the defect was patent since the county inspector became aware of the problem while acting in his official capacity. The court held that strict liability does not apply for construction of the road and the Slavin doctrine

shields the contractor from liability after the construction was complete and accepted by FDOT. Id. at 554.

Should the Court find that pile driving is ultrahazardous as a matter of law, and subject to strict liability, then it should limit the scope of damages to those related to the kind of harm within the scope of the abnormal risk- property damages- and strike all reference to damages for personal injuries, wrongful death, pain and suffering or emotional distress.

V. CONCLUSION

For all of the foregoing reasons, the Court should grant John Moriarty & Associates of Florida's Motion to Dismiss and/or to Strike The Association's Crossclaims, dismissing Counts X and XI, or in the alternative, striking all of the improper allegations as to negligence due to the application of the Slavin doctrine and the Association's lack of standing to maintain any claim for the wrongful death of, or personal injuries to, any of its individual members, along with such other and further relief as this Court deems just and proper.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing has been provided via Florida's E-filing Portal and/or electronic mail to all parties of record, on this 19th day of January, 2022.

By: s/ Jonathan E. Kanov
Jonathan E. Kanov, Esq.
Florida Bar Number 091413
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Florida Bar Number 085580

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MIAMIBEACH

Building Department
City of Miami Beach
1700 Convention Center Drive, 2nd floor, Miami Beach, Florida 33139, (305) 673-7610, www.miamibeachfl.gov

TEMPORARY CERTIFICATE OF OCCUPANCY

Certificate Number: **TCO1900538** **Status:** Issued

Applied Date: 10/22/2019 **Issued Date:** 11/05/2019 **Expiration Date:** 02/03/2020

Site Address: 8701 COLLINS AV **Unit Number:** **Parcel Number:** 0232020060010

Tenant: 8701 COLLINS DEV LLC **Property Owner:** 8701 COLLINS DEV LLC

Occupancy Classification Code:

Number of Building Floor: **Total Number of Units of the Building:** 37

Residential/Commercial/Mixed Use: Commercial

New or Substantial Improvement (Y/N): **Base Flood Elevation:**

Florida Building Code Edition: **Occupant Load:**

Certificate description and specific conditions:

TCO/BC1703668/Rplc B1504647/Priv Prov Plans Rvw & Insp. TCO Included Basement level B1, ground level (lobby), residential levels 3 through 9 (total 37 residential units), residential levels 10 through 21 common areas and roof. Excluded from the TCO; Basement level B1 fenced staging area, field office, spa inclusive of steam room, shower and sauna. Ground level; MENS LOBBY BATHROOM, outdoor amenity pavilion, service room and restroom, spa, north lap pool, south lounge pool, cabanas and surrounding deck and east beach access wood walkway. Level 3; Gym, exercise room and adjoining restrooms. Residential level 4; unit 406. Residential level 8; unit 802. Residential levels 10 through 18; units and balconies. Residential level 19; exterior pools and cabanas.

General terms and conditions of this certificate:

1. This is to certify that the above noted structure or portion of the structure has been inspected for compliance of Florida Building Code and the provision of the zoning ordinance 89-2665 of City of Miami Beach for the proposed occupancy and use.
2. As-built elevation certificate shall be provided by the applicant for new construction, addition or substantial improvement, and is retained in the records of the Building Department. If the structure is designed for dry-flood proofing, the tenant shall comply with procedures and guidelines of the Flood Emergency Operation Plan and install watertight shields over openings prior to a flood warning.
3. Any unauthorized additions, alterations or change in use of this property will void Certificate of Occupancy.
4. The tenant shall obtain a final Certificate of Occupancy prior to expiration date of this certificate.

A Certificate of Occupancy is hereby granted to use said building for the purpose described above, subject to any condition(s) detailed in this document.

Ana M Salgueiro 11/6/2019

Ana M. Salgueiro
Building Official

Date

This Certificate of Completion is valid only if there is an ISSUED status and a Building Official Signature.

MIAMIBEACH

Building Department
City of Miami Beach
1700 Convention Center Drive, 2nd floor, Miami Beach, Florida 33139, (305) 673-7610, www.miamibeachfl.gov

TEMPORARY CERTIFICATE OF OCCUPANCY

Certificate Number: TCO1900561 **Status:** Issued

Applied Date: 11/19/2019 **Issued Date:** 11/27/2019 **Expiration Date:** 02/25/2020

Site Address: 8701 COLLINS AV **Unit Number:** **Parcel Number:** 0232020060010

Tenant: 8701 COLLINS DEV LLC **Property Owner:** 8701 COLLINS DEV LLC

Occupancy Classification Code: R2

Number of Building Floor: **Total Number of Units of the Building:** 14

Residential/Commercial/Mixed Use: Commercial

New or Substantial Improvement (Y/N): Yes **Base Flood Elevation:**

Florida Building Code Edition: **Occupant Load:**

Certificate description and specific conditions:

TCO/ BC1703668/ To occupy the building in all approved areas and start closings in all units which have TCO. See attach plans
Included in the TCO # 2: Ground level; lobby level men's ADA, north lap pool, south lounge pool, cabanas and surrounding deck and east beach access wood walkway, outdoor amenity pavilion and restrooms. Level 3; Gym, exercise room and adjoining restrooms. Residential levels 10, 11, 12, and level 14 buffer floor, Unit 406 at residential level 4 and Unit 802 at residential level 8 (a total of 16 residential units).
Excluded from the TCO # 2: Basement level B1 fenced staging area, field office, spa (jacuzzi), spa inclusive of steam room, shower and sauna. Ground level: outdoor amenity pavilion service room. Residential levels 15 through 18; units and balconies. Residential level 19; level 19 exterior pools and cabanas
Unit 1202 is being TCO'd as designer ready. Flooring and finishes to be done by Tenant under separate permit

General terms and conditions of this certificate:

1. This is to certify that the above noted structure or portion of the structure has been inspected for compliance of Florida Building Code and the provision of the zoning ordinance 89-2665 of City of Miami Beach for the proposed occupancy and use.
2. As-built elevation certificate shall be provided by the applicant for new construction, addition or substantial improvement, and is retained in the records of the Building Department. If the structure is designed for dry-flood proofing, the tenant shall comply with procedures and guidelines of the Flood Emergency Operation Plan and install watertight shields over openings prior to a flood warning.
3. Any unauthorized additions, alterations or change in use of this property will void Certificate of Occupancy.
4. The tenant shall obtain a final Certificate of Occupancy prior to expiration date of this certificate.

A Certificate of Occupancy is hereby granted to use said building for the purpose described above, subject to any condition(s) detailed in this document.

This Certificate of Completion is valid only if there is an ISSUED status and a Building Official Signature.

Ana M. Salgueiro

11/27/2019

Ana M. Salgueiro
Building Official

Date

This Certificate of Completion is valid only if there is an ISSUED status and a Building Official Signature.

MIAMIBEACH

Building Department
City of Miami Beach
1700 Convention Center Drive, 2nd floor, Miami Beach, Florida 33139, (305) 673-7610, www.miamibeachfl.gov

TEMPORARY CERTIFICATE OF OCCUPANCY

Certificate Number: TCO1900576 **Status:** Issued

Applied Date: 12/12/2019 **Issued Date:** 12/19/2019 **Expiration Date:** 03/18/2020

Site Address: 8701 COLLINS AV **Unit Number:** **Parcel Number:** 0232020060010

Tenant: 8701 COLLINS DEV LLC **Property Owner:** 8701 COLLINS DEV LLC

Occupancy Classification Code: R2

Number of Building Floor: **Total Number of Units of the Building:** 13

Residential/Commercial/Mixed Use: Commercial

New or Substantial Improvement (Y/N): Yes **Base Flood Elevation:**

Florida Building Code Edition: **Occupant Load:**

Certificate description and specific conditions:

TCO/ BC1703668/Rplc B1504647/ TCO No 3- includes 13 units with balcony, Level 14 thru Level 18, Spa and inclusive of steam room, shower and sauna. Excluding: Penthouse Level 20 Penthouse pools 1 & 2, ground level: outdoor Amenity Pavilion Service Room. Priv Prov Plans Rvw & Insp. (JEM) New construction condo building. CS:Includes improvements to 87th Terrace and 87th Street - East of Collins Avenue.

General terms and conditions of this certificate:

1. This is to certify that the above noted structure or portion of the structure has been inspected for compliance of Florida Building Code and the provision of the zoning ordinance 89-2665 of City of Miami Beach for the proposed occupancy and use.
2. As-built elevation certificate shall be provided by the applicant for new construction, addition or substantial improvement, and is retained in the records of the Building Department. If the structure is designed for dry-flood proofing, the tenant shall comply with procedures and guidelines of the Flood Emergency Operation Plan and install watertight shields over openings prior to a flood warning.
3. Any unauthorized additions, alterations or change in use of this property will void Certificate of Occupancy.
4. The tenant shall obtain a final Certificate of Occupancy prior to expiration date of this certificate.

A Certificate of Occupancy is hereby granted to use said building for the purpose described above, subject to any condition(s) detailed in this document.

Ana M. Salgueiro 12/19/2019

Ana M. Salgueiro
Building Official

Date

This Certificate of Completion is valid only if there is an ISSUED status and a Building Official Signature.