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

CASE NO: 2021-015089-CA-01
SECTION: CA43
JUDGE: Michael Hanzman

In re:

Champlain Towers South Collapse Litigation
_____/

RECEIVER'S MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS TO DISMISS CROSSCLAIMS

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Defendant Champlain Towers South Condominium Association, Inc., through its Court-appointed Receiver Michael I. Goldberg (the "Association"), files this its Memorandum of Law in Opposition to the Motions to Dismiss Crossclaims filed by Defendants Terra Group, LLC ("Terra Group" or "TG"), Terra World Investments, LLC ("Terra World" or "TW"), 8701 Collins Development, LLC ("8701 Collins" and together with Terra Group and Terra World, the "Terra CC Defendants"), and John Moriarty & Associates of Florida, Inc. ("Moriarty" and together with the Terra CC Defendants, the "Moving Parties"). For the reasons set forth herein, the motions should be denied in their entirety.

INTRODUCTION

The Court is well aware of the background to this dispute, which does not need restating in full here. Suffice it to say that, in the partial collapse of Champlain Towers South ("CTS") on June 24, 2021, and then subsequent demolition of the unsafe remainder of the structure on July 4, 2021, ninety-eight people died, one-hundred-thirty-six owners lost their units, and the contents of those units were destroyed. This tremendous loss of lives, homes, real property, and personal property has caused serious financial and personal distress to the survivors, on top of the horrific loss of loved ones, neighbors, and friends in the collapse. The resolution of this action is, for many, the best hope for achieving any recovery for their varied losses.

The putative class Plaintiffs sued the Association claiming it was negligent in maintaining the subject property and failing to warn residents of imminent danger. The Association, in turn, crossclaimed against *inter alia*, the Terra CC Defendants and Moriarty for negligence (Counts VIII and X) and Strict Liability (Counts IX and XI), alleging that negligent construction planning, practices, and supervision during the development and construction of the Eighty Seven Park condominium next door contributed to the collapse of the Champlain Towers South condominium.

Each of the Moving Parties moved to dismiss the crossclaims.[1] The Association notes that this Court already denied analogous motions to dismiss filed by these same Moving Parties directed at the Plaintiffs' Consolidated Second Amended Class Action Complaint ("SAC"). *See*, Omnibus Order on Motions to Dismiss dated February 3, 2022. Each of the Moving Parties acknowledges that, with one exception discussed below, the motions to dismiss the crossclaims must suffer the same fate as their motion to dismiss the SAC – i.e., denial of the instant motions to dismiss. On the very first page of the 8701 Motion and TG/TW Motions, they state:

> The Association's Crossclaims largely adopt the allegations of Plaintiffs' Consolidated Second Amended Class Action Complaint ("Complaint"). It stands to reason, then that the Crossclaims suffer from the same procedural and substantive defects as the Complaint from which it was derived – the pleading fails to satisfy Rule 1.110; it wrongly commingles claims among multiple defendants; it fails to differentiate among the actions of the multiple defendants; and fails to plead "ultimate facts" regarding its claims of vicarious liability, among other shortcomings."

Moriarty makes a similar concession. *See* JMA Motion, ¶¶ 4,5 ("the Association's Crossclaims replicate most of the Plaintiffs' allegation," and "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 the Second Amended Complaint").

Accordingly, as more fully set forth below, the motions to dismiss the crossclaims must similarly be denied.[2] The one new argument directed to the Association in each of the motions

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[1] See, 8701 Collins Development, LLC's Motion to Dismiss Defendant Champlain Tower South Condominium Association's Crossclaim (the "8701 Motion"); Terra Group, LLC and Terra World Investments, LLC's Motion to Dismiss Defendant Champlain Tower South Condominium Association's Crossclaim (the "TG/TW Motion"); and John Moriarty & Associates of Florida, Inc.'s Motion to Dismiss and/or Strike Champlain Tower South Condominium Association's Crossclaims (the "JMA Motion").

[2] The Association adopts and incorporates by reference each argument made by Plaintiffs in opposition to the Terra Defendants' motion to dismiss counts I and II of the SAC, and Moriarty's motion to dismiss counts III and IV of the SAC, as set forth in Plaintiffs' Omnibus Response to

contends the Association lacks standing to pursue certain damages. As explained below, that argument also does not warrant dismissal of the claims at the pleading stage.

STANDARD ON A MOTION TO DISMISS

The purpose of a motion to dismiss a complaint is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. In considering such a motion, the trial court is required to accept all well pleaded allegations in the complaint as true. *Von Engineering Co. v. R.W. Roberts Const. Co., Inc.*, 457 So. 2d 1080, 1082 (Fla. 3d DCA 1984) (citing *Raney v. Jimmie Diesel Corp.*, 362 So. 2d 997 (Fla. 3d DCA 1978)). All that is required is a "short and plain statement of the ultimate facts showing that the pleader is entitled to relief." Fla. R. Civ. P. 1.110(b). The rule simply requires the defendants be placed "on notice of the nature of the claims against [them] so that [they] may defend the claims." *Payas v. Adventist Health Sys./Sunbelt, Inc.*, 238 So. 3d 887, 894 (Fla. 2d DCA 2018).

ARGUMENT

The Association's crossclaims clearly meet the standard set forth above. The claims are spelled out in great detail in more than 100 pages and 500 paragraphs, containing sufficient ultimate facts to place the defendants on notice of the claims against them so they can adequately defend.

I. All of the Moving Parties' Arguments Regarding the Association's Standing Must Be Rejected.

Each of the Moving Parties moves to dismiss the Association's crossclaims asserting that the Association lacks standing to bring claims for personal property damages inside an individual unit,

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Defendants' Motions to Dismiss filed on November 16, 2021, to the extent not expressly included in this memorandum.

personal injury and wrongful death. *See*, 8701 at 17 – 20; TG/TW Mot. at 16 – 20; JMA Mot. at 19 – 20. Florida law is clear that such arguments are improper on a motion to dismiss.

A. The Crossclaims Are Not Subject to Dismissal Even If They Encompass an Improper Element of Damages.

"The purpose of a motion to dismiss is to determine whether the plaintiff has alleged a good cause of action." *Hammonds v. Buckeye Cellulose Corp*., 285 So. 2d 7, 11 (Fla. 1973). The Moving Parties do not challenge that if liability is established, the Association is entitled to recover damages for the common areas. A "complaint which sufficiently states a cause of action is *not* rendered vulnerable to a motion to dismiss by its allegation of an improper element of damages." *Williams v. Legree*, 206 So. 2d 13, 15 (Fla. 2d DCA 1968) (emphasis added). *See also*, *Salcedo v. Wells Fargo Bank, N.A.,* 223 So. 3d 1099, 1105 (Fla. 3d DCA 2017) ("the amount of damages is not at issue at the motion to dismiss stage of the proceedings"); *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp*., 899 So. 2d 1222, 1229 (Fla. 1st DCA 2005) ("the measure or amount of damages is not an issue at this point in the proceedings"); *Hutchison v. Tompkins*, 259 So. 2d 129, 132 (Fla. 1972) ("It is well established in Florida that where the allegations of a complaint show the invasion of a legal right, the plaintiff on the basis thereof may recover at least nominal damages, and a motion to dismiss should be overruled.").

In sum, "[a] motion to dismiss is not a proper method of attacking a complaint that is insufficient only in that the elements of damage are improper or insufficiently alleged." *Hochman v. Lazarus Homes Corp*., 324 So. 2d 205, 206 (Fla. 3d DCA 1975).

For this reason alone, the motions to dismiss regarding the Association's recoverable damages must be denied.

B. The Association Is Entitled to Recover Damages on Behalf of Its Members.

Florida Statute 718.111(3) authorizes the Association to "[i]nstitute, maintain, settle, or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest to most or all unit owners, including, but not limited to, the common elements."[3] The statue expressly grants the Association the power to bring claims beyond the purview of the Association's common elements,[4] so long as the claim concerns "matters of common interest to most or all unit owners." "Common interest is broader than the common elements, which are the Declaration-defined areas for general use in which each unit owner has an ownership interest." *2711 Hollywood Beach Condo. Ass'n, Inc. v. TRG Holiday, Ltd*., Case No. 13-35751, 2018 WL 3371781, *9 (Fla. Cir. Ct. June 29, 2018).

Rejecting the Moving Parties' argument, the Third District Court of Appeal has expressly stated that a condominium may bring claims for the benefit of its members for loss of personal property within a unit in appropriate circumstances:

> [T]he common interest provision of the rule has been interpreted to permit a class action by the association for a construction defect located physically within a unit, rather than in the common elements, if the defect is prevalent throughout the building.

Seawatch at Marathon Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc., 610 So. 2d 470, 473 (Fla. 3d DCA 1992). *See also*, *Allied Tube & Conduit Corp. v. Latitude on the River Condo. Ass'n, Inc.,* 306 So. 3d. 312, 314 (Fla. 3d DCA 2020) ("As to controversies affecting the matters of common

[3] *See also*, Florida Rule of Civil Procedure 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 to its members").

[4] It should be noted that the Association has *direct* claims for personal property owned by the association including pool and gym equipment, furniture, fixtures, computers and other equipment.

interest, the condominium association, without more, should be construed to represent the class composed of its members as a matter of law.").

This case presents those appropriate circumstances. With the destruction of the entire building, there can be no question that every member of the Association suffered the loss of personal property within the units, such that the Association can represent their common interest in pursuing those damages.

The cases primarily relied upon by the Moving Parties, *2711 Hollywood Beach* and *Akoya Condominium Association, Inc. v. 3M Company,* Case No. 13-023351, 2015 WL 12724122 (Fla. Cir. Ct. 2015), both Circuit Court opinions, are easily distinguishable or inapplicable. *Akoya* was an economic loss rule case. In an attempt to avoid the harsh consequences of the rule, the plaintiff association pointed to personal property within a few units in effort to establish damage to "other property." Specifically, the damage was limited to a door in one unit, a medicine cabinet in another unit, a carpet in a third unit, and a carpet, mirror, frame and cabinet in a fourth unit. *Id.*, 2015 WL 12724122 at *3. In finding that the association lacked standing to bring these claims, the court explained:

> Here, the damage to the limited items of property owned by individual unit owners is not common to all units. Accordingly, Akoya lacks standing to pursue damages to the specific items of property owned by a handful of unit owners.

Id. Obviously, here, with the building's partial collapse and subsequent demolition of the remaining structure, the personal property damages are not so "limited."

2711 Hollywood Beach is similarly distinguishable. First, it was decided on summary judgment, not on a motion to dismiss. Moreover, like *Akoya*, the plaintiff association sought to avoid the economic loss rule by claiming damage within individual units constituted "other property." While recognizing that "[t]he Association may serve as class representative for unit owners for matters of common interest" and that "[c]ommon interest is broader than common elements," the

court rejected the Association's claim that it was acting in a representative capacity because there was "no showing of notice of intent to sue as a class to unit owners, no request for the court to address the status of the class, no demonstration of a vote by the board to sue as a class, and no showing of notice to potential class members of any right to opt out." 2018 WL 3371781 at 9. By contrast, here, the SAC is a putative class action and all parties are on clear notice that this matter will proceed, in the event of class certification, on a class basis.[5]

The Association has standing to pursue claims common to all unit owners that suffered damages as the result of the catastrophic collapse of their condominium building. Whether each unit owner's damages are limited to property damage or include personal injury or wrongful death is an issue for another day.

II. The Crossclaims Do Not Improperly Comingle Claims Against the Terra CC Defendants.

Each of the Terra CC Defendants' motions asserts that the Crossclaim improperly conflagrates the Terra CC Defendants into one count, claiming that each Terra CC Defendant must be sued in separate counts. (8701 Mot. at 7 – 9; TG/TW Mot. at. 7 – 10). Florida Rule of Civil

[5] The other cases cited by the Moving Parties are similarly distinguishable. In *Malco Indus., Inc. v. Featherock Homeowners Association, Inc.*, 854 So. 2d 755 (Fla. 2d DCA 2003), the court found that a mobile home association did not have standing under Fla. R. Civ. P. 1.222 to bring claims in a representative capacity, because the issue related to only those homeowners that intended to sell within a specific three-year period and therefore was not of common interest to all or most unit owners. *Tropical Condominium LLC v. Tropicana Condominium Association, Inc.*, 2015 WL 13186638 (Fla. Cir. Ct. 2015), is a Florida circuit court opinion lacking any facts, and dismissing a complaint with leave to amend to add an allegation that the dispute is a matter of common interest. The final case cited by the Moving Parties, *Central Carillon Beach Condominium Association, Inc. v. Garcia*, 245 So. 3d 869 (Fla. 3d DCA 2018), merely held that a condominium could not represent unit owners in an action challenging a determination of value by the county's value adjustment board because the applicable tax statute (§194.181(2), Fla. Stat.) expressly required the "taxpayer" to be a party defendant in the action. The Third District Court of Appeal, however, expressly stated that its holding "does not dilute or qualify the continued amenability of other types of lawsuits to the common representation of unit owners by their association permitted by section 718.111(3) and Rule 1.221." 2015 WL 12724122.

Procedure 1.110(f) provides that "[e]ach claim founded upon a separate transaction or occurrence . . . shall be stated in a separate count . . . *when a separation facilitates the clear presentation of the matter set forth*." (Emphasis added). The rule does not permit a plaintiff to "comingle[] separate and distinct . . . claims . . . in a single count." *Eagletech Commc'ns, Inc. v. Bryn Mawr Inv. Grp., Inc.*, 79 So. 3d 855, 863 (Fla. 4th DCA 2012).

Here, separating the counts against the Terra CC Defendants would *not* facilitate the clear presentation of the matter. To the contrary, it would result in duplicative and redundant pleading. While the Association specifically identifies how each Terra CC Defendants' actions contributed to the collapse of the tower, the Crossclaim also pleads that each entity acted in concert with the others.

For example, the Crossclaim alleges that "by and through [their] agents, servants, workmen, employees, ostensible agents, joint ventures, and/or alter egos, the Terra [CC] Defendants owned, operated, constructed, managed, supervised, and/or developed [the] construction project known as 'Eighty-Seven Park,." Counterclaim ("CC") at ¶14. The Association is not "attempt[ing] to state in a single count separate causes of action."

Additionally, the Crossclaim includes each of the elements necessary to plead a joint venture between the Terra CC Defendants. "A joint venture is 'an association of persons or legal entities to carry out a single business enterprise for profit.'" *Marriott Int 'l, Inc. v. Am. Bridge Bahamas, Ltd.*, 193 So. 3d 902, 906 (Fla. 3d DCA 2015) (quoting *Fla. Tomato Packers, Inc. v. Wilson*, 296 So. 2d 536, 539 (Fla. 3d DCA 1974)). One "'is created when two or more persons combine their property or time or a combination thereof in conducting some particular line of trade or for some particular business deal.'" *Jackson-Shaw Co. v. Jacksonville Aviation Auth.*, 8 So. 3d 1076, 1090 (Fla. 2008) (quoting *Kislak v. Kreedian*, 95 So. 2d 510, 515 (Fla. 1957)). As the Third District has explained,

"[p]articipants in a joint venture are each liable for the torts of the other or of the servants of the joint undertaking committed within the course and scope of the undertaking, without regard to which of the joint venturers actually employed the servant." *Fla. Tomato Packers*, 296 So. 2d at 539; *see also*, *Fla. Rock & Sand Co. v. Cox*, 344 So. 2d 1296, 1298 (Fla. 3d DCA 1977) ("[T]he negligence of one joint venturer is imputed to the other in an action based upon the tortious conduct of the joint venturer committed while within the scope of the joint venture."). Moreover, Florida courts have recognized joint venture liability for entities working on construction projects. *See Metric Eng'g, Inc. v. Gonzalez*, 707 So. 2d 354 (Fla. 3d DCA 1998) (acknowledging that engineering firms alleged to be liable for a construction worker's injuries "based upon evidence presented at trial, could be held jointly and severally liable . . . for negligence").

The Terra Defendants cite a string of federal cases to support their argument that the Association's references to the "Terra Defendants" collectively require dismissal of each of the claims against them. 8701 Mot. at 8, n. 15; TG/TW Mot. at 8, n. 16. But none of these cases nor the conventions of federal court pleading apply here. In any event, even if judged under the federal standard, the Association's allegations are sufficient. For example, in *Magluta v. Samples*, 256 F.3d 1282, 1283 (11th Cir. 2001), the court found that the complaint failed to meet the federal "short and plain statement of the claim" standard, Fed. R. Civ. P. 8(a)(2), because it was "a quintessential 'shotgun' pleading," which "name[d] fourteen defendants, and all defendants [we]re charged in each count," "making no distinction among the fourteen defendants charged, though geographic and temporal realities ma[d]e plain that all of the defendants could not have participated in every act complained of." *Id.* at 1284. *Magluta* is readily distinguishable. Here, the Association plead two claims – negligence and strict liability – against the three Terra Defendants for actions they took

together and contemporaneously in constructing a high-rise condominium and which contributed to the singular collapse of CTS.

The other federal cases the Terra CC Defendants cite also do not apply. *Real Estate Mortgage Network, Inc. v. Cadrecha*, 2011 WL 2881928, at *2 (M.D. Fla. July 19, 2011), applied the Eleventh Circuit's law on shotgun pleadings where "each count incorporate[d] the preceding paragraphs," which the Crossclaim does not do. *Centrifugal Air Pumps Australia v. TCS Obsolete, LLC*, 2010 WL 3584948, at *2 (M.D. Fla. Sept. 9, 2010), dismissed a complaint that referred to "an unknown number of unidentified (and non-party)" entities "collectively throughout the complaint," which the Crossclaim also does not do. *Gibbs v. United States*, 2011 WL 485899, at *2 (M.D. Fla. Feb. 7, 2011), involved "a litany of general, and at times, incomprehensible, allegations, which [were] incorporated into each successive count ... without specifying what allegation is relevant to each successive claim for relief, and to which defendant the allegation applies." The Crossclaim does not suffer from these deficiencies. The court dismissed a claim in *Marsar v. Smith & Nephew, Inc.*, 2013 WL 4106345, at *1–3 (M.D. Fla. Aug. 14, 2013), because the amendment to the complaint made it nearly impossible to discern which factual allegations supported the separate claims for relief. Here, the Crossclaim makes plain which factual allegations support each claim of negligence and strict liability. In *Rivero v. Taylor*, 2010 WL 3384913, at *3 (S.D. Fla. Aug. 3, 2010), a federal magistrate recommended dismissal of a complaint where the 216-paragraph complaint was "a rambling, confusing statement of factual assertions and legal conclusions." The same circumstances do not exist here. Finally, in *Hanley v. Sports Authority*, 1998 WL 934792, at *3 (S.D. Fla. Nov. 16, 1998), the court dismissed claims against a particular defendant about whom the plaintiff "failed to allege any facts," while, here, the Crossclaim alleges specific facts about each of the Terra Defendants.

In sum, none of the Terra CC Defendants federal authorities supports dismissal of the Crossclaim, even were the Court to use federal pleading standards in this state-court proceeding.

III. The Crossclaims Against the Terra CC Defendants Contain Ultimate Facts Sufficient to Support the Negligence Claim.

As a corollary to the allegation that the Crossclaims improperly join each of the Terra CC Defendants in one Count, those same defendants argue that the Crossclaims do not contain sufficient ultimate facts to support a cause of action against each defendant. 8701 Mot. at 13 – 17; TG/TW Mot. at 13 – 16.[6] To the contrary, the Crossclaims adequately allege each element for a claim of negligence, with sufficient ultimate facts to meet Florida's pleading standard.[7]

The Crossclaim alleges that the **Terra Group's** chief operating officer David Martin, orchestrated a back-room deal to allow **8701** to a acquire a city owned street, which then allowed **8701**, **Terra Group,** and **Terra World** to develop the expanded property right up to CTS's property line.[8] Then, having been forewarned that the construction methods being considered could damage and destabilize the neighboring property, proceeded nonetheless without regard to the potential damage.[9] Breaches of duties owed by each Terra CC Defendant, individually and collectively as joint venture partners included (i) engaging in ultrahazardous pile driving despite warnings;[10] (ii) failing to adequately monitor vibrations arising from sheet pile driving;[11] (iii) ignoring warnings

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[6] The Terra CC Defendants' motion does not make the same argument with respect to the strict liability count.

[7] The Court is well aware of the elements of a negligence claim in Florida; duty, breach, causation and damages. *Clay Elec. Co-op, Inc. v. Johnson,* 873 So. 2d 1182, 1185 (Fla. 2003).

[8] CC ¶¶ 65 – 98.

[9] CC ¶¶ 99 – 124.

[10] CC ¶¶ 125 – 142.

[11] CC ¶¶ 143 – 183.

from CTS residents and others that their construction activities was causing damage to CTS;[12] (iv) engaging in improper and unreasonably dangerous soil compaction activities;[13] (v) destabilizing CTS though improper dewatering of the Eighty-Seven site during construction;[14] and (vi) damaging CTS's foundation wall during construction of the footpath between Eighty Seven Park and CTS.[15]

Accordingly, all of the elements of a negligence claim are pled against each of the Terra CC Defendants.

IV. The *Slavin* Doctrine Does Not Require Dismissal of the Claims Against Moriarty.

Moriarty does not challenge that the Association sufficiently pleads the elements for its negligence claim against it. Rather, Moriarty asserts that it is protected from liability as a matter of law by the "*Slavin* Rule." As demonstrated below, the *Slavin* Rule is inapplicable to the facts of the instant case, and even if applicable, Moriarty fails to demonstrate that it meets the necessary elements to enjoy its protection as a matter of law, based only upon the allegations contained in the Crossclaim.

A. The *Slavin* Rule Does Not Apply to an Injury Occurring Off the Owner's Premises.

The *Slavin* Rule, derived from the case of *Slavin v. Kay*, 108 So. 2d 462 (Fla. 1958), provides that "a contractor is not liable to third parties for injuries that occur after the contractor has completed its work and the work has been accepted by the property owner if the defect is found to be a '**patent**' defect **which the owner could have discovered and remedied.**" *Foster v. Chung*, 743 So. 2d 144, 146 (Fla. 4th DCA 1999) (emphasis added). The *Slavin* Rule, only applies, however, to injuries sustained by third parties on the *owner's* property.

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[12] CC ¶¶184 – 217.

[13] CC ¶¶ 218 – 232.

[14] CC ¶¶ 233 – 253.

[15] CC ¶¶ 254 – 273.

Every case cited by Moriarty in its motion to dismiss insulated the contractor from injuries that occurred on the owner's own property, not from injuries sustained by a third party off the owner's property. That is for good reason. The rationale behind *Slavin* is that the owner "is presumed to have made a reasonably careful inspection [of the property], and to know of its defects," and therefore is it a position to fix them. *Id.* But that rationale cannot be applied where the injury to the third party, like in the instant case, did not occur on the owner's property. Accordingly, Moriarty cannot hide behind the *Slavin* Rule to avoid liability for its contribution to the collapse of the CTS building.

B. The Issue of Whether the Defect Was Patent or Latent Is a Jury Question.

Even if this Court were to conclude that the *Slavin* Rule could apply to offsite injuries, it cannot be determined as a matter of law that Moriarty is entitled to the protections offered by the rule. As Moriarty recognizes in its motion, the *Slavin* Rule only applies to protect the contractor against patent defects, not latent defects. "[T]he original wrongdoer is not relieved of liability if the defect is found to be 'latent,' that is, not apparent by use of one's ordinary senses from a casual observation of the premises or 'hidden from the knowledge as well as from the sight and not discoverable by the exercise of reasonable care.'" *Kala Invs., Inc. v. Sklar,* 538 So. 2d 909, 913 (Fla. 3d DCA 1989). Because reasonable persons could differ as to whether a particular defect could have discovered through the exercise of reasonable care, this is uniquely a jury question. See, *id.* and cases cited therein (reversing summary judgment). *See also*, *Damelio v. Target Corp.,* 2021 WL 5918742, at *3 (S.D. Fla. 2021) (denying summary judgment because "any possible application of the *Slavin* doctrine also involves questions of fact for the jury, including whether the alleged defective conduction allegedly created by [the defendant] was patent or latent"); *Brady v. State Paving Corp.*, 693 So. 2d 612, 613 (Fla. 4th DCA 1997) (reversing summary judgment because record contained conflicting material evidence concerning *Slavin* doctrine).

The Crossclaim alleges inherently latent conditions – subsurface and subterranean effects to the structural support of the CTS building. The observable above-ground construction activities cannot possibly permit this Court to determine, as a matter of law, that the geotechnical forces affecting the subsurface conditions were a patently discoverable hazard – even with complaints from the neighbors. Also, the alleged fact that the Eighty-Seven Park developers – the Terra Defendants – should have made an inquiry because of the "red flags" does not render the hazard "patent" for purposes of *Slavin*. Put simply, whether the structural destabilization to an adjoining property was a defect readily discoverable by the owner remains an issue of fact.

C. The Crossclaim Adequately Alleges Strict Liability.

The Crossclaim alleges that Moriarty, as the general contractor, was intimately involved in and supervised pile driving activities on the property. *See*, CC ¶¶ 125 – 183, 403 – 417. As a matter of Florida law, pile driving is an ultra-hazardous and abnormally dangerous use of land to which strict liability applies. *See Hutchinson v. Capeletti Bros., Inc.*, 397 So. 2d 952, 953 (Fla. 4th DCA 1981). In *Hutchinson*, the defendant construction company, "in the process of constructing a bridge for the Florida Department of Transportation, engaged in pile driving activity which damaged the residence of appellants." *Id.* The court concluded that pile-driving is subject to strict liability after applying the six-factor balancing test set forth in section 520 of the *Restatement (Second) of Torts* (1977) ("*Restatement*") to the activity of pile driving:

> (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.

Hutchinson, 397 So. 2d at 953 (citing *Cities Serv. Co. v. State*, 312 So. 2d 799, 800 – 02 (Fla. 2d DCA 1975)).

Moriarty acknowledges that "*Hutchinson* has found that sheet pile driving is considered abnormally dangerous for purposes of imposing strict liability." JMA Mot. at 31. Still, it argues that this clearly stated rule should not apply in the instant case.

First, Moriarty suggests that pile driving is not ultra-hazardous because its danger "can be reduced or eliminated by the exercise of reasonable care." The Crossclaim alleges otherwise and these allegations must be taken as true for purposes of this motion. CC ¶ 407, 412 – 413; *Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.,* 842 So. 2d 204, 206 (Fla. 3d DCA 2003) (quoting *Bell v. Indian River Mem 'l Hosp.*, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001)). The cases cited by Moriarty do not support its stated proposition. *St. Cyr v. Flying J Inc*., 2006 WL 2175662, at *1 (M.D. Fla. July 31, 2006), and *Baltodano v. CTL Distribution, Inc.,* 820 So. 2d 421, 422 (Fla. 3d DCA 2002), both involved the transfer of dangerous substances from one container to another. In such cases, the attendant risks "can easily be eliminated by the exercise of reasonable care by use of proper handling and dispensing procedures[.]" *St. Cyr*, 2006 WL 2175662, at *4; *see also Baltodano*, 820 So. 2d at 422. Moriarty fails to explain how, taking the allegations of the Crossclaim as true, the same can be said about the pile driving activity here.

Second, Moriarty argues that wrongful death and personal injury "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." JMA Mot. at 32. Moriarty must concede, however, that the Crossclaim seeks compensation for damage to property, which it acknowledges is within the zone of risk. As explained in Section III A above, a complaint which sufficiently states a cause of action is not rendered vulnerable to a motion to dismiss by the inclusion of an improper element of damages.

Moreover, Moriarty's construction of *Hutchinson* is overly narrow. The case does not hold that pile driving can only support a claim for property damage. If anything, the case supports

recovery for personal injury and wrongful death damages. Just as pile driving "involves a high degree of risk of harm to the property of others," *Hutchinson*, 397 So. 2d at 953, it presents a high degree of risk of harm to the safety of anyone on such damaged property. The Crossclaim sufficiently alleges that the pile driving activity at Eighty-Seven Park foreseeably damaged and negatively impacted CTS's structural stability. Thus, physical injuries and death associated with the destabilizing pile driving activity is a "harm that is within the scope of the abnormal risk that is the basis of the liability." *Great Lakes Dredging & Dock Co. v. Sea Gull Operating Corp.*, 460 So. 2d 510, 513 (Fla. 3d DCA 1984).[16] *Hutchinson*'s policy rationale also supports its application to personal injury and wrongful death damages. As is the case with property damage, the cost associated with personal injuries and death "is a cost which may be passed on to the ultimate user as well as a risk which may be insured against." *Hutchinson*, 397 So. 2d at 953–54.

Moriarty's other cited cases are distinguishable on similar grounds. In *Great Lakes Dredging*, "no claim [was] made that the noise or vibrations caused by the machine pose a physical danger to the structure of any building or property in the area." 460 So. 2d at 511. But that is the central allegation supporting the strict liability claims here. In *Coffie v. Florida Crystals Corp.*, 460 F. Supp. 3d 1297, 1313 (S.D. Fla. 2020), a case involving sugar cane burning for harvest, the plaintiffs "alleged property damage in the form of diminished property values due to discoloration of buildings and cars" and diminished economic opportunities, which are "not the kind of harms that make burning abnormally dangerous[.]" But the Association here does not seek these kinds of damages. Rather, it seeks damages flowing from CTS's structural instability, which is a foreseeable

[16] Moriarty claims that it has "found no case law that supports the proposition that the installation of auger cast piles at the site is ultrahazardous or abnormally dangerous." JMA Mot. at 32. But the mere installation of auger cast piles is not the subject of the strict liability claims. Rather, the claims are directed to the activity of "sheet pile driving." CC ¶¶ 125 – 142

consequence of the pile driving at Eighty-Seven Park. Indeed, damage to adjacent properties was so clearly foreseeable that NV5 warned against it. CC ¶¶ 110 -13.

Moriarty cites *Poole v. Lowell Dunn Co.*, 573 So. 2d 51 (Fla. 3d DCA 1990), for the proposition that "damages for emotional distress are unavailable in strict liability cases." JMA Mot. at 31. But that misreads the case. In *Poole*, the plaintiffs suffered no physical injuries or death from the blasting activity; they only suffered property damage and were disturbed by the noise. 573 So. 2d at 52. The case does not say that plaintiffs cannot recover non-economic damages for physical injuries or death under a strict liability claim. *Poole* thus does not support Moriarty's request to "strike all reference to damages for personal injuries, wrongful death, pain and suffering or emotional distress." JMA Mot. at 33. Nor can Moriarty's claim be squared with other Florida case law. In *Great Lakes*, the court stated that, to trigger strict liability, there must be a finding that "the ultrahazardous or abnormally dangerous activity poses some ***physical***, rather than economic, ***danger to persons or property*** in the area[.]" 460 So. 2d at 513 (emphasis added). If an abnormally high risk of physical danger to *persons* triggers strict liability, then damages flowing from such injuries are necessarily recoverable.[17]

In sum, just as with the Terra CC Defendants' motions, the Moriarty motion to dismiss should also be denied.

CONCLUSION

For the foregoing reasons, the motions to dismiss filed by Crossclaim Defendants Terra Group, LLC, Terra World Investments, LLC, 8701 Collins Development, LLC, and John Moriarty & Associates of Florida, Inc. should be denied in their entirety.

[17] *Edward M. Chadbourne, Inc. v. Vaughn*, 491 So. 2d 551, 553 (Fla. 1986), which Moriarty cites, JMA Mot. at 31, is even more off-point, as it dealt with whether the plaintiff stated a claim for strict *product* liability. It did not deal with an abnormally dangerous or ultra-hazardous activity.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of February, 2022, a true and correct copy of the foregoing *Receiver's Memorandum of Law in Opposition to the Motions to Dismiss Crossclaims* was filed electronically through the Florida Court's E-Filing Portal, which will provide electronic service of the filing to all counsel of record.

By: */s/ Christopher S. Carver*
Attorney