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 NV5 INC.'S MOTION TO DISMISS CROSSCLAIM

Defendant, Champlain Towers South Condominium Association, Inc., through its Court-appointed Receiver Michael I. Goldberg (the "Association"), files this Memorandum of Law in Opposition to the Motion to Dismiss the Association's Crossclaim (etc.) filed by Crossclaim Defendant NV5, Inc. ("NV5") (the "Motion" or "Mot.").[1]

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.

[1] Although the NV5's filing is entitled "NV5's Motion to Dismiss the Association's Crossclaim or, in the Alternative, Motion for a More Definite Statement," NV5 makes no mention of an alleged need for a more definite statement in the body of the Motion. Accordingly, the Association does not address that issue.

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*, NV5 for negligence (Count XII) and strict liability (Count XIII), 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 ("Crossclaims" or "CC"). NV5 moved to the dismiss the Crossclaims.

The Association notes that this Court denied a virtually identical motion to dismiss filed by NV5 directed to the Plaintiffs' Consolidated Second Amended Class Action Complaint. *See* Omnibus Order on Motions to Dismiss dated February 3, 2022. The motion to dismiss the Association's Crossclaim must be denied for the same reasons.

ARGUMENT

I. LEGAL STANDARD.

To state a claim, the Association need only offer a "short and plain statement of the ultimate facts showing that the pleader is entitled to relief." Fla. R. Civ. P. 1.110(b). *See Cummings v. Warren Henry Motors, Inc*., 648 So. 2d 1230, 1232 (Fla. 4th DCA 1995) ("In our state, generally a pleading is sufficient if it sets forth a short and plain statement of the ultimate facts on which the pleader relies and informs the defendant of the nature of the cause of action against him."). The rule demands only that 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). More is not required. Indeed, a complaint satisfies Rule 1.110 "even if inartfully drawn," so long as it "contains facts sufficient to indicate that a cause of action exists." *Snead Constr. Corp. v. Parkway E., Inc.*, 324 So. 2d 206, 208 (Fla. 3d DCA 1975).

II. COUNT XII STATES A CLAIM FOR NEGLIGENCE.

To state a cause of action in negligence, the Association must plead facts to support four elements; duty, breach, causation, and damages. *See Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003). In the Motion, NV5 "wonders" why it is "named as a Defendant in this action." Mot. at 1. But, as the Crossclaim makes clear, NV5, the geotechnical engineer for the luxury condominium "Eighty-Seven Park" next door, was absolutely critical in authorizing and monitoring inherently dangerous aspects of the development and construction of Eighty-Seven Park, and failed to warn CTS residents of the dangers posed by these construction activities. The elements of negligence against NV5 are pleaded with far more specificity than required.

A. The Crossclaim Adequately Alleges the Elements of Negligence Against NV5.

In support of Count XII, the Association alleges that NV5 owed a duty to "persons present in and occupying adjacent structures, including the Association and its members, to ensure that the development and construction activities on the Eighty-Seven Park project did not negatively impact or harm [CTS] or in any way compromise [its] stability," including the duty "to ensure that the safest method of basement excavation support was chosen and implemented on the Eighty-Seven Park project site." CC ¶¶ 423, 432. This duty arose from the responsibilities NV5 undertook on the project and the information it obtained. Because NV5 undertook to "issue[] warnings . . . regarding the danger that certain construction activities posed to CTS" (*id.* ¶ 424), prepared a report detailing the "available and appropriate options of basement excavation support" (*id.* ¶ 429), and because it had "knowledge of the risks that certain construction activities posed to the CTS Building and its residents" (*id.* ¶ 427), it "was responsible for ensuring. . . that all of its warnings . . . were heeded" (*id.* ¶ 426). Plaintiffs additionally allege that the nature of the duty NV5 owed was non-delegable as to certain of the "inherently dangerous" construction activities, including pile driving, dewatering, and excavation. *Id.* ¶ 434.

The Crossclaim details how NV5 breached its duty in various ways, specifically including, but not limited to, failing "to appropriately monitor and control the risks associated with dewatering, site compaction, pile driving, and excavation procedures," and failing to "undertake appropriate and necessary measures to analyze and ensure that the Eighty-Seven Park construction activities were not negatively impacting CTS." *Id.* ¶¶ 440-41. In short, NV5 knew the risks associated with various construction methods and warned of them. Yet, when the Terra Defendants and Moriarty pursued more dangerous construction methods in the development of Eighty-Seven Park notwithstanding those warnings, NV5 failed to take any action, "placing the residents and occupants of CTS at grave and immediate risk of harm." *Id.* ¶ 444(a). This negligence was a "substantial factor" causing the collapse and the Association's damages. *Id.* ¶ 447.

NV5 admittedly appreciated these dangers, as demonstrated in its 2015 Report stating site compaction activities must be "monitored for potential adverse effect on adjacent existing structures" (*id.* ¶ 219), that excavation activities must be monitored for "potential impacts these could have on adjacent structures, especially where such excavations are close to project property lines" (*id.* ¶ 113); that sheet pile driving "can cause damaging vibrations to adjacent properties and structures" (*id.* ¶ 130); and that "during dewatering the adjacent properties must be monitored for adverse impacts from dewatering drawdown" (*id.* ¶ 237). Yet, when construction proceeded in a manner NV5 directly cautioned against, NV5 remained silent.

These allegations are more than sufficient to state a claim for negligence against NV5.

B. NV5 Owed a Duty to the Association and Its Members, Including a Non-Delegable Duty as to Hazardous Activities.

NV5 asserts that the Crossclaim fails to allege a duty owed to the Association and its Members. Mot. 12–23. NV5 argues that its services were solely for the benefit of "Terra" and therefore did not create a zone of foreseeable risk of harm to the Association and its members. Mot. at 13. These arguments fail in the face of the facts alleged in the Crossclaim.

Critically, NV5 outright ignores that as a professional engineer it carried a non-delegable and fundamental duty to protect the safety, health, and welfare of the public. As the Crossclaim pleads, the "National Society of Professional Engineers Code of Ethics for Engineers establishes the fundamental canon and rule of practice that professional engineers must 'Hold paramount the safety, health, and welfare of the public.'" *Id.* ¶¶ 442. The Crossclaim alleges that NV5 violated this fundamental duty. *Id.* ¶¶ 444, 445. It is anticipated that professional engineering experts will opine as to the standard of care related to engineers' fundamental duty to protect the safety, health, and welfare of the public, including CTS residents, and how NV5 failed to meet such standard. At this stage of the proceedings, however, it is clear from the Crossclaim that NV5, as a professional engineer, owed a duty to the Association and its members who were foreseeably at risk of harm due to the construction activities at Eighty-Seven Park.

In addition to the duty generally owed by an engineer to protect the safety, health, and welfare of the public, including CTS residents, the Crossclaim additionally alleges a non-delegable duty to perform inherently dangerous and hazardous activities with due care. *See id.* at ¶¶ 434-35; *see also Md. Maint. Serv., Inc. v. Palmieri*, 559 So. 2d 74, 76 (Fla. 3d DCA 1990) ("[A] defendant's liability extends to persons foreseeably injured by his failure to use reasonable care in performance of a contractual promise."); *Smyth ex. rel. Est. of Smyth v. Infrastructure Corp. of Am.*, 113 So.3d 904, 912 (Fla. 2d DCA 2013) (holding where inherently dangerous activities are involved, one who employs a contractor is subject to "liability [that] is nondelegable"). Multiple decisions have recognized liabilities created by engaging in inherently dangerous activities. *See, e.g.*, *Am. Home Assurance Co.*, 908 So. 2d 459, 468 (Fla. 2005) (agreeing with other courts that found, as a matter of law, "the act of transporting the turbine ... was inherently dangerous"); *Baxley v. Dixie Land & Timber Co.*, 521 So. 2d 170, 174 (Fla. 1st DCA 1988) ("For purposes of this opinion, we treat the cutting, loading and delivering of logs to Gilman Paper Company as inherently dangerous work as

that finding by the trial court is not challenged on this appeal."); *Madison v. Midyette*, 541 So. 2d 1315, 1318 (Fla. 1st DCA 1989) ("[W]e conclude as a matter of law that the clearing of land by fire is an inherently dangerous activity."); *Noack v. B. L. Watters, Inc.*, 410 So. 2d 1375, 1376 n.1 (Fla. 5th DCA 1982) (holding "[t]he installation of natural gas lines is an inherently dangerous activity"); *Gen. Portland Land Dev. Co. v. Stevens*, 395 So. 2d 1296, 1300 (Fla. 4th DCA 1981) ("[T]he operation of a buck hoist. . . is an inherently dangerous activity"); *Atl. Coast Dev. Corp.*, 385 So. 2d at 679 ("A crane in operation is inherently dangerous.").

The Crossclaim invokes the well-settled legal duty that turns simply on the creation, by actions or inactions, of a reasonably foreseeable condition through a defendant's conduct or failure to act. "The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others." *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992). At the motion to dismiss stage, the query is "whether a foreseeable, general zone of risk was created by the defendant's conduct." *Id.* at 502 n.1. In this context, duty "is a minimal threshold *legal* requirement for opening the courthouse doors." *Id.* at 502.

Here, the Association and its members live mere yards from the site of the hazardous and inherently dangerous construction activities, which included driving sheet piles more than 40 feet into the earth using a vibratory hammer, and without proper vibration monitoring, placing them within the zone of risk of harm. Under such circumstances, engineers can be liable for causing injury to third parties or their property, where those injuries were reasonably foreseeable consequences.

Additionally, Florida recognizes a cause of action against an engineer for negligently providing professional services. *See Moransais v. Heathman*, 744 So. 2d 973, 975–76 (Fla. 1999), *receded from on other grounds*, *Tiara Condo. Ass 'n, Inc. v. Marsh & McLennan Cos.*, 110 So. 3d

399 (Fla. 2013). An engineer, like any other professional, owes a duty "to perform the requested services in accordance with the standard of care used by similar professionals in the community under similar circumstances." *Moransais*, 744 So. 2d at 975–76; *see Lochrane Eng 'g, Inc. v. Willingham Realgrowth Inv. Fund, Ltd.,* 552 So. 2d 228, 232 (Fla. 5th DCA 1989) (same); *see also Luciani v. High*, 372 So. 2d 530, 531 (Fla. 4th DCA 1979) (involving suit against engineer based on negligently performed tests resulting in economic loss to plaintiff's property). The duty turns on whether an engineer "reasonably knew or should have known" the plaintiffs "would be injured" if the engineer was "negligent in the performance of ... services." *Moransais*, 744 So. 2d at 979. This goes hand-in-hand with professional engineers' fundamental duty to "hold paramount the safety, health, and welfare of the public." *Id.* at 422.

Moore v. PRC Engineering, Inc. is instructive. There, the court considered whether a consulting engineering firm "owed a duty to the plaintiffs to institute, maintain, and inspect safety procedures at the construction site," and whether the engineering firm "may be held liable for injuries suffered by the plaintiffs resulting from defendants' negligent performance of its duties." 565 So. 2d 817, 818 (Fla. 4th DCA 1990) . The trial court found the engineer owed no such duty, which rested solely with the general contractor. *Id.* The Fourth District Court of Appeal reversed, rejecting NV5's exact argument that the engineers "were present at the job-site merely to ensure that the owner received what was contracted for and consequently owed no legal duty to [non-privity injured parties]." *Id.* at 820. Importantly, in *Moore*, a case decided on summary judgment, the trial and appellate courts considered not just the engineer's contract, *but also* the circumstances surrounding the performance of the contract, including the testimony of the plaintiffs' engineering expert, who confirmed that the engineer had a duty to see the work was done safely.

Here, the Association's allegations are sufficient to plead a duty as to NV5. Whether the evidence ultimately supports a finding of duty and breach is an issue for summary judgment, as in

Moore and in other cases determining whether particular activities give rise to a duty owed to parties not in privity, particularly where inherently dangerous activities are involved.

The cases cited by NV5 in its Motion do not hold, as it suggests, that NV5 did not owe a duty to the Association, a non-privity third party. Mot. at 13–17. In *First Wisconsin National Bank v. Roose*, a class of condominium purchasers creatively sought recourse for a failed condominium project *from the bank that had loaned money to the developer,* which the court described as "a novel and imaginative" approach. 348 So. 2d 610, 611 (Fla. 4th DCA 1977). NV5 claims *Roose* "held that any inspections performed by the lender in conjunction with its security interest in the property were for the *sole benefit of the lender* and did not create a duty to the condominium owners to supervise the developer's construction and maintenance of the property." Mot. at 14. NV5 misreads *Roose*. The court actually held that while the condominium owner "would have a duty imposed on the mortgagee to protect the interests of the owners by supervising the construction and maintenance by the developer," "insufficient factual allegations cause the defeat of this count." *Roose*, 348 So. 2d at 611. It was the lack of well plead allegations that resulted in dismissal, not the absence of a duty as a matter of law.

NV5's reliance on *Geer v. Bennett*, 237 So. 2d 311 (Fla. 4th DCA 1970), *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973), and their progeny similarly does not support dismissal. To the contrary, these cases warrant the denial of the Motion. From *Geer*:

> The law applicable to an architect's liability for personal injury or death may be summarized as follows. An architect may be liable for negligence in failing to exercise the ordinary skill of his profession, which results in the erection of an unsafe structure whereby anybody lawfully on the premises is injured. Possible liability for negligence resulting in personal injuries may be based upon their supervisory activities, or upon defects in the plans or both. Their possible liability is not limited to the owner who employed them. Privity of contract is not a prerequisite to liability. They are under a duty to exercise such reasonable care, technical skill and ability, and diligence as are ordinarily required of architects in the course of their plans, inspections and supervisions during construction for the

> protection of any person who foreseeably and with reasonable certainty might be injured by their failure to do so.

237 So. 2d at 315 (emphasis added). The Crossclaim sufficiently alleges that the Association and its members "foreseeably and with reasonable certainty might be injured by [NV5's] failure to do so." Correspondingly, therefore, Count XII adequately states a claim.

The other cases cited by NV5, *Recreational Design*,[2] *McElvy, Jennewein, Stefany, Howard, Inc.*,[3] *E.C Goldman, Inc.*,[4] and *Thornton-Thomasetti*[5] are similarly inapposite. These cases address either (i) whether general contractors and subcontractors working on the same construction project as engineers or consultants, can bring direct claims against those engineers and consultants for purely economic injuries arising from their work on the common project, or (ii) whether consultants who did not participate in the project at all, but recommended that the owner not pay the contractor, can be liable to the contractors for providing that advice to the owners. These cases do not address what duties an engineering professional owes to third parties like the Association,

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[2] *Recreational Design & Const., Inc v. Wiss, Janney, Elstner & Ass,* 867 F.Supp. 2d 1234, 1237 (S.D. Fla. 2011) ("[T]here are no allegations that Defendants [engineers] exercised decision-making authority over [contractor's] responsibilities on the project; no allegations that [contractor] and [engineers] ever interacted with one another; [and] no allegations otherwise establishing a close nexus between [contractor] and [engineers]."

[3] *McElvy, Jennewein, Stefany, Howard, Inc. v. Arlinton Elec., Inc.* 582 So. 2d 47 (Fla. 2d DCA 1991) (electrical subcontractor could not bring claim against architects who recommended to owner that it deny subcontractor's request to switch out a material supplier, finding subcontractors claim too "attenuated").

[4] *E.C. Goldman, Inc. v. A/R/C Ass., Inc.,* 543 So. 2d 1268 (Fla. 1989) ("an expert who has no connection whatsoever with a construction project and is hired by the owner of the project solely to evaluate the work of a roofing subcontractor" does not have liability for the owner's decision not to pay the roofing subcontractor).

[5] *City of Tampa v. Thornton-Tomasetti, PC,* 646 So. 2d 279 (Fla. 2d DCA 1994) This is primarily an economic loss rule case, where the court ruled that owner could not recover from consultants with which it was not in privity for "purely economic losses." The economic loss rule, however, does not apply in the instant case because the Association and its members are not seeking purely economic losses, but rather damage to "other property," which is expressly excluded by the economic loss rule.

neighbors obviously within a foreseeable zone of risk of harm, who suffer catastrophic loss to their persons and property as a proximate cause of a professional's negligence.

C. The Terra Defendants' Negligence Does Not Excuse NV5's Negligence.

NV5 attempts to deflect responsibility by blaming "Terra," arguing that Terra had the ultimate decision-making authority regarding all construction activities at the Project. Mot. at, *e.g.*, 21. But even if Terra and others are at fault, that does not exculpate NV5 from its own negligence. Ultimately, it will be the role of the jury to parse comparative fault. The Court cannot resolve the issue on a motion to dismiss.

Moreover, the allegations NV5 cite as exculpatory are, in fact, probative of their knowing disregard for life and property. NV5 touts the allegations in the Crossclaim regarding warnings that NV5 provided to Terra regarding vibration and vibration monitoring. Motion at 4-5. But NV5 ignores that the Association *also* alleges that NV5 knew the Terra Defendants did not heed NV5's recommendations; and that "NV5 ignored its own warnings and allowed dangerous work to proceed on the Eighty-Seven Park project, despite the harm it was inflicting on CTS." CC ¶ 422. The warnings evince NV5's actual knowledge of the risks, but does not excuse its subsequent failure to act with reasonable care to protect occupants of CTS from the foreseeable harm that it clearly recognized, demonstrating a knowing disregard for the safety of CTS occupants.

D. That NV5 Worked Through Agents Does Not Defeat Count XII.

NV5 seeks dismissal because it did not itself perform vibration monitoring, but relied upon Geosonics to monitor and record the vibrations. Mot. at 3 (citing CC. ¶ 156). NV5, however, was also directly involved in the planning and implementation of selective vibration monitoring, reviewed the Geosonics data and reports, authored its own interpretive report providing opinions concerning the impact of the excessive vibration levels, was fully aware of the excessive vibration levels and the damage that could cause, but took no action to stop it or warn those in peril. CC at

¶¶ 443-46. NV5 simply ignores its duty to complete its work with reasonable care and to protect the public, including CTS residents, and that such a duty is nondelegable, thereby making it responsible for the negligence of subcontractors, like Geosonics. *See White v. Am-Sprad Metals Inc.*, 583 So. 2d 769, 770 (Fla. 4th DCA 1991) (reversing summary judgment in favor of defendant metalworker, finding that the defendant could not "avoid its duty of care by unauthorizedly, and without the general contractor's knowledge, subcontracting. . . to perform its contract with the general contractor"); *City of Coral Gables v. Prats,* 502 So. 2d 969, 971 (Fla. 3d DCA 1987) (city's contract with subcontractor did not relieve city of nondelegable duty "to use reasonable care to maintain the sidewalks in a safe manner during the construction"); *see also Smyth*, 113 So. 3d at 912 (where inherently dangerous activities are involved, one who employs a contractor is subject to "liability [that] is nondelegable"); *Baxley*, 521 So. 2d at 172 ("[A]n employer may be held liable for injuries caused by the failure of an independent contractor to exercise due care with respect to the performance of work which is inherently or intrinsically dangerous." (quoting *Peairs v. Fla. Publ 'g Co.*, 132 So. 2d 561, 566 (Fla. 1st DCA 1961)); *Atl. Coast Dev. Corp. v. Napoleon Steel Contractors*, 385 So. 2d 676, 679 (Fla. 3d DCA 1980) ("Holding a particular undertaking to be nondelegable means that *responsibility*, i.e., ultimate liability, for the proper performance of that undertaking may not be delegated." (emphasis added)). This is especially so where the Association alleges that NV5 was intimately involved in the work of said subcontractors. *See* CC at 424-28.

Thus, the fact that NV5 did not physically perform the monitoring, but delegated that task to its subcontractor, Geosonics, does not relieve it of responsibility. *Id*. at ¶¶ 143-146, 156. NV5 was still responsible for fulfilling its duties as to the monitoring. *Id.* ¶ 444. Further, the Crossclaim adequately alleges that NV5 was deeply entrenched in the vibration monitoring activities. *Id.* ¶¶ 102 -114, 121 – 124.

E. The Association's Allegations Regarding Vibration Monitoring Are Not "Erroneous," and It Is No Basis for Dismissal in Any Event

NV5 focuses a significant section of its Motion on parsing discreet allegations regarding the monitoring of the driving of the sheet piles on a single day in March 2016, claiming that Plaintiffs "describe[e] the Geosonics data in a clever way" and that their allegations regarding vibration readings are "not accurate." Mot. at 8. This is a baseless attack. The Association references the vibration monitoring report data, alleging that the vibration readings largely exceeded the allowable threshold, with 29 of 36 reported readings registering beyond the limit. CC. ¶¶ 166 - 167. NV5's interpretation of the data claims that only "41.1 percent, exceeded the . . . threshold" is hardly a defense. Mot. at 8. Even by this interpretation, NV5 concedes the vibration readings exceeded the applicable threshold, creating a duty to act or warn.

NV5 spends pages in its Motion contesting factual allegations in the Crossclaim regarding the number of times vibration limits were exceeded, or specific complaints made by concerned residents. *Id.* at 8-11. But these argument do not have any place in a motion to dismiss, where the Court must accept all allegations "as true" and consider them "in the light most favorable" to the Association and its members. *Susan Fixel,* 842 So. 2d at 206.

III. COUNT XII STATES A CLAIM FOR STRICT LIABILITY.

A defendant is liable in tort to third parties injured by inherently dangerous activities, even if that defendant was not negligent. *Hutchinson v. Capeletti Bros., Inc.*, 397 So. 2d 952 (Fla. 4th DCA 1981). Strict liability is based in public policy: "[Defendant] is creating hazards to others, to be sure, but they are ordinary, and reasonable risks incident to desirable social and economic activity. But common notions of fairness require that the defendant make good any harm that results even though his conduct is free from fault." *Id.* at 953. "It is appropriate that the loss occasioned by that non-negligent activity be shifted to . . . [the] construction company . . . [as] a

cost of doing business . . . which may be passed on to the ultimate user as well as a risk which may be insured against." *Id.* at 953-53.

Florida law holds, and NV5 concedes for purposes of this motion, that pile driving is an ultra-hazardous and abnormally dangerous activity subject to strict liability. *Id.*; Mot. at 25, n. 3. Still, NV5 argues that because it did not physically operate the machines that drove the piles, it is insulated from liability. Mot. at 25. NV5 does not cite a single case that supports this proposition. Rather, it cites to *Hutchinson,* which most certainly did not limit its holding of strict liability to those that physically drove the piles.

The Crossclaim alleges that NV5 was heavily involved in the pile driving activities. In Paragraph 450, the Association alleges that "NV5 was intimately involved in the performance and progress of the pile driving activities on the project and was responsible for closely monitoring the vibration levels during portions of the pile driving work." Specifically, the Crossclaim alleges, among other things, that NV5 prepared a report that specifically cautioned that vibrations caused by the ultrahazardous and abnormally dangerous pile driving activities could damage adjacent structures, including the CTS Building, if not properly monitored and controlled" (CC ¶ 459); that due to NV5's knowledge of the risks associated with pile driving, it was responsible "to vigilantly monitor and control those risks and ensure that the identified risky and dangerous construction activities did not negatively impact the structural stability of the CTS Building" (CC ¶ 427); and to ensure that those driving the piles "appropriately considered the potentially devastating impact on adjacent properties, including the CTS Building, when choosing basement excavation support methods." (CC ¶431). Of course, all of these allegations must be taken as true for purposes of NV5's Motion. They are more than sufficient to invoke the public policy concerns expressed in *Hutchinson*, and to shift the risk of damage caused by the pile driving activities from the innocent victims, to those participating in the dangerous activity.

Accordingly, the Motion should also be denied as to Count XIII

CONCLUSION

For the foregoing reasons, NV5's motion to dismiss the Association's Crossclaim should be denied in its entirety.

Dated: March 21, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 21st day of March, 2022, a true and correct copy of the foregoing Receiver's Memorandum of Law in Opposition to NV5 Inc.'s Motion to Dismiss Crossclaim 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: *Andrew P. Gold*
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