IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR MANATEE COUNTY, FLORIDA

MIKE URBANIAK and

SALLY URBANIAK,

Plaintiffs Case No.:2013-CA-006088

Vs.

KB HOME FORT MYERS, LLC

KB HOME TAMPA, LLC and

KB HOME ORLANDO, LLC

Defendants

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PLAINTIFFS, MIKE URBANIAK AND SALLY URBANIAK'S, MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS, KB HOME FORT MEYERS LLC, KB HOME TAMPA LLC, AND KB HOME ORLANDO LLC, MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW, Plaintiffs MIKE URBANIAK AND SALLY URBANIAK (hereinafter referred to jointly as "URBANIAKS") and pursuant or Rule 1.510 of the Florida Rules of Civil Procedure, and file this their Memorandum of Law in Opposition to Defendants KB HOME FORT MEYERS LLC, KB HOME TAMPA LLC, and KB HOME ORLANDO LLC (hereinafter referred to collectivity as "KB HOMES" or individually as KB HOME FORT MEYERS, KB HOME TAMPA, OR KB HOME ORLANDO") Motion for Partial Summary Judgment as follows:

OVERVIEW

URBANIAKS, oppose the KB HOMES Motion for Partial Summary Judgment on numerous grounds. A summary of those grounds includes the following: (1) only one of the three Defendants signed the contract therefore the defendants' legal arguments don't apply to the remaining two defendants; (2) even the contracting defendant had independently created statutory and common law legal duties apart from the contract; (3) there are significant material

facts which support the elements of each of the causes of action pled by URBANIAKS; (4) Judge Smith is handling 5 companion cases which are factually similar and he has already denied this identical Motion for Partial Summary Judgment in Case No. 2013-CA-006328; (5) URBANIAKS condominium was materially changed during the repairs; (6) there are building(s) that still are unfinished and URBANIAKS will be financially responsible as members of the association for those damages; and (7) the fraud invalidates the contractual limitations relied upon by KB HOMES FT MYERS and attempts to avoid the Rescission Count.

The project itself was constructed over a number of years and suffered from water intrusion throughout its construction process. There is a history of multiple problems and repairs from 2006 through 2014. Water intrusion and structural deficiencies are material problems beginning in 2006 from the beginning of the project, with a history of repairs dogged by cost cutting and warnings by general contractors and sub-contractors that the problems would persist without significant changes to design, materials and construction methods. However KB HOMES failed to disclose this history to the URBANIAKS and at some point in 2013 the Florida Department of Justice stepped in and performed a criminal investigations finding KB HOME responsible for its construction and sales tactics. The URBANIAKS lawsuit is premised upon that history.

FACTS

The URBANIAKS purchased a new condominium unit from KB HOME FORT MYERS located within the Willowbrook Condominiums. KB HOME TAMPA was acting as the statutory developer of the Willowbrook Condominiums [1] as well as one of the three general contractors[2] of the Willowbrook condominium project. As part of the purchase URBANIAKS were required to purchase not only the condominium unit, but become member of the Willowbrook Condominium Association as well. [3] Pursuant to the contract they became owner of their unit, however as members of the Willowbrook Condominium Association, they also became responsible for the association related financial obligations related to the repair and

[1] See KB Home 3rd Amended Complaint styled KB Home Tampa LLC, et al v. AND Plus Construction Services, Inc. et al, Case No: 2013-CA-002679

[2] See KB Home 3rd Amended Complaint styled KB Home Tampa LLC, et al v. AND Plus Construction Services, Inc. et al, Case No: 2013-CA-002679

[3] See Sales Contract between KB Home Fort Myers and URBANIAKS

maintenance of common elements and limited common elements. That distinguishes this sale from the sale of a single family residence, townhouse or other similar residence. Essentially KB HOME FORT MEYERS as the Seller of the Contract was selling more than simply the unit but also the condominium project and the responsibility associated with being a member of the Willowbrook Condominium Association. KB HOMES TAMPA, as the statutory developer was developing to sell more than simply the unit but also the condominium project and the responsibility associated with being a member of the Willowbrook Condominium Association. And all three, KB HOMES, were the statutory General Contractors building more than simply the unit but also the condominium project and that would create among the purchasers the responsibility associated with being a member of the Willowbrook Condominium Association.

The URBANIAKS signed their Contract for the purchase of their condominium unit on or about March 16, 2010 (a unit being used as a model home) from KB HOMES FT MYERS[4]. Before, URBANIAKS signed their contract, KB HOMES, tore the back half of the building off of every building within Willowbrook due to severe water intrusion and related structural deficiencies and subsequently after those repairs but before URBANIAKS signed their contract had multiple warranty claims for water damage and construction deficiencies that evidence a systemic problem at Willowbrook. After the initial 558 repairs discussed above, the project continued to suffer from water intrusion and KB HOMES were aware of that new water intrusion. In addition to wearing the hat as developer KB HOME TAMPA was also a General Contractor on the project. KB HOME ORLANDO and KB HOME FORT MEYERS were also General Contractors on this project. [5] Due to a contracting real estate market all three defendants, began to "roll their employees" into one another and wore multiple hats with sales representatives etc. [6]

As the General Contractors on the project all three KB HOMES companies had the duty set forth in Chapter 553 and Chapter 558 Florida Statutes. Additionally, as the developer of the Willowbrook project KB HOME TAMPA had the duties under Chapter 718 Florida Statutes that provided an implied Warranty of Fitness. Moreover, KB HOME ORLANDO and KB HOME

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[4] See Defendants Answer and Affirmative Defenses, admitting KB HOMES FT MYERS was the seller under the contract, page 2-3, and paragraphs 18, 26 and 33.

[5] See Third Amended Complaint in case styled KB Home Tampa LLC, et al v. AND Plus Construction Services, Inc. et al, Case No: 2013-CA-002679; See ¶ 44, page 14.

[6] See deposition transcript of Mathew Brown and Sworn Statement to Mathew Brown

FORT MYERS as the General Contractor on the project provided a Warranty of Fitness to the URBANIAKS under Chapter 718. [7] KB HOME FORT MYERS also had those duties set forth in the contract. KB HOME attempts to limit all of the remedies available to URBANIAKS through the contractual provisions of this contract, when in fact it limitations were limited to claims made against KB HOME FT MYERS, and even those limitations did not void the independent statutory duties that KB HOMES FT MYERS had assumed. The Contract between the URBANIAKS and KB HOME FT MYERS, specifically the limitations that KB HOMES asserts limit the URBANIAKS' ability to assert damage claims, is contractually limited in scope to the buyer and seller, KB HOME FT MYERS and URBANIAKS. These limitations do not extend to KB HOME ORLANDO and/or KB HOME TAMPA.

Moreover, KB HOMES, acting as the Seller (KB HOMES FT MYERS), Developer (KB HOMES TAMPA) and General Contractor (KB HOMES FT MYERS, KB HOMES TAMPA and KB HOMES ORLANDO, and intertwining their employees on the Willowbrook project (i.e. KB HOMES TAMPA employees acted as sales representatives for KB HOMES FT MYERS), had a duty to disclose material facts which would impact the value of the URBANIAKS purchase of the condominium unit. That disclosure was not limited simply to the unit but because the URBANIAKS were being compelled to purchase a unit within a condominium project and therefore become responsible for the association's liabilities, that disclosure extended to the project as a whole. There appears to be no dispute within the record that KB HOMES knew the Willowbrook project, the buildings, the individual units and the project as a whole suffered from severe water intrusion and construction and structural defects. There appears to be no dispute within the record that if KB HOMES had informed URBANIAKS of these problems that URBANIAKS would never have signed the contract.

KB HOMES knowingly constructed an apartment complex that was structurally deficient and suffered from server water loss. At the time KB HOME FORT MYERS signed the Contract

[7] See § 718.203 which provides that "the Contractor and all Sub-contractors and suppliers grant to the developer and to the purchaser of each unit implied Warranty of Fitness as to the work performed or material supplied by them as follows: (a) for a period of three years from the date of completion of construction of a building or improvement, a warranty as to the roof and structural components to the building or improvement and mechanical and plumbing elements serving a building or improvement, except mechanical elements serving only one unit. (b) for a period of one year at the completion of all construction, a warranty as to all other improvements and materials.

they were aware of the structural deficiencies and the water intrusion problems associated with the Willowbrook Condominium Project[8] . Moreover, at the time KB HOME FORT MYERS signed the Contract they were aware of the structural deficiencies and the water intrusion problems associated with the URBANIAKS building and their unit[9]. Moreover, at the time KB HOME FORT MYERS signed the Contract, employees of KB HOME TAMPA and KB HOME ORLANDO were all actively engaged in this fraudulent activity, in an effort to sell homes in a contracting real estate market. All three defendants were aware of the structural deficiencies and the water intrusion problems associated with the URBANIAKS unit and building and all conspired to hide these facts from the URBANIAKS to ensure the closing went through and the Condominium unit was sold.

The timeline of those defects, the attempts to repair them with techniques that KB HOMES knew would fail to adequately correct the problem and which would lead to more water intrusion after the closing, the knowledge of structural deficiencies and the concerted efforts of all of the KB HOMES defendants to conceal these facts from the URBANIAKS is outlined in the deposition transcripts of Mathew Brown the Construction Manager for KB HOMES at the Willowbrook Project taken in a case styled KB Home Tampa LLC, et al v. AND Plus Construction Services, Inc. et al, Case No: 2013-CA-002679.[10] (hereinafter referred to "KB Home Construction Defects Lawsuit") and by the Florida department of Justice in their investigation into the Willowbrook condominium project (among others). The scope of the subsequent repairs is depicted in photographs taken on December 6, 2006 by Rimkus Consulting, an engineering firm hired to investigate the water loss claims after KB HOMES placed their sub-contractors on notice in a Chapter 558 process[11] of the water loss problems. Taken together these

[8] In early 2006 KB HOME TAMPA notified its subcontractors of the structural defects pursuant to Chapter 553 and Chapter 558 Florida Statutes placing the on notice of the defects demanding that they affected the repairs.

[9] See Deposition Transcript of Matthew Brown Vol. I and Vol. II taken on October 22, 2015 in Case No: 2013-CA-002679 pages 25-35, and the Sworn Statement of Matthew Brown take in the Florida Attorney General investigation on October 22, 2013 pages 63, 67 and the Interrogatory responses within incorporated production response and photographs dated December 6, 2006 filed by Southeast Framing, Inc., in case number 2013-CA-002679.

[10] See a copy of Third Amended Complaint filed in KB Home Tampa LLC, et al v. AND Plus Construction Services, Inc. et al, Case No: 2013-CA-002679, and filed in the this case in opposition to the Motion for Summary Judgment with a request that the court take judicial notice of those pleadings and which will be provided to the Court at the hearing.

[11] See Deposition Transcript of Matthew Brown Vol. I and Vol. II taken on October 22, 2015 in Case No: 2013-CA-002679 pages 25-35, and the Sworn Statement of Matthew Brown take in the Florida Attorney General investigation on October 22, 2013 pages 63, 67 and the Interrogatory responses within incorporated production

documents paint a vivid picture of widespread water intrusion, structural problems, repairs that KB HOMES knew were insufficient and a concerted effort to conceal these facts from URBANIAKS. KB HOMES was more than willing to place their sub-contractors on notice of the problems, because that created a financial advantage for them, at the same time they failed to notify the URBANIAKS.

In early 2006 KB HOMES Willowbrook project was suffering from widespread water intrusion problems caused by design defects, material defects and installation defects[12]. Mathew Brown was asked to investigate the problem and he advised KB HOMES of his opinions as to the multiple causes of the problem and the scope of the needed repairs[13]. This all occurred before the URBANIAKS signed their contract yet KB HOMES failed to disclose these facts to the URBANIAKS in an effort to induce them to sign a sales contract in a contracting real estate market[14]. The repairs began in the fall of 2006 and continued into early 2007. Mr. Matthew Brown advised KB HOMES that the repairs they were performing would not work and that the buildings and units would continue to suffer from water intrusion into the future[15] making the purchasers of these condominium units responsible to the damage to their units and the common elements and limited common elements of the project as a whole and any related damages. However KB HOMES failed to disclose these facts to the URBANIAKS. After the repairs the new construction began to suffer from water intrusion problems (just as Mr. Mathew Brown had warned) and ultimately the repaired work began to suffer from water intrusion problems (just as

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response and photographs dated December 6, 2006 filed by Southeast Framing, Inc., in case number 2013-CA-002679.

[12] See Deposition Transcript of Matthew Brown Vol. I and Vol. II taken on October 22, 2015 in Case No: 2013-CA-002679 pages 25-35, and the Sworn Statement of Matthew Brown take in the Florida Attorney General investigation on October 22, 2013 pages 63, 67 and the Interrogatory responses within incorporated production response and photographs dated December 6, 2006 filed by Southeast Framing, Inc., in case number 2013-CA-002679.

[13] See Deposition Transcript of Matthew Brown taken on October 22, 2015 page 27; line 19-25; page 28; Line 1-9

[14] See Deposition Transcript of Matthew Brown Vol. I and Vol. II taken on October 22, 2015 in Case No: 2013-CA-002679 pages 25-35, and the Sworn Statement of Matthew Brown take in the Florida Attorney General investigation on October 22, 2013 pages 63, 67 and the Interrogatory responses within incorporated production response and photographs dated December 6, 2006 filed by Southeast Framing, Inc., in case number 2013-CA-002679.

[15] See Deposition Transcript of Matthew Brown Vol. I and Vol. II taken on October 22, 2015 in Case No: 2013-CA-002679 pages 25-35, and the Sworn Statement of Matthew Brown take in the Florida Attorney General investigation on October 22, 2013 pages 63, 67 and the Interrogatory responses within incorporated production response and photographs dated December 6, 2006 filed by Southeast Framing, Inc., in case number 2013-CA-002679.

Mr. Mathew Brown had warned).[16] The URBANIAKS' unit, their building and all of the buildings within WILLOWBROOK, continued to suffer from water intrusion, but instead of advising the URBANIAKS of the problems, they continued to hide the true nature of the defects within the warranty process thereby perpetuating the fraud and breaching the warranties provided.

Additional Structural problems associated with the type of wood were discovered by Mr. Mathew Brown[17]. Structural defects he testified, that were of a nature that they should have been obvious to professional construction personnel[18] and yet KB HOMES had ignored these structural deficiencies hoping no one would ever mention them. The wood called for within the plans and specifications had been replaced with a cheaper, weaker substitute, which was cheaper to build with. The differences created a situation so dangerous Mr. Brown testified that the structural deficiency might lead to a collapse of the structures, lead them to "implode". Mr. Brown was instructed not to document the problem, however, fearing he might be the "scapegoat" as the qualifying agent on the project, he wrote a letter documenting the repairs needed and the life-safety risks to the homeowners, if KB HOMES continued to ignore them. URBANIAKS were not informed of the scope of the deficiencies or the danger in fact Mr. Brown testified no homeowner was told what the specific problem was. However, Mr. Brown's letter had the desired effect and it forced repairs however in retaliation Mr. Brown was fired and he filed a Whistle Blower Lawsuit.[19] Thereafter, the URBANIAKS' unit continued to suffer from water intrusion and KB HOMES continued to hide why when handling warranty claims[20].

Matthew Brown testified to great degree about the widespread nature of the water intrusion issues, structural defects, improper repairs that would lead to continue water intrusion and the structural defects associated with the improper use of wood product (which occurred

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[16] See Deposition Transcript of Mathew brown taken on October 22, 2017 page 50-52

[17] See Deposition Transcript of Mathew Brown taken by Florida Attorney General's Office on October 22, 2013 pages 20-25, and the Deposition of Matthew Brown taken on October 22, 2015 in Case No: 2013-CA-006279 pages 40-49, page 81, pages 156-

[18] See Deposition Transcript of Mathew Brown taken by Florida Attorney General's Office on October 22, 2013 pages 20-21

[19] See Deposition Transcript of Matthew Brown Vol. I and Vol. II taken on October 22, 2015 in Case No: 2013-CA-002679 page 160

[20] See Deposition Transcript of Matthew Brown Vol. I and Vol. II taken on October 22, 2015 in Case No: 2013-CA-002679

after the discovery of the water intrusion issues and the repairs that are illustrated in the photographs). A sampling of his testimony includes the following:

A: Prior to me going up to Willowbrook, prior to me taking over that role as regional construction manager, I was sent there by the director of construction of Fort Myers, Sean McNelis, with my counter-part Sean Skinner, to evaluate some of the water intrusion issues that had occurred in Willowbrook due to the decks.

Q: and that was the beginning part of 2006?

A.: I would say yes, the best I can remember, yes.

Q: and how many decks were experiencing water intrusion at that point?
A: I don't know an exact number. I can tell you for the most part most of them.

See Deposition Transcript of Michael Brown dated October 22, 2015 Page 27 Line 21-25 and Page 28; Line 3-9.

Q. Ok. And of these 20 buildings, was the third floor deck or the second floor deck or both that were experiencing water instruction?
A. Both.
Q. and when you first went out there to evaluate the decks what was your conclusion of why the experiencing water intrusion?
A. multiple reasons; some of them due to design, some of them due to installation of products, some of due to the products themselves.

See Deposition Transcript of Michael Brown dated October 22, 2015 Page 29; Line 15-25.

Q. In event, they did not follow your recommendation about a roof overhang?
A. Correct.

See Deposition Transcript of Michael Brown dated October 22, 2015 Page 32; Line 14-16.

In specifically referencing the repairs to the balcony deck system (multiple balcony decks for each unit) Matthew Brown testified follows:

THE WITNESS: .....to be honest with you, I don't think there was a time in Willowbrook where there was not a leaking deck being remediated at some point. The level of remediation differed. Some of them were catching it early and just trying to remediate and fix the issue that was causing the water intrusion. Some of it was more extensive, you know, putting up a zip wall and ripping off the entire back deck and replacing it. That I was not there for.

In specifically referencing the repairs that took place in 2006 and 2007 Matthew Brown testified follows:

Q. And were these pavers to be used only for the decks?
I mean, were the pavers designed to be placed over a peel – and- stick membrane?
A. They're remodeling pavers, they are made to be – they're designed to go over different surfaces. They don't specify which surfaces they should be placed over.
Q. Should they be placed over peel –and – stick membrane?
A. My opinion was no.
Q. In fact several times you ignored your recommendation for project fixes even though you were a certified general contractor?
A. correct.

See Deposition Transcript of Michael Brown dated October 22, 2105,

In specifically referencing the new construction after the repairs of 2006-2007 Matthew Brown testified follows:

Q. Then when you and Danny Vinson started doing new construction out at Willowbrook, what was the plan regarding the decks? Were you also going to use tile, or was that when you described it got changed to peel-and –stick?
A. I don't recall the exact date, but during that time period, yes, there was a transition made from the tile to the peel-and stick and a paver application.
Q. So when you and Danny Vinson got back, you guys went back to using tile. I'm assuming at some point there became issues with the tile starting to leak on those decks?
A. Correct.
Q. How long after an issue arose with how the tile was being used to waterproof the decks, after you and Danny Vinson were dual project managers?
A. When I got up there, Danny had already been up there and they were beginning to experience water intrusion at the deck. It was not determined that it was specifically related to the tile or not, but the issue was still there though. At the time we switched from the crack suppression and the tile to a peel-and-stick with thin inch and three quarters pavers on top of the peel and stick.
Q. Was that a decision that you and Danny Vinson made, or was that a decision that came from the director of purchasing, to switch to the peel and stick material?
A. Chad is the one who made that decision. Danny and I made the recommendation to have the deck hot mopped with a modified membrane, for there to be a pan for the sliding glass door that was to be supplied by the roofer, some additional flashing protections put in at the knee walls and columns, as well as a modified membrane on the knee wall and column caps.

See Deposition Transcript of Michael Brown dated October 22, 2105, page 51-52

Q. Just in this deposition you pointed out the Spruce v. Southern Yellow Pine issue the fact that you disagreed with peel and stick and a whole host of other issues. Did you also recommend a higher grade of paint and caulk to be applied?
A. I did.

Q. And they did not take you up on that recommendation either?
A. No they did not.
Q. In fact the peel and stick was such a big issue that you removed your license being applied to that or as the qualifier? Is that correct?
A. That was part of the reason, yes.
Q. What were the other parts of the reason?
A. Some of the things we just discussed.

See Deposition Transcript of Michael Brown dated October 22, 2105,

From his sworn testimony before the Attorney General in the State of Florida Mr. Brown testified in part as follows:

Q. So, every building you checked had the Spruce?
A. Yes.

See Deposition Transcript of Michael Brown dated October 13, 2013, Page 22-23;

Q. and when you say that column could implode you're talking about the column made out of Spruce?
A. Yes. The column made out of spruce would implode the building . . .

See Deposition Transcript of Michael Brown dated October 13, 2013, Page 23; Line; 19-23

Q. Did you observe some decks that were pitched towards the house?
A. Yes.
Q. Do you recall approximately how many of those were pitched towards the house?
A. more than half a dozen.

See Deposition Transcript of Michael Brown dated October 13, 2013, Page 63; Line 25; Page 64; Line 1-5

Mr. Mathew Brown testified that he frequently expressed his concerns to Tom Schramski, the regional construction manager, Chris Ketzler, director of construction, Jeff Logsdon, division president for KB HOME TAMPA and Chad Burlingame, director of purchasing.[21] With no movement in adopting his recommendations he pulled his license from the job due to fears for unit owner safety and long term problems and thereby let KB HOMES how serious a problem they had on their hands. None of this was told to URBANIAKS.

[21] See deposition of Mathew brown taken October 22, 2015 page 52-53

The Chapter 553 and Chapter 558 process described above and documented in the Rimkus photographs, was complete when KB HOMES FT MYERS sold the condominium unit to the URBANIAKS however the work was doomed to lead to more water intrusion problems. Additionally the new construction, including URBANIAKS building, began to evidence water intrusion. KB HOMES failed to disclose the construction defects, the water intrusion and other structural deficiencies to the URBANIAKS[22]; as evidenced in the Southeast Framing Responses to Interrogatories[23], and the incorporated Rimkus report. If the URBANIAKS had been apprised of these defects and deficiencies and the scope of the problem they would not have signed the Contract.[24] If at anytime between signing the Contract and the closing they had been advised of these facts they would have backed out of the closing. [25] If any time after the closing they had been advised of these issues they would have demanded that the Contract be rescinded before any changes to the unit had been made.[26]

In fact Mr. Urbaniak testified that after about a year of leaks and no successful repairs from KB HOMES through the warranty process they investigated the source of the leaks and discovered exactly what Mr. Mathew Brown had warned KB HOMES would happen if they didn't follow his recommendations, a balcony system that leaked from the top down.

> Q. Okay. And with respect to concealment of information, can you tell me what you know of that relates to that. For example, the balconies were a problem, right?
> A. Yeah. After we figured there was water intrusion, again, having a little bit of a background of construction, I went to the top balcony, pulled up a couple of the pavers and noticed that there was rolled roofing on top of plywood that went straight to the wall, and that's all there was. We couldn't figure out where the water was coming from. Because it wasn't coming at that level, it was coming out the second level. And that's when I went up there and I knew at that point that that's where the water was coming from and there was an issue.
> Q. Okay.
> A. It took less than a year for that -- it was
> leaking while they were building it. And then, obviously, it was leaking while she was in it. And then it took a year before it really came through, when that first phone call that we were having some issues. And that's when I had gone down there to look at it and I knew that that thing wasn't put together correctly.

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[22] See sworn Affidavits of Mike Urbaniak and Sally Urbaniak filed with the Court on February 3, 2017.
[23] See Interrogatories with incorporated photographs in Request to Produce filed by Southeast Framing, Inc., Case No: 2013-CA-002679.
[24] See sworn Affidavits of Mike Urbaniak and Sally Urbaniak filed with the Court on February 3, 2017.
[25] See sworn Affidavits of Mike Urbaniak and Sally Urbaniak filed with the Court on February 3, 2017.
[26] See sworn Affidavits of Mike Urbaniak and Sally Urbaniak filed with the Court on February 3, 2017.

Deposition Testimony of Mike Urbaniak pg 38-39

After the 2006-2007 558 repairs were affected, KB HOMES continued to receive warranty claims from the 279 units within the Willowbrook Condominiums, placing them on notice that the project as a whole was suffering from severe water instruction, structural defects, stucco delaminating, the collapsing of balconies and other extremely serious and dangerous problems. URBANIAKS made multiple warranty claims to KB Home however KB Home with this wealth of information continued the fraud by not addressing the underlying problems that were causing the issues within the Willowbrook Condominiums and within the URBANIAKS ' unit and failing to tell the URBANIAKS that the project as a whole had systemic problems, severe structural defects, etc. Prior to signing the closing the URBANIAKS asked KB HOMES if the unit or the project was having any problems (they saw a water stain in the garage) and the response from the KB HOMES TAMPA sale representative was that there were some "minor issues" limited to "corner units" in the project that had been completely repaired but that his unit had been water tested and was completely fine.[27] The history of major problems and repairs in 2006-2007 was completely left out, the systemic and wide spread warranty claims from essentially day on until and through 2010 was omitted, the fact that they had structural wood problems that had to be repaired was omitted, the fact that they had been warned by their own qualifiying agent that their repairs were not going to stop the water intrusion problems, that the new construction after the 2006-2007 repairs also suffered from the same problems, and that the URBANIAKs' own unit had begun to show signs of those problems that they had painted over was omitted, that the roofing sub-contractor had warned them that the construction specifications demanded by KB HOMES would lead to water intrusion was omitted and the fact that the water intrusion was wide spread and systemic and had never been properly repaired was mis-represented as a "minor problem" for a few corner units that had been taken care of. Yet, on December 29, 2011 KB Home placed its sub-contractors on notice pursuant to Chapter 553 and 558 Florida Statutes of these structural deficiencies[28]. Less than two years later they had sued them all for these issues they hid from URBANIAKS and the Florida Justice Department launched an investigation. At some point between this notice and the 2006 notices KB HOME

[27] See deposition transcript of Mike Urbaniak page 23 line 23-25 and page 24 line 1-25 and page 25 line 1.

[28] See Affidavit of Mr. Andrew Moore dated, June 13, 2016, which includes a sample of correspondence from KB HOME counsel to one its sub-contractors placing them on notice of structural defects and deficiencies.

notice that the Confidential Mediated Settlement Agreement has been filed under seal in case number 2015-CA-003841[29] In that case, KB HOMES have filed suit against all its sub-contractors who have in turn filed third party lawsuits against their sub-contractors, a case styled KB Home Tampa LLC, et al v. AND Plus Construction Services, Inc. et al, Case No: 2013-CA-002679.[30] (hereinafter referred to "KB Home Construction Defects Lawsuit").

There is no dispute in the record, as set forth in the "KB Home Construction Defects Lawsuit" that KB HOME TAMPA has asserted in that lawsuit that it was the developer of the underlying project.[31] Moreover, there is no dispute in the record that KB HOME TAMPA LLC, KB HOME FORT MYERS, LLC AND KB HOME ORLANDO LLC all served as General Contractors on the Willowbrook Condominium project[32]. It is further without dispute until after turnover KB HOME TAMPA maintained control of the association and maintenance and repair of the association[33]. It is also without dispute that during this period of developer control the Willowbrook Condominiums suffered from severe and significant construction and structural deficiencies[34] and related structural collapses and systemic and project wide water intrusion.

The URBANIAKS have suffered individual damages[35]. Those damages are documented within their deposition transcripts and interrogatory responses filed in opposition to this Motion for Partial Summary Judgment. Additionally URBANIAKS have been informed by the Willowbrook Association, that they will be responsible for special assessments that the Willowbrook Association is assessing for continued repair costs to the building(s) and related damages.[36]

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[29] See defendant's Southeast Framing, Inc.'s Motion to File Under Seal Confidential Mediated Settlement Agreement dated October 9, 2015.

[30] See a copy of Third Amended Complaint filed in KB Home Tampa LLC, et al v. AND Plus Construction Services, Inc. et al, Case No: 2013-CA-002679, and filed in the this case in opposition to the Motion for Summary Judgment with a request that the court take judicial notice of those pleadings and which will be provided to the Court at the hearing.

[31] See ¶ 44, page 14 of the "KB Home Construction Defects Lawsuit"

[32] See ¶ 44, page 14 of KB Home Construction Defects Lawsuit.

[33] See ¶ 46, page 14 of KB Home Construction Defects Lawsuit.

[34] See ¶ 48, page 15 of KB Home Construction Defects Lawsuit.

[35] See damages outlined in the Deposition Transcripts of Mike Urbaniak and Sally Urbaniak filed with the Court on February 3, 2017, filed in opposition to Defendants' Partial Motion for Summary Judgment.

[36] See sworn Affidavits of Mike Urbaniak and Sally Urbaniak filed with the Court on February 3, 2017.

I. LEGAL STANDARD IN EVALUATING MOTIONS FOR SUMMARY JUDGMENT

In evaluating and analyzing KB HOMES' Motion for Partial Summary Judgment, the Court is required to perform a "two-pronged analysis." As stated by the Second District Court of Appeal and *Poe v. IMC Phosphates, MP, Inc.*, 885 So.2d 397, 400-401 (Fla. 2nd DCA 2004). The Court specifically set forth that two-pronged analysis as follows:

> Review of a summary judgment is de novo, requiring a two-pronged analysis. *Volusia County v. Aberdeen at Ormond Beach, LP*, 760 So.2d 126, 130 (Fla. 2000). First, a summary judgment is proper only if there is no genuine issue of material fact, viewing every possible inference in favor of the party against whom summary judgment has been entered. *Huntington National Bank v. Merrill Lynch Credit Corp.*, 770 So.2d 396, 398 (Fla. 2nd DCA 2000). Second, if there is no genuine issue of material fact, a summary judgment is proper only if the moving party is entitled to a judgment as a matter of law.

See also *Goeree v. Mirtsou*, 923 So.2d 610, 611 (Fla. 2nd DCA 2006), *Marielia v. Yanchuck*, 966 So.2d 30, 33 (Fla. 2nd DCA 2007) and *Florida Dept. of Financial Services v. MJ Versaggi Trust*, 952 So.2d 583, 585-586 (Fla. 2nd DCA 2007).

With regard to the first prong, the issues of material fact are determined by the pleadings, deposition transcripts and exhibits attached thereto filed in the Court record, answers to interrogatories filed in the Court record and admissions and responses thereto, as well as any and all affidavits filed in support or opposition of the Motion for Summary Judgment. It is in reviewing those documents that the Court must determine if there is a genuine issue of material fact. The Florida Supreme Court in *Markowitz v. Helen Homes of Kendall Corporation*, 826 So.2d 256, 258-259 (Fla. 2002), specifically stated the following:

> A Trial Court may grant a Motion for Summary Judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the Affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" Fla.R.Civ.P. 1.510; citing *Fisel v. Wynns*, 667 So.2d 761, 764 (Fla. 1996). When reviewing the entry of summary judgment, "an Appellate Court must examine the record and any supporting affidavits in the light most favorable to the non-moving party" *Turner v. PCR, Inc.*, 754 So.2d 683, 684 (Fla. 2000).

Moreover, during in the first prong of this evaluation, the evidence in the form of the pleadings, deposition transcripts, interrogatory answers, response to request for admissions, etc.,

must be so overwhelming and strong that it must even overcome all reasonable inferences that could potentially be drawn from that evidence. All of those pleadings, deposition transcripts, exhibits and interrogatory answers, admission responses and affidavits must all be reviewed by the Court in such a fashion that they are read in a light most favorable to the non-moving party to the summary judgment motion. In *Estate of Githers v. Bon-Secours-Maria Manor Nursing Care Center*, 928 So.2d 1272, 1274 (Fla 2nd DCA 2006) the court reasoned as follows:

> A movant is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). In determining whether a genuine issue of material fact exists, this court must view "every possible inference in favor of the party against whom summary judgment has been entered." *Maynard,* 861 So.2d at 1206. It is the movant's burden to prove the nonexistence of genuine issues of material fact, "and the burden of proving the existence of such issues is not shifted to the opposing party until the movant has successfully met his burden." *Nard, Inc. v. DeVito Contracting & Supply, Inc.*, 769 So.2d 1138, 1140 (Fla. 2d DCA 2000) (quoting *Holl v. Talcott,* 191 So.2d 40, 44 (Fla.1966)). We recognized in *Nard* that "the merest possibility of the existence of a genuine issue of material fact precludes the entry of final summary judgment." *Id.* Then, "if there is no genuine issue of material fact, a summary judgment is proper only if the moving party is entitled to a judgment as a matter of law." *Maynard,* 861 So.2d at 1206.

In *Maldonado v. Publix Supermarkets*, 939 So.2d 290, 293 (Fla. 4th DCA 2006), the Court specifically stated as follows:

> To obtain a final summary judgment, the moving party must conclusively demonstrate that no genuine issue of material fact exists and that the moving party is entitled to a judgment as a matter of law. Fla.R.Civ.P. 1.510; *Hall v. Talcott*, 191 So.2d 40, 43 (Fla. 1996). "The proof must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party."

Florida Rule of Civil Procedure 1.510(c) states that summary judgment is proper where the materials admissible in evidence on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." The movant carries the initial burden of "demonstrating the nonexistence of any genuine issue of material fact." *Corbitt v. Kuruvilla*, 745 So.2d 545, 548 (Fla. 4th DCA 1999) (citations omitted). "If this burden is met, the opposing party must come forward with counter evidence sufficient to reveal a genuine issue." Id. In other words, a party cannot forestall summary judgment by merely raising "paper issues" which do not demonstrate the existence of a material factual

dispute. *See* Williams v. Garden City Claims, Inc.,796 So.2d 586, 588 (Fla. 3d DCA 2001) (Citations omitted). It is not enough for the opposing party merely to assert that an issue does exist. The non-moving party must present record evidence, which would be admissible at trial to overcome the burden of demonstrating a genuine issue of material fact. Harvey Building, Inc. v. Haley, 175 So.2d 780 (Fla. 1965).

Therefore, the burden set forth in Rule 1.510 of the Florida Rules of Civil Procedure is on the moving party to actually prove that the non-moving party cannot prevail in the case. It is not sufficient to simply establish that there is no evidence in the record. See Shafran v. Parrish, 787 So.2d 177, 179 (Fla. 2nd DCA 2001), wherein the Second District Court of Appeal specifically ruled as follows:

> Fla.R.Civ.P. 1.510 authorizes a summary judgment in those instances where the record demonstrates both the absence of a genuine issue of material fact and the moving party is entitlement to judgment as a matter of law. When affidavits are filed to establish the factual basis of the motion, they must be made on personal knowledge, demonstrate the affiance competency to testify, and be otherwise admissible in evidence. As the moving parties, the appellee's had to demonstrate conclusively that they non-moving party, Mr. Shafran, could not prevail. Citing Tampa Port Authority v. NES International, Inc., 756 So.2d 241 (Fla. 2nd DCA 2000). Valk v. JEM Distribution of Tampa Bay, Inc., 700 So.2d 416, 419 (Fla. 2nd DCA 1997).

Finally, the Court is not permitted, in evaluating the evidence in front of it, to weigh any of the evidence in reaching a summary judgment decision (in fact the evidence must be read in such a fashion to be read in the light most favorable to the nonmoving party). See Davis v. Hathaway, 408 So.2d 688, 689 (Fla. 2nd DCA 1982). Wherein the Second District Court of Appeal stated as follows:

> Summary Judgment may be granted when there is no material issue of disputed fact. Fla.R.Civ.P. 1.510, however, the Court may not weigh the evidence to reach a summary judgment when there are facts in dispute. Citing, Morgan v. Growers Marketing Services, Inc., 370 So.2d 74 (Fla. 2nd DCA 1979); and Ritchey v. Merrill Lynch Pierce, Fenner and Smith, Inc., 361 So.2d 438 (Fla. 2nd DCA 1978).
>
> See also, Pita v. State Street Bank and Trust Company, 666 So.2d 268 (Fla. 3rd DCA 1996); and Budweiser-Busch Distributing Company, Inc. v. Keystone Lines, 607 So.2d 503, 505 (Fla. 1st DCA 1992).

II. FRAUD IN THE INDUCEMENT

Defendants' assert that the Fraud in the inducement and the fraud claims should be stricken pursuant to Florida law. However, under Florida law fraud in the inducement can be established with the following elements: (1) a misrepresentation of material facts: (2) that the representor knew or should have known of the statements of falsity; (3) that the representor intended that the representation would induce and other to rely on; and (4) the plaintiff suffered injury and justifiable reliance on the representation. See *Output, Inc., v. Danka Business Systems, Inc.*, 991 So. 2d. 941 (Fla. 4th DCA 2008) citing *Hillcrest Pacific Corp. v. Yamamura*, 272 So. 2d. 1053 (Fla. 4th DCA 1999).Those misrepresentations can include omissions. See specifically *Allen v. Stephan Co.*, 784 So. 2d. 456, 457 (Fla. 4th DCA 2000). When the fraud "relates to the performance of the contract the economic loss doctrine will limit the parties to their contractual remedies" however, when the fraud occurs in connection with the misrepresentations statements or omissions which caused the complaining party to enter into a transaction then such fraud is the inducement and survives as an independent tort". See also Susan *Fixel, Inc. v. Rosenthal and Rosenthal, Inc.*, 842 So. 2d. 204, 209 (Fla. 3rd DCA 2003) ("if the fraud occurs in connection with the misrepresentations, statements or **omissions**, which cause a party to enter into a transaction, then such fraud is fraud in the inducement and survives as an independent tort." See *also Ladner v. Am South Bank*, 32 So. 3d. 99 (Fla. 2nd DCA 2009) (adopting and quoting in language and *Output, Inc., v. Danka Business Systems, Inc.*, 991 So. 2d. 941, 944 (Fla. 4th DCA 2008) (fraud occurs . . . in connection with misrepresentation, statements or **omissions**. . .).

Additionally in *Tiara Condominium Association v Marsh*, USA, Inc. 991 F.Supp.2d 1271, the court in a post *Tiara Condo Ass'n Inc. v Marsh* 110 So.3d 399, 407 (Fla. 2013) world (a case that severely limited the economic loss rule), found that torts "...based on the breach of duties which are not contractually grounded...fall outside reach of the independent tort rule...". The Second District Court of Appeal held in *United States Fire Insurance Company v. ADT Security Service, Inc.*, 134 So.3d 477 (Fla 2nd DCA 2014) that acts which are independent of the contract are not barred by the economic loss rule or independent tort rule:

> Here, the trial court relied on the contract rue that ADT was entitled to a judgment on the pleadings. This was error because the contractual provisions would not bar a tort claim for acts which were independent of the contract. (cites omitted) (**recognizing that liquidated damages provisions in contract would not bar a claim for fraud in the**

inducement.). Accordingly, we hold that USFI alleged a legal sufficient cause of action which was independent of any breach of contract and the trial court erred by granting judgment on the pleadings... (Emphasis added)

URBANIAKS have filed, in opposition to the motion for summary judgment, evidence in the form of sworn testimony of Mr. Mathew Brown. [37]. Clearly it establishes that before the Contract was entered all three defendants were aware that the Willowbrook project suffered from severe water intrusion, had severe structural defects, and needed to be repaired and was in fact being improperly repaired which would lead to more property damage to the URBANIAKS' building and their unit. Yet none of that information was conveyed to the URBANIAKS before they signed their Contract, before their closing or anytime thereafter. URBANIAKS have filed, in opposition to the motion for summary judgment, evidence in the form of Interrogatory responses filed within the "KB Home Construction Defects Lawsuit", which incorporated and attached production responses, containing experts' reports which visually through photographs document the sheer scope of those repairs. Those photographs were taken on December 6, 2006 before URBANIAKS signed their Contract. There are clearly material issues of fact that evidence that the defendants were aware of these problems before the URBANIAKS signed the Contract. The failure to advise the URBANIAKS of these problems was clearly intended to have them enter into a contractual relationship they would not have entered into but for the fraud[38] . At a minimum it raises issue of fact that cannot be resolved within the confines of a Summary judgment Hearing and/or Motion.

As set forth in *Johnson v. Davis*, 480 So. 2d. 625, 629 (Fla. 1985) and set forth in *Bisque Associates of Florida, Inc. v. Towers Quayside No. 2 Condominium Association, Inc.*, 639 So. 2d 997 (Fla. 3rd DCA 1994) "Florida law requires the seller of the home to disclose those facts which materially affect the value of the property, which are not readily observable and are not known to the buyer. *Johnson v. Davis*, 480 So.2d. 625, 629 (Fla. 1985) this duty is equally applicable to all forms of real property **new and used**." (Emphasis added). The defendants in this case had a duty to disclose those facts materially affecting the value of the property. In this case that included the condominium unit and the potential liability associated with owning that unit as a member of the condominium association, therefore the property, Willowbrook Condominiums,

[37] See Deposition Transcripts of Matthew Brown taken in Case No: 2013-CA-002679 on October 22, 2015 as well as the Office of Attorney General Anti-Trust Division taken on October 22, 2013

[38] See Affidavit of Mike Urbaniak and Sally Urbaniak filed with the Court on February 3, 2017.

as whole. The testimony of Mr. Mathew Brown clearly establishes that the defendants were well aware that there was serious structural and construction defect related problems with condominium project and with the building the URBANIAKS' unit was located in, and which would not have readily observable to the URBANIAKS, which was not known to the URBANIAKS and yet defendants failed to disclose these facts to the URBANIAKS and therefore pursuant to *Johnson v. Davis* and its prodigy and *Output, Inc., v. Danka Business Systems, Inc.*, 991 So. 2d. 941 (Fla. 4th DCA 2008) citing *Hillcrest Pacific Corp. v. Yamamura*, 272 So.2d. 1053 (Fla. 4th DCA 1999); *Allen v. Stephan Co.,* 784 So.2d. 456, 457 (Fla. 4th DCA 2000) and *Fixel, Inc. v. Rosenthal and Rosenthal, Inc.*, 842 So. 2d. 204, 209 (Fla. 3rd DCA 2003); and *Ladner v. Am South Bank*, 32 So. 3d. 99 (Fla. 2nd DCA 2009) are liable to the URBANIAKS for fraud. SALLY URBANIAK testified in lay terms as follows

> Q. Okay. And what about with respect to the fraud, what in addition are you seeking?
> A. Well, I don't know legally how it works... I mean, they knew -- KB Home knew from whistle-blowers that have come out, they're all public record, that back in 2007, they knew that these were dangerous -- or structurally defective homes. But yet we bought ours in 2010. Nobody bothered to tell us or even tell us the severity or they were having any issues with any of the units, or we would have made an educated decision.....Everybody else in the state of Florida, when they sell a home, has to disclose. I don't know why KB Home -- to me, they sold us a property that they knew had issues. The majority of their -- come to find out, the majority of that community had issues..... -- I mean, we almost got divorced, to be honest with you, because I blamed him for buying this.
>
> Deposition Transcript of SALLY URBANIAK pg 30-31

SALLY URBANIAK was correct "Everyone...in the State of Florida..." does need to disclose those facts which materially affect the value of the property. And that does include KB HOMES. The systemic nature of the long history of water intrusion and balcony collapses and repeated ineffective repairs and warnings by general contractors and sub-contractors all materially affect the value of the property because URBANIAKS are responsible, as association members, for their unit and all common and limited common element repairs and maintenance etc. While KB HOMES may disagree, URBANIAKS position is that they weren't telling people the truth because it would have killed condominium sales. KB HOMES, as experienced builders, knew that economic truth as well and chose to lie, mis-represent and conceal and that is actionable fraud.

III. CONTRACTUAL LIMITATIONS

The defendants assert that the contract provides contractual limitations on damages that should bar all damages other than those allowed in the written warranty. However, the contract limited in the scope to the parties to the contract, in this case the seller KB HOME FORT MYERS and the URBANIAKS. Those limitations should not apply to the damages sought against KB HOME TAMPA and KB HOME ORLANDO as the general contractors of the project or as potential agents of KB HOME FORT MYERS applying warranty work, repair work, etc. Those Defendants were not parties to the contract and they have independent statutorily created duties.

Moreover, because the agreement was procured through fraud, all of the terms of the agreement limiting damages are unenforceable. Whether or not that occurred and whether or not that occurred as a result of fraud is a question of fact for the jury to decide. "The law in Florida is well settled that a party may not contractually thwart liability for its own fraud. Fraud is an intention and thus not subject to the cathartic effect of the exculplutory clauses found in the contract" citing *Burton v. Linotyp, Co.*, 556 So.2d. 1126, 1127 (Fla. 3rd DCA 1989). "Though a party may waive any right to which he is legally entitled, whether secured by contract, conferred by statute or guaranteed by constitution, such a proposition does not apply where there is an allegation of fraud." *D&M Juniper, Inc. v. Friedopfer*, 853 So.2d. 485, 488, (Fla. 4th DCA 2003). Most importantly, "where there is fraudulent inducement of a contract the fraudulent misrepresentation vitiates every part of the contract including any "as is" clause." See also *Ocenaic Villas, Inc. v. Godson*, 148 Fla. at 458, 4 So. 2d at 690 (holding fraudulent misrepresentation vitiates every part of the contract"; *Lower Fees, Inc., v. Bankrate, Inc.*, 74 So. 3d. 517, 520 (Fla., 4th DCA 2011) (holding that a fraudulent misrepresentation vitiates every part of the contract relying on *Oceanic Villa*).

URBANIAKS allege that the entire Contract was procured through KB Home fraudulent misrepresentation "omission" but for those omissions they would have never agreed to enter into the Contract. As such the limiting provisions found in the Contract which could have potentially limited the damages against KB HOMES FORT MYERS do not apply. Additionally the limiting

provisions do not relieve the defendants of the statutory warranty obligations under Chapter 718 FS, the liability under Chapter 553 and 558 FS and not does it relieve non-parties to the contract of their statutory duties.

Finally the limitations only provide limitations as to the warranty claim and is not specifically enough written to void damages against KB HOMES FT MYERS under the breach of Contract claims or claims created via duties independent of the contract, statutorily created duties.

IV. CHAPTER 558 AND NEGLIGENCE CLAIMS

Defendants' assert that in the statutorily created Chapter 558 claims and the Negligence claims should be stricken pursuant to Florida law. That they are barred by the contractual claim, that a breach of contract cannot be the basis for a tort claim. However, this misstates the law; torts that are based upon independently created duties (via statute or common law) are not barred by either the Economic Loss Rule or the Independent Tort Rule, because they are based upon duties created independent of the Contract. They can in fact stand on their own; they don't require the duties created within the contract to survive.

In *Tiara Condominium Association v Marsh*, USA, Inc. 991 F.Supp.2d 1271, the court in a post *Tiara Condo Ass'n Inc. v Marsh* 110 So.3d 399, 407 (Fla. 2013) world, found that torts "...based on the breach of duties which are not contractually grounded...fall outside reach of the independent tort rule...". The Second District Court of Appeal held in *United States Fire Insurance Company v. ADT Security Service, Inc.,* 134 So.3d 477 (Fla 2nd DCA 2014) that acts which are independent of the contract are not barred by the economic loss rule or independent tort rule:

> Here, the trial court relied on the contract rue that ADT was entitled to a judgment on the pleadings. This was error because the contractual provisions would not bar a tort claim for acts which were independent of the contract. (cites omitted) (recognizing that liquidated damages provisions in contract would not bar a claim for fraud in the inducement.). Accordingly, we hold that USFI alleged a legal sufficient cause of action which was independent of any breach of contract and the trial court erred by granting judgment on the pleadings...

V. PERMANENT DIMINUTION IN VALUE AS AN OF DAMAGES

KB HOMES inserts in its Motion for Partial Summary Judgment the diminution of value associated with the damage to the condominium unit is not an element of damage that is recoverable in the State of Florida. However, not only is the diminution of value a proper measure of damage in the State of Florida, it is deemed an issue of fact to be determined by the jury and not a legal issue to be determined by the Court. In the case of *Bisque Associates of Florida, Inc. v. Towers Quayside No. 2 Condominium Association, Inc.*, 639 So.2d 997 (Fla. 3rd DCA 1994) the Court held that in the State of Florida, the law requires the seller of a home to disclose those fact materials affecting the value of the property, which are not readily observable but known to the seller, thereby creating the potential for a permanent impairment to the value of the property. In *Bisque* the court held a permanent diminution in the condominiums value are damages appropriately considered by the jury. In Bisque the Court specifically ruled as follows:

> Florida decisional has not explicitly addressed the question on whether the determination of permanent or temporary injury to real property is a matter of law to be resolved with the trial judge or of question fact to be presented to the jury. However, Court's of several other states have expressly held that whether an injury to real property is characterized as temporary or permanent is an issue of fact to be determined by the jury, if the pleadings permit. (Cites omitted). We follow this proposition.
>
> In the case at bar, plaintiffs plead and sought to establish a permanent impairment of market value because of their alleged legal obligation to disclose to potential purchasers the reason adverse plumbing history of the condominium unit. Florida law requires the seller of the home to disclose those facts materially affecting the value of the property which are not readily observable and are known to the buyer. Johnson v. Davis, 480 So. 2d. 625, 629 (Fla. 1985) this duty is equally applicable to all forms of real property, new and used.
>
> The plaintiffs proffer the testimony of Cheryl Kaufman, a real estate broker with experience marketing units in the same building as mixed units. She would have testified to her inability to sell the unit for market value after disclosure, because of the potential buyer's reluctance to pay full market price per unit whose plumbing had a repeated tendency to clog and overflow. The matter of qualifications on an expert witness falls within the sound discretion of the trial Court. (Cites omitted). However, the record reveals that the Court disallowed the plaintiff's witness testimony concerning diminution of value not because she was unqualified to testify, but rather because the Court had already decided that the physical injury to the property was not permanent in nature and thus

> concluded that the jury should not hear testimony regarding diminution in value.
>
> In all, there were 10 or more plumbing back-up events, and no evidence to suggest that the physical plumbing had been cured. In light of this tangible evidence relative the intangible but potentially permanent diminution of the condominium's value as a result, the trial judge was incorrect to exclude testimony relating to the permanence of the injury. The jury should hear the evidence and can accord whatever way to this evidence its sees fit.
>
> In view of the foregoing, a new trial on damages should be had so that a jury can decide the nature of the injury and accordingly, the measure and amount of damages due.

In the above-referenced matter there is evidence of a long series of water intrusion problems, structural deficiencies, attempts to repair, apparent failures to properly to repair the condominiums (2006-2007) , post 2006-2007 water intrusion problems on new construction and repaired construction, continued warranty claims, repair efforts and ultimately wholesale repairs which according to defendants' own experts in the companion case that they filed against their sub-contractors did not return the buildings to their original condition. All of this was well documented in the media and KB HOMES' own construction Manager Mr. Mathew Brown has testified both for the Florida Department of Justice and in the "KB Home Construction Defects Lawsuit", that design deficiencies (lack of a 3rd floor roof over the rear balconies[39], the use of wood framing on the rear balconies (not masonry block) in combination of the lack of proper repairs[40]), would continue to lead to future water intrusion issues and those deficiencies still exist in the property. Additionally the repairs evidenced by KB HOMES' own experts in "KB Home Construction Defects Lawsuit" evidence material changes were made to the condominium buildings and units[41] during the repairs forever altering the units and the buildings themselves (changes to the huri-bolt system inside the wall because the cost to tear out all the walls too expensive, the replacement of tile and pave balconies with painted stucco etc.). Therefore, the factual predict is laid for the jury to ascertain whether a permanent impairment to the

[39] Deposition Transcript of Matthew Brown taken on October 22, 2015 pages 29-32

[40] See Deposition Transcript of Matthew Brown Vol. I and Vol. II taken on October 22, 2015 in Case No: 2013-CA-002679 pages 25-35, pages 52-53 and 64 and the Sworn Statement of Matthew Brown take in the Florida Attorney General investigation on October 22, 2013 pages 63, 67 and the Interrogatory responses within incorporated production response and photographs dated December 6, 2006 filed by Southeast Framing, Inc., in case number 2013-CA-002679.

[41] See Deposition Transcripts of Plaintiffs' expert Mr. Miller, P.E. and Gary Keene.

URBANIAKS' unit occurred. In fact it was unfeasible on an economic basis to repair the buildings pursuant to the plans and specifications. Therefore given the continued long term history associated with the units, associated with construction defects, repairs, failure to property repairs, repeated repairs, etc., and the fact that the condominiums were never and can never be returned and restored to their original condition, the issue of whether or not a permanent diminution in value as set forth in case law cited above is a proper measure of damage.

CONCLUSION

KB HOMES Motion for Partial Summary Judgment should be denied on numerous grounds including the following: (1) only one of the three Defendants signed the contract therefore the legal arguments don't apply to the remaining two defendants; (2) even the contracting defendant had independently created statutory and common law legal duties apart from the contract; (3) there are significant material facts which support the elements of each of the causes of action pled by URBANIAKS; (4) Judge Smith is handling 5 companion cases which are factually similar and he has already denied this identical Motion for Partial Summary Judgment in Case No. 2013-CA-006328; (5) URBANIAKS condominium was materially changed during the repairs; (6) there are building(s) that still are unfinished and URBANIAKS will be financially responsible as members of the association for those damages; and (7) the fraud invalidates the contractual limitations and attempts by the Defendants to avoid the Rescission Count.

As set in more detail above and pursuant to the evidence filed in the record there are issues of material fact which support all of the causes of action set forth in the URBANIAKS Amended Complaint. The performance of the Contract which caused the URBANIAKS to enter into the transaction to begin with. Moreover, while the Contract does contain some limiting provisions are voided due to the fraud and do not apply to the statutory duties or do they apply to defendants not party to the Contract finally because the defendants where developers and general contractors they have independently created statutory duties. Therefore, pursuant to the case law cited above *Poe v. IMC Phosphates, MP, Inc.*, 885 So.2d 397, 400-401 (Fla. 2nd DCA 2004), *Volusia County v. Aberdeen at Ormond Beach, LP*, 760 So.2d 126, 130 (Fla. 2000), *Huntington National Bank v. Merrill Lynch Credit Corp.*, 770 So.2d 396, 398 (Fla. 2nd DCA 2000), *Goeree v. Mirtsou*, 923 So.2d 610, 611 (Fla. 2nd DCA 2006), *Marielia v. Yanchuck*, 966 So.2d 30, 33

(Fla. 2nd DCA 2007), *Florida Dept. of Financial Services v. MJ Versaggi Trust*, 952 So.2d 583, 585-586 (Fla. 2nd DCA 2007), *Markowitz v. Helen Homes of Kendall Corporation*, 826 So.2d 256, 258-259 (Fla. 2002), *Fisel v. Wynns*, 667 So.2d 761, 764 (Fla. 1996), *Turner v. PCR, Inc.*, 754 So.2d 683, 684 (Fla. 2000), *Estate of Githers v. Bon-Secours-Maria Manor Nursing Care Center*, 928 So.2d 1272, 1274 (Fla 2nd DCA 2006), *Maldonado v. Publix Supermarkets*, 939 So.2d 290, 293 (Fla. 4th DCA 2006), *Hall v. Talcott*, 191 So.2d 40, 43 (Fla. 1996), *Corbitt v. Kuruvilla*, 745 So.2d 545, 548 (Fla. 4th DCA 1999), *Williams v. Garden City Claims, Inc.*,796 So.2d 586, 588 (Fla. 3d DCA 2001), *Shafran v. Parrish*, 787 So.2d 177, 179 (Fla. 2nd DCA 2001), *Tampa Port Authority v. NES International, Inc.*, 756 So.2d 241 (Fla. 2nd DCA 2000), *Valk v. JEM Distribution of Tampa Bay, Inc.*, 700 So.2d 416, 419 (Fla. 2nd DCA 1997), *Davis v. Hathaway*, 408 So.2d 688, 689 (Fla. 2nd DCA 1982), *Morgan v. Growers Marketing Services, Inc.*, 370 So.2d 74 (Fla. 2nd DCA 1979), *Ritchey v. Merrill Lynch Pierce, Fenner and Smith, Inc.*, 361 So.2d 438 (Fla. 2nd DCA 1978), *Pita v. State Street Bank and Trust Company*, 666 So.2d 268 (Fla. 3rd DCA 1996), *Budweiser-Busch Distributing Company, Inc. v. Keystone Lines*, 607 So.2d 503, 505 (Fla. 1st DCA 1992), *Bisque Associates of Florida, Inc. v. Towers Quayside No. 2 Condominium Association, Inc.*, 639 So.2d 997 (Fla. 3rd DCA 1994), *Johnson v. Davis*, 480 So. 2d. 625, 629 (Fla. 1985), *Output, Inc., v. Danka Business Systems, Inc.*, 991 So. 2d. 941 (Fla. 4th DCA 2008) , *Hillcrest Pacific Corp. v. Yamamura*, 272 So.2d. 1053 (Fla. 4th DCA 1999), *Allen v. Stephan Co.*, 784 So. 2d. 456, 457 (Fla. 4th DCA 2000), *Fixel, Inc. v. Rosenthal and Rosenthal, Inc.*, 842 So. 2d. 204, 209 (Fla. 3rd DCA 2003), *Ladner v. Am South Bank*, 32 So. 3d. 99 (Fla. 2nd DCA 2009), *Output, Inc., v. Danka Business Systems, Inc.*, 991 So. 2d. 941, 944 (Fla. 4th DCA 2008), *Burton v. Linotyp, Co.*, 556 So.2d. 1126, 1127 (Fla. 3rd DCA 1989), D*&M Juniper, Inc. v. Friedopfer*, 853 So.2d. 45, 48, (Fla. 4th DCA 2003), *Oceanic Villas, Inc. v. Godson*, 148 Fla. at 458, 4 So. 2d at 690, *Lower Fees, Inc., v. Bankrate, Inc.*, 74 So. 3d. 517, 520 (Fla., 4th DCA 2011) , *Tiara Condominium Association v Marsh*, USA, Inc. 991 F.Supp.2d 1271, and *United States Fire Insurance Company v. ADT Security Service, Inc.*, 134 So.3d 477 (Fla 2nd DCA 2014) the Court should deny defendants KB HOME TAMPA LLC, KB HOME FORT MYERS LLC, and KB HOME ORLANDO LLC'S Motion for Partial Summary Judgment.

Wherefore, Plaintiffs MIKE URBANIAK and SALLY URBANIAK pray this honorable Court deny Defendants KB HOME TAMPA LLC, KB HOME FORT MYERS LLC, and KB

HOME ORLANDO LLC'S Motion for Partial Summary Judgment and for such other relief that this Court deems just and equitable in the premises.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon Paul J. Ullom, Esq., pullom@carltonfields.com Carlton Fields, P.A., Post Office Box 3239, Tampa, FL 33601-3239 via Florida E-Portal on this 8th day of February, 2017.

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