DISTRICT COURT, MESA COUNTY, COLORADO 125 N. Spruce Street, Grand Junction, CO 81501 Phone: (970) 257-3640	DATE FILED: October 9, 2023 3:17 PM FILING ID: 84F6B432A9960 CASE NUMBER: 2022CV30210
PLAINTIFFS: JOSEPH ARTHUR RYAN, an individual, and **BARBARA ANN RYAN**, an individual v. **DEFENDANTS: CHRONOS HOMES, LLC**, a Colorado limited liability company and **CODY J. DAVIS,** an individual	<COURT USE ONLY>
*Attorneys for Plaintiff*s: Coleman & Quigley, LLC Joseph Coleman #6856 Isaiah Quigley #46621 Stuart R. Foster #54092 2454 Patterson Road, Suite 210 Grand Junction, CO 81505 Phone: (970) 242-3311 Email: Joe@cqlawfirm.net; Isaiah@cqlawfirm.net; Stuart@cqlawfirm.net	Case No.: 2022CV30210 Division: 12
PLAINTIFFS' RESPONSE IN OPPOSITION TO CHRONOS BUILDERS, LLC'S AND CODY DAVIS' MOTION FOR PARTIAL SUMMARY JUDGMENT	

Plaintiff, by and through counsel of record, Coleman & Quigley, LLC, respectfully files this Response in Opposition to Chronos Builders, LLC's ("Chronos") and Cody Davis's Motion for Partial Summary Judgment. In support thereof, Plaintiffs state as follows:

I. INTRODUCTION.

In her late 70s, Ms. Ryan had no clue that the dream home she and her now late husband were finally able to purchase was constructed on a foundation type that was knowingly and inherently prone to differential movement, heave and failure. This is something Mr. Davis absolutely knew but did not inform Ms. Ryan or her late husband of in the process of their purchase. Notably this condition is also prevalent in third party soils engineering documents, Defendants contracted to provide the buyers with, but did not.

What the Court cannot miss in this case is that issues and conditions which can and

should be disclosed that would otherwise have a material impact on the bargain and even the decision to purchase in the first place, must, in good conscience be disclosed. *Burman v. Richmond Homes Ltd.*, 821 P.2d 913, 918 (Colo. App. 1991); *see also Gattis v. McNutt (In re Estate of Gattis)*, 318 P.3d 549, 554-55 (Colo. App. 2013). n the instance where such disclosure is not made there is no mere mistake. Instead, the non-discloser harbors keen knowledge that if complete and unfettered disclosure was made, it would adversely impact the sale.

The Court should not permit an innocent purchaser to be harmed because of the disparate bargaining position they were placed in due entirely to a lack of key knowledge only the seller possesses. Very simply, if it would affect the bargaining position of the buyer, it is decidedly something that should be disclosed.

In this case there is zero doubt that Mr. Davis elected to construct this home on what is referred to as a "shallow foundation." He made this election based upon knowledge of the attendant risks associated with the same. Risks that were identified to him before he broke ground. Indeed, in early phased geotechnical reporting, Huddleston Berry stated the following statement of risk:

> *Shallow foundations will not provide as much protection against heave related movements; however, properly constructed they can help to reduce the risk of excessive differential movements.*

See Def's Ex. C, p. 2. This statement assures that if a shallow foundation type is ultimately selected, there is risk – even if constructed properly. Simply stated, the shallow foundation merely reduces, but does not eliminate risk of excessive differential movement and does not provide as much protection against heave related movements. This report was not disclosed to the Plaintiff, period.

Ultimately, by plain virtue of selecting this shallow type of foundation, the home was knowingly predisposed to movements. And if not constructed correctly, which is also the case here, the results are dire.

Mr. Davis clearly possessed knowledge of these risks and he could have and should have disclosed them to the Plaintiff. Yet, he did not. Even when Defendants contracted to do so.

The prevailing question for the Court here is this: When purchasing a brand-new home, wouldn't you, as a presumptive buyer like to know that the general contractor specifically selected to build the home on a foundation which inherently carried risk of heave and differential movement?

This was a brand-new home being purchased. As such, there is no reason for one to doubt the construction. Particularly in the instance where the seller specifically encourages no home inspection to take place. *See* Addendum to Contract, (Pltf's Ex. 2). Clearly, the Ryans should have been able to know what the Seller knew and decide whether the known and inescapable risk was something they were able to take on. Accordingly, the motion should be denied.

II. STATEMENT OF UNDISPUTED FACTS.

1. In 2017, Ms. Ryan and her late husband Art, were in the market for a new home in Grand Junction after relocating from Elizabeth, Colorado. *See* Pltf's Ex. 1, ¶ 2.

2. After searching, the Ryans found a property they liked located at 1390 Horseshoe Drive, Fruita, Colorado 81521 (the "Residence"). *See id*. at ¶ 3.

3. In looking at the Residence, the Ryans understood it was newly built by Chronos. *See id*. at ¶ 4.

4. Not being from the area or having any necessary information on the subject, the Ryans were never informed and knew nothing about the native soils and the soils issues that were endemic to the areas where Chronos constructed the Residence. *See id*. at ¶ 5. The Ryans were also unaware of the foundation that was selected by Chronos and its inherent risks. *See id*.

5. After looking at the Residence, the Ryans decided to make Chronos an offer to purchase that was ultimately accepted. The parties then went under the contract on the Residence and the "Contract to Buy Real Estate (Residential)" was mutually executed on June 15, 2017 (the "Contract"). *See* Def's Ex. A.

6. During the contracting phase Chronos also presented the Ryans with an Addendum. *See* Pltf's Ex. 1 at ¶ 8; *see also* Pltf's Ex. 2.

7. The Addendum states as follows:

- Paragraph 5 of the Addendum provided as follows: "REFERENCE SECTION 10.2 'INSPECTION.' THIS HOME IS NEW CONSTRUCTION. BUYER RETAINS THE RIGHT TO INSPECT, HOWEVER, THE HOME HAS BEEN BUILT IN ACCORDANCE WITH MESA COUNTY CONSTRUCTION CODE. ONLY ITEMS COSMETIC OR MECHANICAL IN NATURE WILL BE ADDRESSED."

- Paragraph 11 provided as follows: "NO SELLERS PROPERTY DISCLOSURE WILL BE PROVIDED."

See Pltf's Ex. 2 at ¶¶ 5, 11.

8. Since it was a new home and based on the Addendum, no disclosures were made and no inspection was completed. *See* Pltf's Ex. 1 at ¶ 9. This was because the Addendum assured that none was needed due to the home being "new construction." *See id*.; *see also* Pltf's Ex. 2 at ¶¶ 5, 11.

9. Attendant with the Contract, the Ryans were provided with an engineering report from Capstone Enterprises West, LLC ("Capstone") via their realtor. *See* Def's Ex. D; *see also*

Pltf's Ex. 1 at ¶ 11.

10. The Ryans were not, however, provided with the Huddleston-Berry Engineering & Testing, LLC ("Huddleston-Berry") documents. *See* Pltf's Ex. 1 at ¶ 12; Def's Ex. C. This was despite Defendants affirmative obligation to disclose all documents, including engineering reports/inspection reports that were in their possession pursuant to Section 10.6.1.2 of the Contract. *See* Def's Ex. A at § 10.6.1.2.

11. At no time did anyone disclose the risky nature of the foundation selected. *See* Pltf's Ex. 1 at ¶ 13, 27.

12. The selection of a foundation with inherent risks would have completely altered the decisionmaking process and the purchase would have been unlikely – if not substantially impacted in price considerations. *See id*. at ¶¶ 14, 28. Lacking this crucial piece of information, the Ryans ultimately purchased the Residence. *See id*. at ¶ 15.

13. Then in 2019, the Ryans began witnessing signs of the certain defects that began presenting and persisting throughout the Residence: (a) Cracking in the walls, ceilings and concrete; (b) wall and floor movement and deflection; (c) heaving and lifting of the garage floor; and (d) detachment of the areas between the ceiling and walls. *See id*. at ¶ 16.

14. The Ryans then alerted Mr. Davis of the defects. *See id*. at ¶ 17. Mr. Davis then, personally, led an investigation into determining the damages and their cause. *See id*.

15. After the initial movements and damages came to light, there was continued efforts to conceal the known realities that the foundation selection was to blame. *See id*. at ¶ 18.

16. The problems persisted despite Mr. Davis making numerous representations that the minor cosmetic fixes that were performed and that more time was needed to understand the

issues while hiding the fact that the construction of the foundation was to blame. *See id*. at ¶¶ 18-28. Ultimately, Mr. Davis and Chronos stopped communication without any plans for fixing the issues that had been identified and despite our numerous, ongoing submittals for review, analysis and repair. *See id*. at ¶ 25.

17. The Ryans finally made a request for review, analysis, and plan for correction in January 2022. *See id*. at ¶ 25. Following this submittal, the Ryans were informed by a different Chronos representative that Chronos would no longer be willing to look into or address the matter as a result of Chronos' belief that the warranty had expired. *See id*. at ¶ 26.

18. It was only upon initiating the present lawsuit that the Ryans learned of the true source of the problem, which was the selection of a foundation with inherent risks given the soil composition of the area. *See id*. at ¶ 27. Had the Ryans known this critical fact this would have completely altered their decisionmaking process surrounding the purchase of the Residence in the first place, given that the Ryans would not have purchased the Residence at all or seriously negotiated a reduction in price had this information been disclosed to us. *See id*. at ¶ 28.

III. LEGAL STANDARD.

"Summary judgment is a drastic remedy that may only be granted when the moving party demonstrates to the court that he is entitled to judgment as a matter of law." *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1149 (Colo. 1997). When deciding summary judgment, the Court must be "stringent and give[] every benefit of all favorable inferences that may be drawn from the evidence to the non-moving party." *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993). "[T]he trial court may not assess the weight of the evidence or credibility of witnesses in determining a motion for summary judgment …." *Kaiser*

Foundation Health Plan of Colorado v. Sharp, 741 P.2d 714, 718 (Colo. 1987). Any doubt as to the existence of a question of triable fact must be resolved in favor of the nonmovant. *Greenwood Trust Co.*, 938 P.2d at 1149. "Summary judgment is to be granted only if there is a complete absence of any genuine issue of fact, and a litigant should not be denied a trial if there is the slightest doubt as to the facts." *Pioneer Sav. & Trust, F.A. v. Ben-Shoshan*, 826 P.2d 421, 425 (Colo. App. 1992).

IV. LEGAL DISCUSSION.

A. The Court Should Readily Dismiss the Partial Motion for Summary Judgment Based on This Supposed Failure to Plead a Misrepresentation Made by Chronos as This Should Have Been Brought as a C.R.C.P. 12(b)(5) Motion That is Now Barred.

Defendants' own summary of its Argument under Section I of the Motion makes clear that this this Motion is an untimely C.R.C.P. 12(b)(5) motion to dismiss hiding in a motion for summary judgment's clothing. But at any rate, Plaintiffs have properly pled its claims for fraudulent misrepresentation and negligent misrepresentation. Therefore, the Motion should be denied.

Defendants' summary for Section I of its Motion tees this problem up well:

> In this matter, review of Plaintiffs' Complaint shows that their claims of misrepresentations are not based on any specific statements or averments made by Chronos. Instead, their claims as plead (sic) are based on silence, which cannot be the basis for claims of misrepresentation.

Def's Mtn. for Summary Judgment, § 1, p. 4. The Motion then goes on to rely on Defendants belief that Plaintiffs failed to plead sufficient facts to support its request for dismissal. *See id*. at 4-6. Further adding to this oddity, Defendants even cite the specific offensive allegations in the Complaint that seemingly support this oddly styled argument for purposes of summary judgment. *See id*. at pp. 5-6, 10.

As the Court is well aware, there are marked differences between C.R.C.P. 12(b)(5) motions to dismiss and motions for summary judgment under C.R.C.P. 56. One notable difference is that C.R.C.P. 12(b)(5) motions to dismiss must be filed within 21 days of service of the complaint and summons. *See* C.R.C.P. 12(a)(1), (b).

Another difference are the legal standards. *Compare Burman*, 821 P.2d at 917 (providing summary judgment standard) *with Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011) (providing C.R.C.P. 12(b)(5) motion to dismiss standard). In that regard, "[t]he purpose of a motion to dismiss for failure to state a claim is to test the formal sufficiency of the statement of the claim for relief." *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992). C.R.C.P. 12(b)(5) motions to dismiss "are 'viewed with disfavor and are rarely granted under our 'notice pleadings.'" *Id*. at 1291 (Colo. 1992) (quoting *Davidson v. Dill*, 503 P.2d 157, 162 (Colo. 1972)). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id*. (internal quotations and citations omitted). Courts may not consider matters outside the allegations in the complaint when ruling on a motion to Rule 12(b)(5) motions to dismiss. *McDonald v. Lakewood Country Club*, 461 P.2d 437, 440 (Colo. 1969). Although, "[i]f a complaint is challenged for failure to state a claim, and 'matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . .'" *Dunlap*, 829 P.2d at 1290.

Conversely, summary judgment "is proper only when the pleadings, affidavits, depositions, or admissions show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Burman*, 821 P.2d at 917. The non-

moving party "is entitled to the benefit of all favorable inferences that may be drawn from the facts." *Id.* "However, a court may enter summary judgment if, in addition to the absence of any genuine factual issues, the law entitles one party or the other to a judgment in its favor." *Id.*

As noted *supra*, the fatal flaw with the Motion is that it relies exclusively on its argument that is solely grounded on the sufficiency of the pleading of the facts and claims as styled in the Complaint. *See generally* Pltf's Mtn. for Summary Judgment at pp. 4-6. Several examples underscore this point:

- "Plaintiffs' claim fails here, as there was no allegation made in their Complaint."
- There are pleading errors under "C.R.C.P. 9(b)[.]"
- "The Complaint makes clear in other areas that the misrepresentation alleged is that of non-disclosure."
- "Plaintiffs' second claim for relief must fail, as it does not meet the elements required for this claim, nor does it plead any of the alleged misrepresentations with particularity."
- "In its allegation of fraudulent misrepresentation, Plaintiffs' Complaint fails to reference any affirmative statement upon which it can base its claim of fraudulent misrepresentation."
- "The facts alleged in the Complaint in support of Plaintiffs' claim for fraudulent misrepresentation state in pertinent part[.]"
- "In this matter, review of Plaintiffs' Complaint shows that their claims of misrepresentation are not based on any specific statements or averments made by Chronos. Instead, their claims, as plead are based on silence, which cannot be the basis for claims for

misrepresentation."

See id. at pp. 4-6.

Notably missing is any argument regarding the absence of a genuine issue of material fact, which is the touchstone finding for summary judgment. In fact, Section I of the Motion quite clearly focuses on "Plaintiff's Fail[ure] to Plead a Misrepresentation Made by Chronos." *See id*. at § I. This is the hallmark of a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted. *See Asphalt Specialties, Co. v. City of Commerce City*, 218 P.3d 741, 744-45 (Colo. App. 2009).

But the bigger problem is the fact this motion for summary judgment which is disguised as a C.R.C.P. 12(b)(5) motion to dismiss is barred, because it was filed well past the 21-day deadline of service of the complaint and summons. *See* C.R.C.P. 12(a)(1), (b). On this point, Defendants elected to simply file an Answer and an Amended Answer – not a motion to dismiss. *See* Court Register of Actions (Filed 09/06/2022 & 07/21/2022). Meaning, even if the Court wanted to convert what is actually a C.R.C.P. 12(b)(5) motion to dismiss to a motion for summary judgment for its consideration on that basis, it could not because the underlying motion to dismiss was filed well past the 21-day deadline. *See id*.; *cf. BSLNI, Inc. v. Russ T. Diamonds, Inc.*, 293 P.3d 598, 601 (Colo. App. 2012) (stating that trial court improperly considered a C.R.C.P. 12(b)(5) motion to dismiss filed after an answer as a motion to dismiss).

As the Court can see, the Motion is actually an untimely C.R.C.P. 12(b)(5) motion to dismiss. Given the untimely filing per C.R.C.P. 12(a)(1), (b) the Court should dismiss the Motion on that basis.

B. Plaintiffs Were Subjected to Misrepresentation by Defendants in Purchasing the Property, Thus, Demonstrating a Genuine Issue of Material Fact.

1. The Fraudulent Misrepresentation Claim.

To establish a fraudulent misrepresentation Plaintiffs must prove:

> (1) a fraudulent misrepresentation of material fact was made by the defendant; (2) at the time the representation was made, the defendant knew the representation was false or was aware that he did not know whether the representation was true or false; (3) the plaintiff relied on the misrepresentation; (4) the plaintiff had the right to rely on, or was justified in relying on, the misrepresentation; and (5) the reliance resulted in damages.

See Barfield v. Hall Realty, Inc., 232 P.3d 286, 290 (Colo. App. 2010) (citing with approval CJI-Civ 4th 19:1 (1998)).

Here, Plaintiffs had no clue that the dream home they purchased was constructed on a foundation type that was knowingly and inherently prone to differential movement, heave and failure. *See* Pltf's Ex. 1 at ¶ 5, 9, 13, 14, 27, 28. Notably, based on the engineering reports that were supplied to Defendants during the construction of the home, this was known – Defendants just failed to inform Plaintiffs of this in the process of their purchase. *See id*. at ¶ 5, 9, 13, 14, 27, 28; *see* Def's Ex. C, D; *see also* Def's Mtn. for Summary Judgment, ¶¶ 2-6. In fact, Defendants knew and were advised that "deep foundations such as micropiles will provide the most protection against heave related movements" and that "[s]hallow foundations" (such as the one used here) "will not provide as much protection against heave related movements" but if done properly "can help reduce the risk of excessive differential movements." *See* Def's C, p. 2.

With that in mind, Defendants by their affirmative selection, undoubtedly knew and were aware of the foundation they decided to construct. Just like Defendants knew that this type of foundation would not provide as much protection for heave related movements given the soil. Despite this knowledge, Defendants failed to provide this knowledge to Plaintiffs to help guide

their decision to purchase the home. Even worse, Defendants returned to the home several times offering patchwork fixes to hide this knowledge from Plaintiffs. *See* Pltf's Ex. 1 at ¶¶ 16-28. Thus, demonstrating a misrepresentation on Defendants part regarding the type and risks surrounding the foundation that was implemented here during the purchasing process. This disputed misrepresentation regarding the foundation type and associated risks to aide Defendants in the sale of the home to Plaintiffs is a genuine issue of material fact that warrants denial of summary judgment.

2. Negligent Misrepresentation.

Negligent misrepresentation occurs when someone,

> in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Barfield, 232 P.3d at 290. To begin, Defendants are not entitled to summary judgment as their argument regarding non-disclosure not being a basis for negligent misrepresentation on the misnomer that Defendants must have supplied information is contrary to the law governing negligent misrepresentation. *See Mullen v. Allstate Ins. Co.*, 232 P.3d 168, 174 (Colo. App. 2008). On this point, Colorado specifically identifies negligent misrepresentation by omission. *See id.*; *see also Sachs v. Am. Family Mut. Ins. Co.*, 251 P.3d 543, 547 (Colo. App. 2010) (stating, "American Family contends the relevant point in time is the time of the Sachses' alleged acts or omissions – namely, their negligent misrepresentation."). Meaning, if, as Plaintiffs contend, Defendants omitted/failed to disclose or supply the material information regarding the type and risks associated with the foundation, this can serve as a basis for the negligent

misrepresentation that is alleged here. Defendants' legal argument to the contrary then is both a misreading and misapplication of the law that cannot serve as a basis for granting summary judgment.

Likewise, Defendants own cases fail to affirmatively establish that Colorado absolutely does not recognize a claim for negligent nondisclosure – just that it is uncertain. *Hildebrand v. New Vista Homes II, LLC*, 252 P.3d 1159, 1167 (Colo. App. 2010) (citing *Sheffield Services Co. v. Trowbridge*, 211 P.3d 714 (Colo. App. 2009) (doubting that negligent non-disclosure is recognized in Colorado)). Thus, Defendants own cases do not even support their own position.

Furthermore, there is a genuine issue of material fact regarding the information Defendants supplied to Plaintiffs. Here, it is pretty clear that the information that was supplied to Plaintiffs did not inform them of the foundation type and associated risks. *See* Pltf's Ex. 1 at ¶ 5, 13, 12, 27, 28. Likewise, Plaintiffs never received any pertinent information regarding the type and attendant risks associated with the foundation. *See id*. Moreover, Mr. Davis returned to the property on several occasions to assist with and provide "fixes" he claimed would resolve the foundation issues. *See id*. at 16-26. He then sold Plaintiffs on these "fixes" as resolving these issues, despite knowing the contrary to be true based on the foundation issues that existed at the property and the information that was supplied to Plaintiffs before, during, and after all of this happening. *See id*. Thus, demonstrating a genuine issue of material fact on the negligent misrepresentation claim, and the need for the Court to deny the Motion.

C. Defendants are Not Entitled to Summary Judgment on Plaintiff's Fraudulent Concealment Claim.

To establish a claim for fraudulent concealment, plaintiffs must demonstrate that: "(1) the defendant's concealment of a material existing fact that in equity or good conscience should be

disclosed; (2) the defendant's knowledge that the fact is being concealed; (3) the plaintiff's ignorance of the fact; (4) the defendant's intent that the plaintiff act on the concealed fact; and (5) the plaintiff's action on the concealment resulting in damage." *Barfield*, 232 P.3d at 292. "In order to prevail on a claim of fraudulent concealment, a plaintiff must show that a defendant actually knew of a material fact that was not disclosed and that the defendant's intent was to cause the plaintiff to act differently than he might otherwise have done if the information had been disclose'." *Kopeikin v. Merchants Mortgage & Trust Corp.*, 679 P.2d 559, 601-01 (Colo. 1984). "A plaintiff must also show that the defendant had a duty to disclose material information." *Barfield*, 232 P.3d at 292.

1. There is a Genuine Issue of Material Fact Regarding Defendants Actual Knowledge of the Concealed Fact Regarding the Foundation and its Risks.

Regarding Defendants argument that they lacked actual knowledge regarding its selection of a riskier type of foundation, this is completely inconsistent with what the engineer reports provide. And belies the reality that they themselves were tasked with weighting the options and making an affirmative selection.

The Huddleston-Berry report specifically states that: "**Shallow foundations will not provide as much protection against heave related movements**; however, properly constructed **they can help to <u>reduce the risk</u> of excessive differential movements**." Def's Exhibit C at p. 2 (emphasis added).

Thus, the nondisclosed report notes and explains the risks associated with a shallow foundation such as the one ultimately implemented here and also how best to minimize said risks, as possible. None of this information or actual knowledge that Defendants were supplied with regarding the attendant risks was ever supplied to Plaintiffs, despite Defendants possessing

the same the whole time. This utterly contradicts (or creates a genuine issue of material fact, rather) that Defendants possessed the actual knowledge of these riskier alternative foundations, because the engineering reports directly explain said risks so Defendants could make a design and construction decision. With Defendants ultimately electing to choose what the engineers described as "not providing as much protection against heave related movements" associated with the soils at the site. Def's Exhibit C at p. 2.

The foregoing, thus, creates a genuine issue of material fact regarding Defendants actual knowledge. The Court should, therefore, deny the Motion.

2. As the Builder of the Home and Under the Contract, Defendants Had a Duty to Disclose the Material Fact.

To establish a fraudulent concealment or nondisclosure claim, a "plaintiff must show that a defendant had a duty to disclose information." *Burman*, 821 P.2d at 918. "Generally, a person has a duty to disclose to another with whom he deals facts that in equity or good conscience should be disclosed." *Id*. "A party to a business transaction has a duty to disclose to the other party facts basic to the transaction if (1) he knows that the other is about to enter into it under a mistake as to them and (2) the other party, because of the relationship between them, the customs of the trade, or other objective circumstances, would reasonably expect a disclosure of those facts." *Id*. Furthermore, a seller must disclose a latent defect to a purchaser. *See Cohen v. Vivian*, 349 P.2d 366 (Colo. 1960).

Just like Colorado has "recognized [an] independent duty of care requiring builders to construct homes without negligence" for purposes of the economic loss rule and its application, Defendants had a similar duty to disclose to Plaintiffs its construction of the home here using a riskier alternative foundation. *See A.C. Excavating v. Yacht Club II Homeowners Ass'n*, 114 P.3d

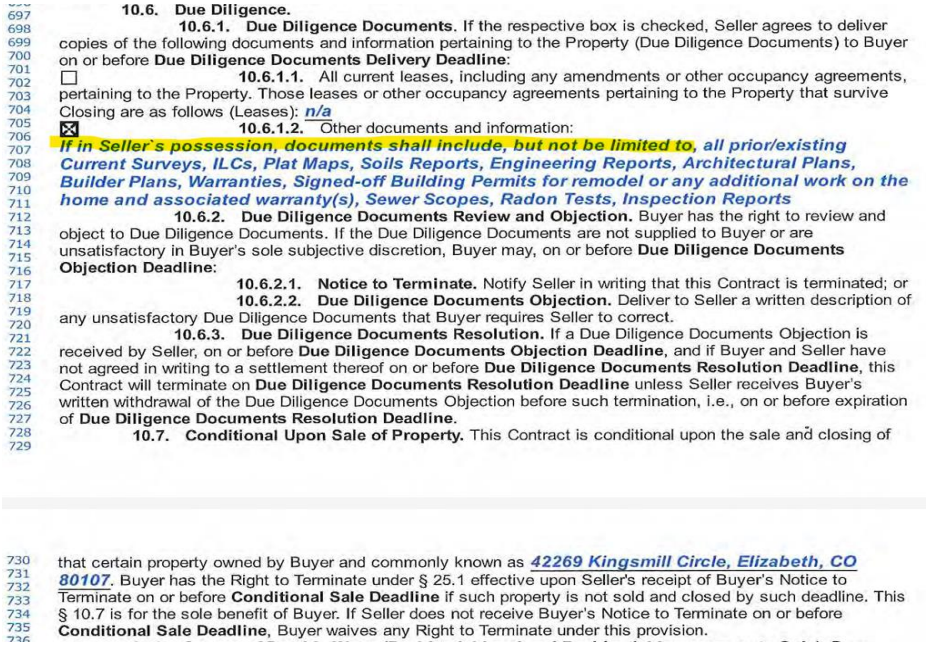
862, 866 (Colo. 2005). The same logic applies for negligent construction as it does for informing purchasers of the risks associated with the soils and foundation that was built, so the purchaser can make an informed decision when purchasing the home. That did not occur here where Plaintiffs were never informed of the risks associated with their foundation and what could happen if issues arose. This would have certainly influenced their decision to purchase the home had they known. Instead, Defendants flouted their duty to make a profit and left Plaintiffs to pick up the check for their risky decisionmaking.

This undoubtedly created a duty on Defendants' part to disclose the same to Plaintiffs. Defendants failed to uphold this duty. Accordingly, the Court should deny summary judgment.

D. A Genuine Issue of Material Fact Exists Regarding the Concealment of the "Nature of the Soils" and "Alleged Riskier Type of Foundation."

As the Affidavit of Ms. Ryan makes clear, no such disclosure or "Soils Reports" and Engineering Reports" was ever given to Plaintiffs prior to the sale of the property. Simply put, Defendants never furnished Plaintiffs with this pertinent information in the Huddleston-Berry report, that if actually disclosed would have certainly influenced their decision to purchase the property.

Even Defendants citation to the Contract does not tell the whole story. In that regard, here is what Section 10.6.1.2, states in full part regarding the disclosure of said documents are Defendants wrongfully claim:



10.6. Due Diligence.

10.6.1. Due Diligence Documents. If the respective box is checked, Seller agrees to deliver copies of the following documents and information pertaining to the Property (Due Diligence Documents) to Buyer on or before **Due Diligence Documents Delivery Deadline**:

☐ **10.6.1.1.** All current leases, including any amendments or other occupancy agreements, pertaining to the Property. Those leases or other occupancy agreements pertaining to the Property that survive Closing are as follows (Leases): ***n/a***

☒ **10.6.1.2.** Other documents and information:

If in Seller's possession, documents shall include, but not be limited to, all prior/existing Current Surveys, ILCs, Plat Maps, Soils Reports, Engineering Reports, Architectural Plans, Builder Plans, Warranties, Signed-off Building Permits for remodel or any additional work on the home and associated warranty(s), Sewer Scopes, Radon Tests, Inspection Reports

10.6.2. Due Diligence Documents Review and Objection. Buyer has the right to review and object to Due Diligence Documents. If the Due Diligence Documents are not supplied to Buyer or are unsatisfactory in Buyer's sole subjective discretion, Buyer may, on or before **Due Diligence Documents Objection Deadline**:

10.6.2.1. Notice to Terminate. Notify Seller in writing that this Contract is terminated; or

10.6.2.2. Due Diligence Documents Objection. Deliver to Seller a written description of any unsatisfactory Due Diligence Documents that Buyer requires Seller to correct.

10.6.3. Due Diligence Documents Resolution. If a Due Diligence Documents Objection is received by Seller, on or before **Due Diligence Documents Objection Deadline**, and if Buyer and Seller have not agreed in writing to a settlement thereof on or before **Due Diligence Documents Resolution Deadline**, this Contract will terminate on **Due Diligence Documents Resolution Deadline** unless Seller receives Buyer's written withdrawal of the Due Diligence Documents Objection before such termination, i.e., on or before expiration of **Due Diligence Documents Resolution Deadline**.

10.7. Conditional Upon Sale of Property. This Contract is conditional upon the sale and closing of

that certain property owned by Buyer and commonly known as ***42269 Kingsmill Circle, Elizabeth, CO 80107***. Buyer has the Right to Terminate under § 25.1 effective upon Seller's receipt of Buyer's Notice to Terminate on or before **Conditional Sale Deadline** if such property is not sold and closed by such deadline. This § 10.7 is for the sole benefit of Buyer. If Seller does not receive Buyer's Notice to Terminate on or before **Conditional Sale Deadline**, Buyer waives any Right to Terminate under this provision.

What the provision actually states is that "If in Seller's possession, documents shall include . . . ." *See* Def's Exhibit A, § 10.6.1.2. Notably missing is any evidence through an affidavit or some other documents that all the documents (especially, the Huddleston-Berry report) were actually disclosed and received by Plaintiffs as Defendants baldly claim. This is because the truth of the matter is that Defendants buried the Huddleston-Berry report and never disclosed it to Plaintiffs during any point of the home buying process. *See* Pltf's Ex. 1 at ¶ 12. This is because the Huddleston-Berry report contains crucial information regarding the inherently risky nature of the foundation Defendants utilized that would have doomed the sale of the Residence to Plaintiffs, or at least put the parties in even negotiating positions. *See id*. at ¶¶ 5, 13-14, 27-28.

Accordingly, a genuine issue of material fact exists regarding Defendants concealment of the pertinent information/documents. Thus, requiring the Court to dismiss the Motion.

E. Mr. Davis is Personally Liable Regardless of His Role as Chronos' Agent, Representative, or Principal.

In Colorado, a corporate principal or "an officer may be held personally liable for his or

her individual acts of negligence even though committed on behalf of the corporation, which is also held liable." *Hoang v. Arbess*, 80 P.3d 863, 867 (Colo. App. 2003). This personal liability attaches when a corporate officer or manager personally participates or was directly involved in the tortious conduct. *Id*. at 868. This participation can take various forms, such as direct involvement through conception or authorization, active participation, cooperation, specific direction, or sanction of a particular action. *Id*. (compiling cases). The mere fact that a principal is acting on behalf of a business entity does not absolve or otherwise relieve the principal from personal liability. *Id*.

In *Hoang*, for example, the Colorado Court of Appeals found that a plaintiff adduced sufficient evidence to show that a corporate officer "approved of, directed, actively participated in, or cooperated in the negligent conduct" in connection with an improvement to residential real property. *Id*. Evidence included, among other things, facts that the corporate officer was personally involved in construction, oversaw subcontractors, set policies, and visited construction sites. *Id*. at 868-69. *Hoang* comports with another construction case where courts imputed personally liability to a corporate officer. *See Sanford v. Kobey Bros. Const. Corp.*, 689 P.2d 724, 725-26 (Colo. App. 1984). In *Sanford*, a principal of a construction company argued that he could not be held personally liable for negligent construction and breach of implied warranties. The appellate court disagreed, holding that "a servant may be held personally liable for his individual acts of negligence, as also may an officer, director, or agent of a corporation for his or her tortious acts, regardless of the fact that the master or corporation also may be vicariously liable." *Id*. at 725.

Like the corporate officers in both *Hoang* and *Sanford*, Mr. Davis can be found

personally liable for his own personal negligent acts, and his position within Chronos does not shield him from personal liability. Here, Plaintiffs have alleged many instances where Mr. Davis approved the construction of the home using the riskier foundation, despite the soil issues that plagued the area. *See* Compl., ¶¶ 8 – 35. Furthermore, the engineering reports informing of these issues are all addressed to Mr. Davis. While Mr. Davis returned to the home on several occasions to try and "fix" the problems he signed off and created through the construction of the home and failure to disclose the necessary information regarding the foundation and soils to Plaintiffs that would have served to inform their decision to purchase the home at all.

This all demonstrates that Mr. Davis "approved of, directed, actively participated in, or cooperated in the negligent conduct" in connection with an improvement to residential real property, just like the corporate office in *Hoang* and other cases of note. *Hoang*, 80 P.3d at 867. Thus, demonstrating the ability to hold Mr. Davis personally liable here. Accordingly, the Court should deny the Motion.

V. CONCLUSION.

The foregoing demonstrates a parade of genuine issues of material and a failure to demonstrate that Defendants are entitled to summary judgment as a matter of law. The Court should, therefore, deny the Motion so Plaintiffs can make the requisite showings at a full trial on the merits where these abundant issues may be fully heard and decided upon by the Court.

Dated: October 09, 2023.

Respectfully submitted by,

COLEMAN & QUIGLEY, LLC

By: *Isaiah Quigley*
Isaiah Quigley
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby swear and affirm that on October 09, 2023, a true and accurate copy of the foregoing was served on all parties of record via their counsel of record through the Colorado Courts E-Filing System.

By: */s/ Stuart R. Foster*
Stuart R. Foster