IN THE SUPREME COURT OF FLORIDA

DARLENE EASTERDAY, as personal representative of the Estate of ALLEN L. EASTERDAY, Deceased,

Petitioner,

vs.

CASE NO: 70,082
4TH DCA NO: 4-86-0562

FRANK MASIELLO, MASTER DESIGN GROUP, INC., and REYNOLDS, SMITH & HILLS, INC.

Respondents.

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS SUPPORTING POSITION OF PETITIONER

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PRELIMINARY STATEMENT

The Academy of Florida Trial Lawyers appear in this case as Amicus Curie supporting the position of petitioner Darlene Easterday. The Academy will be referred to in this brief as AFTL. The defendants in the trial court, who are respondents before this Court, are Masiello Design Group, Inc., and Reynolds, Smith and Hills, Inc., and will be referred to collectively as "Contractors". As appendices to this brief, AFTL attaches Easterday's Second Amended Complaint, and the trial court's order granting the Contractors' Motion to Dismiss the Second Amended Complaint.

STATEMENT OF THE CASE AND FACTS

This appeal arises out of a trial court order granting a Motion to Dismiss, and entering final judgment thereon. Accordingly all well pleaded allegations of the Second Amended Complaint must be taken as true.

Contractors are architects and engineers who hold themselves out as experts either in the design and construction of penal institutions, or in the area of engineering requirements for penal institutions. Despite this representation, Contractors negligently designed a corrections facility by, inter alia, failing to provide for guard grills over certain duct work which penetrated either

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the wall or ceiling of a cell area. The facility provided by Contractors, did not conform with the minimum design standard and specifications as set forth by the requirements of the Department of Corrections.

As a result of the Contractors' negligence, plaintiff's decedent, had access to an exposed "yard arm", by which he hung himself.

In granting the motions to dismiss, the trial court apparently assumed that the failure to provide guard rails over duct work was a "design deficiency". (App. 2). Nonetheless, the trial court held that such deficiency was a patent defect for which the contractors could not be held liable. The sufficiency of Easterday's allegations with respect to breach of a duty owed to plaintiff's decedent and causation, are not before this Court, not having been raised below.

The District Court of Appeal for the Fourth District affirmed the trial court's order of dismissal. Easterday v. Masiello, ____ So. 2d ____ 12 FLW 331 (Fla. 4th DCA Case No. 4-86-0562, Opinion filed January 21, 1987).

The case is before this Court on the following question certified by the Fourth District:

> "Does Slavin v. Kay preclude recovery against the architects and/or engineers for a personal injury to a third party caused by patent design defect in a structure?"

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SUMMARY OF THE ARGUMENT

The rule of Slavin v. Kay, 108 So. 2d 462 (Fla. 1958) provides an absolute immunity that is not warranted by, or consistent with, the development of case law in this State. Slavin affords protection to a negligent actor, without regard to the actor's negligence, or to the causal link between the negligence and the resulting injury. This restrictive view should give way to an approach which emphasizes comparative negligence, contribution among joint tortfeasors, and the foreseeability of an intervening cause.

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ARGUMENT

POINT I

A RULE OF LAW TOTALLY INSULATING A CONTRACTOR FROM LIABILITY FOR A PATENT DESIGN DEFECT THAT IS INCORPORATED INTO A BUILDING SHOULD BE ABANDONED IN FAVOR OF A RULE WHICH RECOGNIZES THE CURRENT STATE OF THE LAW CONCERNING COMPARATIVE NEGLIGENCE AND INTERVENING CAUSE.

In Chadbourne v. Vaughn, 491 So. 2d 551 (Fla. 1986), AFTL appeared as amicus before this Court, taking the position that the Court should recede from the rule of Slavin v. Kay, 108 So. 2d 462 (Fla. 1958). In reaching its decision in Chadbourne, a products liability case in which plaintiff sought recovery under Section 402A, Restatement (Second) of Torts, this Court did not directly confront the issue of whether Slavin should be overruled. It would appear that the question is now squarely before the court.

A.

THE SUPPOSED BAR OF A PATENT DESIGN DEFECT IS SUBSUMED BY FLORIDA'S DOCTRINE OF COMPARATIVE NEGLIGENCE.

To fall under the restrictive rule of Slavin, supra, the Contractors must, as did the trial court below, focus on the distinction between patent and latent defect.

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The sole public policy reason enunciated by Justice Drew in authoring the Slavin opinion is to relieve the contractor of liability "on account of dangerous conditions which an owner or intermediate party could discover and remedy." 108 So. 2d at 467. Accordingly, any court following Slavin must apportion liability as a matter of law, placing no liability at all on the contractor who is directly responsible for the patent defect in construction or design.

Florida is firmly committed to the doctrine of comparative negligence, as well as to contribution among joint tort feasors, the idea being, that fault will be apportioned among those parties actually responsible for injuries. The current jurisprudential scenario in this regard contrasts with that of the 1950's at which time courts were more inclined to follow rules which raised absolute bars to recovery.

The landmark decision of Hoffman v. Jones 280 So. 2d 431 (Fla. 1973), has changed the complexion of tort litigation. In Hoffman, this Court adopted the doctrine of comparative negligence, by which the finder of fact apportions fault between a tort feasor and the claimant. In Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977), this Court held that the formerly recognized complete bar of implied

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assumption of the risk is now merged into comparative negligence. In Auburn Machine Works Co., Inc. v. Jones, 366 So. 2d 1167 (Fla. 1979), this Court considered whether a patent danger or defect in a product would automatically bar the manufacturer's liability under Florida law. This Court noted that the machine in question in that case was "obviously dangerous". The Court nonetheless rejected the manufacturer's argument that, owing to the patent and obvious nature of the danger, the manufacturer owed no legal duty to the injured plaintiff. Justice Alterman charaterized this argument as being inconsistent with the trend of this Court's decisions.

If an open and obvious hazard, such as that in Auburn Machine Works, supra, which is actually discovered by the victim himself, will not bar recovery, it is very difficult to understand how a patent defect discovered by a party other than the victim would operate to totally bar recovery. The victim would then be at the mercy of a third party over which he has no control whatsoever. In this case, for instance, the presumption apparently is that the owner of the corrections facility should have discovered and remedied the dangerous protruding duct work. The owner obviously did not do so. Easterday's decedent, had no control, and no

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possibility of control, over the design, construction and maintenance of the correction facility in which he died.

If one considers the operation of the Slavin doctrine, and then makes a comparison to operation of the doctrine enunciated in Auburn Machine Works, supra, the inconsistency is apparent. Under the Slavin, doctrine, the law indulges a conclusive presumption that the owner will discover and remedy patent design and construction defects. The owner's failure to do so is viewed as an efficient, intervening cause of the injuries, and the negligent contractor is protected, without regard to whether or not the owner was justified in relying upon the contractor's expertise to provide a safe facility.

Under the rule of Auburn Machine Works, supra, there is no such conclusive presumption. Quite to the contrary, the jury is allowed to weigh the negligence of the manufacturer against the negligence, if any, of the user of a product which is patently dangerous.

AFTL is unable to conceive of any policy argument that would afford protection to the negligent contractor, where the negligent product manufacturer has none. As Justice Adkins pointed out in his dissent in Chadbourne v. Vaughn, supra, the distinctions upon which the Slavin doctrine rests have more theoretical than practical significance. AFTL

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would agree with Justice Adkins' observations, joined in by Justice Shaw that Slavin has no place in modern tort law.

The result is even more anomalous, considering that the owner of the corrections institution, presumably the county sheriff, relied upon the expertise of the defendant Contractors. Under the Slavin doctrine those parties with the most expertise, the Contractors, are not held to answer for their negligence. The sheriff, as owner, may or may not be responsible for the Contractor's negligence in designing and constructing the facility. Darlene Easterday, who has lost her son in a tragic and needless suicide, finds her claim barred, not by her son's actions in taking his own life, but by a rule of law that is memorialized not by reason and logic, but rather by the needs and exigencies of days gone by.

The Slavin rule was, of course, adopted at a time when Florida did not recognize any right of contribution among joint tortfeasors. In 1975, the Legislature adopted Florida's version of the Uniform Contribution Among Tortfeasors Act, codified as Section 768.31 Florida Statutes (1985). The negligent contractor is not now without a remedy against the allegedly negligent owner who accepts a building with a patent defect, and fails to remedy the same. Application of the Uniform Contribution Act would allow the

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trier of fact to weigh the relative fault of joint tort-feasors, and liability would be aportioned accordingly.

B.

THE INTERVENING CAUSE BASIS OF SLAVIN V. KAY SHOULD GIVE WAY TO FLORIDA'S MORE MODERN VIEW OF FORESEEABILITY AND INTERVENING CAUSE.

It is not logical to say that a dangerous, though patent, design defect cannot be a legal cause of injury. Rather, the doctrine must be bottomed upon the view that the intervening failure of the owner to correct the obvious problem acts to cut off any liability of the originally negligent contractor. This view is not consistent with the development of the law in this State.

A defendant's negligence need not be the only cause of injuries to the plaintiff. The law requires only an actual causal connection between the negligent act and the injury. The proper inquiry, as this Court has observed, is whether the defendant's negligence was "a" material contributing cause of plaintiff's damages. If this inquiry can be answered in the affirmative, the finder of fact may impose liability. Asgrow-Kilgore Company v. Mulford Hickerson Corp., 301 So. 2d So. 2d 441 (Fla. 1974); Fla. Std. Jury Instr. (CIV.) 5.1(a).

The existence of an intervening cause does not, as a

The existence of an intervening cause does not, as a matter of law, break the chain of proximate causation. This is clearly recognized by the Florida standard jury instruction approved by this Court:

> "In order to be regarded as a legal cause of loss, injury or damage, negligence need not be its only cause. Negligence may also be a legal cause of loss, injury or damage event though it operates in combination with the act of another, some natural cause, or some other cause occurring after the negligence occurs if such other cause was itself reasonably foreseeable and the negligence contributes substantially to produce such loss, injury or damage, or the resulting loss, injury or damage was a reasonably foreseeable consequence of the negligence and the negligence contributes substantially to producing it."
>
> Fla. Std. Jury Instr. (CIV.) 5.1(c). (Emphasis supplied)

In Vining v. Avis Rent-A-Car Systems, Inc., 354 So. 2d 54 (Fla. 1977), the issue was whether the owner of a car may be liable for the conduct of a thief who steals the car and subsequently injures someone while negligently operating the stolen vehicle. Clearly the act of theft is an intervening cause. The question, then, is whether such intervening cause operates to break the chain of legal causation. This Court in Vining, supra, held that if the theft is foreseeable, the owner's original negligence is leaving his keys in the ignition may be the proximate cause of the damages sustained. The court further held that the determination of foreseeability should rest with the jury,

and should only be taken from the jury and decided as a matter of law in a case where reasonable men could not differ.

This Court expanded upon its analysis of intervening cause in Gibson v. Avis Rent-A-Car Systems, Inc., 386 So. 2d 520 (Fla. 1980) and reaffirmed the holding of Vining, supra, that the question of whether an intervening cause is foreseeable is for the trier of fact. In Gibson, the plaintiff was forced to stop on the highway, because the intoxicated operator of the Avis car had negligently stopped, thus blocking traffic. As soon as plaintiff stopped his car, he was struck from behind by yet another vehicle. The question on appeal was whether the injured plaintiff had a cause of action against Avis and the intoxicated driver of its leased car. The trial court directed a verdict in favor of Avis. This Court reversed, observing that one who is negligent is not absolved of liability when his conduct sets in motion a chain of events resulting in injury to the plaintiff. If an intervening cause is foreseeable, the original negligent party may still be held liable. 386 So. 2d at 522.

Recent cases have analyzed proximate and intervening cause in terms of foreseeability, concluding that intervening cause does not break the chain of causation if

the intervening cause is foreseeable, and whether the intervening cause is reasonably foreseeable depends on whether the harm that occurred is within the scope of danger or risk attributable to the original negligent act. Padgett v. West Florida Cooperative, Inc., 417 So. 2d 764 (Fla. 1st DCA 1982), and cases cited therein. Following this reasoning, a question would properly be presented to the jury as to whether the Contractors could have reasonably foreseen the owner's failure to correct the obvious dangerous condition, and further could have foreseen any resulting injury within the scope of danger attributable to the Contractors' original negligence.

In light of the intervening cause cases discussed here, and the law of Florida as set out in the standard jury instruction on intervening cause, the Slavin rule can survive only as an exception. This exception would allow the designer or builder of an obviously dangerous structure the benefit of an exceedingly short statute of limitations, since liability is barred once the structure is completed and accepted by the owner. In allowing such contractors to escape liability, the lower court's ruling seems to run counter to the concern expressed by this Court in the Slavin opinion itself:

> "(To deny recover) would result necessarily in the anomaly of fault without liability and wrong

> without a remedy, contrary not only to our sense of justice but directly conflicting with the express mandate of the Florida Constitution, Declaration of Rights, Section 4 FSA, that "every person for any injury done him...shall have remedy..."

Slavin v. Kay, supra at 467.

Since Slavin v. Kay, supra, provides an immunity which totally denies recovery, notwithstanding the defendant's fault, it should be receded from, in favor of the more rational line of intervening cause opinions authored by this Court.

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CONCLUSION

AFTL urges this Court to answer the certified question in the negative, and to expressly recede from Slavin v. Kay, supra.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Amicus Curiae Brief of the Academy of Florida Trial Lawyers Supporting Position of Petitioner has been furnished to Jeff Tomberg, Esquire, P. O. Drawer EE, Boynton Beach, Florida 33435, Pamela Chamberlain, 2700 SE Financial Center, 200 South Biscayne Blvd., Miami, Florida 33131-2395 and Winslow D. Hawkes, III, Esquire, P. O. Drawer 3604, West Palm Beach, Florida 33402, by U. S. Mail, postage prepaid, on this 9th day of April, 1987.

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