IN THE SUPREME COURT OF FLORIDA

DARLENE EASTERDAY, et al.,

Petitioner,

vs.

FRANK MASIELLO, etc., et al.,

Respondents.
_____/

CASE NO. 70,082
4th DCA CASE NO. 4-86-0562

ANSWER BRIEF OF RESPONDENT, REYNOLDS, SMITH & HILLS, INC.

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STATEMENT OF THE CASE

This matter is before this Court on Petitioner's Second Amended Complaint. Respondents' Motions to Dismiss were granted with prejudice by Circuit Court Judge, Jack H. Cook, by Order dated March 6, 1986. In granting the Motion to Dismiss, Judge Cook cited both Slavin v. Kay, 108 So.2d 462 (Fla. 1958), and Conley v. Coral Ridge Property, Inc., 396 So.2d 1220 (4th DCA 1981). Petitioner (Appellant and Plaintiff below) took an appeal to the District Court of Appeal, Fourth District. The Fourth District affirmed the Trial Court's dismissal citing Slavin, but certified the following question as one of public importance: "Does Slavin v. Kay preclude recovery against architects and/or engineers for a personal injury to a third party caused by a patent design defect in a structure?" Easterday v. Masiello, 501 So.2d 117 (4th DCA 1987)

STATEMENT OF FACTS

Petitioner's decedent hung himself from an air conditioning duct while incarcerated in the Palm Beach County Jail. Petitioner contends that Respondents ("Architects/Engineers") were negligent in the design of the ducts. For the sake of this appeal, Respondent, REYNOLDS, SMITH & HILLS, INC., is the "engineer", an independent contractor hired by the architect. Prior to oral argument to the Fourth DCA, Petitioner never contested that the exposed A/C duct was anything other than an obvious condition, that is a patent defect in the design.

Petitioner also never disputed that the suicide was committed at a time other than when design and construction of the project were completed and the County Jail facility was fully in the control of the County.

SUMMARY OF ARGUMENT

Slavin is not an "absolute immunity" or a "bar to recovery", but rather recognition of the absence of proximate cause. Slavin is operative only in the special circumstances we have here: where the alleged defect is obvious and where the owner is in full control. Recovery is not "barred" except against a Defendant without ability to correct the alleged defect, that is without ability to prevent the injury. Anyone injured by the existence of the alleged defect has a right of action against the owner and it is, of course, the owner who is the one entity with the ability to eliminate or warn against the alleged defect. If the rule were otherwise, a contractor could be "required" to trespass to protect himself from liability for obvious defects.

In Guice v. Enfinger, 389 So.2d 270 (1st DCA 1980), recognition was given that suicide is an intervening cause except where the propensity to suicide is known. The fact that Plaintiff's decedent's death was caused by suicide further distances the alleged negligence of Respondents from any causation for the death, but is not necessary to a determination of the absence of proximate cause where Slavin is otherwise applicable. The negligence of an owner in not correcting a defect is itself an intervening cause.

ARGUMENT I

THE SO-CALLED SLAVIN "DOCTRINE" IS A TIME PROVEN, SHORT CUT TO THE ACCURATE DETERMINATION OF PROXIMATE CAUSE FOR INJURIES SUSTAINED AS THE ALLEGED RESULT OF OBVIOUS DEFICIENCY OR DEFECT IN CONSTRUCTION.

Under the Slavin doctrine, contractors are not liable for injuries resulting from obvious defects in construction occurring after the contractor has completed the work and turned it over to the accepting owner.

> "By occupying and resuming possession of the work, the owner deprives the contractor of all opportunity to rectify his wrong. Before accepting the work as being in full compliance with the terms of the contract, he is presumed to have made a reasonably careful inspection thereof, and to know of its defects, and if he takes it in a defective condition, he accepts the defects and the negligence that caused them as his own, and thereafter stands forth as their author." Slavin, supra, at 466.

For a property having an obvious defect posing a danger, the duty of correcting the defect and eliminating the danger or warning against it falls on the party in control of it. Having divested himself of any right of possession at the time of acceptance by the owner, a contractor is no longer in any position to effect repair or warning. Generally the contractor's duty to the owner has ended with acceptance by the owner. Without the permission of the owner, the contractor does not even have access to the property.

As an economic consideration in construction, Slavin also makes sense. An owner presumably recognizes obvious defects. Having recognized them, he can either require the contractor to correct them, or he can make the corrections himself. Making the correction himself may be beneficial by avoiding conflict with the contractor.

There are safeguards for the owner and third persons. Slavin does not apply where there has been no acceptance by the owner. Carter v. Livesay Window Company, 73 So.2d 411 (Fla. 1954). It does not apply where the defect is not discoverable by reasonable inspection. It does not apply until after the contractor has relinquished control. Seitz v. Zak Smith and Company, Inc., 709 So.2d 706 (1st DCA 1987).

The Plaintiff in Seitz was injured when he fell from a floodlight tower overlooking a high school stadium. During construction, the contractor had mismatched sections of the tower with the result that one of the metal pegs used for climbing the tower was missing. The Plaintiff noticed the missing peg on the way up, but forgot it and fell on the way down. All parties agreed that the missing peg was observed or discoverable by the owner when the tower was accepted.

La Bombarbe v. Phillip Swager Associates, 474 N.E.2d 942 (Ill. Appellate 4th District 1985) appears to be the only reported case with a fact situation very close to that of Easterday. La Bombarbe hung himself from a grill on a heating/air conditioning duct. His estate's administrator claimed that

the architect was negligent in designing a cell with "anchor points". The Illinois Court focused on duty and foreseeability finding that an architect owes a duty to those who would be likely to use the prison to exercise care that the design is safe for the building's intended use, but is not expected to anticipate all means of self-destruction contemplated by an inmate.

> "The magnitude of the burden placed on architects to eliminate all fixtures, such as grills, that might be of aid in the commission of suicide and, at the same time, to design an attractive and feasible cell at a reasonable cost would seem to be great. Yet, according to the article, the resultant design would be insufficient to protect the inmate from his self-inflicted destruction. The cost of placing this relatively useless burden upon architects would likely cause further increase in the already extremely high cost of housing prisoners." La Bombarbe v. Phillip Swager Associates, supra, at 945.

The article referred to in the quote above discussed the ineffectiveness of trying to prevent suicide by architectural design. The study had found that where there was a will toward self-destruction, human intervention not building design was required to stop it.

It is not strictly established that the Slavin doctrine applies to the design process as well as to the actual construction, but the rationale seems as persuasive. There are at least two paths to defective construction: (1) failure of a contractor to follow adequate plans and (2) the compliance of a contractor with inadequate plans. Both the contractor and the

designer (architect/engineer) are usually hired by the owner and their work is generally completed at the time of acceptance by the owner.

In construing Slavin courts have intermingled the concept of design with construction. For example, in Conley the court rejected the argument that a building's poor design was other than obvious where an air conditioning grill could be removed for easy access to the house. In Howard, Needles, Tammen & Bergendoff v. Calvin, 473 So.2d 1365 (3rd DCA 1985), the court rejected the engineer's appeal not because Slavin didn't apply to engineers, but because the project hadn't been turned over to the owner. Where Slavin is applicable, there is a break in the chain of causation whether the obvious defect is the result of contractor or the designer.

ARGUMENT II

THE ACT OF SUICIDE IS AN INDEPENDENT INTERVENING CAUSE WHICH BREAKS THE CHAIN OF LEGAL CAUSATION EXCEPT IN THE SPECIAL CIRCUMSTANCE WHERE THE PROPENSITY TO SUICIDE IS KNOWN TO THE CUSTODIAL ENTITY AGAINST WHOM LIABILITY IS SOUGHT.

Under established Florida case law, the Defendant is not liable for injuries resulting to a Plaintiff where there exists an independent intervening cause, unless the independent intervening cause is a foreseeable and probable consequence of the wrongful action of the Defendant. In Guice, supra, the Court held the acts of a county jail inmate who hung himself with his belt while incarcerated in jail was an independent intervening cause of his death for which the sheriff's office was not liable,

even if the sheriff's office was negligent in its failure to remove the belt from the inmate. In affirming summary judgment for the Defendant, the Court held that although the deceased's act of hanging himself was a possible consequence of the failure to remove his belt, it was not a probable consequence and not foreseeable.

The Fourth District distinguished Guice in Overby v. Wille, 411 So.2d 1331 (4th DCA 1982). In Overby, the decedent had demonstrated both a tendency toward self-destruction and questionable mental health which should have alerted his custodians to taking special care. They did not take special care and Overby was found the next morning hanging from the cell door.

Since the judicial adoption of comparative negligence, Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), the responsibility of determining the facts of any case has fallen more heavily on juries. The positive result has been a fuller determination of responsibility for injury since causation is weighed in total. The negative result has been that cases of little or no merit are routinely tried to conclusion or are ended by payment of settlement money based much more on the cost of defense than any real responsibility. Keeping a party in a lawsuit where proximate cause does not and cannot exist insures that a winning defendant will probably also be a loser.

Under the current status of case law where a scintilla of a fact issue will defeat a motion for summary judgment City of Orlando v. Ashlock, 395 So.2d 1002 (4th DCA 1977) and where that

scintilla can be created as easily as by the submission of an expert's affidavit (Vila v. B.F. Goodrich Company, 383 So.2d 766 (3rd DCA 1980)) the day before the hearing on a motion for summary judgment set many days before (Florida Rule of Civil Procedure 1.510(c)), there already exists disproportionate safeguards to assure a plaintiff's day in court against all of those who could reasonably have wronged him. This Court should not eliminate one of the very few circumstances where the judiciary can readily apply sound reasoning of proximate causation to protect contractors/architects/engineers from the tremendous expense of seeing all litigation to its end.

CONCLUSION

Slavin provides an accurate rationale for assessing proximate cause. As such, it is neither incompatible with nor anachronistic to the concept of comparative negligence. There are few circumstances where the allegations of a complaint fall within the provisions of Slavin. Where the conditions are met; however, there is a break in the chain of causation between the acts of the contractor/architect/engineer and the injury complained of.

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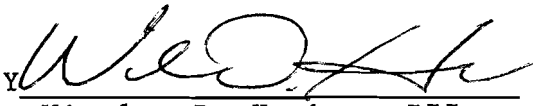
BY 
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