IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,082

DARLENE EASTERDAY, as Personal Representative of the Estate of **ALLEN L. EASTERDAY**, Deceased,

Petitioner,

v.

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

Respondents.

On Appeal From the District Court of Appeal
For the Fourth District of Florida

Answer Brief of Respondents Frank Masiello and Master Design Group, Inc.

Joseph W. Downs III
Pamela A. Chamberlin
BEASLEY, OLLE & DOWNS
2700 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2395
Telephone: (305) 371-5400

Attorneys for Respondents
Frank Masiello and
Master Design Group, Inc.

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II. STATEMENT OF THE CASE AND OF THE FACTS [1]

A. Course of Proceedings and Deposition Below

This wrongful death action was commenced on July 18, 1985, with the filing of a complaint alleging negligence in the design of the Palm Beach County Criminal Justice Complex, allegedly resulting in the death by suicide of the petitioner's decedent, then a prisoner in that facility. (R. 1).[2] The complaint was in two counts, one against Frank Masiello and Master Design Group, Inc., architects (hereinafter "the respondents"), and the other against Reynolds, Smith & Hills, consulting engineers. The plaintiff amended her complaint once before any motion on the merits was filed. (R. 8). All defendants moved to dismiss the amended complaint for failure to state a cause of action. (R. 14, 17, 26). These motions were granted on January 21, 1986, and the plaintiff was given twenty days to further amend her complaint. (R. 42). Twenty-three days later, the plaintiff served a second amended complaint. (R. 43-48). All defendants again moved to dismiss for failure to state a cause of action. (R. 49, 51). The lower court dismissed the second amended complaint[3] with prejudice. (R. 53).

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[1] Respondents include this statement of the case and the facts because the statement provided in the petitioner's brief is incomplete.

[2] Throughout this brief, references to the record on appeal will be indicated as (R. _____).

[3] The document attached to the petitioner's brief as "Appendix 2" is not the second amended complaint that is relevant to these proceedings. That document appears to be a complaint by the petitioner against the Palm Beach County Sheriff arising out of the same incident. The petitioner's Appendix 2 is not,

On March 11, 1986, the plaintiff filed a notice of appeal from the lower court's order to the Fourth District Court of Appeal. (R. 55). On that appeal, the petitioner conceded that the lower court's ruling was correct in light of this Court's decision in Slavin v. Kay, 108 So. 2d 462 (Fla. 1958), which was recently reaffirmed in Edward M. Chadbourne, Inc. v. Vaughn, 491 So. 2d 551 (Fla. 1986). The petitioner's argument in the Fourth District Court of Appeal was for a change in the existing law that required dismissal of her claim. The court of appeals affirmed the lower court's dismissal with prejudice of the petitioner's second amended complaint, and certified to this Court the following question as being of public importance:

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

(4th DCA Op. at 3).[4]

B. Statement of Facts

According to the allegations of the second amended complaint, Masiello and Master Design Group designed the Palm Beach County Criminal Justice Complex. (R. 43-44). The petitioner's decedent, a young man of twenty years, was an

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however, part of the record in this case, and the petitioner's references to this document throughout her brief are therefore all erroneous and possibly misleading. All such references to this document must be disregarded by the Court as not being of record. See Kelley v. Kelley, 75 So. 2d 191, 193-94 (Fla. 1954). Wherever necessary in the respondent's statement of the facts, these discrepancies will be resolved by citation to the true second amended complaint in this case.

[4] A copy of the Fourth District's opinion in this case was attached as an appendix to the petitioner's brief.

inmate at that facility when he committed suicide by hanging himself from a "yardarm" in his cell. (R. 46). The petitioner, the decedent's mother, brought this action against the respondents under the Wrongful Death Act. (R. 46). The alleged basis for the petitioner's claim against Masiello and Master Design Group, Inc. was that their design for the cells of the Criminal Justice Complex "failed to provide guard grills over duct work where it penetrated a secure wall or ceiling" (R. 45), and that the petitioner's decedent thus "had inexcusable access to a yardarm by which he could hang." (R. 46). The petitioner conceded below, as she does on this appeal, that this alleged "defect" was patent. (Petitioner's Brief at 1).[5]

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[5] To the extent that the petitioner's attachment to her brief of her complaint against the Palm Beach County Sheriff represents an attempt to interject at this late date an allegation that the defect, while patent, was not in fact known to the Sheriff, that attempted amendment is highly improper. The record reflects no attempt by the petitioner to seek leave to amend her claim to include such an allegation. Moreover, such "amendment" would in any event be unavailing, as the concept of patency does not require actual knowledge. See Edward M. Chadbourne, Inc. v. Vaughn, 491, So. 2d 551, 554 (Fla. 1986)(key to holding in Slavin is patentness of defect or owner's knowledge of defect); Lubell v. Roman Spa, Inc., 362 So. 2d 922, 923 (Fla. 1978)(contractor free from liability under Slavin because defective condition was "discoverable").

III. STATEMENT OF THE ISSUES

1) Whether the decision of the Fourth District Court of Appeal, affirming the lower court's dismissal with prejudice of the petitioner's second amended complaint, was correct under the case of Slavin v. Kay, which precludes recovery against the architects for personal injury to a third party caused by a patent design defect in a structure.

2) Whether the case of Slavin v. Kay should be overruled.

3) Whether the doctrine of strict liability should be extended to design professionals for defects in structural improvements to real estate.

4) Whether, even if the Court would be inclined to overrule Slavin v. Kay and to extend the strict liability doctrine to design professionals for defects in structural improvements to real estate, the petitioner's second amended complaint states a cause of action under either a theory of negligence or of strict liability in tort.

IV. SUMMARY OF ARGUMENT

Florida law recognizes the rule, announced in Slavin v. Kay, 108 So. 2d 462 (Fla. 1958), that after a structure has been completed and is accepted by the owner, an architect is relieved from liability to third parties for patent defects in the design of the structure. This rule was the stated basis for the lower court's dismissal with prejudice of the second amended complaint, and for the Fourth District's affirmance of that dismissal. The Slavin rule was properly applied in this case, where the plaintiff concedes the patency of the alleged design defect and argues simply that Slavin should be rejected by this Court.

The rule announced in Slavin and reaffirmed by this Court most recently in Edward M. Chadbourne, Inc. v. Vaughn, 491 So. 2d 551 (Fla. 1986), should not be abandoned by this Court. The Slavin doctrine is in keeping with the legislative intent underlying the fifteen-year statute of repose applicable to actions for design defects in real property. Also, the elimination of Slavin in a case such as the one at bar would in effect shift the responsibility for maintaining and operating the county jails of this state from the local county governments and the Department of Corrections to the architects who design the jails. This result would be against the public interest.

The second amended complaint does not, and does not purport to, state a cause of action for strict liability in tort against the respondents. Moreover, it is the settled law of this state that no such action will lie against design professionals for defects in structural improvements to real property.

This Court should not extend the doctrine of strict liability to cover improvements to real property. The public policy grounds for imposing strict liability upon the manufacturers of consumer goods do not exist in this case. A design for a county jail is not offered for sale in the stream of commerce, but is submitted in response to an invitation to bid and is subject to extensive approvals and inspections prior to occupancy. Additionally, the cost-shifting rationale of strict products liability does not apply here, because the additional cost to the architects would inevitably be shifted to the taxpayers of this state.

Even if this Court were to depart from settled law and hold that design professionals could be held strictly liable in tort for defectively designed improvements to real property, this Court should still affirm the Fourth District's ruling, because the petitioner's second amended complaint does not state a cause of action for strict liability in tort. No cause of action for strict liability is or can be stated, because it is not alleged that the air conditioning vent designed by the respondents was defective or dangerous when used in an expected, reasonable manner. Likewise, no cause of action for negligence exists, because the respondents were not as a matter of law under a duty to anticipate and prevent the decedent's suicide.

The decision of the Fourth District Court of Appeal should therefore be affirmed.

V. ARGUMENT

A. The Lower Court's Ruling, Dismissing the Petitioner's Second Amended Complaint With Prejudice, Is Correct Under Existing Law Holding that an Architect is Not Liable For Injuries to Third Parties Caused by Patent Defects After the Work Has Been Completed and Accepted by the Owner.

The lower court properly held that under the doctrine announced in Slavin v. Kay, 108 So. 2d 462 (Fla. 1958), the second amended complaint did not and could not state a cause of action against Masiello and Master Design Group. In Slavin v. Kay, this Court held that a contractor is relieved of liability for injuries caused by defects discoverable by ordinary observation once the work has been turned over to and accepted by the owner. Id. at 467. Slavin v. Kay has been consistently followed by the courts of this state. See, e.g., Lubell v. Roman Spa, Inc., 362 So. 2d 922 (Fla. 1978); Jackson v. L.A.W. Contracting Corp., 481 So. 2d 1290 (Fla. 5th DCA 1986); Birch v. Capelleti Brothers, 478 So. 2d 454 (Fla. 3d DCA 1985); Mori v. Industrial Leasing Corp., 468 So. 2d 1066 (Fla. 3d DCA 1985); Conley v. Coral Ridge Properties, Inc., 396 So. 2d 1220 (Fla. 4th DCA 1981); El Shorafa v. Ruprecht, 345 So. 2d 763 (Fla. 4th DCA 1977).

The application of the Slavin rule is well illustrated by the Conley case. In that case, the plaintiffs leased a condominium unit from a private owner. The plaintiffs' apartment was robbed when an intruder gained access to the unit through an air conditioning grille in a wall of the apartment. The plain-

tiffs sued, inter alia, the builder-developer of the condominium on a negligent design theory. Conley, 396 So. 2d at 1221-22. The lower court directed a verdict in favor of the defendant on the ground that the defect, if any, was patent and obvious and the builder-developer could therefore not be held liable after the unit was accepted by the plaintiffs' lessor. Id. at 1222.

The present case is clearly analogous to Conley. Here, the alleged design defect, the lack of a guard grille over an air conditioning vent in the decedent's cell, was admittedly patent. The design had been accepted, the work completed, and the jail occupied at the time of this incident. The responsibility for correcting the patent condition of the air conditioning vent lay, if anywhere, with Palm Beach County or the Department of Corrections.

The petitioner has no cause of action against Masiello or Master Design Group for the negligent design of the vent, and the lower court's order of dismissal with prejudice should be affirmed.

B. This Court Should Not Abandon the Doctrine of Slavin v. Kay.

The petitioner does not dispute that the lower court's ruling is correct under Slavin v. Kay. Rather, the petitioner asserts that the Slavin rule should be abandoned. This Court has recently declined to depart from the Slavin rule in the case of Edward M. Chadbourne, Inc. v. Vaughn, 491 So. 2d 551, 554 (Fla. 1986).

The grounds urged by the petitioner for rejection of the Slavin rule are unpersuasive. The petitioner argues that the Slavin rule should be abandoned in favor of a rule that would subject contractors and architects to liability, including strict liability, to the same extent as manufacturers of consumer goods. The petitioner cites in her brief, as her sole authority for this point, a casenote in the University of Miami Law Review. See Casenote, Vaughn v. Chadbourne: Strict Liability and the Road that Faded Away, 40 U. Miami L. Rev. 359 (1985). The article itself recognizes that there is no case law in Florida contradicting Slavin. See id. at 385-86. Rather, the article argues that the Slavin rule is merely a variation of the "patent danger" defense in product liability actions, which defense was held by this Court in Auburn Machine Works Co. v. Jones, 366 So. 2d 1167 (Fla. 1979) not to constitute an absolute bar to recovery by an injured party against a manufacturer in a strict product liability case. This Court there held that the obviousness of the danger to the injured party was merely evidence of contributory negligence on the part of the injured user of the defective product. Id. at 1171-72.

The patent danger defense in product liability cases such as Auburn Machine Works has nothing whatsoever to do with the Slavin rule. Under the Slavin rule, the issue is not whether the defect was patent to the injured party, but whether it was patent to the owner of the property who contracted for and accepted the defendant's work. See El Shorafa v. Ruprecht, 345 So. 2d 763, 764 (Fla. 4th DCA 1977).

Also unlike the former patent danger rule of product liability law, the Slavin rule does not act as an absolute bar to recovery by the plaintiff, but simply limits the number of available defendants the plaintiff can sue. Even if the contractor or architect is absolved from liability under the Slavin rule on the ground that the defect was patent to the owner upon or after acceptance, the plaintiff is not prevented from recovering from the owner for negligence in failing to remedy the defect. See Lubell v. Roman Spa, Inc., 362 So. 2d 922, 923 (Fla. 1978). The attempted analogy between Slavin and the product liability patent danger defense is thus not valid, in that the logic and effect of the two concepts are totally distinct.

The Slavin doctrine does not constitute an absolute defense against an architect's liability for negligent design. This doctrine applies only to patent defects in construction that has been accepted by the owner. An architect is not insulated from liability for negligent design of a latent defect.

The validity of the Slavin doctrine has been implicitly recognized by the Florida Legislature in its enactment of the fifteen-year statute of repose for actions founded on the design, planning, or construction of improvements to real property. See Fla. Stat. § 95.11(3)(c) (Supp. 1986). Section 95.11(3)(c) provides a general four-year limitations period for construction and design-related actions, and states that in the case of a latent defect, the period runs from the date the defect could have been discovered with the exercise of due

diligence. However, the statute places an absolute fifteen-year cutoff on actions based on latent defects. This cutoff of liability for latent defects evidences a clear legislative intent to protect architects and builders from being subjected to liability decades (or theoretically even centuries) after completion and acceptance of a structure. See 1980 Fla. Laws ch. 80-322, preamble.

The difference between the patency concept in Slavin and the patent danger defense rejected by the Court in Auburn Machine Works is illustrated by the application of section 95.11(3)(c). Obviously, the latency or patency of a design defect, for purposes of applying section 95.11(3)(c), must be determined by the patency of the defect to the owner, not to a third party who might be injured by the defect. A defect patent to the owner might well by undiscovered, and thus in a sense "latent," to a third party up until the time that the defect causes injury. An illustration of this is that a floor may, due to a design defect, have a weak spot that will bear very little weight. This condition may become patent to the owner through inspection or through experience, and yet not be observed by a third party until he falls through the flooring. If the architect's liability under section 95.11(3)(c) was determined by the discovery of the defect by the injured third party, the purpose of that section would be frustrated, because the architect could be subject to liability based on patent (to the owner) defects long after the four-year statute of limitations had run.

This legislative intent to protect architects and builders from indefinite, potentially endless exposure to liability would be frustrated if the doctrine of Slavin v. Kay were discarded. A patent design or construction defect, within the meaning of Slavin, could potentially cause injury or damage countless years after completion and acceptance of the work by the owner. The continuation in existence of the defect for such a long period would have been due to the owner's failure to remedy the patently dangerous situation, and yet the architect would still be liable, because the action was not barred by the fifteen-year statute of repose applicable to latent defects.

This result cannot have been intended by the legislature. Rather, the legislature must have recognized and taken into account the doctrine of Slavin v. Kay, which protects architects and contractors from liability once the work has been accepted. For this Court to overrule Slavin would thus undo the clear legislative plan for limiting the liability of builders and design professionals.

The rationale of the Slavin doctrine is that the architect's or contractor's liability for patent defects should end once control of and responsibility for the structure passes to the owner upon acceptance. In this particular case, involving a county jail, that rationale is especially compelling.

The Florida Statutes and applicable Department of Corrections rules set forth a detailed procedure through which any plan or design for construction of county or municipal jail facilities must pass prior to final acceptance and occupancy. See Fla. Stat. § 951.23(4) (Supp. 1986); Fla. Admin. Code Rule

33-8.015(1)-(7), (12). The Florida Statutes also set forth the duty of state prison inspectors to inspect and supervise all county detention facilities under the direction of the Department of Corrections. Fla. Stat. § 951.02 (1985). The Department of Corrections is authorized and directed to adopt rules and regulations with respect to the maintenance and operation of county jails and the confinement of prisoners by classification for the saftey of the prisoners, and is empowered to enforce such rules and regulations. See Fla. Stat. §§ 951.23(5)(a)1, 3, 951.23(6) (Supp. 1986); Fla. Admin. Code Rule 33-8.005(5).

To impose upon the architect who designs a county jail the responsibility for injuries to prisoners caused by patent defects, after construction of the jail has been completed and accepted by the county and the Department of Corrections, would in effect require that architect to insure that the county, its employees, and the Department of Corrections fulfill their governmental duties. This result cannot be deemed desirable or in the interest of the public, and this Court should not impose such an onerous burden on those who design county detention facilities in this state.

C. This Court Should Not Modify Existing Law to Create a Cause of Action for Strict Tort Liability For Structural Improvements to Real Estate.

Not only does the petitioner wish to eliminate the Slavin bar to her negligence claim against the respondents, the petitioner also argues, not very coherently, that this Court should reverse its long-standing and recently reaffirmed

precedent and create a cause of action for strict liability against design professionals for structural improvements to real estate.[6] The Court should not thus extend the scope of products liability law.

This Court first adopted the principle of strict products liability in the 1976 case of West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976). The basic effect of that case was to create an irrebuttable presumption of negligence on the part of a manufacturer of a dangerous, defective product that reaches its ultimate consumer without substantial change and without inspection for defects. Id. at 84, 86. The policy justification for this rule is that consumers are entitled to expect that goods they buy are free from dangerous defects, and that they should have no duty to inspect such goods prior to using them in an intended, reasonable manner. Restatement (Second) of Torts § 402A comment c (1964).

Subsequent to West, this Court and other courts of this state have held that the doctrine of strict products liability does not apply to structural improvements to real estate. See Edward M. Chadbourne, Inc. v. Vaughn, 491 So. 2d 551, 553 (Fla. 1986); Craft v. Wet 'n Wild, Inc., 489 So. 2d 1221, 1222 (Fla. 5th DCA 1986); Jackson v. L.A.W. Contracting Corp., 481 So. 2d 1290, 1291 (Fla. 5th DCA 1986); Neumann v. Davis Water and

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[6] The respondents would note once again that the petitioner has never attempted to state a cause of action under a strict liability theory, but rather based her claim solely on negligence. The petitioner raised this issue for the first time on appeal. The respondents set forth their arguments on this point, however, for the convenience of the Court and so that all issues may be fully briefed.

Waste, Inc., 433 So. 2d 559, 561 (Fla. 2d DCA), pet. for rev. dismissed, 441 So. 2d 632 (Fla. 1983); Alvarez v. DeAguirre, 395 So. 2d 213, 216 (Fla. 3d DCA 1981).

The rationale for these decisions was articulated by this Court in Chadbourne. Chadbourne held that a strict liability action was not maintainable against a road paving contractor that had both manufactured its own paving mix and applied it to a county roadway, where it subsequently proved to be defective and resulted in the death of one motorist and the injury of another. The defective state of the roadway was patent, and was, prior to the accident, in fact observed by a Walton County commissioner inspecting the roadway. Id. at 552-53.

This Court gave several reasons for its refusal to apply strict liability to the paving contractor in Chadbourne:

(1) A public road is not a "product;"

(2) The "purchaser" of the road, the Department of Transportation, had at least as much knowledge about road construction as did the contractor, Chadbourne, and the Department of Transportation inspected and then accepted the road;

(3) Chadbourne did not solicit buyers in the open market, but responded to the Department of Transportation's invitation to bid;

(4) There was no opportunity for the contractor to reap profits from the consuming public in a state bid situation;

(5) There was little disparity in bargaining power between the Department of Transportation and Chadbourne;

(6) A public road is not offered for sale in the steam of commerce in the way that soft drinks or automobiles are;

(7) The road was not placed in the market to be used without inspection for defects;

(8) The responsibility for maintaining and repairing the roadway lay with the county, not with Chadbourne;

(9) The defect was in fact patent.

Id. at 553-54. This Court thus concluded that the policy reasons for applying strict liability were absent in the Chadbourne case. Id. at 553.

Every one of the reasons set forth in Chadbourne for not extending the strict liability doctrine to the contractor who installed a defective roadway surface applies with equal or greater force in this case:

(1) Clearly, a county jail facility is no more a "product" than was the public road in Chadbourne. There, the injured plaintiff argued that the contractor was a "manufacturer," because it made as well as applied its own paving mix. In this case, the

respondents cannot be said to be manufacturers. The respondents designed but did not build the jail. There is clearly no "product" involved here.

(2) Here also, the "purchaser" of the jail was Palm Beach County, under the direction of the Florida Department of Corrections. The Department of Corrections clearly has at least as much knowledge as the respondents about the safe design of jail cells.

(3) Designs for county jails are not sold on the open market like consumer goods, but are only submitted in response to an invitation to bid. See Palm Beach County, Fla., Code §§ 1-50 to 1-66.2 (1986).

(4) There is no opportunity for an architect, submitting a design for a county jail in a competitive bidding setting, to reap huge profits at the expense of the consuming public.

(5) Any disparity in bargaining power between the architects bidding on such projects and Palm Beach County favors the county.

(6) County jails are not sold or introduced into the stream of commerce like consumer goods.

(7) The Palm Beach County Jail was not expected to be used without inspection for defects. In fact, the Department of Corrections has

promulgated rules requiring extensive approvals and inspections prior to occupying the facility. See Fla. Stat. § 951.23(4) (Supp. 1986); Fla. Admin. Code Rule 33-8.015(1)-(7), (12).

(8) The responsibility for inspecting, maintaining and operating the jail lay with the county and the Department of Corrections, not with the architect. See Fla. Stat. §§ 951.02, 951.23(5)(a)1, 3, 951.23(6) (1985 & Supp. 1986).

(9) The alleged "defect" in this case, the ungrilled air conditioning vent, is admitted to be patent.

Additional policy considerations are raised where the structure involved is a public facility. The comments to Restatement section 402A indicate that the justification for strict liability is cost-shifting between the injured consumer and the manufacturer of a defective product: "public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained." Restatement (Second) of Torts § 402A comment c (1964).

Where, as here, liability is attempted to be shifted to an entity that contracts with a public body to design a public facility, that cost-shifting justification does not apply. This is not a situation analogous to that of a manufacturer of

consumer goods, where the additional cost of liability insurance can be spread to all of its customers in the price of its products. The extra cost will be paid, if liability is imposed here, initially by the public bodies and municipal and county governments contracting for the design or construction of public facilities, and ultimately and inevitably by the taxpayers. The county is insulated from liability in excess of $100,000 by its sovereign immunity. Fla. Stat. § 768.28(5) (Supp. 1986). Nothing insulates local governments from rising costs of design and construction resulting from increased liability insurance premiums, however, and those increased costs of public improvements must get passed on to the taxpaying citizens of this state.

1. Even if the doctrine of strict liability were to be extended to builders of improvements to real property, that doctrine should not apply to designers of such improvements.

The respondents are of the opinion, expressed above, that strict liability should not apply to structural improvements to real estate, especially where the property involved is a public facility. This case, however, involves not the builders, but only the designers of the allegedly defective structure. Even if strict liability were to be extended to the builders of real property improvements, such liability should not be extended to those who merely design such improvements.

Even if a structure itself could be said to be a "product" for purposes of strict liability, the design for the structure is still clearly not a product. The architect who

contracts to design a building is not selling or manufacturing a product, but is providing a professional service. See Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Associates, Inc., 168 So. 2d 333, 335 (Fla. 2d DCA 1964). The traditional standard by which an architect's services are measured in determining whether or not an architect is negligent is whether the architect has exercised such reasonable care, technical skill, ability, and diligence as are ordinarily required of architects in the course of their plans, inspections, and supervision. E.g., Conklin v. Cohen, 287 So. 2d 56, 61 (Fla. 1973). To apply the principle of strict liability, which does not require proof of any want of diligence or care on the part of the defendant, would undermine the traditional standard of architect's professional liability.

Also, to impose strict liability on the respondents for injury allegedly resulting from the performance of their professional services would be to create an entirely new range of causes of action against professionals of all types. There would be no logical reason, if strict liability were extended to design professionals in the construction industry, to restrict this cause of action only to such professionals. Strict liability could also extend to surgeons, dentists, surveyors, etc. The courts of this state have previously refused to extend the liability of these professionals under the theory of implied warranty, see Audlane, 168 So. 2d at 335, and it should likewise refuse to drastically broaden the scope of strict liability in tort to include providers of professional services, such as

architects. See City of Mounds View v. Walijarvi, 263 N.W.2d 420 (Minn. 1978)(containing extensive discussion of distinction between professional services and consumer goods).

The policy justifications for imposing strict liability on the seller or manufacturer of a product are completely inapplicable to an architect who designs, but does not build, a structure. This is even conceded by the author of the University of Miami Law Review casenote upon which the petitioner so heavily relies. See Casenote, Vaughn v. Chadbourne: Strict Liability and the Road that Faded Away, 40 U. Miami L. Rev. 359, 369 n.57 (1985). There is no mass production involved in the provision of professional services to clients. There is no unfair hardship placed on the consumers of such services to trace through the channels of commerce to locate to negligent actor. These factors distinguish the rendition of professional services from the ordinary consumer transaction. See La Rossa v. Scientific Design Co., 402 F.2d 937, 942-43 (3d Cir. 1968). In the case of architects in particular, the typical one-on-one relationship between the architect and his client is completely different from the production of consumer goods by a "faceless business entity, insulated by a network of distributors, wholesalers, and retailers." Chubb Group v. C.F. Murphy & Associates, Inc., 656 S.W.2d 766, 779-80 (Mo. App. 1983); also Volume Services, Inc. v. C.F. Murphy & Associates, Inc., 656 S.W.2d 785, 793 (Mo. App. 1983).

In this case, the respondents did not build or manufacture anything. They provided only professional services as architects. In such a case, the doctrine of strict liability

does not apply. Abdul-Warith v. Arthur G. McKee and Co., 488 F. Supp. 306, 310 n.3 (E.D. Pa. 1980); Huang v. Garner, 203 Cal. Rptr. 800, 804 n.5 (1984).

This Court should decline to extend the concept of strict tort liability to architects who design improvements to real property.

D. Even if the Doctrine of Strict Liability Were Held to Be Applicable to Architects and if Slavin v. Kay Were Overruled, the Petitioner Still Does Not State a Cause of Action for Strict Liability or for Negligence.

Assuming that this Court were to radically alter the law of this state and hold that the principle of strict liability may apply to architects who design buildings containing dangerous defects, and that Slavin v. Kay is no longer good law, that would not require reversal of the lower court's dismissal of the petitioner's claim.

Even assuming that the doctrine of strict products liability were applicable to an architect who negligently designed a building, the petitioner does not and cannot state a cause of action against the respondents under that theory. The suicide by the petitioner was not caused by any defect in the air conditioning vent designed by the respondents. The allegation here is not that the vent was designed in such a way that it fell out of the ceiling and crashed down on the head of decedent, killing him. Here, the decedent used the air conditioning vent to deliberately take his own life. The Restatement comments indicate that, "A product is not in a defective

condition when it is safe for normal handling and consumption." In the present context, there is no allegation that the air conditioning vent was not perfectly designed for its intended use, that is, providing fresh air circulation in the decedent's cell.

In the case of Daniell v. Ford Motor Co., 581 F. Supp. 728 (D.N.M. 1984), the plaintiff attempted to claim that the design of an automobile was defective because the trunk lock could not be opened from the inside. The plaintiff was injured when she locked herself in the trunk in a suicide attempt, and could not escape. The district court held that the automobile trunk was not "defective" as a matter of law, because the trunk was not unreasonably dangerous within the contemplation of the ordinary consumer or user of the trunk when used for the ordinary purposes of an automobile trunk. Id. at 731. Likewise in the present case, no defect in the air conditioning vent is alleged, in that it is not alleged to have been unreasonably dangerous when used as intended.

The apparent gravamen of the petitioner's argument on appeal, although it was not pleaded below, is that the particular type of mis-use present here was or should have been foreseen and guarded against by the respondents, and that the failure of the respondents' design to prevent such misuse rendered it defective. Such a contention is blatantly illogical and has no support in the law. The likelihood of a person's hanging himself from an air conditioning vent is not, as a matter of law, an occurrence against which the respondents had a duty to guard. Concededly, it is a statistically measurable and

generally known fact that a certain number of persons commit suicide each year. In that sense, it is "foreseeable" to every designer or manufacturer of chandeliers, ceiling fans, or curtain rods that their products could conceivably serve as a means of a suicide by hanging. The failure of these designers or manufacturers to guard against that possibility does not, however, render their products or designs defective.

It may be argued that there is a greater incidence of suicide among inmates of jails and prisons than among the population as a whole, but the distinction is not one which affects the liability of the respondents. The designer of a jail cell air conditioning vent has no more way of knowing whether, when, or how a particular individual will attempt to hang himself than has the designer of a household light fixture. Because of this inability to foresee a particular incident, the designer of the jail and the interior decorator of suburban houses would, if liability were were imposed here, in effect be made insurers against all possible misuse of the items they design.

The illogic of such a contention was well stated by the Fifth Circuit Court of Appeals in Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985), when it rejected the plaintiffs' argument that the manufacturers of handguns should be strictly liable for injuries caused by their misuse:

> There is nothing inherent in the logic of the plaintiffs' arguments that would prevent their application to the manufacturers of any instrumentality that can be used dangerously, such as knives, lead pipes, explosives, automobiles, alcohol, and rolling pins. Indeed, most consumer products marketed to the general public have both legitimate and

> harmful uses. We cannot accept the argument that the manufacturer should become an insurer of all uses of those products, both legitimate and illegitimate, simply by virtue of having marketed them.

Id. at 1269; see also Daniell, 581 F. Supp. at 730-31.

While in strict liability the key to liability is the existence of a "defective" condition, in negligence the first inquiry is whether or not there is a legal duty on the part of the defendant to guard against a particular harm. In this case no such duty exists, and the petitioner cannot state a cause of action for negligence against the respondents.

A series of cases in the Florida district courts of appeal deal with the liability of jailers and similar persons for the suicides of inmates in their custody. These cases indicate that a jailer has a duty to take measures to prevent self-inflicted harm only where the prisoner has threatened suicide or demonstrated violent or suicidal tendencies. See Overby v. Wille, 411 So. 2d 1331, 1332, 1333 (Fla. 4th DCA 1982); Quinones v. Metropolitan Dade County, 366 So. 2d 535 (Fla. 3d DCA 1979); North Miami General Hospital v. Gilbert, 360 So. 2d 426, 427 (Fla. 3d DCA 1978). In the absence of such signals in an individual prisoner's case, however, a jailer is under no duty to guard against the possibility of suicide. Guice v. Enfinger, 389 So. 2d 270, 271 (Fla. 1st DCA 1980). In Guice, the First District based its decision on the settled rule that recovery is not allowed for the merely "possible," but only for the "natural and probable" consequences of negligence. Id. at 272 (citing Cone v. Inter-County Telephone & Telegraph Co., 40 So. 2d 148, 149 (Fla. 1949)).

Thus, under established precedent, even those who have responsibility for protecting and housing prisoners or mental patients are not under a blanket duty to protect each and every one of their charges from the mere possibility of suicide, regardless of a history or demonstration of suicidal tendencies. It would be an absurd result for the architects who merely designed the jails to be burdened with such a broad duty.[7] The architect has no responsibility, and indeed no ability, to evaluate the prisoners who will occupy the cells he designs, and it would be illogical to hold that architect liable for the suicide of a prisioner.

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[7] The petitioner alleges in conclusory terms in her second amended complaint that the respondents' design did not comply with "Department of Corrections requirements." (R. 45). The complaint does not contain any citation to such requirements, or specify in what respect the respondents' design did not comply with any applicable standards. A review of the applicable Department of Corrections standards for design and construction of county detention facilities shows that in fact there are no requirements for the design of jail cells to prevent suicide by inmates. The only reference in the rules to the design of air conditioning systems states, in full:

> (a) Heating, ventilating or air conditioning should be central systems of the designer's choice. Duct systems from prisoner areas, when large enough for escape attempts, must have substantially fastened cut off grilles inside the ductwork. Ductwork over a secure housing area should be avoided.
>
> (b) Mechanical ventilation of all confinement areas not having adequate natural ventilation is mandatory.

Fla. Admin. Code Rule 33-8.015(10)(a)-(b). It is apparent that the rules' only concern in the design of air conditioning systems is to provide ventilation. The only reference to guard grilles' being required is to prevent escape attempts, not to prevent suicide.

An additional consideration is that the legislature and the Department of Corrections has assigned the responsibility for detecting suicidal tendencies to those having custody to the prisoners. See Fla. Admin. Code Rule 33-8.005(5)(suicide-risk prisoners to be closely supervised, including documented physical sight checks every fifteen minutes). The case law cited above has further refined the extent to which civil liability can be imposed on jailers for breaches of that responsibility. It is outside the purview of this Court's function to shift the burden of that duty from the correctional officers of this state to the architects of the county jails.

Extensive research revealed only one reported case in which an architect of a jail was sued for negligent design resulting in the death by suicide of a prisoner. That case is, however, remarkably similar to the case at bar. In La Bombarde v. Phillips Swager Associates, Inc., 474 N.E.2d 942 (Ill. App. 1985), the plaintiff's decedent committed suicide while a prisoner in an Illinois county jail by hanging himself from a grille on an air conditioning duct. The plaintiff sued the county and the architectural firm that designed the jail, alleging as to the latter that the architect's design had negligently provided for grilles on heating and air conditioning ducts, which provided an anchor point from which the decedent hanged himself.[8] Id. at 943. The trial court dismissed the complaint for failure to state a cause of action, and the Illinois appellate court affirmed. Id.

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[8] It is ironic that in the present case, the claimed negligence lies in the respondents' not providing for such grilles.

The court in La Bombarde held that the architect as a matter of law was under no duty to design a jail in such a manner as to prevent an inmate from committing suicide. Id. at 944. The court recognized and distinguished the duty imposed on jailors, under certain circumstances, to anticipate and prevent inmate suicides. The court, citing an article relied upon by the plaintiff for the statistical foreseeability of suicide, stated:

> The magnitude of the burden placed on architects to eliminate all fixtures, such as grilles, that might be of aid in the commission of a 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.

Id. at 945 (citing A Suicide A Day In Our Nation's Jails, Crim. Just. Newsletter, Dec. 7, 1981, at 2-3).

The same reasoning in this case indicates that the respondents were under no duty to design a suicide-proof jail. The petitioner thus cannot state a cause of action against the respondents under either a strict liability or a negligence theory, and the order appealed from should be affirmed.

VI. CONCLUSION

The decision of the Fourth District Court of Appeal, affirming the dismissal of the petitioner's second amended complaint with prejudice, should be affirmed.

BEASLEY, OLLE & DOWNS
Joseph W. Downs III
Pamela A. Chamberlin

By: _____
2700 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2395
Telephone: (305) 371-5400

VII. CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondents Frank Masiello and Master Design Group, Inc. was served by mail this 1st day of May, 1987, upon the following:

Jeff Tomberg
TOMBERG & TOMBERG, P.A.
626 S.E. Fourth Street
Post Office Drawer EE
Boynton Beach, Florida 33435

Winslow D. Hawkes, III
PETERSON & FOGARTY
P.O. Drawer 3604
West Palm Beach, Florida 33402

Glenn Mitchell
MITCHELL, HANSER & SCHWARTZ
2001 Palm Beach Lakes Boulevard
Suite 503
West Palm Beach, Florida 33409

Charles J. Kahn, Jr.
LEVIN, WARFIELD, MIDDLEBROOKS, MABIE,
THOMAS, MAYES & MITCHELL
266 South Palafox Street
P.O. Box 12308
Pensacola, Florida 32581