SUPREME COURT OF FLORIDA

CASE NUMBER: **75,538**
DISTRICT COURT OF APPEAL, FOURTH DISTRICT –
CASE NUMBER: **88-0834**
FLA. BAR NO. **375111**

TERRY FITZGERALD, as mother and next friend of BRANDI FITZGERALD, a minor,

Petitioner,

vs.

JAN CESTARI, MARIA CESTARI, his wife and MARY B. CESTARI,

Respondents.

BRIEF OF PETITIONER,
TERRY FITZGERALD, as mother and next friend of
BRANDI FITZGERALD, a minor.

Respectfully submitted,

Kenneth R. Drake, Esquire
Attorneys for Petitioner, TERRY FITZGERALD, as mother and next friend of BRANDI FITZGERALD, a minor
Touby Smith DeMahy & Drake, P.A.
141 Northeast Third Avenue, Penthouse
Bayside Office Center
Miami, **Fl 33132**
(305) 375-0900

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I. INTRODUCTION

Petitioner, TERRY FITZGERALD, as mother and next friend of BRANDI FITZGERALD, a minor, appeals the summary final judgment entered against her in the 15th Judicial Circuit, Palm Beach County, and affirmed by the Fourth District Court of Appeal. This court has accepted jurisdiction on the basis of conflict between the opinion of the Fourth District Court of Appeal and other district courts of appeal.

The parties will be referred to by name: Petitioner will be referred to as "FITZGERALD" or "BRANDI"; Respondents will be referred to as "CESTARIS." Citations to the record will appear as (R. 1-658.) All emphasis will be the writer's unless otherwise indicated.

II. STATEMENT OF THE CASE

FITZGERALD filed suit against the CESTARIS seeking damages for injuries suffered by BRANDI when she ran through a plate glass sliding door in a single family home owned by the CESTARIS and leased to Ed and Pat Cavanaugh. BRANDI was visiting the Cavanaughs' son, Chris, at the time of the accident.

FITZGERALD raised two counts in her Amended Complaint. Count I alleged that the CESTARIS breached their duty of care to keep the premises in a reasonably safe condition and to give timely notice of latent or concealed perils, by failing

to place decals or other markings on the sliding glass door, and by failing to inspect and repair the sliding glass door because it was not composed of safety or tempered glass, as required by the Southern Standard Building Code. Count II alleged that BRANDI was a member of the class which was to be protected by the Southern Standard Building Code, and therefore, the failure of the CESTARIS to maintain their premises in conformity with the Southern Standard Building Code constituted negligence. (R. 155-60.)

The CESTARIS moved for summary judgment on two bases: execution of a release by FITZGERALD[1]; and, because the sliding glass doors were installed by the original builder of the CESTARIS' premises, and based upon the doctrine set out in Slavin v. Kay, 108 So.2d 462 (Fla. 1959), the builder's original negligence was the proximate cause of BRANDI's injuries. (R. 239.)

The trial court entered final summary judgment against FITZGERALD, finding that there were no genuine issues of material fact on the following bases:

> The Court concludes that the Cestaris had no duty to investigate and determine the type of glass used in the construction of the sliding glass door in their home. The Court further concludes that the Cestaris had no duty to place decals or other markings on the sliding glass door.

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[1] The CESTARIS had previously moved for summary judgment on this issue (R. 132-40), which the trial court denied. (R. 150.)

(R. 311.) The summary judgment was affirmed by the Fourth District Court of Appeal, and the Petitioner timely invoked the discretionary jurisdiction of this Court on the basis of conflict between the opinion of the Fourth District Court of Appeal and opinions of other district courts of appeal.

III. STATEMENT OF THE FACTS

On the date of the accident, BRANDI was visiting her grandmother's home. (R. 539.) The CESTARIS owned a single family home (R. 188-93; 199-201), and leased that home to the Cavanaughs. (R. 159.) BRANDI's grandmother's home was located behind the CESTARIS' house. (R. 540.) BRANDI, seven years old at the time and in second grade, was visiting the Cavanaughs' son. (R. 541, 543.) When returning to her grandmother's house, BRANDI ran through a sliding glass door which was at the rear of the CESTARIS' house. (R. 542.) BRANDI was unaware that the sliding glass door had been closed. (R. 283.)

The glass door broke into large pieces. There were no decals or other markings on the sliding glass door at the time of the accident. (R. 188-93; 199-201; 547.) BRANDI was taken to the emergency room of a local hospital, where she was seen by a plastic surgeon. BRANDI had suffered multiple lacerations to her face, neck and left leg. (R. 283-85.) Although the wounds healed, BRANDI was left with a large scar on the left side of her face, near her chin, which is

permanent. (R. **289-90, 294,** and **301.)** Although the plastic surgeon testified that she would benefit from additional procedures, including scar revision, dermabrasion, and collagen therapy, (R. **291),** as of the time of the summary judgment, those procedures had not been performed because FITZGERALD could not afford them. (R. **547-48.)**

As the **sole** item of evidentiary support for their motion for summary judgment, the CESTARIS filed the affidavit of Jan Cestari. Mr. Cestari asserted that he and his family were unaware of the type of glass that composed the sliding glass door in their home, that the type of glass was not readily discoverable by **his** inspection, and that the sliding glass doors had been originally installed by the builder of the house, prior to their purchase of the house. (R. **219-20.)**

In addition to Requests for Admission and the deposition of Terry Fitzgerald, FITZGERALD submitted the deposition testimony of Norman Spangler. Mr. Spangler testified that tempered or safety glass can be distinguished from @*anneal@@r non-safety glass by the markings which appear on the tempered glass. In other words, if the glass is tempered, then a permanent marking on the glass would acknowledge that. (R. **622-24.)** Mr. Spangler testified that the sliding glass door did not consist of safety glass, based upon a description of the glass, the lacerations received by BRANDI, and the size and configuration of the pieces of glass

into which the door broke. (R. 627.) Mr. Spangler also testified that a sliding glass door, without decals or markings, is inherently dangerous. (R. 638.) And, the applicable building code required glass doors to be made of safety glass.

IV. SUMMARY OF ARGUMENT

Whether the CESTARIS breached their duty of care to BRANDI was a question of fact for a jury to resolve. First, a jury should have been permitted to decide whether the CESTARIS breached their duty of care by failing to place decals or markings on the glass door to warn that it is closed. The Second and Third District Courts of Appeal have previously ruled this to be a question of fact. Other jurisdictions have similarly ruled. The factual circumstances of this case do not permit entry of summary judgment as a matter of law.

Second, a jury should have been permitted to decide whether the CESTARIS breached their duty of care by failing to conduct a reasonable inspection of the glass door, and consequently failing to remedy that dangerous condition. The affidavit of JAN CESTARI did not establish the lack of a genuine issue of material fact on this issue. Additionally, the evidence before the trial court established that the condition was discoverable upon reasonable inspection, that

the door was inherently dangerous, and that it violated the applicable building code.

Additionally, Florida Statutes require a landlord to maintain its premises in compliance with the requirements of the applicable building code, and provide a civil remedy to those injured by a landlord's breach of this requirement.

Under these circumstances, a jury should have been permittedto decide the question of the CESTARIS' negligence.

V. ARGUMENT

THE TRIAL COURT ERRED IN GRANTING SUMMARY FINAL JUDGMENT BECAUSE ISSUES OF MATERIAL FACT EXISTED AS TO THE CESTARIS' NEGLIGENCE.

BRANDI FITZGERALD, a seven year old child at the time of the accident, ran through a plate glass sliding door. The door was not made of safety or tempered glass, The door did not have any decals or other markings to warn that it was closed. BRANDI did not know that the glass door had been closed. And, the presence of a glass door, composed of glass other than tempered or safety glass, violated the applicable building code,

Yet, based solely on the affidavit of the owner of the premises that he was unaware of the type of glass used in the glass door, and that the type of glass was not readily discoverable through his inspection, the trial court ruled that the CESTARIS had no duty to inspect and discover that the glass doors were not composed of safety glass, and

further ruled that the CESTARIS had no duty to place warnings or decals on the glass doors. The trial court erred because the facts as presented to the trial court, with all reasonable inferences drawn in favor of FITZGERALD, established genuine issues of material fact which should be submitted to a jury for trial. It is ordinarily a question for the jury whether a defendant has breached a duty owed to a plaintiff. See, e.g, Wallach v. Rosenberg, 527 So.2d 1386 (Fla. 3d DCA), rev. den., 536 So.2d 246 (Fla. 1988); Garrison Retirement Home Corp. v. Hancock, 484 So.2d 1257 (Fla. 4th DCA 1985); Miller v. Florida East Railway Co., 477 So.2d 55 (Fla. 5th DCA), cause dis., 482 So.2d 348 (Fla. 1985).

A. THE TRIAL COURT ERRED IN RULING AS A MATTER OF LAW THAT THE CESTARIS HAD NO DUTY TO PLACE DECALS OR OTHER MARKINGS TO WARN THAT THE GLASS DOOR HAD BEEN CLOSED.

The CESTARIS' duty of care. A landowner owes to an invitee two concurrent duties of care: one, the duty to use reasonable care in keeping the premises in a reasonably safe condition; **and** two, the duty to give notice or warning of any latent perils known or which should be known to the owner, but which cannot be discovered by the invitee through the exercise of reasonable care. See, e.g., Levy v. Home Depot, Inc., 518 So.2d 941 (Fla. 3d DCA 1987); Lynch v. Brown, 489 So.2d 65 (Fla. 1st DCA 1986). Further, the owner of a residential dwelling unit, who leases it to a tenant for

residential purposes, has a duty to reasonably inspect the premises before allowing a tenant to take possession, and to make repairs necessarytotransfer a reasonably safe dwelling unit to the tenant. After tendering possession, the landlord has a continuing duty to exercise reasonable care to repair dangerous defective conditions. Wansur v. Eubanks, 401 So.2d 1328 (Fla. 1981). And, the CESTARIS, as owners/landlords of the premises, can be held liable to third persons for injuries caused by defects in the leased premises. See. e.g., Wilson v. Wilson, 382 So.2d 773 (Fla. 3d DCA 1980); Bowen v. Holloway, 255 So.2d 696 (Fla. 4th DCA 1971); Bovis v. 7-Eleven. Inc., 505 So.2d 661 (Fla. 5th DCA 1987).

Application of this Duty. Thus, the CESTARIS owed a duty to FITZGERALD to keep their premises in a reasonably safe condition and to warn FITZGERALD of latent or concealed dangers. The CESTARIS did not place warning decals or markings on the glass door to advise invitees, such as BRANDI, that the door was closed. BRANDI, called to go home by her mother, and unaware that the glass door had been closed, ran through the door which lead to the rear of the premises, and suffered severe injuries.

These circumstances created a jury issue on the question of whether the CESTARIS breached their duty owed to BRANDI. This breach is senarate and apart from the CESTARIS, failure to discover that the sliding glass door was not comnosed of safety alass. The CESTARIS knew or should have

known that a glass door presents a danger to invitees who are unaware that the door is there, or that it has been closed since the invitee entered the premises. Further, the CESTARIS were aware that children would be present on the premises. The Cavanaughs had a minor son the same age as BRANDI. A child's capacity to observe dangerous conditions such as this is much less than that of an adult. In South Florida, where sliding glass doors are prevalent, and consequently, where sliding glass door accidents are all too frequent, it is common to place decals or markings on a glass door to denote its presence. And, the cost of doing so is relatively small. Thus, whether the failure to place a warning or decal on a sliding glass door is a breach of the duty of a landowner to its invitees is a question of fact for a jury to determine.

Decisions of the Second and Third District Courts of Appeal support this conclusion. This issue was most recently discussed in Hannabass v. Florida Home Insurance Co., 412 So.2d 376 (Fla. 2d DCA 1981), where the court held that a jury question was presented on the issue of the negligence of a landowner where a minor child (eleven years old) was injured by running through a sliding glass door which did not have a warning decal affixed to it.

> The passageway through which [plaintiff] was running when she was hurt was normally kept open, but the [defendants] had closed it the day of the accident because they had turned on the air conditioning. Although it was clear that they had been cautioned to put a warning

> decal on the door, there was conflicting testimony whether they had done so prior to the accident. Therefore, the jury was entitled to find some negligence on their part.

412 So.2d at 377. Here, it is undisputed that the CESTARIS had not placed warning decals on the glass door.

In McCain v. Bankers Life & Casualty Company, 110 So.2d 718 (Fla. 3d DCA), cert. den., 114 So.2d 3 (Fla. 1959), the court held that a jury issue was presented as to whether the owner of certain premises failed to keep the premises in a reasonably safe condition where a minor child (eight years old) was injured when he walked through a plate glass door which had no warning decals or other warning devices attached to it. The court, after a comprehensive review of a number of cases from many jurisdictions, dealing with similar accidents, noted that the only real basis for denial of liability in a glass door case was that the plaintiff should have observed the door or window. 110 So.2d at 721. (This was before the advent of the doctrine of comparative negligence.) The court found that such an analysis is not conclusive where a child is involved. 110 So.2d at 721-722. The court therefore ruled that a jury issue was presented under those circumstances.

McCain was followed in Peppermint Twist, Inc. v. Wright, 169 So.2d 330 (Fla. 3d DCA 1964), affirming the trial court's submission of the issues of negligence and contributory negligence to the jury in a glass door case

involving a minor of 18 years of age, and Canner v. Blank, 152 So.2d 193 (Fla. 3d DCA 1963), reversing a summary judgment entered in favor of defendants in a glass door case involving a 13 year old girl.

In affirming the summary judgment here, the Fourth District Court of Appeal failed to properly analyze these cases. The majority opinion, citing only two of these four cases, stated that they dealt only with the issue of the minor's contributory negligence, that they predated this court's decision in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), and that neither party had raised the issue of contributory negligence. Fitzgerald v. Cestari, 553 So.2d 708, 709 (Fla. 4th DCA 1989).

The dissenting opinion (Judge Dell) provides a better reasoned analysis. 553 So.2d at 710-12. (A copy of the entire opinion is attached as the Appendix.) Judge Dell noted that a number of other jurisdictions had found that, under factual circumstances similar to these, the question of the Defendant's negligence was for the jury. For instance, in Kemline V. Simonds, 231 Cal.App.2d 165, 41 Cal. Rptr. 653 (Cal. 1st DCA 1964), an eight year old child ran through a glass door:

> We think that the trier of fact reasonably could find that simple precautions, such as colored tape, metal strips or other markings on or across the glass panel would have remedied or at least substantially reduced the danger of such condition at small cost to defendants.

41 Cal. Rptr. at 656. See also Shannon V. Butler Homes, Inc., 102 Ariz. 312, 428 P.2d 990 (1967); Giodano V. Mariano, 112 N.J.Super. 311, 271 So.2d 20 (A.D. 1970); Dixon v. Allstate Insurance Co., 362 So.2d 1368 (La. 1978).

Judge Dell, finishing with a review of Florida's cases on point (Canner, Peppermint Twist, and McCain), concluded that the absence of warning decals on the glass door created a jury question. 553. So.2d at 711-12.

Thus, a jury issue is presented here as to whether the CESTARIS breached their duty of care to BRANDI by failing to place warning decals or other markings on the glass door to notify invitees that the door was present and closed.

B. THE TRIAL *COURT* ERRED IN RULING AS A MATTER OF LAW THAT THE CESTARIS HAD NO DUTY *TO* INSPECT AND DETERMINE THAT THE GLASS DOOR WAS NOT COMPOSED OF TEMPERED OR SAFETY GLASS.

The CESTARIS had a duty to maintain their premises in a reasonably safe condition. Additionally, the CESTARIS had a duty to reasonably inspect their premises before allowing the Cavanaughs to take possession, and to make the repairs necessary to transfer a reasonably safe dwelling unit to the Cavanaughs. Mansur V. Eubanks, 401 So.2d 1328.

The facts before the trial court on this issue were uncomplicated. The sliding glass door was not made of tempered or safety glass. A glass door composed of safety or tempered glass would have a permanent marking in one of the corners of the glass denoting its composition. (R. 623-

24.) If the door is not marked, then it is not safety or tempered glass. (R. 623-25.) And, a glass door, composed of non-safety glass, without markings or warnings, is inherently dangerous. (R. 638.) Upon these facts, the issue of whether the CESTARIS breached their duty of maintaining their premises in a reasonably safe condition was for the jury to decide.

The Slavin doctrine. Surely, a jury could conclude that the sliding glass door was not reasonably safe because it was not made of tempered or safety glass and therefore that the CESTARIS breached their duty of care to maintain the premises in a reasonably safe condition. The CESTARIS seek to avoid this conclusion by raising the doctrine first espoused in Slavin v. Kay, 108 So.2d 462 (Fla. 1958.) Slavin held that where a contractor creates a dangerous condition or defect, which is not discoverable by inspection, then the contractor's original negligence is considered the proximate cause of the plaintiff's injury. 108 So.2d at 466.

Thus, under Slavin, the question becomes whether the dangerous condition is discoverable upon reasonable inspection. (This conclusion dovetails with the CESTARIS' duty of care as owners and landlords.) The trial court, and the Fourth District Court of Appeal, incorrectly determined as a matter of law that the composition of the glass door was a latent defect and therefore not discoverable.

This issue is a jury question. In Lubell V. Roman Spa, Inc., 362 So.2d 922 (Fla. 1978), this Court dealt with a similar question, overruling the determination by the First District Court of Appeal that the doctrine set out in Slavin relieved the owner of liability where the dangerous condition was not discoverable by inspection. This Court found that there was evidence in the record indicating that the defect may have been discoverable by inspection. This Court therefore found that the trial court appropriately submitted the question of the defendant's negligence to the jury.

Here, not only did the CESTARIS fail to establish the lack of a genuine issue of material fact on this point, but further FITZGERALD adduced record evidence to establish that reasonable inspection by the CESTARIS would have revealed that the glass door was not made of safety or tempered glass. JAN CESTARI's affidavit merely made the conclusion that the type of glass in the glass door was not readily discoverable by his inspection. (R. 219-20.) The affidavit does not state, and no other evidence before the court explains, whether any of the CESTARIS performed any inspection of the premises or the glass doors, and if so, what the inspection consisted of, who performed it and when. On the other hand, FITZGERALD introduced evidence to establish that safety or tempered glass is clearly marked as such. (R. 623-25.) In other words, if one looked at the glass door, and the marking did not note "Tempered" or "Safety," then it was not.

Thus, the question of whether the CESTARIS, as owners and landlords, breached their duty to FITZGERALD was for the jury to decide. This conclusion is bolstered by the fact that the lack of safety glass in the sliding glass door violated the applicable building code. It is well settled in Florida that violation of an applicable building code is evidence of negligence. See, e.g., Brogdon v. Brown, 505 So.2d 19 (Fla. 3d DCA), rev. den., 513 So.2d 1060 (Fla. 1987). The CESTARLS, as owners/landlords, had a duty to inspect the premises and transfer a reasonably safe dwelling unit to the Cavanaughs. This duty seems to have been breached, on its face, by the transfer of the premises in a condition in violation of applicable building code.

Additionally, other jurisdictions have held that a plate glass door, unmarked, is inherently dangerous.

> A large sheet of thin, clean, transparent, untempered, not-laminated glass presents such an obvious risk of serious injury that it must be considered a hazardous substance.

Dixon, 362 So.2d at 1369-70. See, also, Judge Dell's dissent, 553 So.2d at 710.

Consequently, the jury should have been presented with the question of the CESTARIS' negligence. The trial court erred in granting summary final judgement where there was a genuine issue of material fact as to whether or not the dangerous condition was discoverable by reasonable inspection.

C. FLORIDA STATUTES REQUIRE A LANDLORD TO MAINTAIN ITS PREMISES IN COMPLIANCE WITH THE REQUIREMENTS OF APPLICABLE BUILDING CODES.

Section 83.51(1)(a), Florida Statutes (1983), requires a landlord at all times during the tenancy to maintain his premises in compliance with the requirements of the applicable building code. This statutory requirement is enforceable by civil action, Section 83.54, Florida Statutes (1983), and the landlord's failure to comply with the requirements of this statute may entitle "the aggrieved party" to recover damages caused by the non-compliance. Section 83.55, Florida Statutes (1983).

It is undisputed that the glass door was not composed of safety glass or tempered glass. It is further undisputed that the applicable building code required safety glass or tempered glass, at all material times. The CESTARIS had a duty to maintain their leased premises in compliance with the applicable building code. This statutory requirement is in line with the common law duty imposed by Mansur v. Eubanks. And, the CESTARIS, as landlords, could be held liable to third parties, such as BRANDI FITZGERALD, for their failure to maintain their premises in a reasonably safe condition, and therefore, for their failure to comply with the statutory requirements noted above.

Thus, the trial court erred in ruling as a matter of law that the CESTARIS had no duty to inspect and determine

the type of glass of which the sliding glass door was composed.

VI. CONCLUSION

The trial court erred in granting final summary judgment, and the Fourth District Court of Appeals likewise erred in affirming that judgment. Whether or not the CESTARIS breached their duty of care by failing to place warning decals or markings on the sliding glass door was a jury question. In affirming the trial court's summary judgment, the Fourth District Court of Appeal ignored long-standing Florida case law which holds that a jury question is presented in cases involving sliding glass door accidents.

Additionally, a jury question was presented on the issue of whether the CESTARIS breached their duty of care by failing to reasonably inspect the premises and determine that the sliding glass door was not composed of safety glass. The CESTARIS failed to meet their burden on summary judgment to establish conclusively the lack of a genuine issue of material fact on this issue. Additionally, there was record evidence before the trial court establishing that this dangerous condition could be determined upon reasonable inspection.

Finally, where Florida statutes require that a landlord maintain his premises in compliance with the applicable building code, and where the undisputed evidence establishes that the premises were not in compliance with the

applicable building code, a jury question has been created on the issue of negligence.

For all of the reasons above, the opinion of the Fourth District Court of Appeals should be quashed, and this matter should be reversed and remanded for trial.

Respectfully submitted,

TOUBY SMITH DEMAHY & DRAKE
Attorneys for Appellants
141 Northeast Third Avenue
Penthouse
Bayside Office Center
Miami, FL 33132
(305) 375-0900

By: _____
KENNETH R. DRAKE

VII. CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 17th day of July 1990 to: HOWARD POMERANTZ, ESQUIRE, 7800 W. Oakland Park Blvd., Suite 101, Sunrise, FL 33321; JAY B. GREEN, ESQUIRE, 315 S.E. Seventh Street, Advocate Building Second Floor, Ft. Lauderdale, FL 33301; RICHARD A. SHERMAN, ESQUIRE, Suite 102 N. Justice Building, 524 S. Andrews Avenue, Ft. Lauderdale, FL 33301.

TOUBY SMITH DEMAHY & DRAKE
Attorneys for Appellants
141 Northeast Third Avenue
Penthouse
Bayside Office Center
Miami, FL 33132
(305) 375-0900

By: _____
KENNETH R. DRAKE