IN THE SUPREME COURT OF APPEAL
FOURTH DISTRICT COURT OF APPEAL

CASE NUMBER: **88-0834**

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

Petitioner/Plaintiff,

vs.

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

Respondents/Defendants.
_____/

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

Respectfully submitted,

Kenneth R. Drake, Esquire
Attorneys for Appellee
Touby Smith DeMahy & Drake, P.A.
141 Northeast Third Avenue
Penthouse
Bayside Office Center
Miami, Fl **33132**
(305) 375-0900

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. STATEMENT OF THE CASE	1
111. SUMMARY OF ARGUMENT	3
IV. ARGUMENT	5
V. CONCLUSION	9
CERTIFICATE OF SERVICE	10
APPENDIX TO JURSIDICTIONAL BRIEF	11

TABLE OF AUTHORITIES

	PAGE
Canner v. Blank, 152 So.2d 93 (Fla. 3d DCA 1963)	7
Hannabass v. Florida Home Insurance Company, 412 So.2d 376 (Fla. 2d DCA 1981)	5,6,7
Hoffman v. Jones, 280 So.2d 431 (Fla. 1973)	7
Mansur v. Eubanks, 41 So.2d 1328 (Fla. 1981)	4,8,9
McCain v. Bankers Life & Casualty Company, 110 So.2d 718 (Fla. 3d DCA 1959)	6
Peppermint Twist, Inc. v. Wright, 169 So.2d 330 (Fla. 3d DCA 1964)	7
Reaves v. State, 485 So.2d 829 (Fla. 1986)	1
Other Authorities:	
Section 83.51(1)(a)	8

I. INTRODUCTION

Petitioner, TERRY FITZGERALD, as mother and next friend of BRANDI FITZGERALD, a minor, invokes the discretionary jurisdiction of this Court on the basis that the decision of the Fourth District Court of Appeals directly and expressly conflicts with decisions of this Court and other District Courts of Appeal on the same rules of law.

The parties will be referred to by name: Petitioner will be referred to as "FITZGERALD"; Respondent will be referred to as "CESTARIS." All emphasis will be the writer's unless otherwise indicated.

II. STATEMENT OF THE CASE

The statement of the case is based upon the opinion, a copy of which is attached to this brief as the Appendix, and will be referred to as "A. 1-10."[1]

BRANDI FITZGERALD, a seven year old child, suffered personal injuries when she ran through a sliding glass door at the home owned by the CESTARIS. (A. 5.) The sliding glass door had no decals or other markings and was not made of laminated safety glass, wired glass or tempered glass.

---

[1] A portion of the facts appear in the dissenting opinion. Petitioner is not unmindful of this Court's opinion in Reaves v. State, 485 So.2d 829 (Fla. 1986), however, the majority opinion references, and impliedly incorporates, the facts raised in the dissenting opinion. "While the dissent discusses many of the facts and the law from other jurisdictions, we add more of the former. . . ." (A. 1.)

(A. 2-5.) The CESTARIS were the landlords of the premises, and BRANDY FITZGERALD was a visitor on those premises. (A. 3.) FITZGERALD's complaint alleged that the CESTARIS had a duty to use ordinary care to maintain the premises in a reasonably safe condition, that they breached their duty by failing to give timely notice of latent or concealed perils, and further that they breached their duty of reasonable care to place decals or other markings on the sliding glass door. (A. 5.)

The CESTARIS filed a motion for summary judgment, asserting that the lack of safety glass was a latent defect that was not discoverable by them through normal inspection, that it was the negligence of the original builder that was the proximate cause of BRANDI FITZGERALD's injuries, and that they had no duty to place decals or other markings on the sliding glass door. (A. 2.) In support of their motion, JAN CESTARI filed an affidavit asserting that he did not install the sliding glass door on the premises; that the sliding glass door was already in place when he purchased the home; that he and his family were unaware of the type of glass that comprised the sliding glass door; and that the type of glass in the subject doors was not readily discoverable by inspection of same. (A. 2-4.)

The trial court granted the CESTARIS' Motion for Summary Judgment finding that: "the Cestaris had no duty to investigate and determine the type of glass used in the

construction of the sliding glass door and that the CESTARIS had no duty to place decals or other markings on the door." (A. 2.)

The Fourth District Court of Appeals affirmed the trial court's ruling, holding as follows: (1) that the lack of safety glass in the sliding glass door, as a matter of law, was a "latent" defect of which the CESTARIS had no knowledge and which a reasonable inspection would not have disclosed to them: (2) that the CESTARIS, as a matter of law, had no duty of care to place decals or other markings on the sliding glass door to warn third persons, such as BRANDI FITZGERALD, of the presence of the door.

III. SUMMARY OF ARGUMENT

The opinion of the Fourth District Court of Appeals expressly and directly conflicts with that line of cases which hold that a jury question is presented on the issue of whether a landowner has breached his duty to keep his premises in a reasonably safe condition where a minor child has been injured by running through a glass door or window which had no warning decals or other warning devices attached to it to warn the minor child of the presence of the glass door. Here, BRANDI FITZGERALD, a seven year old child, ran through a sliding glass door which had no warning decals or markings on it to warn of its presence. The Fourth District Court affirmed the trial court's ruling that the CESTARIS,

landlords/owners of the residence, owed no duty of care as a matter of law to third persons, such as BRANDI FITZGERALD, to place warning decals or other markings on the sliding glass door to warn of its presence. This holding directly and expressly conflicts with opinions of the Second and Third District Court of Appeals on this exact issue.

Additionally, the opinion in this case directly and expressly conflicts with that line of cases, commencing with Mansur v. Eubanks, 41 So.2d 1328 (Fla. 1981), which hold that the owner of a residential dwelling, who leases it to a tenant for residential purposes, has a duty to reasonably inspect the premises before allowing the tenant to take possession, and to make the repairs necessary to transfer a reasonably safe dwelling unit to the tenant. The Fourth District Court's opinion holds that a landlord's failure to replace a sliding glass door, not made of laminated safety glass, wire glass or temper glass, does not breach his duty to transfer a reasonably safe dwelling unit to the tenant. The court's holding that a landlord has no duty to place decals or other warning markings on sliding glass doors, and has no duty to replace non-safety glass in a sliding glass door also directly conflicts with that line of cases starting with Mansur v. Eubanks.

IV. ARGUMENT

A. THIS DECISION CONFLICTS WITH DECISIONS OF THE SECOND AND THIRD DISTRICT COURTS OF APPEAL

In this opinion, the Fourth District Court has held, as a matter of law, that a landlord/landowner has no duty to affix warning decals or other devices to sliding glass doors to warn third persons, such as BRANDI FITZGERALD, that the doors is closed, and therefore, glass doors without warning decals are reasonably safe as a matter of law. The Fourth District Court's holding on this issue is independent of its holding that the composition of the sliding glass door amounted to a "latent" defect for which the CESTARIS could not be held liable.

This holding is in direct conflict with holdings of other district courts of appeal on the same issue. In Hannabass v. Florida Home Insurance Company, 412 So.2d 376 (Fla. 2d DCA 1981), 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. There, plaintiffs appealed on the basis of inadequate damages. The defendants cross-appealed contending that they were entitled to a directed verdict on the issue of liability. The court stated:

> 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.

Id. at 377.

The holding in Hannabass is therefore in direct conflict with the holding in this opinion. In both cases, a minor child was injured when she ran through a sliding glass door which did not have a warning decal on it. The Second District Court of Appeals found that those facts presented a jury question, but the Fourth District Court of Appeals in this opinion found that as a matter of law no duty of care was violated and therefore no jury question was presented. That creates direct conflict, and this Court should take jurisdiction.

Similarly, in McCain v. Bankers Life & Casualty Company, 110 So.2d 718 (Fla. 3d DCA 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 was injured when he walked through a plate glass door which had no warning decals or other warning devices attached to it to advise the plaintiff of the presence of the door.

In McCain, the summary final judgment was entered in an action brought to recover damages for injuries sustained by an eight year old boy when he walked into and broke a

plate glass door. The Third District Court, drawing a distinction between the duty owed to adults and that owed to minor children, stated: "We hold that the question of negligence, upon the face of this case, an issue for the jury, and accordingly the judgment is reversed." Id.

McCain was followed in the Third District Court of Appeals by Canner v. Blank, 152 So.2d 93 (Fla. 3d DCA 1963), where the court held under similar facts that a jury question was presented, and reversed a summary judgment entered in favor of the defendants in an action to recover damages for injuries sustained by a thirteen year old girl when she ran through a closed sliding glass door, which bore no markings or decals. See also, Peppermint Twist, Inc. v. Wright, 169 So.2d 330 (Fla. 3d DCA 1964), where the court held that a jury question was presented as to the negligence of a landowner for failing to maintain its premises in reasonably safe condition where a minor plaintiff, eighteen years of age, was injured by walking through a plate glass door which was clear and bore no warning decals or markings to indicate that the door was closed.

Thus, the Fourth District Court's opinion in this case is in direct conflict with this line of cases. The Fourth District Court's attempt to distinguish this line of cases on the basis that they predate the Florida Supreme Court's decision in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) is not persuasive because it does not consider Hannabass v.

Florida Home Insurance Company which is a 1981 Second District Court of Appeals case.

This Court should accept jurisdiction to resolve this conflict between the Second and Third District Court of Appeals and the Fourth District Court of Appeal.

B. THIS DECISION CONFLICTS WITH THE LINE OF CASES COMMENCING WITH MANSUR V. EUBANKS.

The Fourth District Court of Appeals in this opinion has held that, as a mater of law, the existence of a non-tempered sliding glass door was a "latent" defect, which the defendants as landlords had no duty to discover or repair.[2] This holding is in direct and express conflict with the rule of law set out in Mansur v. Eubanks, 401 So.2d 1328 (Fla. 1981) where this court held "that 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 to take possession, and to make the repairs necessary to transfer a reasonably safe dwelling unit to the tenant. . . ." Id. at 1330.

The Fourth District Court's holding here makes it clear that the condition of the premises was not reasonably

---

[2] The court so held, even though Florida law requires a landlord "at all times during the tenancy. . . [to] comply with the requirements of applicable building, housing, and health codes. . ." Section 83.51(1)(a), Florida Statutes, and the lack of safety glass amounts to a violation of the applicable building code.

safe. The basis for this court's holding was that the negligence charged against the CESTARIS was not causally related to FITZGERALD's injury, but rather it was the negligence of the original builder that was so causally-related.

The opinion of the Fourth District Court of Appeals, holding that the transfer of a residential dwelling unit by a landlord to its tenant in a condition not reasonably safe, -on the basis that the condition was created by a prior party-which then causes injury to a third person directly conflicts with this Court's holding in Mansur v. Eubanks that a landlord has a duty to transfer a reasonably safe dwelling unit to its tenant.

V. CONCLUSION

This opinion directly conflicts with the opinions of the Second and Third District Courts of Appeal which hold that a jury question is presented on the issue of whether a landowner has breached his duty of reasonable care by failing to place warning decals or other markings on glass doors, and further conflicts with the holding of this Court in Mansur v. Eubanks that a landlord of a residential dwelling unit has a duty to transfer the premises in a reasonably safe condition.

The Petitioner, TERRY FITZGERALD, as mother and next friend of BRANDI FITZGERALD, a minor, respectfully request

that this Court accept jurisdiction of this case due to express and direct conflict between the decision in the instant opinion and the decisions of the Supreme Court and other District Courts of Appeal as stated above.

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

By: _____
KENNETH A. DRAKE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of February 1990 to: Jay B. Green, Esquire, 315 S.E. 7th Street, Suite 200 - Advocate Building, Ft. Lauderdale, FL 33301 and Howard Pomerantz, Esquire, 7800 W. Oakland Park Blvd., Suite 100, Sunrise, FL 33321.

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

By: _____
KENNETH A. DRAKE

Fitz.Br