IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,538

Florida Bar No: 184170

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.

ON PETITION FOR DISCRETIONARY JURISDICTION
FROM THE FOURTH DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENTS ON JURISDICTION JAN CESTARI, MARIA CESTARI, his wife, and MARY B. CESTARI

(With Appendix)

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 102 N Justice Building
524 South Andrews Avenue
Fort Lauderdale, FL 33301
(305) 525-5885 - Broward
(305) 940-7557 - Dade

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LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

TABLE OF CITATIONS

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

POINT ON APPEAL

I. THERE IS NO DIRECT AND EXPRESS CONFLICT BETWEEN THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL AND THE CASES CITED BY THE PETITIONERS AND THEREFORE THERE IS NO BASIS FOR JURISDICTION IN THIS CASE.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

STATEMENT OF THE FACTS AND THE CASE

The Respondents supplement the Statement of the Facts and the Case with the following. Brandi Fitzgerald suffered a cut to her chin and knee when she ran into a sliding glass door owned by the Cestaris. The Plaintiffs' Complaint alleged that the sliding glass door contained a latent or concealed peril and that the homeowners failed to warn of this latent defect by placing decals or markings on the sliding glass door. The Defendants agreed that the condition of the door, i.e. lack of safety glass, was a latent defect, not discoverable through reasonable inspection. Therefore the only duty of care owed to the Plaintiffs was by the original builder. Since the Defendants owed no duty to warn of this hidden defect, of which they had no knowledge, by placing decals or markings on the sliding glass door, they moved for Summary Judgment. This Motion was accompanied by an Affidavit of Mr. Cestari, noting that the door was in place when he purchased the home and had been put there some 20 years before by the original contractor. In addition, a reasonable inspection of the door would not reveal the type of glass used in it.

In opposition to the Motion for Summary Judgment, the Plaintiffs filed an Affidavit of alleged expert Norman Spangler. In his Deposition Mr. Spangler stated that he was a clinical psychologist, working towards his Ph.D in psychology (Spangler, 4). Basing his opinion on no facts or studies, but simply on hearsay stories told to him over the years, the following was Mr. Spangler's expert opinion:

(MR. GREEN)
Q: So in your opinion are sliding glass

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

doors an inherently dangerous object.

A: Yes.

Q: What facts or studies do you use to make that opinion.

A: The only facts are my own, like I said, various experiences by other people who have had it happen.

(Spangler 42-43).

Both the trial court and the Fourth District Court of Appeal held that any negligence due to the homeowner's failure to have safety glass in their sliding glass door was chargeable to the original builder under Slavin, infra; in that the lack of safety glass was a latent defect that was not discoverable through normal inspection. Fitzgerald v. Cestari, 553 So.2d 708 (Fla. 4th DCA 1989); Slavin v. Kay, 108 So.2d 462 (Fla. 1958).

SUMMARY OF ARGUMENT

The cases cited by the Petitioners are distinguishable both on their facts and on the application of law and no contrary application of law is presented in the underlying opinion. Rather the Fourth District's opinion expressly noted that the case would have resulted in a simple per curiam affirmed, without any written opinion whatsoever, if it were not for the dissent of Judge Dell. However, even Judge Dell's dissent acknowledges that the affirmance of the Summary Judgment below was not in conflict with any Florida law. Rather, Judge Dell argued that law from foreign jurisdictions should be applied to create a new duty of care. The bottom line, however, is that the opinion below is perfectly consistent with a wealth of the existing Florida law

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

and the majority opinion conforms to this settled law. No grounds for conflict jurisdiction are present and jurisdiction should not be accepted in this case.

ARGUMENT

I. THERE IS NO DIRECT AND EXPRESS CONFLICT BETWEEN THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL AND THE CASES CITED BY THE PETITIONERS AND THEREFORE THERE IS NO BASIS FOR JURISDICTION IN THIS CASE.

Pursuant to Florida Rule of Appellate Procedure 9.030 there is no direct and express conflict presented by the opinion below and the cases cited by the Petitioner namely, Mansur v. Eubanks, 401 So.2d 1328 (Fla. 1981); Hannabass v. Florida Home Ins. Co., 412 So.2d 376 (Fla. 2d DCA 1981); McCain v. Bankers Life & Casualty Co., 110 So.2d 718 (Fla. 3d DCA 1959); Canner v. Blank, 152 So.2d 193 (Fla. 3d DCA 1963); Peppermint Twist, Inc. v. Wright, 169 So.2d 330 (Fla. 3d DCA 1964). None of these cases has a holding which is expressly in conflict with the application of the law in the present case. Therefore there is no basis for jurisdiction and the Petition must be denied.

The Petitioners are simply seeking a second appeal on the merits, when there is no reason for a second review of this matter. The Petitioners are simply disgruntled by the Fourth District's opinion.

The standard by which express and direct conflict is measured was stated by this Court in Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960):

> (1) the announcement of a rule of law which conflicts with a rule previously announced by

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

> this Court, or (2) the application of a rule of law to produce a different result in the case which involves substantially the same controlling facts as a prior case disposed of by this Court.

Nielson, 731.

Similarly stated in Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962) that the test for determining whether a conflict exists is:

> [W]hether the Court of Appeal has announced a decision on a point of law which, if permitted to stand, would be out of harmony with the prior decision of this Court or another Court of Appeal on the same point, thereby generating confusion and instability on the precedents.

Conflict is not measured by this Court's view regarding the correctness of the District Court's decision. Kyle, 885.

The cases relied on by the Petitioners for establishing conflict jurisdiction were referenced and discussed by the Fourth District in its opinion. It is clear that the lower court considered the present case in light of the existing law as stated in Slavin, Mansur, McCain, etc. The Fourth District's attention to and full discussion of the appellate cases, as applied to the facts below, established that the Fourth District intended to and did conform its opinion to the principles of settled law in reaching its decision. Therefore there is no basis for express and direct conflict with the foregoing caselaw. Each of the foregoing cases are distinguishable from the present case. The holding in the present case is not contrary to any of these cases and therefore there is no jurisdictional issue presented for this Court's discretionary review.

In fact the Fourth District clearly distinguished the cases

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

relied on by the Petitioners stating that the only issue presented in those cases was whether or not the injured minor plaintiff was contributorily negligent. Fitzgerald, 709. To avoid this express finding the Petitioners now cite to Hannabass claiming that it is a later case and therefore conflict exists. However, Hannabass involved a situation where it was clear that the defendants had been warned that there was something wrong with their sliding glass door and therefore they were cautioned to put some kind of decal on the door. Hannabass, 377. Of course those facts do not exist in the present case, where there is absolutely no showing that the Cestaris were in any way aware of the type of glass contained in their sliding glass door. As a matter of fact, even the expert hired by the Petitioners testified that for the Cestaris determine what type of door they had, they would have to (1) search around for a one inch manufacturer's logo and (2) have the logo translated by some glass company, in order for them to determine the type of glass used. Therefore Hannabass also has absolutely no application to the facts in the present case also is just as easily distinguished as Canner, McCain and Peppermint Twist. Fitzgerald, supra. Furthermore there is no rule of law announced in Hannabass that is contrary to any rule of law announced in the present case.

The Fourth District expressly noted that its decision was based on current Florida law derived from what is commonly known as the Slavin Doctrine. The rule of Slavin is that a building contractor will be held liable to third parties for injuries that occur after the contractor has completed the building if injury

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

results from a latent defect. Slavin, supra. While sustaining various attacks in the lower courts this Court has made it clear that the Slavin Doctrine is alive and well. Easterday v. Masiello, 518 So.2d 260 (Fla. 1988).

Under the Slavin rule the original contractor is not relieved of liability if the defect is found to be latent; one that is not apparent by use of ones ordinary senses from a causal observation of the premise. Kagan v. Eisenstadt, 98 So.2d 370, 371 (Fla. 3d DCA 1957). It is also established that the test for whether or not a defective condition is patent, is not whether the object itself was obvious, but whether the defective nature of the object was obvious to the owner with exercise of reasonable care.

In the present case the owners unrefutedly stated that they had absolutely no knowledge of the nature of the type of glass used in their sliding glass door and that the glass was installed by the original home builder. Even the Plaintiffs' "expert" testified that in order to determine the defective nature of the sliding glass door, the doors would have to be examined to locate a one inch manufacturer's logo, which would then have to be translated by a glass expert, to determine whether or not safety glass was contained in the sliding glass door. The trial court determined, as a matter of law, that the defect was latent and not discoverable through the exercise of reasonable care; based on the evidence presented by the Plaintiffs, which as noted by the Fourth District in its opinion was correctly resolved by the trial court. Fitzgerald, 709.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING. 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

In seeking review in this Court not only have the Petitioners failed to show any direct and express conflict between the opinion below and any of the cases cited, but they also erroneously state that the issue is that the Defendants had a duty to place warning stickers on the glass doors. In support of this they cite this Court's decision in Mansur to establish conflict. However in Mansur, a case involving a gas explosion, this Court held that there was a duty to reasonably inspect the premises by the landlord before allowing the tenant to take possession and to make repairs necessary to transfer a reasonably safe dwelling to the tenant. Mansur, 1330. However, this duty to reasonably inspect is so that the landlord can discover any patent defects and correct them. There is nothing in Mansur that holds that the landlord has a duty to find latent defects so that they may be remedied. In fact, in Mansur, this Court stated that the landlord has a continuing duty to exercise reasonable care to repair dangerous defective conditions upon notice of their existence by the tenant. Mansur, 1330. In other words, neither Mansur nor another case in Florida holds that the homeowner has a duty to warn of a latent defect in a sliding glass door.

It is clear that the Plaintiffs are confused on the duty to warn issue. The Plaintiffs below pled in their Complaint that the defect was latent and then asserted that the homeowner had a duty to warn of the latent defect. This Court is well aware that there is no such law in Florida. The only duty to warn that exists is one to warn of a known dangerous condition. Wilson v. Wilson, 382 So.2d 773 (Fla. 3d DCA 1980).

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

In order to impose a duty to warn upon homeowners requiring them to place markers and decals on the sliding glass doors, the Plaintiffs attempted to establish that a sliding glass door is a "dangerous instrumentality." There is no case in Florida that holds that a sliding glass door is a dangerous instrumentality. In fact the only case to discuss it refers to an out-of-state case, which holds that a sliding glass door is not a dangerous instrumentality. Seitz v. Zac Smith & Co., Inc., 500 So.2d 706 (Fla. 1st DCA 1987), citing with approval the holding in, Watts v. Bacon and Van Buskirk Glass Co., 155 N.E.2d 333 (Ill. App.2d 1959)(we have carefully examined the plaintiff's testimony in the record before us and we cannot find any evidence, direct or from which reasonable inferences could be drawn, which would place the glass door in question within the category of inherently dangerous instrumentality). The fact that Florida does not recognize glass doors as dangerous instrumentalities is substantiated by the dissenting opinion which cited various out-of-state cases for this proposition, but none from Florida.

The bottom line of course is that the Plaintiffs wish this Court to impose a new duty upon homeowners to place decals or some kind of markings on sliding glass doors. However, both the majority and dissent below concede that the Fourth District's opinion is based on the law of Florida. The law in Florida has always been that there is no duty to warn of a latent defect. Therefore there is no duty upon Florida homeowners to place decals or markings on sliding glass doors, unless they know that the door is dangerously defective. This Court has had the

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING. 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305)525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305)940-7557

opportunity on numerous occasions to change the Slavin Doctrine and has refused to do so. In the present case the Slavin Doctrine clearly applies holding the original contractor liable for the child's injuries. Therefore this is not a situation where the Plaintiff is without redress. As a matter of fact, the Plaintiffs have already signed a release and received $2,000 from the homeowners' insurer in satisfaction of their claims against the homeowners. In addition, the Plaintiffs can pursue the original builder for alleged violation of the South Florida Building Code regarding the type of glass installed in the sliding glass doors.

The only important issue at present is whether or not this Court has jurisdiction. Clearly, where both the dissent and the majority opinions concede that the opinion is based on the law in Florida, it is impossible to establish any kind of conflict jurisdiction. In addition the Fourth District could have certified the case for review and did not.

The Fourth District's opinion extensively discusses all the applicable Florida law. It is apparent that the District Court examined this case closely and reach its decision after a thorough review of all existing law and made its decision in conformance with the law. Even the dissent concedes this.

The Petitioner's Jurisdictional Brief represents only their unhappiness with the Fourth District's opinion that confirmed the trial judge's determination that, as a matter of law, a latent defect existed and was not discoverable by reasonable inspection. The Plaintiffs plead a latent defect, but erroneously want to

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305)525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305)940-7557

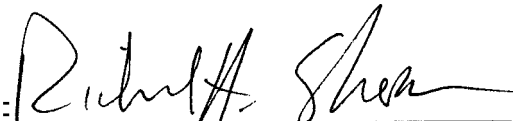
impose a duty to warn.

Respectfully the Petitioners fail to illustrate expresses and direct conflict between the lower opinion and any other authority and there is no basis for this Court's jurisdiction. Therefore this Court should decline to exercise its discretionary jurisdiction.

CONCLUSION

The Petitioners have failed to show direct and express conflict between the present case and any other case cited in their Brief. The Fourth District's opinion extensively discusses the issue in the present case in the light of applicable Florida law. It is acknowledged both in the majority and dissenting opinions that the court's decision is in full conformity with Florida law. Since the holding in the present case is not in conflict and has not created any disharmony with any other appellate court decisions, this Court must decline to exercise its discretionary jurisdiction.

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 102 N Justice Building
524 South Andrews Avenue
Fort Lauderdale, FL 33301
(305) 525-5885 - Broward
(305) 940-7557 - Dade

By: 
Richard A. Sherman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 21st day of March, 1990 to:

Kenneth R. Drake, Esquire
Touby, Smith, DeMahy & Drake
Bayside Office Center, Penthouse
141 N.E. 3rd Avenue
Miami, FL 33132

Howard Pomerantz, Esquire
7800 W. Oakland Park Blvd.
Suite 101
Sunrise, FL 33321

Jay B. Green, Esquire
315 S.E. 7th Street
2nd Floor - Advocate Building
Fort Lauderdale, FL 33301

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 102 N Justice Building
524 South Andrews Avenue
Fort Lauderdale, FL 33301
(305) 525-5885 - Broward
(305) 940-7557 - Dade

By: Richard A. Sherman