

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,538

Florida Bar No: 184170

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

Petitioner,

s.

JAN AN CESTARI, MARIA CESTARI, )  
is wife, and MARY B. CESTARI,))

Respondents. )  
)  
)  
)

**FILED**

SID J. WHITE

AUG 20 1990

CLERK, SUPREME COURT

---

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

---

---

BRIEF OF RESPONDENTS ON THE MERITS  
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  
N Justice Building  
524 South Andrews Avenue  
Fort Lauderdale, FL 33301  
(305) 525-5885 - Broward  
(305) 940-7557 - Dade

LAW OFFICES OF RICHARD A. SHERMAN, P.A.

SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. 525-5885

SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. 940-7557

TABLE OF CONTENTS

	<u>Page</u>
Table of Citations.....	<b>ii</b>
Point on Appeal.....	<b>iii</b>
Introduction.....	<b>1-2</b>
Statement of the Facts and the Case.....	<b>3-12</b>
Summary of Argument.....	<b>13-14</b>
Argument :	
THE TRIAL COURT AS WELL AS THE APPELLATE COURT CORRECTLY GRANTED SUMMARY JUDGMENT BASED ON THE <u>SLAVIN</u> DOCTRINE IN FAVOR OF THE TWICE REMOVED SUBSEQUENT HOMEOWNERS WHERE AS A MATTER OF LAW THEY OWED NO DUTY TO THE PLAINTIFF AND ANY NEGLIGENCE IN THE FAILURE TO HAVE SAFETY GLASS IN THEIR SLIDING GLASS DOORS WAS A PROXIMATE RESULT OF THE NEGLIGENCE OF THE ORIGINAL CONTRACTOR AND AS A MATTER OF LAW ONLY THE CONTRACTOR SHOULD BE HELD LIABLE.....	<b>15-42</b>
<b>Conclusion.....</b>	<b>43</b>
Certificate of Service.....	<b>44</b>

TABLE OF CITATIONS

	<u>Pase</u>
<u>Bovis v. 7-Eleven, Inc.</u> , 505 So.2d 661 (Fla. 5th DCA 1987) .....	21,22
<u>Bowen v. Holloway</u> , 255 So.2d 696 (Fla. 4th DCA 1971).....	20,21
<u>City of Miami v. Perez</u> , 509 So.2d 343 (Fla. 3d DCA) review denied, 519 So.2d 987 (Fla. 1987) .....	24
<u>Firth v. Marhoefer</u> , 406 So.2d 521 (Fla. 4th DCA 1981)...	39,40
<u>Fitzgerald v. Cestari</u> , 553 So.2d 708 (Fla. 4th DCA 1989).....	11
<u>Florida Power and Light Co. v. Lively</u> , 465 So.2d 1270 (Fla. 3d DCA) review, denied, 476 So.2d 674 (Fla. 1985) .....	23,24
<u>Florida Power and Light v. Macias</u> , 507 So.2d 1113 (Fla. 3d DCA 1987).....	24
<u>Grall v. Risdén</u> , 167 So.2d 610 (Fla. 2d DCA 1964), cert. denied. 174 So.2d 763 (Fla. 1965).....	34
<u>Haynes v. Lloyd</u> , 533 So.2d 944 (Fla. 5th DCA 1988).....	24
<u>Hannabass v. Florida Home Ins. Co.</u> , 412 So.2d 376 (Fla. 2d DCA 1981).....	27,28,29
<u>Holl v. Talcott</u> , 191 So.2d 40 (Fla. 1966).....	11
<u>Johnson v. Rinker Material, Inc.</u> , 520 So.2d 684 (Fla. 3d DCA 1984).....	23
<u>Kagan v. Eisenstadt</u> , 98 So.2d 370, 371 (Fla. 3d DCA 1957).....	33,34
<u>Kaminer Construction Corp. v. United States</u> , 488 F.2d 980 (Ct. Cl. 1973).....	34
<u>Lake Parker Mall, Inc. v. Carson</u> , 327 So.2d 121 (Fla. 2d DCA 1976).....	24
<u>Lubell v. Roman Spa, Inc.</u> , 362 So.2d 922 (Fla. 1978).....	37,38
<u>Mai Kai, Inc. v. Colucci</u> , 205 So.2d 291 (Fla. 1967).....	35,36
<u>Mansur v. Eubanks</u> , 401 So.2d 1328 (Fla. 1981) .....	31,39,40,41
<u>Marlo Investments, Inc. v. Verne</u> , 227 So.2d 58 (Fla. 4th DCA 1969).....	40

TABLE OF CITATIONS Continued

	<u>Page</u>
<u>McCain v. Bankers Life &amp; Casualty Co.</u> , 110 So.2d 718 (Fla. 3d DCA) ■ <u>cert. denied</u> , 114 So.2d 3 (Fla. 1957) . . . .	28
<u>Memorial Park, Inc. v. Spinelli</u> , 342 So.2d 829 (Fla. 2d DCA 1977) . . . . .	25
<u>Metropolitan Dade County v. Colina</u> , 456 So.2d 1233 (Fla. 3d DCA 1984) . . . . .	25
<u>Mozee v. Champion International Corp.</u> , 554 So.2d 596 (Fla. 1st DCA 1989) . . . . .	24
<u>Peppermint Twist, Inc. v. Wright</u> , 169 So.2d 330 (Fla. 3d DCA 1964) . . . . .	28
<u>Pope v. Cruise Boat Company, Inc.</u> , 380 So.2d 1151 (Fla. 3d DCA 1980) . . . . .	25, 26
<u>Rice v. Florida Power and Light Co.</u> , 363 So.2d 834 (Fla. 3d DCA 1978) <u>cert. denied</u> , 373 So.2d 460 (Fla. 1979) . . . .	23
<u>Seitz v. Zac Smith &amp; Co., Inc.</u> , 500 So.2d 706 (Fla. 1st DCA 1987) . . . . .	41
<u>Simmons v. Owen</u> , 363 So.2d 142 (Fla. 1st DCA 1978) . . . . .	34, 35
<u>Slavin v. Kay</u> , 108 So.2d 462 (Fla. 1958) . . . . .	25, 32, 33, 35, 37
<u>Tanner v. Blank</u> , 152 So.2d 193 (Fla. 3d DCA 1963) . . . . .	28
<u>Watts v. Bacon and Van Buskirk Glass Co.</u> , 155 N.E.2d 333 (Ill. App.2d 1959) . . . . .	41
<u>Westchester Exxon v. Valdes</u> , 524 So.2d 452 (Fla. 3d DCA 1988) . . . . .	23
<u>Wilson v. Wilson</u> , 382 So.2d 773 (Fla. 3d DCA 1980) . . . . .	19, 20

REFERENCES

Florida Statute Section 83.51 . . . . .	31, 39, 40
Florida Statute Section 83.51(1) (a) . . . . .	38

POINT ON APPEAL

THE TRIAL COURT AS WELL AS THE APPELLATE COURT CORRECTLY GRANTED SUMMARY JUDGMENT BASED ON THE SLAVIN DOCTRINE IN FAVOR OF THE TWICE REMOVED SUBSEQUENT HOMEOWNERS WHERE AS A MATTER OF LAW THEY OWED NO DUTY TO THE PLAINTIFF AND ANY NEGLIGENCE IN THE FAILURE TO HAVE SAFETY GLASS IN THEIR SLIDING GLASS DOORS WAS A PROXIMATE RESULT OF THE NEGLIGENCE OF THE ORIGINAL CONTRACTOR AND AS A MATTER OF LAW ONLY THE CONTRACTOR SHOULD BE HELD LIABLE.

INTRODUCTION

This appeal brings to mind the age old adage that "hard cases make bad law." The Defendant homeowners are totally innocent and the party responsible is the contractor who improperly did not put in safety glass. The homeowner had no way of knowing **it** was not safety glass until the accident, and if **it** were safety glass the accident would not have happened. Under the rule the Plaintiff argues the innocent homeowner is in risk of losing his home, although he never had notice **it** was not safety glass, and **it** was the contractor who was responsible.

There is no question that the Defendants in this case reasonably relied on the fact that the sliding glass door in their home was proper safety or strengthened glass; where the home passed the original building inspections; as well as the subsequent inspections by the bank at the time that they bought the house. Since the house had passed several expert inspections, the Cestaris rightfully assumed that the home was built in accordance with all relevant Building Codes and had no reason to think otherwise until Fitzgerald's accident. There are no ordinances requiring decals on sliding glass doors, as the governing bodies have decided they are unnecessary, because safety glass is required.

Therefore the trial court below, as well as the appellate court, found that there was no duty on the part of the twice removed homeowners, to put decals on the sliding glass door they believed to be safe, and there was no cause of action against them; such that they might lose their home for something that

they were not even aware of. It is for this very reason that the original contractor, who knows whether or not he is putting safety glass in the sliding glass doors, is held to owe a duty to third parties such as Fitzgerald, and her remedy is clearly and logically against this original contractor. This is the Slavin Doctrine upon which the Summary Judgment in the present case was entered and should be affirmed.

STATEMENT OF THE FACTS AND THE CASE

The home in this case was built in 1961 and the original owners were Mr. and Mrs. Jelley (R 132-140). On December 13, 1961, the Certificate of Occupancy was issued for the home, which noted that the home had passed all the required inspections (R 132-140). The home is located in Boca Raton and governed by the provisions of the Southern Standard Building Code (R 132-140). In his Affidavit, the Chief Code Administrator for the City of Boca Raton stated that under the Southern Standard Building Code; including its modifications, revisions and supplements; there had never been any requirement for the placement of decals or other markings on sliding glass doors (R 132-140). Therefore, the failure to place such decals or markings on the doors did not constitute a building code violation in Boca Raton (R 132-140). Allegedly the Building Code required safety glass, which was either laminated, wired or tempered **glass** and apparently this glass was not installed in the sliding glass door by the original contractor; but the door, as well as the rest of the structure, passed all expert inspections and the Certificate of Occupancy was issued (R 132-140). Apparently only tempered glass is required to have a visible stamp on it (R 132-140). Other safety glass is not marked at all and neither is annealed glass (R 132-140; 623-624).

Apparently Mr. and Mrs. Jelley sold the home to Elizabeth Wetzel, who resided in the house for almost 20 years. She then sold the home to Mr. and Mrs. Cestari on March 28, 1980 (R 151). Subsequently in 1984 the Cestaris leased their home to Mr. and



Mrs. Cavanaugh (R 131). On April 18, 1984 Brandi Fitzgerald, an invitee of the Cavanaughs, was injured when she ran into the sliding glass door in the home owned by the Cestaris (R 155-160). This was the first and only notice to the Cestaris that their sliding glass door apparently did not contain safety glass; as this was the original glass installed in the home when it was purchased in March of 1980 (R 219-220).

The Plaintiff filed an Amended Complaint, adding to her original Count of negligence against the Cestaris for failure to give notice of a hidden peril and failure to place a decal on the sliding glass door; a Count for negligence per se, asserting that the Cestaris had a duty to see that their home conformed with the Southern Standard Building Code (R 155-160). In the Joint Pre-Trial Stipulation, the parties stipulated to the authenticity of the Certificate of Occupancy issued for the home and other City of Boca Raton Building Department records, which verify that the required inspections had been done to the home and that it had passed these inspections.

The Defendants moved for Summary Judgment based on the Slavin Doctrine; asserting that the sliding glass doors were installed by the original builder of the home and that any lack of safety glass was a latent defect that was not discoverable by the Cestaris through a normal and reasonable inspection of the premises (R 239-278). The Cestaris asserted that since the contractor's original negligence was the proximate cause of the Plaintiff's injuries, the Defendants could not be held liable as a matter of law and were entitled to Summary Judgment (R 239-278).

At the hearing on the Motion for Summary Judgment, Plaintiff's counsel argued for the first time that there was a genuine issue of material fact as to whether the lack of safety glass in the sliding glass door was a latent or patent defect (R 527). Fitzgerald pled that the defect was latent. Fitzgerald's lawyer argued that under the Slavin Doctrine, if the defect was discoverable by any means, by anybody, then the homeowner was to be held liable (R 527-528). Plaintiff's counsel claimed that an expert had stated that a homeowner could call up a glass store to have the stamp on the glass translated (if the glass contained such a stamp), to show that it was tempered glass, as opposed to annealed glass and that this was something that most people would not do (R 528).

Although it may not be common for most of us to do this, it is discoverable.

(R 528).

Fitzgerald went on to argue that the Cestaris owed a duty to her to put decals on sliding glass doors; based on expert testimony that decals were required when there are children in the house (R 528-529).

In response defense counsel noted that it was possible to hire any expert to come in and eventually discover a latent defect; but that was not the purpose behind the Slavin Doctrine; which holds the contractor liable as the proximate cause of the third party's injuries, since the contractor absolutely knows whether or not his work meets the Code requirements (R 529-530).

After the hearing on the Motion for Summary Judgment, the Plaintiff filed her Memorandum of Law (R 312-373). In the

Memorandum, the Plaintiff argued that the Cestaris had to be found negligent per se, because of the failure of their glass door to meet applicable building codes and that if this was a latent defect, that the latent defect was discoverable (R 312-373). In addition the Plaintiff argued for the first time that sliding glass doors without decals were inherently dangerous and therefore the Defendants were guilty of negligence per se (R 312-373). Finally the Plaintiff argued that her expert, Spangler, had established a duty upon all owners of all premises to place decals on all sliding glass doors (R 312-373).

In their Reply to the Plaintiff's Memorandum of Law, the Defendants discussed at length the legal authority for the proposition that they could not be held negligent per se as it was the original contractor who would have violated the Code; which Code was enacted to protect the general public. Again the Defendants asserted that if there was any negligence regarding the type of glass installed in the subject home, the liability should be on the builder or original contractor and not on twice removed homeowners. The Cestaris noted that the home was constructed in 1961, it passed inspections, had been occupied for 20 years and that the Cestaris had inspected it when they purchased it in 1980. Therefore as the subsequent purchaser of the home they should not be held to the same standard of care as the original contractor; who had the ability, as well as the duty, to see that the home complied with the Building Code.

The trial judge entered Summary Judgment in favor of the Cestaris, ruling that as a matter of law: (1) 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 and (2) that the Cestaris had no duty to place decals or markings on this sliding glass door (R 311). The Plaintiff then filed a Motion for Rehearing, attaching to it an Affidavit of expert, Spangler (R 412-485). The Motion for Rehearing asserted that the court could not rule as a matter of law on the question of duty (R 412-485). Again the Plaintiff asserted there was a duty to place decals or stickers on the door pursuant to expert Spangler's Deposition, which was never given to the Judge to review (R 412-485). In other words, the Plaintiff had no supporting evidence regarding any genuine issue of material fact at the time the Summary Judgment was considered by the court, and even after the court had ruled on it. For the first time the Plaintiff argued in the Motion for Rehearing that the glass door was inherently dangerous without a decal and therefore all parties dealing with the door were jointly liable (R 412-485). The Motion for Rehearing was denied (R 486).

The Plaintiff appealed asserting that genuine issues of material fact remained as to whether the glass door contained a latent defect created by the original contractor, a patent defect discovered by the Cestaris, or was inherently dangerous, imposing a duty on both the Cestaris and the original contractor to warn or make safe with the application of decals or markings. As previously mentioned the allegations regarding the inherently dangerous nature of the door and that the door may contain a patent defect were never pled by the Plaintiff and only appeared

as appellate afterthought, after the judge had granted the Summary Judgment.

Similarly, during the Oral Argument in the Fourth District, the Plaintiff raised for the first time the issue regarding the landlord/tenant duty and the Fourth District noted that it would not entertain any legal argument on the subject since it had not been pled or raised in the trial court. In spite of the fact that these three legal issues were never properly pled or ruled on below, the Plaintiff continues to present argument on them in her Brief of Petitioner.

While the trial court never had an opportunity to read the Deposition of the alleged expert Spangler, the Deposition was finally supplemented to the Record on Appeal (R 588-654).

Spangler is a clinical psychologist who, after several unsuccessful attempts to get his Ph.D. in psychology, settled for teaching small business marketing and operating a small firm that makes parts for sliding glass doors, windows, and screens. (592-597). Apparently Spangler taught a few courses in psychology at the College of St. Scholastica and at Harper Community College and went to Europe to try and find work as a psychologist and was unsuccessful. He worked as a sales representative for a greeting card company, when he ran into somebody in the sliding glass door business and he began his manufacturing business (R 592-598). Spangler has written books on lap swimming rules, swimming etiquette and safety, auto body rust repair and sliding glass door repair (R 98). He had never taken any courses dealing with the type of glass used for sliding

glass doors and does not manufacture glass for sliding glass doors, but simply parts for the doors themselves (R 600-602).

In his Deposition Spangler stated that sliding glass doors can be made of annealed glass or tempered glass and that you cannot tell by looking at the glass itself whether it is tempered or annealed (R 622-623). Apparently tempered glass is annealed glass which has been heated so that it is more difficult to break than annealed glass. However, simply by looking at the glass in the door you cannot tell whether it was annealed or tempered glass (R 622-623). Tempered glass apparently has a small, one inch square, logo on it with the manufacturer's name. A person not in the sliding glass door business would not know that the logo meant that it was tempered glass (R 623-624). However, if a person found the indicia on the door and called a glass shop, the glass shop would instruct them as to what it meant and that the logo would indicate that it was tempered as opposed to annealed glass, laminated glass, or some other kind of glass (R 624).

In other words, unmarked glass in a sliding glass door could be safety glass which is not tempered; but it is only tempered glass that has the logo on it and therefore if there was no logo on it the glass could be safety glass anyway. Spangler went on to testify that most people are not aware what is required to convert annealed glass into tempered glass (R 624-625). He also testified that the federal government itself did not even require safety glass to be in sliding glass doors until 1977, well after the construction of the home in question (R 620). In addition, Spangler testified that there were no requirements that he was

aware of to put decals on any type of sliding glass doors.

His expert opinion was that because any sliding glass doors are easy to run into they are inherently dangerous without any kind of marks (R 629). He based his expert opinion on no facts or studies, but simply "various experiences of other people who have had it happen." (R 630-631). In other words regardless of what a sliding glass door is made from, whether laminated, tempered, annealed or whatever kind of glass; Spangler's opinion was that all of these doors were inherently dangerous, because of their failure to have decals, even though he admitted that there was absolutely no such regulation or requirement to have decals he knew of. The lack of any requirements for decals on sliding glass doors of course was substantiated by the Affidavit of the Code Administrator, Seeley, previously filed in the Record in this case; which also indicated that there was absolutely no requirement to place decals on sliding glass doors in the Standard Southern Building Code. Even if the trial judge had considered Spangler's Deposition testimony, which was unavailable at the time of the Summary Judgment, it would not have changed the result in this case. Spangler testified that you cannot tell by looking at glass whether it is annealed glass or whether the annealed glass has been treated to be tempered glass or whether the glass is laminated or some other type of glass. In other words, tempered glass has a mark on it, that can be translated by a professional glass company, but if the glass is laminated or some other type of safety glass or is annealed glass, these have no marking on them either. Since safety glass can be made out of

various types of glass, the presence of a logo only on tempered glass does not render the nature of the glass discoverable by casual observation.

The Fourth District correctly found that based on well established law, any negligence due to the failure to have some type of safety glass in the sliding glass door was chargeable to the original builder, under the Slavin Doctrine and that any lack of safety glass was a latent defect, not discoverable through reasonable inspection. Fitzgerald v. Cestari, 553 So.2d 708 (Fla. 4th DCA 1989). The Fourth District went on to hold that the negligence charged against the Cestaris was not, as a matter of law, causally related to the Plaintiff's injury, as it was the negligence of the original builder that was so causally related. Fitzgerald, 709. The Fourth District cited this Court's decision in Holl v. Talcott, 191 So.2d 40 (Fla. 1966) for the proposition that the movant meets his burden of entitlement to Summary Judgment when he can show that the negligence charged against him was not causally related to the Plaintiff's injury. Holl, 47. On that same page this Court also noted that material issues in any cause are those which are relevant to the issues made by the pleadings and therefore it follows that the movant's burden is limited to making the required showing only as to those issues. Holl, 47.

The issues in this case, as made by the pleadings, were simply whether the homeowners failed to warn a licensee, of their lessees, of a latent danger in their sliding glass doors of which they were totally unaware, and whether they were negligent in



failing to affix decals to a sliding glass door. Therefore these were the only issues properly raised and considered by the appellate court and this Court's review of the Fourth District's decision should similarly be limited to these issues. However, in an abundance of appellate precaution the Defendants/Appellees will address all the issues raised in the Brief of Petitioner, as none of them provide a sufficient basis for reversing the Summary Judgment entered in favor of the homeowners below.

SUMMARY OF ARGUMENT

This appeal brings to mind the age old adage that "hard cases make bad law." The Defendant homeowners are totally innocent and the party responsible is the contractor who improperly did not put in safety glass. The homeowner had no way of knowing it was not safety glass until the accident, and if it were safety glass the accident would not have happened. Under the rule the Plaintiff argues the innocent homeowner is in risk of losing his home, although he never had notice it was not safety glass, and it was the contractor who was responsible.

There is no question that the Defendants in this case reasonably relied on the fact that the sliding glass door in their home was proper safety or strengthened glass; where the home passed the original building inspections; as well as the subsequent inspections by the bank at the time that they bought the house. Since the house had passed several expert inspections, the Cestaris rightfully assumed that the home was built in accordance with all relevant Building Codes and had no reason to think otherwise until Fitzgerald's accident. There are no ordinances requiring decals on sliding glass doors, as the governing bodies have decided they are unnecessary, because safety glass is required.

Therefore the trial court below, as well as the appellate court, found that there was no duty on the part of the twice removed homeowners, to put decals on the sliding glass door they believed to be safe, and there was no cause of action against them; such that they might lose their home for something that

they were not even aware of. It is for this very reason that the original contractor, who knows whether or not he is putting safety glass in the sliding glass doors, is held to owe a duty to third parties such as Fitzgerald, and her remedy is clearly and logically against this original contractor. This is the Slavin Doctrine upon which the Summary Judgment in the present case was entered and should be affirmed.

## ARGUMENT

THE TRIAL COURT AS WELL AS THE APPELLATE COURT CORRECTLY GRANTED SUMMARY JUDGMENT BASED ON THE SLAVIN DOCTRINE IN FAVOR OF THE TWICE REMOVED SUBSEQUENT HOMEOWNERS WHERE AS A MATTER OF LAW THEY OWED NO DUTY TO THE PLAINTIFF AND ANY NEGLIGENCE IN THE FAILURE TO HAVE SAFETY GLASS IN THEIR SLIDING GLASS DOORS WAS A PROXIMATE RESULT OF THE NEGLIGENCE OF THE ORIGINAL CONTRACTOR AND AS A MATTER OF LAW ONLY THE CONTRACTOR SHOULD BE HELD LIABLE.

---

It is important to remember that both the trial court and the appellate court ruled as a matter of law that no duty existed in this case, which was within their power, since the questions of duty and proximate cause are always initially resolved by the courts. There is absolutely no rule in Florida that an ordinary homeowner has a duty to hire a professional housing inspector to examine its home to insure that it is within current code compliance. This is especially so, when the house in the present case had numerous expert inspections from the time it was built in 1961 and passed all the inspections; including the most recent inspections by the bank when the Cestaris bought the home in 1980. The average homeowner in Florida has absolutely no inkling of any duty to place decals on sliding glass doors or windows since they rightfully assume that the house is fine and safe; especially where the building inspector has certified that the home met all required safety standards, and the bank inspector has said that the home was okay. It was undisputedly established through the Plaintiff's own expert, that there is no government agency that has put out any information or any ad campaign warning homeowners to check the glass in their doors to make sure that they are not annealed glass, as opposed to tempered glass,

laminated glass, wired glass, etc.; or to put decals on all glass doors. The Code Administrator for Boca Raton testified in his Affidavit that there has never been any requirement to put decals on sliding glass doors. As previously stated, the ordinary homeowner in Florida assumes that a house that has passed inspection, which contains glass doors, has the proper type of glass and does not know that it is not the proper type of glass until a tragic accident occurs. On the other hand, the contractor who built the house knows exactly the type of glass installed and if any duty is placed on a party to know the type of glass it must be placed on the party with full knowledge of the type of glass used; which is the contractor, not the twice removed ordinary homeowner.

It is also important to remember that the Defendants in this case are totally innocent. To hold them to a duty to hire an expert to inspect their home for code compliance, after the home has already been inspected by experts in the past, would result in a vast amount of liability placed on unsuspecting homeowners in Florida, who would get sued and could possibly lose their home because of this new duty. It is only common sense that if there is any negligent party in this case, it is the original contractor who had both the ability and duty to comply with the building code and of course is the very reason for the Slavin Doctrine; which this Court has unquestionably adhered to.

- A. The Trial Court Correctly Found That as a Matter of Well Established Florida Law the Cestaris Owed No Duty to Place Decals Upon a Door That They Rightfully Relied on as Being Safe.

Once again the Plaintiff in her attempt to recover against the homeowners presents a new argument to this Court. For the first time in this case the Plaintiff is now arguing that the Cestaris had a duty to place decals or markings on the door to show that the door was closed. Previously the Plaintiff had argued, without any pleadings, that there was a duty to place warnings on the glass door because the door was not made of safety glass. The Plaintiff is now arguing that there is a duty to warn of a new latent danger; i.e. that the door was closed. While this new duty of care may seem appealing, in the present case the Cestaris, who are the owners of the home, leased the premises to the Cavanaugh's and it is the Cavanaugh's who had the full control over whether or not their sliding glass door was open or closed. To impose the duty suggested by the Plaintiff now in the Supreme Court, would result in a virtual explosion of liability suits in Florida; not only against unsuspecting homeowners who would be facing the loss of their home as the result of judgments or breaches of duty of which they were completely unaware; but against any landowner or property owner who possesses a sliding glass door. As this Court is well aware there are literally thousands of sliding glass doors in Florida and it is respectfully submitted that if this Court should decide that decals should be placed on all sliding glass doors, then the appropriate notice to all homeowners and landowners should be through ad campaigns, or legislation, etc., to effectuate this type of public policy and not a judgment against the Cestaris.

It is interesting that the Plaintiff is arguing that the

duty to place decals or markings on doors is to advise invitees of licensees that the door is closed; since the homeowner only has a duty to warn of latent or concealed dangers. There is no opinion in Florida that holds that the presence of a sliding glass door constitutes a latent danger, especially where the homeowner rightfully assumes the doors contain the required safety glass. While the Plaintiff has mixed and matched various theories from the very beginning of this lawsuit, **it** is important to remember that the door in question is only allegedly defective because of the lack of safety glass. Nowhere was **it** pled or argued before that all sliding glass doors in Florida are latent dangers because they may be closed. The fact that they may not be easily seen when closed is obviously the very reason that various codes require that the doors contain safety glass. As a matter of fact, the Plaintiff's own expert testified that **if** the door had been made of the required safety glass the glass would not have broken and the child would not have been cut. In other words, if the contractor had installed the correct glass, whether the door was open or not there would have been no danger to the child. None of the cases cited by the Plaintiff stand for the proposition that the presence of a sliding glass door which is supposed to contain safety glass is a hidden danger requiring a warning.

The Plaintiff alleges that the Cestaris, as landlords, should be held liable to third persons for injuries caused by defects in the leased premises citing three cases. However, even these three cases do not stand for the proposition that the

Cestaris owed a duty to place decals on a sliding glass door to warn an invitee of their lessee, Cavanaugh, that the door was closed.

In Wilson v. Wilson, 382 So.2d 773 (Fla. 3d DCA 1980) the Third District held that the landlords were not liable for injuries sustained by a child; in the absence of any showing that the landlords had knowledge, actual or constructive, that there was gasoline on the leased premises and no evidence existed which would lead to the conclusion that landlord should have anticipated or foreseen the child's accident. Based on the lack of evidence presented by the plaintiff that the defendants had actual or constructive knowledge of the alleged dangerous condition, a directed verdict in favor of the defendant was affirmed. Wilson, supra.

The Third District noted that liability for negligence in failing to maintain the premises in a reasonably safe condition must be predicated on the knowledge that a dangerous condition exists, so that in the exercise of ordinary care, action can be taken to remedy the situation. Wilson, 775. No liability can attach if it is not shown that the landlord had actual or constructive knowledge of the dangerous condition. Wilson, 775. "This is especially true where the dangerous condition is traceable to acts of other persons." Wilson, 775.

Based on the very case cited by the Plaintiff, it is clear that the Defendant homeowners who undisputedly had no knowledge, either actual or constructive, of the defective condition pled, which was the hidden dangerous condition of lack of safety glass,



were entitled to Summary Judgment. Wilson, 775. Moreover, whether the alleged dangerous condition was the door that was closed by the lessee, or the lack of safety glass as a result of improper construction by the contractor, it is clear that the dangerous condition was acts of other persons and under the Wilson case, a judgment was properly entered for the Cestaris.

Similarly, in Bowen v. Holloway, 255 So.2d 696 (Fla. 4th DCA 1971) there is absolutely nothing that would require liability to be imposed upon the Defendants. In that case, the Fourth District found that there were genuine issues of material fact precluding summary judgment where the evidence was that a stall area, lacked a fence on the street side and that on several prior occasions, horses pastured on the property had been found roaming at large. What happened was that the plaintiff brought an action against the owners of the pasture and stall, because a horse strayed from that area causing injury to motorcyclist who collided with the horse, who was running at large. The landlord, on prior occasions, had knowledge that the horses pastured on his property had been found running at large due to the lack of the fence. Bowen, 697. Therefore, the court held that liability could be imposed upon the landlord who had actual knowledge of the dangerous condition. The Fourth District held that a landlord may be liable to third persons for injuries caused by defects in the leased premises, during the term of the lease, when the defect in or condition of the premises at the time of the lease was in the nature of either an existing nuisance or incipient nuisance made active by the tenant's normal use of the

premises. Bowen, 697-698. The dangerous condition of course was the alleged absence of any fence preventing the horses from running wild. Under those circumstances the Fourth District found that the jury should determine whether there was any negligence on the part of the landowner that knew there was no fence present when he leased the premises.

Finally in Bovis v. 7-Eleven, Inc., 505 So.2d 661 (Fla. 5th DCA 1987) the Fifth District restated the well established law that the duty to protect others from injury resulting from a dangerous condition on the premises does not rest on the legal ownership of the dangerous condition. Rather the duty rests on the right to control the access by third parties, which right usually exists in the one in possession of the property and control of the premises. Bovis, 664. In that case the appellate court held that the possessor has the right and duty to exclude licensees and invitees from an area that is dangerous because of dangerous operations or activities, or because of dangerous premise's conditions and has the duty to warn third persons of such danger. Bovis, 664. The danger alleged by Fitzgerald in her Brief was the fact that the sliding glass door was closed; which of course was within the actual and constructive knowledge of the lessee of the property, the Cavanaugh's.

Bovis, an employee of a lessee, was injured when she slipped and fell on the leased building and filed suit against the lessors/landowner. Bovis, supra. The trial court in reversing a summary judgment granted to the lessee/employer, held that the lessee was liable to the lessor for any damages the employee

would recover against the landowner. The basis for the appellate court's ruling was that the lessor had no right to control access by third parties to the leased premises; the lessee had actual possession and the right to control and therefore the lessee, not the landowner, had the continuing legal duty to inspect the premises, permitting or denying the access of the premises to others and to act accordingly to the safety or danger when existing. Bovis, 663-664. The appellate court observed that the landowner was not an insurer of the safety of persons on the property, nor was the landowner subject to strict liability or liability per se for injuries resulting from dangerous conditions on the owned property. Bovis, supra. Rather the crux of the cause of action was not the ownership of the premises, but the failure of the possessor of the premises to use due care in permitting invitees to come unwarned into an area where foreseeably they may be injured by a dangerous condition which to them was not readily apparent. Bovis, 662-664.

According to the Plaintiff's Complaint and evidence the sliding glass door in question was supposed to contain safety glass. If the contractor had put in the required safety glass, as the Cestaris rightfully assumed he did, there would have been no danger, even if the door was closed. This is supported by the fact that there is absolutely no requirement in Florida or anywhere else to place decals or markings on glass doors. The reason being is that the doors are supposed to be made of safety glass, and when they are properly constructed they do not present a danger, even when closed. For this reason the trial court

as well as the Fourth District correctly ruled that there was no duty on the part of the Cestaris to place decals or markings on the sliding glass door.

The Plaintiff has erroneously argued that only a jury can determine the duty owed by the Defendants to the Plaintiff and whether there was any breach of that duty, which proximately caused Fitzgerald's damages. The essential elements of negligence, from which liability will flow, are duty, breach of duty, legal cause and damage. Florida Power and Light Co. v. Lively, 465 So.2d 1270 (Fla. 3d DCA) review, denied, 476 So.2d 674 (Fla. 1985). Whether such a duty exists is a question of law for the court. Lively, supra; Westchester Exxon v. Valdes, 524 So.2d 452 (Fla. 3d DCA 1988). If no reasonable duty is abrogated, as a matter of law, no negligence can be found. Rice v. Florida Power and Light Co., 363 So.2d 834 (Fla. 3d DCA 1978) cert. denied, 373 So.2d 460 (Fla. 1979).

In Lively the court pointed out that it was elementary tort law that negligence is a breach of duty of care owed to the injured party. If there is no duty to exercise care as to a given plaintiff then the defendant's conduct does not amount to negligence and it is not actionable. Lively, 1273. The courts are frequently called upon to determine as a question of law if any duty exists between the defendant and the plaintiff. Johnson v. Rinker Material, Inc., 520 So.2d 684 (Fla. 3d DCA 1984) (summary judgment for defendant/landowner affirmed where no legal duty to decedent trespasser was breached); Westchester, supra, (directed verdict for defendant affirmed as no duty was owed to

self service customer, based on plaintiff's theory of liability that, the owner should have provided more than one attendant to serve cars at a full service island, or that owner should have posted sign to instruct patrons to remain inside of cars); Florida Power and Light v. Macias, 507 So.2d 1113 (Fla. 3d DCA 1987) (defendant owed no duty to guard against accident, where plaintiff was injured when his car hit an FP&L light pole); Haynes v. Lloyd, 533 So.2d 944 (Fla. 5th DCA 1988) (owners of real property are not the insurer of safety of persons on the property, nor is owner strictly liable or liable per se, without fault, for injuries resulting from dangerous condition on owned property; possessor of real property has no legal duty to constantly know of all existing dangerous conditions on the property and there is no legal evidentiary presumption of such knowledge affirming summary judgment in favor of landlord); City of Miami v. Perez, 509 So.2d 343 (Fla. 3d DCA) review denied, 519 So.2d 987 (Fla. 1987) (city/landowner owed no duty of care to employee of independent contractor); Lake Parker Mall, Inc. v. Carson, 327 So.2d 121 (Fla. 2d DCA 1976) (landowner owes no duty to warn employees of independent contractor concerning dangerous conditions if warning given to supervisory personnel of independent contractor); Moze v. Champion International Corp., 554 So.2d 596 (Fla. 1st DCA 1989) (landowner owes no duty to provide safe work place or duty to warn employees of independent contractor); Lively, supra, (FP&L owed no duty to pilot, who was injured when his plane hit FP&L transmission line).

There are hundreds of cases in Florida where the courts have

determined whether the defendant owed any duty to the plaintiff as a matter of law. Therefore the courts below were absolutely correct, as a matter of law, in determining that no duty existed between the Defendants and the Plaintiff to place decals or markings on the sliding glass door. Similarly, the question of proximate cause was also properly determined by the lower courts, when they held that under the Slavin Doctrine, the proximate cause of Brandi Fitzgerald's injury was the negligence of the contractor; who knowingly installed the glass in the sliding glass door that allegedly did not meet the existing code requirement. Slavin v. Kay, 108 So.2d 462 (Fla. 1958) (landowner could not be held to be proximate cause of plaintiff's injury suffered in defendant's motel; proximate cause of the plaintiff's injury was the negligence of the contractor, where the injury occurred after the acceptance of the work by the owner; and where the defective condition was hidden from "ordinary observation" and was a latent defect, which the owner, who accepted the work, would not be chargeable with knowledge). ~~See also~~, Memorial Park, Inc. v. Spinelli, 342 So.2d 829 (Fla. 2d DCA 1977) (as a matter of law, proximate cause of the plaintiff's injury was not the action of the defendant/landowner in having sign on his property that obstructed traffic visibility); Metropolitan Dade County v. Colina, 456 So.2d 1233 (Fla. 3d DCA 1984) (as a matter of law, Dade County's failure to place traffic control signal in an intersection, or send repair crew out, were not the proximate cause of the plaintiff's injury resulting from an intersection collision, where the traffic signal had been knocked out); Pope

v. Cruise Boat Company Inc 380 So.2d 1151 (Fla. 3d DCA 1980) (as a matter of law, the conduct of the Cruise Boat Company permitting parking of a boat trailer and pick-up trucks on the shoulder of the road was not the proximate cause of the plaintiff's injury; where the plaintiff was forced to go around the protruding vehicles and was hit by a car).

Under these cases, and a wealth of others, it is clear that the initial question of duty and proximate cause are ones for the court to determine and the trial court and appellate court correctly found that there was no duty to place decals on a sliding glass door; where the Defendants undisputedly relied on the doors to contain safety glass and were safe; having passed various expert inspections and that the proximate cause of the Plaintiff's injuries resulting from the breaking of the glass in the sliding glass door, was the negligence of the contractor for failing to install the proper glass. The Defendant homeowners in this case owed no duty to the Plaintiff to place decals on the doors and the negligence which resulted in the accident was proximately caused by the original contractor therefore Summary Judgment in favor of the Defendant homeowners was properly granted as there were no issues of actionable negligence to present to the jury.

The Plaintiff is attempting to have this Court impose a new duty of care upon the landowners to discover latent defects which the expert inspectors did not discover. In addition, the Plaintiff is attempting to have the court impose a duty on homeowners to hire expert inspectors to make sure that their home

complies with the building code. In the present case this is after the home has already passed numerous inspections. There is no question that the Cestaris, like hundreds of thousands of ordinary homeowners in Florida, properly assumed that their home was not defective and it complied with all the building code requirements. After all, there were verified documents in the Record on Appeal which substantiated the fact that the home had been inspected and passed.

The latent defect, which the Plaintiff is attempting to impose liability for, is the fact that the sliding glass door did not contain safety glass. If it had contained safety glass of course there would be no need to place a decal on it. At any rate, the bottom line is that even the Plaintiff's own expert testified that through ordinary observation a homeowner cannot determine whether the glass in their window is safety glass or not. The only glass containing any kind of marking is tempered glass, but of course there are various other types of safety glass which are available which contain no marking. Even if the ordinary homeowner saw the marking on the sliding glass door, it would mean absolutely nothing to them, since the logo would then have to be interpreted by a glass expert. Therefore this is not a situation where the homeowner has a duty to repair a known dangerous defective condition.

Even the cases relied on by the Plaintiff do not impose such a duty upon homeowners. In this Court, the Plaintiff puts great reliance on Hannabass v. Florida Home Insurance Co., 412 So.2d 376 (Fla. 2d DCA 1981) to impose a duty of care upon the



homeowners; even though Hannabass expressly stated that in that case the homeowners have been cautioned to place a warning on the sliding glass door and the genuine issue of material fact found in that case was simply whether or not they had in fact put such a warning on the door. It could have been that the homeowners were told to put decals on the door because it was known that it did not contain safety glass.

Of course it is totally undisputed in the present record that the Cestaris had absolutely no warning or notice that they should put a decal on the their door. There were two very good reasons for this. First, the Cestaris rightfully assumed that their door contained safety glass and second, there are no government agencies, or code regulations, or ordinances, requiring decals to be placed on sliding glass doors. Therefore the facts in the present case are totally different than Hannabass and certainly that case does not raise a duty of care, as the Plaintiff wishes to impose on the Cestaris.

Upon examining the other cases relied on by the Plaintiff, it is clear that the Fourth District correctly distinguished them: where a careful reading of the cases established that the unresolved issue was the contributory negligence if any of the injured minor plaintiff. Peppermint Twist, Inc. v. Wright, 169 So.2d 330 (Fla. 3d DCA 1964); Tanner v. Blank, 152 So.2d 193 (Fla. 3d DCA 1963); McCain v. Bankers Life and Casualty Co., 110 So.2d 718 (Fla. 3d DCA) cert. denied, 114 So.2d 3 (Fla. 1957). The common thread that runs through those three cases, which predated the abrogation of the contributory negligence rule, was

that ordinarily the plaintiff's contributory negligence in failing to see the door knocked into, would be sufficient to preclude the plaintiff's action against the defendant. In those three cases however, the courts made an exception, because the plaintiff was a child and therefore the court felt that the jury should determine the comparative negligence of the child, only because the child would not be held to the same standard of care as an adult for contributory negligence.

There is absolutely no discussion of any of the facts in those cases regarding the condition of the glass doors, the duty imposed upon the homeowner, etc. Therefore the Fourth District was correct that the unresolved issues in those three cases was simply whether there was contributory negligence on the part of the minor plaintiff; where under ordinary circumstances a summary judgment in favor of the defendant would have been upheld due to the contributory negligence of the adult plaintiff.

As previously mentioned, Hannabass, which is a later decision, does not impose any duty upon the homeowners in the present case; where the facts in Hannabass, while very sketchy, clearly established that the homeowners had been warned to place some kind of decal on the door and therefore the question for the jury to determine was only whether or not they heeded the warning.

It is respectfully submitted that the lower courts in this case correctly found that there was no duty to place decals on the sliding glass doors and no duty to warn of a latent peril of which the homeowner was undisputedly unaware. In the future if

such a duty would be consistent with the public policy of the State of Florida, then it would be incumbent upon the governmental agencies, to either enact regulations or at the very least, to spread this information through ads, television, etc., so all Florida homeowners would be on notice that such a duty now exists. However, there would be absolutely no need for decals in the present case, where the homeowners rightfully relied on the fact that safety glass had been installed and if the contractor had done what he was supposed to do, the glass would not have broken and injured the Plaintiff. In addition, it is important to remember that it was the lessee who had control over whether or not the door in the present case was closed. The bottom line is simply that if the safety glass had been installed as required by the original contractor there would have been absolutely no need for decals; whether the door was open or closed. The need for decals only arguably could exist because the proper glass was not installed by the original contractor. Therefore there is absolutely no need for this Court to impose a duty upon every homeowner and landowner in the state of Florida to place decals on their sliding glass doors. This is especially true where the homeowners risk losing their home, which is the major investment of their life for failure to abide by a duty that they are totally unaware of.

B. The Trial Court Correctly Ruled as a Matter of Law That the Lack of Safety Glass Was a Latent Defect Not Discoverable Through Normal Inspection.

Once again the Plaintiff asserts that the homeowners, as landlords, had a duty to transfer a reasonably safe dwelling to

the Cav nuaghs which duty was breached when they failed to hire an expert to determine the type of glass in the sliding glass door. It is important to remember that all allegations regarding any duty as a landlord under either, this Court's decision in Mansur v. Eubanks, 401 So.2d 1328 (Fla. 1981), or Florida Statute Section 83.51, were never pled or raised in the trial court or the appellate court and are waived. The landlord argument was mentioned apparently for the first time at oral argument in the Fourth District; where the court ruled that this issue was waived, since it was never raised below. However, the Defendants will address these allegations under Mansur and the statute, in subsection C of this Brief. The ruling by the appellate court, upholding the trial court's determination that there was a latent defect not discoverable through ordinary inspection, under the Slavin Doctrine was decided correctly.

The Record below established that only tempered glass has a logo on it, which can be translated by a glass company to show that it is tempered glass. Other types of safety glass, as well as annealed glass, have no markings on them whatsoever. Therefore through ordinary observation, looking at a piece of glass in a sliding glass door, without markings, it is impossible for the ordinary homeowner to determine just from looking at the glass, whether or not it is safety glass. Therefore, the Plaintiff is wrong when she argues that if the glass in the door is not marked, it is not safety glass, for this simply is not so, as established by her own expert. However, even if this were true, that tempered safety glass was the only type of glass

placed in sliding glass doors and it does contain a type of marking upon it, which can be translated by a glass expert, this still does not impose a duty on the Defendants. The Plaintiff's argument is that if any defect is discoverable, through any means whatsoever, than the Slavin Doctrine does not apply to hold the original contractor liable. This too is simply not what the Slavin Doctrine is or stands for.

As previously mentioned, in Slavin this Court held that a motel owner could not be held to have assumed a risk of a defect which resulted in an injury to the plaintiff; since there had been no intervening fault to sever the causal relationship between the negligence of the original contractor, who had created the dangerous condition and the injury sustained by the occupant of the motel room. The original contractor was held liable to the occupant for the injury sustained; as the contractor's original negligence was held to be the proximate cause of the plaintiff's subsequent injury. Slavin, supra.

This Court noted that the general rule was that the contractor was not liable to third parties after the work was completed and accepted by the owner. Slavin, 463. However, in the case of latent defects, this Court held that the contractors original negligence remained the proximate cause of the plaintiff's injury rendering him liable even after the acceptance of the work by the owner. Slavin, 466.

This Court went on to discuss the type of inspection required, noting that if the defective condition was hidden from "ordinary observation" and was a latent defect, then the owner

who accepted the work would not be charged with the knowledge of the existence of this defect. Slavin, 467.

It observed that while the premises were under the control of the contractor, he had a "duty to the whole world to exercise due care" and he would be liable to any person for harm resulting from negligently creating defects, hidden or otherwise. This liability normally terminated by acceptance by the owner, "only so far as the acceptor is to assume responsibility." Slavin, 467. Therefore when the defect is a condition hidden from ordinary observation, not discoverable through reasonable inspection, then the original contractor remains liable for negligently creating the dangerous condition. On this basis the judgment in favor of the original contractor in Slavin was reversed and the judgment for the owner affirmed. Slavin, 467; Kagan v. Eisenstadt, 98 So.2d 370 (Fla. 3d DCA 1957) (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 the use of one's ordinary senses from the "casual observation" of the premises). This Court has clearly set out the test for whether or not a defective condition is patent, and it is not whether or not the object itself was obvious, but rather whether the defective nature of the object was obvious to the owner with the exercise of reasonable care.

The defective condition alleged by the Plaintiff in this case was the fact that the Cestari's home did not contain one of several types of safety glass in the sliding glass door. This condition was not discoverable upon the casual observation, the

ordinary use of ones' senses, or even upon a reasonable and careful inspection by a reasonably prudent person. Kagan, supra. Grall v. Risdén, 167 So.2d 610 (Fla. 2d DCA 1964), cert. denied, 174 So.2d 763 (Fla. 1965). Only someone who is familiar with the Building Code and/or someone who is familiar with the types of safety glass installed in sliding glass doors, would have the specialized training and whatever measuring devices necessary, to determine that the sliding glass door did not comply with the Code requirements. Even the Plaintiff's expert admitted this when he stated that the homeowner would have to contact a glass company, who could translate the manufacturer's logo on the sliding glass door, if one were present, to inform the homeowner that it was tempered glass. As previously mentioned, of course, there are other types of safety glass that could have been installed which have no logo and therefore could not be translated into whether or not they were safety glass.

It is plain common sense that one inexperienced and unarmed with the devices required to measure the strength of glass, etc. could never make these determinations simply by looking at the door itself. The defect, discoverable only with specialized knowledge was admitted and pled by the Plaintiff to be latent and was latent as a matter of law. See, Simmons v. Owens, 363 So.2d 142 (Fla. 1st DCA 1978) (clearance between wood siding and ground less than six inches as required by the building code was a latent defect); Kaminer Construction Corp. v. United States, 488 F.2d 980 (Ct. Cl. 1973) (holding that the difference between the width of the head of a one and one quarter inch bolt and head of

a one and three inch bolt while discoverable, if measured by ruler, was a latent defect). In Simmons, after determining that the construction defect in the home was latent as a matter of law, the appellate court went on to make the following observations which are relevant in the present case:

We must be realistic. The ordinary purchaser of a home is not qualified to determine when or where a defect exists. Yet, the purchaser makes the biggest and most important investment in his or her life and, more times than not, on a limited budget. The purchaser can ill afford to suddenly find a latent defect in his or her home that completely destroys the family's budget and have no remedy or recourse. This happens too often. The careless work of contractors, who in the past have been insulated from liability, must cease or they must accept financial responsibility for their negligence.

Simmons, 143.

The Simmons court found that it was proper for a subsequent homeowner to bring suit against the original contractor, based on a latent defect, which seriously damaged the home. Similarly, in the present case the third party, Brandi Fitzgerald, has a right of recourse against the original contractor for the latent defect, which resulted in her injury. This is the proper person upon whom to impose liability; especially where the lawsuit against the subsequent homeowner could in effect result in the loss of the very home which was the biggest and most important investment in the Cestaris' life.

In Mai Kai, Inc. v. Colucci, 205 So.2d 291 (Fla. 1967) this Court, resolved the conflict between the underlying prior decision and its decision in Slavin. In Mai Kai, this Court held that the restaurant owner breached no duty of care to the invitee who was



injured when a counter weight fell from the ceiling fan, because of defective welding by the contractor who installed the device. This Court noted that the restaurant owner had a duty to use reasonable care in maintaining the premises in a reasonably safe condition for its business invitees. Mai Kai, 293. However, in finding that the restaurant owner was free from liability, this Court noted that it would not impose liability on landlords if the cases involved latent defective conditions, such as the one in Mai Kai, which could not have been discovered by "reasonable care". Mai Kai, 293. This Court found that there was no inconsistency in the landlord's duty to use reasonable care in preventing or correcting an unsafe condition, as opposed to the absolute liability for a contractor's negligence. Mai Kai, 293. The holding in Mai Kai was that the restaurant owner could not be liable for injuries sustained by its patron, when the counter weight supporting the fan fell upon the patron; on the grounds that the owner had a nondelegable duty to keep the premises reasonably safe for invited use, where the owner in the exercise of reasonable care could not have discovered the unsafe condition. Therefore there is absolutely no question that under Florida law and application of the Slavin Doctrine, the latent defect here is one which is not discoverable through reasonable or ordinary observation; especially when it was entirely missed by even those who had specialized knowledge and skill and the duty to discover it. All the original building inspectors who inspected the home certified it was in compliance with the Building Code and all subsequent inspections by the bank, etc.,

failed to reveal the alleged defect in the sliding glass door. It is undisputed that the Cestaris had absolutely no knowledge, no notice, or the slightest inkling that there was anything wrong with their sliding glass door. In other words, a host of reasonably prudent persons, as well as numerous experts, failed to uncover the defect and therefore it was latent as a matter of law. Since it was a latent defect, undiscoverable through reasonable care, there was no question that the liability and the proximate cause of the Plaintiff's accident was negligence of the original contractor. Slavin, supra.

The Plaintiff's reliance on Lubell v. Roman Spa, Inc., 362 So.2d 922 (Fla. 1978) is also misplaced. This Court in Lubell did not hold that any defect which could be discovered by someone renders it a patent defect or a question for the jury to determine. Rather this Court held that based on the evidence that the supervisor of the spa, which had sued for the injuries, had actively participated in the construction and had even reviewed and approved the plans for the construction work, were clearly material fact questions for a jury to resolve, as to the nature of the defective condition.

Lubell involved a plaintiff who was injured by a piece of defective false ceiling in a health spa. Additionally, though the original contractor's negligence may have been primarily responsible for these injuries, the health spa had attempted to make improvements to the existing ceiling and apparently had knowledge of the defects attributable to the original contractor. In Lubell, this Court did not state absolutely that the patent or

latency of an original contractor's negligence was always a question of fact for the jury. Instead **it** was merely held that the trial court was presented with sufficient evidence of the Spa's prior knowledge of these defects to remove the case from the Slavin Doctrine and submit **it** to the jury:

...approval of the plan for the ceiling by the Spa's maintenance supervisor, the supervisor's observance of some of the construction, and his acceptance of the completed work following inspections...

Lubell, 923.

In other words, the maintenance supervisor for the health spa, probably an expert on construction and construction procedure, inspected and accepted the original contractor's work.

Clearly, Lubell does not stand for the proposition, that these issues must always be submitted to the jury, and **it** is not at all dispositive of the case at bar.

Therefore both the trial and the appellate courts correctly found that the Cestaris owed no duty to investigate and determine the type of glass used in the construction of the sliding glass door; where the Cestaris conducted a reasonable inspection of their home at the time they purchased **it**, and did not discover the latent defect in their sliding glass door.

C. No Statutory Duty Was Ever Pled or Raised in Either the Trial Court or the Appellate Court and This Issue Has Been Waived on Appeal; Even If Not Waived There is No Violation of Florida Statute Section 83.51(1) (a).

This issue has clearly been waived, where the Plaintiff did not allege any statutory breach of duty; such issue was never

raised in either the trial court or the appellate court. Even if properly preserved for appellate review there is no basis for imposing liability on the Cestaris under either a statutory, or common law, action against a landlord. A landlord has the duty to inspect and repair defective conditions prior to turning residential premises over to the tenant and, in doing so, must exercise reasonable care. Mansur v. Eubanks, supra. Thus, a landlord's liability for injuries caused by defects on his premises is based on the same failure to exercise reasonable care; in other words, the negligence standard. By interpreting Florida Statute Section **83.51** as constructive notice to landlords of all defects which are code violations, landlords will be liable for such defects; whether or not such defects are discoverable by the exercise of reasonable care and whether or not they inspected their premises. Where, as here, there is a latent defect, which is a code violation, a landlord could be held liable even though he could not possibly have discovered this defect upon reasonable inspection. There is simply no authority in Florida for holding landlords strictly liable for building code violations, as espoused by the Plaintiff.

The landlord's duty under the statute was discussed in Firth v. Marhoefer, 406 So.2d 521 (Fla. 4th DCA 1981). The Fourth District began its analysis by noting that, under the statute, in order for a landlord to be held liable for a breach of duty, it is necessary to prove the landlord had actual or constructive notice of the existence of the dangerous condition for a sufficient time for it to be remedied. Firth, 522. See also,

Marlo Investments, Inc. v. Verne, 227 So.2d 58 (Fla. 4th DCA 1969). The Fourth District went on to observe that constructive knowledge of a dangerous condition could be imputed to a landlord, where it can be shown that the condition reoccurred with regularity, thus rendering it foreseeable. Firth, 522. In other words, the landlord receives verbal, or written, warnings that the dangerous condition exists (like the homeowners in Hannabass). The landlord is thus on notice of a reoccurring problem. Then a jury question is created as to whether the landlord exercised reasonable care in guarding against foreseeable dangers. Firth, 522. As previously discussed in detail, the defective condition in the present case is a latent one, not discoverable through reasonable and ordinary observation. The Plaintiff's expert testified that a glass expert would have to be consulted in order to determine the type of glass contained in the sliding glass door. The Fourth District's application of Section 83.51 in Firth, of course, is perfectly consistent with this Court's decision in Mansur.

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, or in this case the homeowner, has a duty to scour around or hire experts to find latent defects or code violations

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. Of course, it was undisputed that the Cestaris had no notice of any defect in their door until the accident. Neither Mansur, nor any other case in Florida, holds that the homeowner has a duty to warn of an unknown defect in a sliding glass door.

In order to impose a duty to warn upon homeowners, requiring them to place markers and decals on the sliding glass doors, the Plaintiff argues in passing that a sliding glass door is a "dangerous instrumentality," or is inherently dangerous. 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 an inherently dangerous instrumentality). The fact that Florida does not recognize glass doors as dangerous instrumentalities is substantiated by the dissenting opinion below which cited various out-of-state cases for this proposition, but none from Florida.

The bottom line is that the Plaintiff wants 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, i.e. does not contain safety glass. This Court has had the 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 Plaintiff's injuries. Therefore this is not a situation where the Plaintiff is without redress. As a matter of fact, the Plaintiff already signed a release and received \$2,000 from the homeowners' insurer in satisfaction of her claims against the homeowners. In addition, the Plaintiff can pursue the original builder for alleged violation of the Building Code, regarding the type of glass installed in the sliding glass door.

The Fourth District's opinion extensively discusses all the applicable Florida law. It is apparent that the District Court examined this case closely and reached its decision after a thorough review of all existing law and made its decision in conformance with the law. Even the dissent concedes this and there is no conflict in Florida law to be resolved and the Summary Judgment must be affirmed.

## CONCLUSION

The Fourth District correctly held that any negligence, due to the Cestaris failure to have safety glass in their sliding glass door, was chargeable against the original builder; who had both a duty and the ability to ensure that the glass used met the required code. The trial court also correctly determined that under the Slavin Doctrine, the original builder should be held liable for the Plaintiff's injury and the lack of safety glass is a latent defect not discoverable under normal or reasonable inspection. Even the Plaintiff's expert conceded this where he stated that it would take a glass expert to translate the logo which appears on tempered glass and where there are other types of safety glass that do not even have markings. There is no legal or public policy reason, to impose upon homeowners the duty to put decals or markings on doors; especially where properly constructed doors are safe without decals; where the Cestaris' door passed numerous building inspections and the homeowners reasonably relied on these inspections to ensure the sliding glass door met the applicable code requirements and contained the proper type of safety glass. There is no direct and express conflict with the decision below and any decisions of this Court or any District Court and the Summary Judgment in favor of the homeowners must be affirmed.



CERTIFICATE OF SERVICE

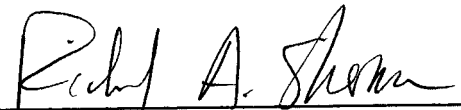
I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 17th day of August, 1990 to:

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  
Green, Haverman & Ackerman, P.A.  
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