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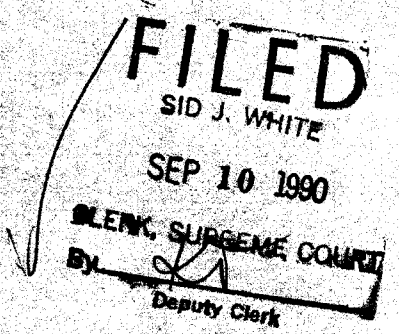
SUPREME COURT OF FLORIDA

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




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

Petitioner,

vs.

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

Respondents.

_____)

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

Respectfully submitted,

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## I. ARGUMENT

Respondents' Answer Brief is rife with misstatements of fact and procedural history. A complete review of these misstatements, and Respondents' legal analysis, would require a page-by-page reply longer than the Initial Brief, but in the interest of brevity, FITZGERALD will only "hit the high points," and as to the rest will stand on its Initial Brief. All emphasis will be that of the writer unless otherwise noted.

### A. SETTING THE RECORD STRAIGHT.

#### FACTS.

1. No evidence of inspection of the glass doors. Throughout the Answer Brief, the CESTARIS suggest that a number of inspections were performed on the house, either as part of the original building inspections or as "subsequent inspections by the bank" at the time that they purchased the home. (Answer Brief, p. 1.) Other than the Certificate of Occupancy, issued December 1961,[1] which indicates a record of certain inspections by the date of those inspections, there is no record evidence of the performance of <u>any</u> inspection of the CESTARIS' home. FITZGERALD is aware of no evidence supporting the assertion of any inspections, by a bank or other entity, at the time that the CESTARIS purchased their house. Although the Certificate of Occupancy indicates the

[1] Attached to Respondents' Answer Brief, App. p. 9.

performance of certain inspections, there is no record evidence establishing the exact nature of the inspections performed, and furthermore none of the various areas of inspection listed on the Certificate of Occupancy appear to have anything to do with the glass doors. Certainly, any suggestion by the CESTARIS that they relied upon previous expert inspections of the house is unfounded.

2. JAN CESTARI's affidavit. Along the same lines, there appears to be confusion as to the content of Mr. CESTARI'S affidavit, filed in support of the CESTARIS' Motion for Summary Judgment. The Fourth District Court of Appeals quoted that affidavit, paragraph 4, as follows: "That on April 18, 1984, the glass in the subject sliding glass doors was the original glass installed by the original contractors that built my home." Fitzgerald V. Cestari, 553 So.2d 708, 709 (Fla. 4th DCA 1989)[2]. However, the affidavit in the undersigned's file states, in paragraph 4: "That on April 18, 1984, the glass in the subject sliding glass door was the original glass installed in my home when I Purchased the house in March of 1980." A copy of this affidavit, and the notice of filing, is attached to the Supplementary Appendix, pp. 1-2 (hereinafter cited as (Supp. App. 1-11)) to this Reply Brief.

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[2] FITZGERALD referred to this language in her Initial Brief, p.4. In any event, the affidavit provides no factual predicate for Mr. CESTARI's knowledge of this "fact."

Based on the second version, the CESTARIS cannot now assert that the subject glass door was installed by the original contractor.

3. Testimony of Norman Spangler misstated. The CESTARIS incorrectly state that Plaintiff's expert, Norman Spangler, testified that the glass door would not have broken if it was composed of safety glass. (Answer Brief, p.18.) This is simply untrue, as well as absurd. Mr. Spangler testified that tempered glass breaks into small fragments, not the large shards into which anneal glass would break. (R. 635-36.) Tempered sliding glass doors are not unbreakable, they are just safer than anneal glass doors.

Additionally, the CESTARIS incorrectly state that Mr. Spangler testified that one cannot determine through ordinary observation whether glass is safety glass, and that only one type of safety glass (tempered) used in glass doors has any markings. (Answer Brief, p.27.) Those statements are also untrue. First, Mr. Spangler testified that the only type of safety glass which he has seen in sliding glass doors is tempered glass. The other types of safety glass, wire and laminated, are not generally used in glass doors. Second, he testified that tempered glass is marked as such on the door, and the lack of such a marking indicates that the glass is anneal. (R. 622-24.)

4. The CESTARIS' claim of "reliance" unsupported. The CESTARIS claim that they relied on the doors to contain

safety glass. (Answer Brief, p. 26.) There is no record evidence of such reliance, and there are no facts which would permit such an inference.

5. The CESTARIS' claim of lack of warning unsupported. In attempting to distinguish Hannabass v. Florida Home Insurance Company, 412 So.2d 376 (Fla. 2d DCA 1981), the CESTARIS claim that they were never warned or cautioned to place decals on the sliding glass door. (Answer Brief, p.28.) No record evidence supports this statement.

6. The CESTARIS are not at risk of losing their rental home. Throughout their Answer Brief, the CESTARIS make the emotional (and completely false) argument that they are innocent homeowners, at risk of losing their home. The CESTARIS have forgotten that they were covered by homeowner's insurance for this incident. (R. 239, para. 2.)

PROCEDURE

1. The allegations of the Amended Complaint support FITZGERALD's position before this Court. The CESTARIS falsely assert that FITZGERALD, for the first time before this court, argues that the Defendants had a duty to place decals on the glass door to show that it was closed, (Answer Brief, p.17), and that previously FITZGERALD had only alleged that the glass door was defective because the lack of safety glass. (Answer Brief, p. 17 and 18.) This is untrue. The Amended Complaint, attached as part of the Supplementary Appendix (Supp. App. 3), clearly states otherwise:

> 10. That the subject glass door was not made of . . . tempered glass, had no decal or other markings on it, and Brandy Fitzgerald ran into the glass, believing that the door was open, causing the glass to shatter and resulting in serious injury to Brandy Fitzgerald.
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> * * *
>
> 12. That [the Cestaris] breached their duty by failing to place decals or other markings on the sliding glass door at the rear of the subject house so that invitees could readily perceive when the subject alass door was closed.

(R. 155-60).

This issue was also directly addressed by FITZGERALD in her Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment. (R. 318.)

2. Filing of Responsive Memoranda. The CESTARIS also suggest that FITZGERALD's Memorandum of Law in Opposition to their Motion for Summary Judgment was not filed until after the hearing. (Answer Brief, p. 5.) According to the Index of the Record on Appeal, neither was theirs. (R. 239 and 374 showing filing dates of March 2, 1988 and March 9, 1988, respectively.)[3]

3. Filing of Norman Spangler's deposition. The CESTARIS also incorrectly claim that Norman Spangler's deposition transcript was not given to the trial court to review. (Answer Brief, p. 7.) This too is untrue. The deposition of Normal Spangler was taken February 4, 1988.

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[3] Apparently, the trial judge kept both parties' memoranda in chambers prior to issuing his ruling. (R. 17, 21.)

(R. 588.) The transcript had not been completed as of the day of the hearing, (R. 33), was made known to the court and argued to the court by both sides, without objection. (R. 33-35.) The transcript was filed with FITZGERALD's Motion for Rehearing on March 9, 1988.[4]

4. **Duty as Landlord.** Finally, the CESTARIS suggest that FITZGERALD raised for the first time their duty as a landlord during oral argument before the Fourth District Court of Appeals. (Answer Brief, p.8.) Although that issue was not raised in FITZGERALD's brief, it was raised by way of Notice of Supplemental Authority, filed prior to oral argument. (See Supp. App. 11.)

## B. REV OF THE CESTARIS LEGAL NALY

In reviewing the CESTARIS' Answer Brief, it is easy to lose sight of three important points: (1) the dual duty of a landowner, such as the CESTARIS, to an invitee, such as FITZGERALD, is to maintain its property in a reasonably safe condition and to warn of concealed or latent dangers; (2) FITZGERALD has maintained throughout this litigation that the CESTARIS breached their duty owed to her by (a) failing to place decals on the glass door to warn when it was closed, and (b) by failing to discover that the door was composed of anneal glass, and replace it with safety glass; and (3) The CESTARIS bore the burden of proving conclusively the lack of

[4]And, Mr. Spangler's deposition transcript was filed by stipulation of both parties as a supplement to the record on appeal. (Supp. App. 9)

a genuine issue of material fact on motion for summary judgment, with all reasonable inferences to be drawn in favor of FITZGERALD, the non-moving party. The CESTARIS did not meet this burden, and summary judgment was improperly entered in their favor.

The CESTARIS' discussion of duty. The CESTARIS assert that FITZGERALD has erroneously argued that only a jury can determine the duty owed by the CESTARIS, and whether the CESTARIS breached that duty. (Answer Brief, p.23.) FITZGERALD did no such thing. FITZGERALD simply has argued that the CESTARIS, as owners of the property, as well as landlords, owed a duty of care to FITZGERALD, as an invitee, and that it is a question of fact whether the CESTARIS breached that duty, under the facts and circumstances of this case, and the supporting case law.

Thus, the appropriate analysis here is, not whether the CESTARIS owed a duty to FITZGERALD (because they certainly did), but rather whether they breached that duty. That issue is one for the jury, under the facts and circumstances of this case: "The issue of breach of duty is often considered a question for the jury, unless only one reasonable conclusion may be drawn from the facts in evidence." Florida Power & Light Company v. Lively, 465 So.2d 1270, 1273 (Fla. 3d DCA), rev. den., 476 So.2d 674 (Fla. 1985).

The issue of whether the CESTARIS breached their duty of care to FITZGERALD was an issue of fact, for the jury to determine. Summary judgment was entered improperly, and the Fourth District Court of Appeal, in affirming that judgment, issued an opinion which conflicts directly and expresslywith decisions of the First, Second and Third District Court of Appeal.

The CESTARIS incorrectly analyzed the "glass door" cases on which conflict jurisdiction is based.[5] Following the Fourth District Court of Appeal, the CESTARIS incorrectly argue that the primary issue in those cases was the contributory negligence of the Plaintiff, which is not at issue here. The CESTARIS have missed the point, and the express lanauaae, of those cases.

McCain V. Bankers Life & Casualtv Company. In McCain, a child ran through a sliding glass door. The door was not marked with decals. The court held: "We hold that the question of negligence is, upon the facts of this case, an issue for the jury, and accordingly the judgment is reversed." 110 So.2d at 718. Thus, the question of a landowner's negligence was squarely before the court in

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[5] Those cases are McCain v. Bankers Life & Casualty Company, 110 So.2d 718 (Fla. 3d DCA), cert. denied, 114 So.2d 3 (Fla. 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); Hannabass V. Florida Home Insurance Company, 412 So.2d 376 (Fla. 2d DCA 1981). See also Isenbera V. Ortona Park Recreational Center, Inc., 160 So.2d 132 (Fla. 1st DCA 1964) (standing for the same proposition as the other cases.)

McCain, just as it is here, and the Third District found it to be one for a jury to decide.

Canner v. Blank. In Canner, a 13 year old girl ran through a sliding glass door, which bore no markings or decals. Citing McCain, the court found that a jury question was presented. 152 So.2d at 194. Although the court did not distinguish between the issues of negligence and contributory negligence, if there was no question as to the negligence of the landowner, or whether the landowner owed a duty to place warnings or decals on the glass door, there would be no need to get to the issue of the Plaintiff's contributory negligence. Canner, therefore, stands for the proposition that the question of the landowner's negligence is one for the jury.

Peppermint Twist. Inc. V. Wright. Again, in Peppermint Twist, an 18 year old minor walked through a glass door. It too bore no markings or decals. The court stated:

> Appellant's contention that no jury questions were presented as to negligence and contributory negligence is without merit.
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> * * *
>
> [W]e hold that the trial court was imminently correct in submitting the issues of negligence and contributory negligence to the jury, and accordingly the judgment is confirmed.

169 So.2d at 331-32.

Hannabass v. Florida Home Insurance Company. The CESTARIS attempt to distinguish Hannabass on the basis of the mention in Hannabass of a warning to the landowners to

place a decal on the glass door (Answer Brief, p.27-28), asserting that the CESTARIS never received such a warning. First, that assertion is without record support, and apparently a fabrication. Second, the CESTARIS' argument, that the Hannabass court implicitly ruled that the question to the jury was whether the homeowner negligently failed to heed the warning to place decals on the door, is illogical. The CESTARIS argue elsewhere that a homeowner has no such duty, therefore a warning would not alter the lack of duty. And, if the homeowner was aware of the lack of safety glass, then the appropriate course would be to replace the door not just to place decals on it. Third, the court's inquiry appears to center around the question of whether the landowners had placed the decal on the door, not the warning.[6]

Isenberg V. Ortona Park Recreational Center, Inc., 160 So.2d 132 (Fla. 1st DCA 1964). In Isenberg, a 16 year old girl ran through a sliding glass door at a tennis "pro shop." The door was open when she first passed through it, but was later closed. There was conflicting evidence as to whether a decal was on the door. 160 So.2d at 133. The trial judge submitted the case to the jury, denying the Park's motion for

[6]"Although it was clear that they had been cautioned to put a warning decal on the door, there was conflicting testimony over whether they had done so prior to the accident." 412 So.2d at 377.

directed verdict. The First District court of Appeal affirmed:

> The trial judge heard the evidence which described the door, its location and construction and with respect to the prior custom of leaving the door open during use of the tennis courts and the closing of the door under the circumstances of this case. He determined that a jury question was presented on the issues of the defendant's negligence. We aaree.

160 So.2d at 134.

These cases, McCain, Canner, Peppermint Twist, Hannabass and Isenberq, establish that a jury question is presented under circumstances identical to those presented here. The underlying opinion of the Fourth District Court of Appeal directly conflicts with this line of cases, and should be overruled.

The CESTARIS do not assert any basis for overruling this line of cases. The rule of law stated in this line of cases has been the law in Florida for thirty years. The CESTARIS assert no basis for overrulinq this Precedent. Under the circumstances of this case, summary judgment was improper, and the issue of the CESTARIS' negligence should have been submitted to the jury. The decision of the Fourth District Court of Appeal should be overruled.

Slavin v. Kay, 108 So.2d 462 (Fla. 1959) does not support the summary judgment. The only affirmative evidence offered by the CESTARIS to establish that the "defect"-the absence of safety glass-was not discoverable upon reasonable

inspection was the affidavit of Jan Cestari. That affidavit merely stated that "the type of glass in the subject doors was not readily discoverable by my inspection of same." That statement does not establish the type of inspection he performed, if any. Certainly, it is not a reasonable inference-unavailable to the CESTARIS at any rate on motion for summary judgment (inferences to be drawn in favor of the non-moving party)-to state that Mr. CESTARI's inspection was "reasonable" under the circumstances. Further, there is record evidence to establish that tempered glass is appropriately marked, and therefore readily discoverable upon reasonable inspection.[7]

The question of whether the defect was readily discoverable upon reasonable inspection was for the jury, and therefore the trial court erred in granting summary judgment. Lubel v. Roman Spa. Inc., 362 So.2d 922 (Fla. 1978).

## CONCLUSION

For all the reasons stated above, the trial court erred in entering summary judgment in favor of the CESTARIS and the Fourth District Court of Appeals' underlying opinion

[7]Additionally, apparently there are two different versions of Mr. CESTARI's affidavit concerning when the subject glass doors were installed in the CESTARIS' home, raisingthe question of applicability of the Slavin doctrine.

should be overruled. This cause should be reversed and remanded for trial on all issues.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 6th day of SEPTEMBER 1990 to: HOWARD POMERANTZ, ESQUIRE, 7800 W. Oakland Park Blvd., Suite 101, Sunrise, FL 33321; JAY B. GREEN, ESQUIRE, 315 S.E. Seventh Street, Advocate Building Second Floor, Ft. Lauderdale, FL 33301; RICHARDA. SHERMAN, ESQUIRE, Suite 102 N. Justice Building, 524 S. Andrews Avenue, Ft. Lauderdale, FL 33301.

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