045 w/app

IN THE FLORIDA SUPREME COURT

CASE NO.

DCA CASE NO. 89-01900

Florida Bar No: 184170

ED RICKE & SONS, INC., a Florida corporation,

Petitioner,

vs.

DEMETRIUS OCTAVIUS GREEN, a minor, by and through his Guardian of the Property, EDWARD P. SWAN, ESQUIRE,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION
ED RICKE & SONS, INC., a Florida corporation

(With Appendix)

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TABLE OF CITATIONS

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STATEMENT OF THE FACTS AND CASE

The opinion of the Third District is in direct and express conflict with this Court's decision in Slavin v. Kay, 108 So.2d 462 (Fla. 1958), and has created new law in Florida announcing for the first time anywhere, that hot water is a dangerous instrumentality sufficient to preclude the application of the Slavin doctrine. The alleged negligent act, hot water spewing out of an outside drain pipe, allegedly due to a defective gas water heater, took place over a quarter of a century ago, and the time period involving this litigation is nearly thirty years. The following is an abbreviated chronology of the facts which led to the Third District announcing for the first time anywhere in Florida the new "hot water" exception to the application af the Slavin doctrine:

August 2, 1963 - HUD through the Miami Housing Authority has plans drawn up to convert solar to gas water heaters at the Scott Homes Project.

January 1965 - Yoyner construction Company, Inc. awarded a contract €or alteration and repairs and installation of water heaters; including Building #37, site of Green's accident.

June 7, 1965 - Final plumbing inspection on Joyner's construction work on Building #37.

January 5, 1966 - Ed Ricke & sos, Inc. awarded the contract to do similar alteration and repairs including building next to Building #37.

way 20, 1966 - Alteration work completed by Ed Ricke and approved by landowner, Miami Housing Authority (no work on Building #37).

1968 - Dade County takes over HUD housing project from Miami Housing Authority.

1969 - Hot water spewing from drain pipe outside Building #37, pooling on ground on regular basis: resident children warming themselves from the steam generated by the hot water draining from outside pipe at Building #37.

December 1976 - Homeowners make requests for repairs to water heater to Dade County Building Maintenance; numerous repairs to

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the hot water heater and relief value performed by landowner, Dade County in Building #37.

March 1977 - Vicky Paxton burned by hot water pooling under drain pipe outside Building #37; landowner, Dade County notified of child's injury.

March 13, 1977 - Demetrius Green burned because of hot water spewing from drain pipe outside Building #37.

March 21, 1977 - Green sues Dade County, HUD and Florida Gas Company; parties settle.

May 2, 1980 - Green sues architect Rader & Associates, Marr Plumbing, Ed Ricke & Sons, Inc., etc.

December 2, 1980 - Ed Ricke & sons answer expressly denying all allegations in Green's complaint that Ricke installed the subject water heater and drain; Ricke raises the affirmative defenses of the Slavin doctrine.

October 1980 - Green settles with subcontractor Marr Plumbing for $300,000.

April 13, 1982 - First trial ends in mistrial.

April 16, 1982 - Verdict in favor of Ricke; reversed by this Court March 28, 1985. Ed Ricke & Sons, Inc. v. Green, 468 So.2d 908 (Fla. 1985).

April 7, 1986 - Third trial. Ricke takes mistrial in order to do further discovery to rebut new evidence that Ricke did not do construction work on Building #37.

July 31, 1989 - Trial court grants Summary Judgment in favor or Ricke based on the fact that it did not do the construction work and denies Ricke's Motion for Summary Judgment under the Slavin doctrine.

The Third District avoided the clear application of the Slavin doctrine in this case by finding that since the hot water, which injured the Plaintiff, was connected to a gas water heater, the Slavin doctrine did not apply; which would have exonerated Ricke. The responsible party under the Slavin rule was the landowner, Dade County, which undisputedly had knowledge of the alleged defective gas water heater, as well as knowledge of the hat water draining on the outside of the building, which injured two children. Green v. Ed Ricke & Sons, Inc., 16 FLW D2212 (Fla. 3d DCA, August 20, 1991); (A 1-2). The Third District also found

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that Ricke was estopped from denying liability for the accident; even though there were three prior mistrials, and Ricke never successfully assumed a factual position to the prejudice of Green (A 102).

SUMMARY OF ARGUMENT

The Third District's opinion is in direct and express conflict with decisions out of this Court; Slavin; Chadbourne; and Palm Beach; has created a new exception to the Slavin doctrine finding that hot water is inherently dangerous; and this Court has jurisdiction to reconcile the conflict and to address the new legal principles announced by the Third District.

ARGUMENT

THE DECISION BELOW IS IN DIRECT AND EXPRESS CONFLICT WITH SLAVIN, CHADBOURNE, and PALM BEACH, AND HAS ANNOUNCED NEW PRINCIPLES OF LAW, IN CONFLICT WITH DECISIONS OF THIS COURT.

It is totally undisputed that Demetrius Green was injured when he fell in a puddle of hot water, from a drain pipe outside the apartment building he lived in.

It is totally undisputed that, if Ricke is responsible for the alteration and repairs to Building #37, that this work was turned over to the landowner, and accepted in 1966, 11 years prior to the Plaintiff's accident. It was also undisputedly established in the Record that, from 1969 to the date of the accident, Dade County, the subsequent landowner, was aware of the open and obvious, dangerous condition; as hot steamy water was spewing forth from the drain pipe on the outside of Building #37

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from 1969, to the date of the Plaintiff's accident in 1977. Numerous requests had been made to repair the heating systems in Building #37, and a child was burned by the water coming out of the drip pipe just two weeks before Green was injured, and still Dade County failed to correct this known dangerous condition. It was only after Green was also burned that Dade County ordered the water heater replaced, to prevent hot water from escaping through the drain pipe on the outside of the building.

As a matter of well established Florida law, once the landowner accepted the construction work done at the Scott Homes Project, it became exclusively liable for any injuries caused by an open and obvious defective condition on the premises. The Slavin doctrine provides that a contractor is relieved of liability for injuries to third parties occurring after the owner has accepted the project, if the owner could have discovered and remedied any alleged dangerous conditions. The policy behind the rule is that it would be unfair to hold a contractor liable for an indefinite period of time for work which has been accepted and inspected by the owner of the premises.

> By occupying and resuming possession of the work, the owner deprives a contractor of all opportunity to rectify his wrong. Before accepting the work as being in full compliance with the terms of the contract, he is presumed to have made a reasonably careful inspection thereof and to know of its defects and if he takes it in the defective condition, he accepts the defects and the negligence that cause them as his own, and thereafter stands forth as their author. When he accepts work that is in a dangerous condition, the immediate duty devolves upon him to make it safe, and if he fails to

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> perform this duty, and a third person is injured it is his negligence that is the proximate cause of the injury. Slavin v. Kay, 108 So.2d 462,466 (Fla. 1958).

This is graphically illustrated in the present case; where Green sued Ricke in 1980, 14 years after the work was completed. Dade County took over the housing project in 1968 from the original owner, the City of Miami Housing Authority. It is undisputed that Dade County was fully responsible for the maintenance and repairs at the project and had full knowledge of the defective heater and the dripping hot water outside and had attempted to repair it. This Court has refused to abandon the Slavin doctrine. Edward M. Chadbourne. Inc. v. Vaughn, 491 So.2d 551 (Fla. 1986). In addition, numerous appellate court decisions have also adhered to the Slavin doctrine; which was restated by the Supreme Court in Chadbourne:

> The key to our holding in Slavin is the patentness of the defect or the owner's knowledge of the defect and the failure to remedy the defect, not whether the party is a contractor. It would be contrary to public policy as well as good common sense to hold a person, whether they are characterized as a manufacturer or a contractor, strictly liable when the defect is patent or known to the owner.
>
> Chadbourne, 554.

In the present case, the condition of the water heater and the hot steamy water, which would spew out of the drain pipe, was open, obvious, and known to Dade County for at least eight years before the Plaintiff's accident. Numerous complaints were made to Dade County; repair orders were issued and work done on the

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gas water heater; which was finally replaced immediately after Green's accident. It was an open and obvious condition of which the County was undisputedly aware. Numerous appellate court decisions adhered to the Slavin doctrine and affirmed summary judgments or dismissal of complaints, where the condition causing the injury was a patent one. The basis for relieving the original contractor, architect, subcontractor, etc., is that the chain of causation is broken, as soon as the landowner accepts the work, where the dangerous condition is patent and discoverable prior to the injury. Seitz v. Zac Smith & Company, Inc., 500 So.2d 706 (Fla. 1st DCA 1987). Summary judgment for the contractor, manufacturer, subcontractors, etc., was affirmed in Seitz, where an employee was injured when he fell from a flood light tower. The Escambia School Board had contracted to have flood light towers built at the high school stadium. The tower was built from prefabricated sections and was improperly assembled at the high school site. The result was there was a peg missing from the area in which a person could climb the tower to make repairs, etc. The School Board accepted the construction project with the missing peg. Subsequent to acceptance, an electrician's helper was injured when he lost his footing and balance, when he stepped into the area of the missing peg and fell to the ground.

It was undisputed that the defect of the missing peg was obvious and discoverable upon reasonable inspection. The First District traced the development of the Slavin doctrine in its

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opinion, and stated that the contractor is relieved from liability, because it could have no present duty to the third party, if the premises are in the control of the owner at the time of the injury and it was the intervening negligence of the owner in failing to correct the dangerous condition that proximately caused the injury. Based on this principle, the First District affirmed the summary judgment in favor of the contractors and subcontractors, noting that the defect was open and obvious and accepted by the owner and it was the School Board's failure to make the tower safe that was the proximate cause of the plaintiff's injury. Seitz, 711.

Interestingly, the Third District relied on Seitz and two of its own decisions to hold that this case fell within an exception to Slavin (A 2). The court reasoned, where the proximate cause of the Plaintiff's injury was hot water from a gas water heater, and since gas has been held to be inherently dangerous, it followed that water was inherently dangerous, and therefore the Slavin exception applied. However, even the two cases cited by the Third District do not support the inherently dangerous elements exception to the Slavin doctrine, in this case.

In Farber v. Houston Corporation, 150 So.2d 732 (Fla. 3d DCA 1963), the Third District simply held that natural gas was a dangerous commodity and that a jury question existed as to the degree of care shown by the corporation handling the gas. Farber, supra. In that case, there was an explosion from gas which had leaked through a gas line in the street. The Plaintiff

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in this case was not injured by an explosion of the gas water heater or by leaking gas. The Third District also relied an its decision of Florida Freight Terminals, Inc. v. Cabanas, 354 So.2d 1222, 1225 (Fla. 3d DCA 1978), for the general principles that an exception to the Slavin doctrine exists were parties are dealing with inherently dangerous elements; however, that case dealt with the crash of a cargo plane carrying Christmas trees into the Inglesias home, killing members of that family.

To date, no case in Florida has held that hot water is inherently dangerous, whether it is connected to a gas or an electric water heater. Similarly, no case in Florida has ever held that a plaintiff can recover for damages caused by an instrumentality connected with gas where the gas itself is not the cause of the injury. Therefore, the Third District has created new law in Florida in direct and express conflict with numerous decisions across the State, especially this Court's decisions in Slavin, Chadbourne and the First District's decision in Seitz.

Estoppel

It is undisputed that Ed Ricke d d not do the construction work at building #37 where Green was injured. The Third District held that it was estopped from denying responsibility based on events occurring during the second and third trial in this case (A 1). Ricke denied installing the water heater in question, expressly in its Answer to the original Complaint. During the 13 years of litigation against Ricke, Ricke has never successfully

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assumed any factual position on the record, rather has lost all the way down the line, up to and including the reversal of the Summary Judgment in its favor by the Third District in the present case. This Court held that in Atlantic Coast Line Railroad Company v. Boone, 85 So.2d 834 (Fla. 1956), that a new trial has the effect of vacating the final judgment and completely revitalizing the entire cause for further proceedings in the form of a new trial. When this Court initially reversed the original verdict for Ricke, it was as if the case was being started from the beginning. Ed Ricke, supra. Therefore, the evidence that Ricke presented in the third trial regarding the fact that it had not done the construction in this case, was totally proper and in no way could act as an estoppel. The Third District cited Palm Beach Co. v. Palm Beach Estates, 110 Fla. 77, 148 So. 544 (Fla. 1933), where this Court held that a party is estopped to change his position to the adversary's injury if the party "successfully assumes a factual position on the record to the prejudice of his adversary." Palm Beach, 549. As pointed out, Ricke has not been successful throughout 13 years of litigation and has never successfully assumed a factual position which would estop it from denying that it was responsible for the construction at Building #37; especially where the record is undisputed that Ricke did not do this construction. The Third District's opinion is in direct and express conflict with the decision in Palm Beach, and for this additional reason this Court has jurisdiction to review the opinion below.

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CONCLUSION

The Third District's opinion is in direct and express conflict with decisions out of this Court; Slavin; Chadbourne; and Palm Beach; has created a new exception to the Slavin doctrine finding that hot water is inherently dangerous; and this Court has jurisdiction to reconcile the conflict and to address the new legal principles announced by the Third District.

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CERTIFICATE OF SERVICE

1 HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 25th day of October, 1991 to:

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APPENDIX

the Circuit Court for Dade County, Thomas K. Petersen, Judge. Bennett H. Brummer, Public Defender, and Carol J.Y. Wilson. Assistant Public Defcndcr, for appellant. Robert A. Butterworth, Attorney General, and Richard S. Fechter, Assistant Attorney General, for appellee.

(Before BASKIN, JORGENSON, and LEVY, JJ.)

(PER CURIAM.) On the State's proper confession of error, we reverse the judgment of conviction and sentence. The trial court committed reversible error in failing to conduct a *Richardson* inquiry after being apprised of the State's discovery violation. See *Smith v. State*, 500 So. 2d 125 (Fla. 1986); Fla. R. Crim. P. 3.220; Fla. R. Juv. P. 8.770(a)(2)(iii).

Reversed and remanded.

* * *

Torts—Contractors—Negligence—Evidence—Estoppel—Action against general contractor alleging negligent installation of gas water heater — Contractor is estopped from introducing evidence that another construction company installed water heater where evidence is inconsistent with contractor's prior position at first trial and appeal—Error to enter summary judgment in favor of contractor — Trial court properly denied contractor's motion for summary judgment alleging it was relieved from liability because work had been turned over to and accepted hy owner prior to accident where gas water heater system is inherently dangerous instrumentality

DEMETRIUS OCTAVIUS GREEN, a minor, by and through his Guardian of the Properly, EDWARD P. SWAN, ESQUIRE, Appellant/Cross-Appellee, v. ED RICKE & SONS, INC., a Florida corporation, Appellee/Cross-Appellant. 3rd District. Case No. 89-1900. Opinion filed August 20, 1991. An Appeal and Cross-Appeal from the Circuit Court for Dade County, John A. Tanksley, Judge. Donald Feldman (Fort Lauderdale); Daniels & Hicks, P.A., and Patrice A. Talisman, for appellant/cross-appellee. Richard A. Sherman, P.A., Richard A. Sherman and Rosemary B. Wilder (Fort Lauderdale), for appellee/cross-appellant.

(Before BASKIN, JORGENSON, and LEVY, JJ.)

(JORGENSON, Judge.) The guardian for Demetrius Green, a minor, appeals from a final summary judgment in favor of Ed Ricke and Sons, Inc., in an action for negligence in performing general contracting duties. Ricke cross-appeals an order denying its motion for summary judgment on alternative grounds. For the following reasons, we reverse in part, affirm in part, and remand.

In 1977, Green was seriously burned when he fell into a deep puddle of boiling water which was discharged from a faulty Vulcan water heater located in building # 37 at the James E. Scott housing project. Green's complaint alleged that in January, 1966, Ricke contracted with the Dade County Housing Authority to convert Vulcan water heaters from solar power to gas at the Scott Homes project. Green further alleged that the water heater in building # 37 was negligently installed and that this negligence caused his injury. Ricke answered and pled that it was without knowledge as to who installed the defective heater.

In 1981, Ricke moved for summary judgment on the basis of the *Slavin* doctrine,' arguing that, although it installed the gas distribution system at the project, this work was turned over to, and accepted by, Dade County prior to the accident, relieving it of liability. The trial court denied the motion for summary judgment.

Prior to the first trial, L. R. Hargis, the former director of maintenance for Dade County Housing, was deposed. Hargis testified that the water heaters installed by Ricke and maintained by the County were Vulcan water heaters and that they had been installed for all of the work done on the project.

At trial in 1982, Ricke's attorney read Mr. Hargis's deposition testimony into evidence. He also requested two jury instructions, which the court gave, that stated that the issues for determination were whether Ricke was negligent with respect to the installation of the water heater and whether, after the installation by Ricke, there was any intervening and supervening negligence.

The jury returned a verdict for Ricke. On appeal, this court reversed and remanded for a new trial finding that Ricke's attorney violated an order in limine. *Green v. Ed Ricke & Sons, Inc.*, 438 So. 2d 25 (Fla. 3d DCA 1983). In so ruling, this court stated: "This action was then instituted against the general contractor, Ed Ricke and Sons, Inc., which installed the water heaters. . . on the grounds that the defect which caused the leakage was due to the negligent installation." *Id.* at 26. The Florida Supreme Court affirmed, *Ed Ricke & Sons, Inc. v. Green*, 468 So. 2d 908 (Fla. 1985), and the case was remanded for a new trial.

The second trial commenced on April 7, 1986. Ed Ricke took the same position in opening statement that it took at the first trial, namely that it was not negligent in installing the water heater. Then, three days into the trial, Ricke's expert presented evidence that another construction company, Joyner, had performed the installation for the water heater in question? Ed Ricke also contended that it had just found the permits for the work done an building # 37. Green moved for and was granted a mistrial. Green then asked this court *to* enforce its mandate, alleging that our prior decision and the Supreme Court's decision established law of the case and, alternatively, that Ricke was estopped to deny the fact that it had installed the water heater. This court denied Green's motion, finding no showing of noncompliance with the mandate.

A third trial was set for February, 1989. Ricke moved for summary judgment, alleging that there was undisputed evidence that it had not done the work complained of and, alternatively, that it was not liable under the *Slavin* doctrine. The trial court entered summary judgment in Ricke's favor, finding no genuine issues of material fact on the issue of who installed the water heater. The trial court denied summary judgment on Ricke's alternative theory.

The trial court erred in entering summary judgment as Ricke was estopped from introducing evidence inconsistent with the earlier positionin the litigation. It is well settled that:

> [A] party, who in an earlier suit on the same cause of action, or in an earlier proceeding setting up his status or relationship to the subject-matter of his suit, successfully assumes a factual position on the record to the prejudice of his adversary, whether by verdict, findings of fact, or admissions in his adversary's pleadings operating as a confession of facts he has alleged, cannot, in a later suit on the same cause of action, change his position to his adversary's injury, whether he was successful in the outcome of his former litigationor not.

Palm Beach Co. v. Palm Bench Estates, 110 Fla. 77, 148 So. 544, 549 (1933) (citations omitted). This rule of estoppel forbids the assertion of inconsistent positions in litigation. It is difficult to imagine a case to which estoppel would more clearly apply. Green filed a complaint against Ricke in May, 1980, eleven months before the statute of limitations ran. Ricke answered that it was without knowledge as to whether it installed the water heater and, in the first trial, never defended on the ground that it had not installed it. In fact, Ricke asked the court to instruct the jury in the first trial that it had installed the heater and maintained this position on appeal and during its opening statement in the second trial. Then, six years after suit was filed and five years after the statute of limitations had run, Ricke changed its position based upon "newly discovered evidence"' which absolved it from liability.

Ricke had a full and fair opportunity to litigate the issue of who installed the water heater. Having elected not to dispute this issue at the first trial or on appeal, Ricke is precluded from offering evidence that it did not install the heater in question. Our decision is in keeping with this court's condemnation of a "gotcha school of litigation." *Salcedo v. Asociacion Cubana, Inc.*, 368 So. 2d 1337 (Fla. 3d DCA), *cert. denied*, 378 So. 2d 342 (Fla. 1979). *See also Sobel v. Jefferson Stores, Inc.*, 459 So. 2d 433 (Fla. 3d DCA 1984).

Accordingly, we reverse the order of summary judgment that was based upon evidence introduced by Ricke that was inconsis-

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tent with Ricke's prior position.

On Ricke's cross-appeal, we affirm the trial court's order denying summary judgment based on the *Slavin* doctrine.[4] The work in question was the installation of a gas water heater system. Florida courts have consistently held That instrumentalities connected with gas are inherently dangerous. *Seitz v. Zac Smith & Co.*, *500* So. 2d 706 (Fla. 1st DCA 1987); *Furber v. Houston Corp.*, **150** So. **2d** 732 (Fla. 3d **DCA** 1963). This case falls within the exception to *Slavin*, and the trial court correctly denied the motion.

Affirmed in part, reversed in part, and remanded for further **proceedings.**

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[1]Slavin v. Kay, 108 So. 2d 462 (Fla. 1958) (generally, Contractor is relieved of liability for injuries to third parties occurring after owner has accepted project if owner could hnve discovered and remedied dangerous condition). We note that there was no cross-appeal in the initial appellate proceedings on the issue of *Slavin*.

[2]Ricke's superintendent, who oversaw the work done by Rickc, testified at the same trial that Ed Rickc and Sons had installed the heater that injured Green.

This evidcncc which Rickc claims to be newly discovered was cvidencc of public record located in the Dade County Building and Zoning Department. It was not the plaintiff's burden to discover this evidence given the fact thnt Rickc never alleged that a third party may hnvc bcsn responsible.

[3]In Florida Freight Terminals, Inc. v. Cabanas, 354 So, 2d 1222, 1225 (Fla. 3d DCA 1978), this court defined the *Slavin* rule as follows: "An independent contractor is not liable for injuries to third parties alter the contractor has coinpleted his work and turned the project over to the owner . . . and it has been accepted by him unless the parties were dealing with inhcrcntly dangerous elements. . . ."

* * *

Condominiums—Error to find that unit owners violated association's rules and regulations by transferring their units more than three times during calendar year where all people occupying owners' premises were social guests and number of such guests, number of their stays and length of each stay were not restricted by any condominium rules—Error to grant temporary injunction prohibiting owners' further rental, lease or transfer of units during year and to find owners in contempt for noncompliance

JOSEPH PACITTI, Appellant, v. SEAPOINTE CONDOMINIUM ASSOCIATION, Appellee. 3rd District. Case No. 91-1339. Opinion filed August 20, 1991. An Appeal from a non-final order of the Circuit Court for Monroe County, Richard Payne, Judge. Browning, Guller and Associates and Charlene G. Guller (Key West), for appellant. Frigola, DeVane, Wright, Dorl and Hendrickson and James J. Dorl (Marathon), for appellee.

(Before SCHWARTZ, C. J.. and NESBITT and JORGENSON. JJ.)

(PER CURTAM.) The Seapointe Condominium Association (Seapointe) claimed unit owners Joseph Pacitti and Richard Procopio had violated Seapointe rules and regulations by transferring their units more than three times during the calendar year and by not providing the association with proper notification of these transfers. The association sought and was granted temporary injunctive relief prohibiting the two owners' further rental, lease, or transfer of their units in 1991. Appellants moved to dissolve the ordered injunction arguing that only social guests were staying in the units, and that neither the declaration of condominium nor the condominium bylaws prohibited such occupation. We reverse both the order denying appellants' motion to dissolve the injunction and the ordcr which followed that found appellants in contempt for their noncompliance.

The general rules and regulations of the condominium mailed to each occupant state:

> 1. All rentals, leases and transfers require notification *to,* and approval of, the Board of Directors.
>
> ....
>
> 4. Rentals, leases and transfers shall be limited to three (3) per calendar year, none of which shall be for a period of less than one (1) month.

The (rial court found the above rules and regulations to *have* been properly enacted and within the scope *of* authority of the board of the association. Further, the court adopted Seapointe's position that, in violation of these rules, appellants had transferred their units more than three times during the year.

Paragraph 11.01 of the Seapointe Declaration of Condominium provides:

> Residential units shall be used and occupied by their respective owners as private single-family residences for themselves, their families and social guests and for no other purposes other than specific exernptionsrnade in this declaration.

Paragraph 5.09(a) of the Seapointe bylaws provides:

> Residential units shall be occupied and used by their respective owners as only private dwellings for the owner, his family, tenants and other social guests and for no other purposes whatsoever,

It is undisputed that all the people that stayed on appellants' premises were "social guests." We conclude the number of such guests, the number of their stays, and the length of each stay, were not restricted by any of the above regulations or documents.

Seapointe argues that a similar use restriction was enforced in *Beachwood Villas Condominium v. Poor*, 448 So.2d 1143 (Fla. 4th DCA 1984). In that case, the court upheld a rule limiting the occupancy of units by social guests during the owner's absence, finding the rule wits neither in contravention of any express provision of the declaration of condominium or any right referable therefrom. However, the guest rule in *Beachwood* is dramatically different from the rules relied upon in the instant case. The *Beachwood* guest rule required:

> (1) board approval for the "transfer" of a unit to guests when the guests are to occupy the unit during the owner's absence, (2) that the number of transfers (either by rental or guest occupancy) not exceed six per year, and (3) that the occupancy rate not exceed a specified number which is calculated to the size of the unit.

There was simply no such rule as to social guests at Seapointe. Considering all the condominium documents, the term "transfer" without more cannot be read so broadly as to require the sought after restrictions to apply.

Accordingly, both the ordcr denying the motion to dissolve the injunction and the ordcr finding appellants in contempt are reversed.

* * *

Civil procedure—Default—Vacation—Error to deny vacation *of* default where default was entered without notice to movant—Movant's failure *to* respond *to* motion for default due to confusion resulting from pendency of two cases involving same matter and parties in two different circuits excusable—Where party believes his rights are protected in related action in different forum arid thus fails to answer a complaint in subsequently filed action, default eiitered in second action to be set wide—Abatement—Where same parties brought similar actions in two judicial circuits, pendency of action in circuit where service of process was first perfected is grounds to abate instant later-filed action

EWING INDUSTRIES, INC., etc., Appellants, v. MIAMI WALL SYSTEMS, INC., etc., Appellees. 3rd District. Case No. 91-448. Opinion filed July 2, 1991. An Appeal from the Circuit Court for Dade County, Bernard S. Shapiro, Judge. Raymond M. Ivey, for appellants. Rcnsbeck, Fegers and Hcss and J.D. Skip Bardfeld, for appellees.

(Before NESBITT, BASKIN, and JORGENSON, JJ.)

SUBSTITUTED OPINION

[Original Opinion at 16 F.L.W. D1746]

(PER **CURTAM.**)This is an appeal of the denial of a motion to vacate a default entered in a contract action. We reverse.

The trial court erred in denying vacation of the default because not only was the default entered without notice to appellant, but appellant's failure to respond to the motion for default was excusable since it was caused by confusion as a result of the pendency of two cases involving the same matter and parties in two

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