IN THE FLORIDA SUPREME COURT

CASE NO. 78,860

Florida Bar No: 184170

FILED
SID J. WHITE
MAR 2 1992
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

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

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder

Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(305) 525-5885 - Broward
(305) 940-7557 - Dade

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LAW OFFICES RICHARD A. SHERMAN, P.A.

SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33316 • TEL. (305) 525-5885

SUITE 206 BISCAYNE BUILDING. 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

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LAW OFFICES RICHARD A SHERMAN. P. A.

SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERWALE, FLA. 33316 • TEL (305)525·5885

SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET. MIAMI, FLA 33130 • TEL (305)940-7557

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POINTS ON APPEAL

I. THE DECISION BELOW MUST BE REVERSED AND JUDGMENT ENTERED FOR RICKE, UNDER THIS COURT'S DECISION IN SLAVIN, AS THE ALLEGED DANGEROUS CONDITION, THE ABSENCE OF A DRAIN UNDER AN OUTSIDE DRIP PIPE WAS UNDISPUTEDLY OPEN AND OBVIOUS.

11. THE THIRD DISTRICT HAS MISAPPLIED THE LAW SET FORTH IN PALM BEACH, INFRA, AND IMPROPERLY APPLIED THE THEORY OF ESTOPPEL IN ORDER TO REVERSE THE SUMMARY JUDGMENT IN FAVOR OF RICKE AND THE DECISION BELOW MUST BE REVERSED AND THE JUDGMENT AFFIRMED FOR RICKE.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUOERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING. 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

INTRODUCTION

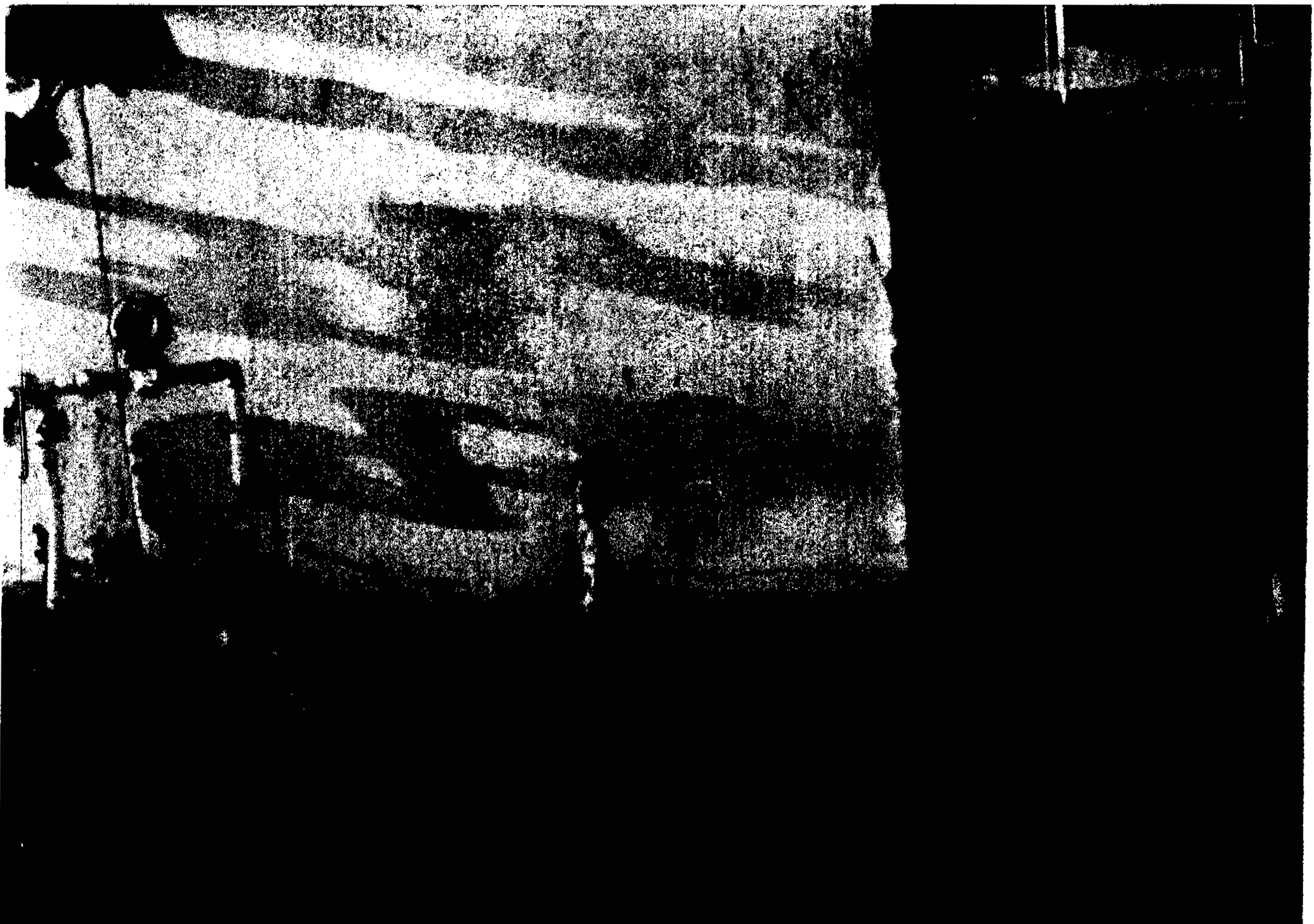
The Petitioner, Ed Ricke and Sons, Inc., will be referred to as Ricke or Defendants.

The Respondent, Demetrius Octavious Green, will be referred to as Green or Plaintiff.

The Record on Appeal will be designated by the letter "R" and the Supplemental Record as "SR."

All emphasis in the Brief is that of the writer unless otherwise indicated.

Included below is the scaled down version of Plaintiff's Exhibit 21 from the April 1986 trial which shows the outside drip pipe in question.



LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING. 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

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 inherently dangerous, sufficient to preclude the application of the Slavin doctrine. Green v. Ed Ricke & Sons, Inc., **584** So.2d 1101 (Fla. **3d DCA** 1991). The alleged negligent act, hot water spewing out of an outside drip pipe, without a drain, took place over a quarter of a century ago, and the time period involving this litigation is nearly thirty years.

The Third District also found 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.

The following in an abbreviated chronology of the events that have taken place since 1963, **up** to and including the present time.

Background Facts

August 2, 1963 - HUD through the Miami Housing Authority has plans drawn up to draw **up** to convert from solar to gas waters at the Scott Homes Project (SR 420; **437**; 441; **443).**

January 1965 - Joyner Construction Company, Inc., awarded a contract for alteration and repairs to 25 buildings in the Scott Homes Project, including installation of water heaters; including Building #37 located at N.W. 75th Street and N.W. 24th Avenue

LAW OFFICES RICHARD A. SHERMAN, P. A
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33316 • TEL (305)525-5886
SUITE 206 BISCAYNE BUILDING. 19 WEST FLAGLER STREET. MIAMI, FLA. 33130 • TEL.(305)940-7557

(R 899; 9211; 925; 926; SR 209).

February 19, 1965 - Joyner Construction pulls plumbing permits to work on building #37 (site of Plaintiff's accident) (SR 188; 281).

June 7, 1965 - Final plumbing inspection on Joyner's construction work on Building #37 (R 899; SR 188; 189).

January 5, 1966 - Ed Ricke & Sons, Inc. awarded the contract to do alteration and repairs for 26 buildings in the Scott Homes Project; including building next to Building #37 (SR 34; R 922; 926).

January 26, 1966 - Ed Ricke & Sons pull the plumbing permits for work on 26 buildings in the Scott Homes Project (R 922; SR 282-283).

May 20, 1966 - Alteration work completed by Ed Ricke and approved (no work on Building #37) (SR 36).

1968 - Dade County takes over HUD housing project from Miami Housing Authority (SR 412-413).

1969 - Hot water spewing from drip pipe at Building #37, pooling on ground on regular basis; resident children warming themselves from the steam generated by the hot water draining from the drip pipe at Building #37 (site of Plaintiff's accident)(SR 341-342; 346-347).

December 1976 - Homeowners make requests for repairs to water heater to Dade County Building Maintenance; numerous repairs to hot water heater and relief value performed by Dade County in Building #37 (SR 489-498).

LAW OFFICES RICHARD A. SHERMAN. P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 . TEL (305) 525-5885
SUITE 206 BISCAYNE BUILDING. 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

March 1977 - Vicky Paxton burned by hot water pooling under drip **pipe** in Building #37; Dade Caunty notified of child's injury (SR **347; 349).**

March 13, 1977 - Demetrius Green burned because of hat water spewing from drip pipe, without a drain, in Building #37, located at N.W. 75th Street and **N.W.** 24th Avenue in Scott Homes Project (R 619).

March 21, 1977 - Dade County orders replacement of the water heater in Building #37 (SR **489-498).**

September 1977 - Green **sues** Dade County, HUD and Florida Gas Company.

May 10, 1978 - Plaintiff takes deposition of Dade County through representative L. Hargis; who identifies two sets of alteration and repair plans, one for repairs for **25** buildings (repairs for Joyner Construction work) and plans for 26 buildings (repairs for construction work by Ed Ricke) (SR 405-406).

November 30, 1978 - Deposition **of** Bert Saymon, representative **for** Rader & Associates, the architects; Plaintiff's counsel announces on the Record that Plaintiff is keeping in his possession all of the exhibits, which are the various color keyed plans involving the Scott Homes Project which could be obtained from him by the Defendants in that lawsuit (Dade County, Florida Gas, HUD).

May of 1978 - Plaintiff **talkes** the deposition of Metropolitan Dade County through its representative L.R. Hargis at the Department of Housing & Urban Development (SR **397-400).**

LAW OFFICES RICHARD A SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33316 • TEL (305)525-8885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET. MIAMI, FLA. 33130 • TEL. (305)940-7557

Hargis brought with him several exhibits which included contract documents and specification for improvements at the housing project; the specifications for alterations and repairs to 25 buildings (Plaintiff's Exhibit #6)(SR **405-406).**

1979 - Green settles with Dade County and Florida Gas for **$100,000.**

May 2, 1980 - Green sues architect Rader & Associates, Marr Plumbing, Ed Ricke & Sons, etc, (R 1-9). Plaintiff alleges that injury was due to absence of a drain under the outside drip pipe as required by the manufacturer and applicable codes (R 1-19). Plaintiff does not plead a latent dangerous condition, **or** that a defective heater caused water to be too hot:

> Count 11: Cause of Action Against Ed Ricke & Sons, Inc. for Negligence...
>
> 30. Defendant, Ricke, breached its duty owed to the Plaintiffs in that it:
>
> (a) Failed to provide for a good and adequate drain, or a reasonable substitute therefor, as provided in the manufacturer's specifications; and/or,
>
> (b) Failed to examine the plans and specifications to determine if they complied with applicable codes and regulations bearing on the work; and/or,
>
> (c) Failed to report to the Housing Authority said lack of compliance; and/or,
>
> (d) Failed to competently and properly supervise the work of its plumbing subcontractor, Defendant, Marr; and/or,
>
> (e) Failed to inform, advise or require its plumbing sub-contractor, Defendant, Marr, to obey the manufacturer's specific instructions and specification in the

LAW OFFICES RICHARD A SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE, FORT LAUDERDALE, FLA. 33316 • TEL (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET. MIAMI, FLA. 33130 • TEL (305) 940-7557

> installation of all water heaters, including the gas water heater in question; and/or,
>
> (f) Failed to notice or observe that all water heaters, including the one in question were installed in violation of the manufacturer's specifications, applicable codes and regulations and reasonable prudent practice; and/or,
>
> (g) Failed to otherwise utilize that degree of care that a reasonable and prudent general contractor would exercise under like circumstances. Specifically, this Defendant carelessly and negligently permitted the installation of the water heater in a manner that it would discharge to a location with little percolation, where puddles of boiling water would likely form. Moreover, it was in areas easily accessible to children of tender years, often used as **a** playground by them.
>
> **(R 1-19).**

May 1980 - April 1981 - No discovery propounded to Green, through interrogatories or requests to produce, and no depositions taken of a Ricke, to establish that Ricke did work on Building **#37,** site of Green's accident; Plaintiff apparently relying on discovery conducted in first lawsuit against Dade County; discovery requests limited to inquiries regarding insurance coverage issue in the **Ricke** suit.

December 2, 1980 - Ed Ricke & Sons' Answer expressly denies the allegations in Green's Complaint that Ricke installed the subject water heater and drain and Ricke raises the affirmative defense that the negligence was due to third parties.

> These Defendants specifically deny the allegations contained in Paragraphs **#27, 28,** 29, **30, 31, 41** and **42** of the Complaint (that Ricke installed water heater) and demand strict proof thereof.

. . .

> 7. As an affirmative defense, these defendants state that the plaintiff's alleged injuries were solely the result of negligence on the part of third-parties who were not in the care, custody, control or supervision of these defendants, and therefore, plaintiff cannot recover against these defendants.

(R 105-127).

October 1980 - Green settles with subcontractor Marr Plumbing for $300,000 (R **87-92).**

May 1981 - Statute **of** Limitations runs for suit against Joyner Construction.

July 22, 1981 - Ricke moves for Summary Judgment on Slavin Doctrine (**R 404-405).**

August 17, 1981 - Summary Judgment denied (R **422).**

April 13, 1982 - First trial ends in mistrial due to juror illness; second jury impanelled immediately.

April 16, 1982 - Verdict entered in favor of Ricke.

July 19, 1983 - Third District Court of Appeal reverses Ricke's verdict for a new trial, due to importer closing argument. Green **v.** Ed Ricke and Sans, Inc., **438** So.2d **25** (Fla. 3d DCA 1983).

March 28, 1985 - Florida Supreme Court affirms new trial based on improper closing argument. Ed Ricke and Sons, Inc. v. Green, **468** So.2d **908** (Fla. **1985).**

THIS LAWSUIT

August 29, 1985 - **Case** set for trial April **7, 1986.**

April 4, 1986 - Plaintiff sends "Notice to **Produce** at

Trial."

March 7, 1986 - Plaintiff obtains Affidavit of Donna M. Romito stating that no building permits were issued to 2370 N.W. 75th St. for repairs in 1960-1970.

March 24, 1986 - Plaintiff sets deposition of Ricke and requests production of all documents, including building permits.

April 4, 1986 - Defense counsel Hamilton sends letter to Plaintiff's counsel, in response to Green's repeated demands to produce permits, stating that he is still looking for plumbing permits and the CO's (SR 298). Attorney Hamilton memorialized that he had previously informed Plaintiff's counsel that if the permits can be found he will produce them and call a witness at trial to testify on this issue (SR **298).** Attorney Hamilton subpoenas records custodian of Dade County Building and Zoning.

April 7, 1986 - Third trial, Plaintiff introduces evidence through testimony of Jim Ricke; that Ricke can locate no plumbing permits for the renovation work on Building #37 where incident took place; Jim Ricke testifies that Ricke did the work on the Scott Home Project under **its** contract, and that Ricke pulled the plumbing permits for all work that it performed (Plaintiff's Exhibit #41) (SR 308-349).

April 11, 1986 - Plaintiff announces that he is still in the process of discovering evidence as to who performed the construction work at the site of the accident, and wishes more time to continue to pursue and discover evidence (SR 352);

Plaintiff announces that if he chooses to move for a

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302.1777 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33316 • TEL (305) 525-5885
SUITE 206 BISCAYNE BUILDING. 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL (305) 940-7557

mistrial, he will go to the Third District Court of Appeal with **a** Motion to Enforce the Mandate, to prohibit a trial on the issue of whether or not Ricke did the construction at the site of the Plaintiff's accident (SR 358);

Trial judge announces that if the Third District holds that the court and parties are bound by the factual assumption that Ricke did the work, then the trial judge will comply with whatever decision is made by the Third District (SR **360);** Judge **notes** that both sides agree that more discovery is needed so that justice can be done, so that a judgment will not be entered against a party who did not do the work sued upon (Ricke) **(SR 360-361).**

Defense counsel notes that his agreement to the mistrial was based on the assumption that the parties would be able to do additional discovery **ta** demonstrate to the court that **Ricke** was not the negligent party and that the Plaintiff would have the opportunity to prove that Ricke was; that the agreement to mistrial was not to present other issues to the Third District in order for the Plaintiff to obtain a judgment on estoppel (SR 362).

Trial court grants Plaintiff's Motion for Mistrial and gives Plaintiff two years to do discovery to establish Ricke did construction work on Building #37.

April 24, 1986 - Plaintiff appeals to the Third District to enforce its Mandate of October **28,** 1983 (SR **365-370).**

Plaintiff argues that the prior decision of the Third

LAW OFFICES RICHARD A SHERMAN. P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33316 • TEL (305) 525-5885
SUITE 206 BISCAYNE BUILDING. 19 WEST FLAGLER STREET. MIAMI, FLA. 33130 • TEL. (305) 940-7557

District, as well as the Supreme Court's decision, was law of the case, which determined that the work was done by Ricke at Building #37; and that Ricke was estopped to deny it did the work under the theories of detrimental reliance, inconsistent positions, the law of the case, and judicial admissions (SR 365-370).

April 25, 1986 - Deposition of Larry Ricke taken by the Plaintiff (SR 255-278).

June 2, 1986 - Ricke responds to appeal filed in Third District; Ricke asserts that there was no limitation of issues or evidence on retrial, when the Third District reversed the verdict and judgment in its favor and ordered a new trial,; trial held April 1986, was within both the law of the case and the Mandate issued by the Third District, and Ricke was not estopped from presenting the evidence that it did not do the work (SR 371-377).

June 16, 1986 - Third District Court of Appeal enters an Order dismissing Green's Motion to Enforce the Mandate, as there was no showing of noncompliance by Ricke, with the prior decision of the Third District or its Mandate (SR 396).

November 8, 1988 - Fourth trial set for April 3, 1989, (R 781).

February 21, 1989 - Ricke moves for Summary Judgment on undisputed evidence that it did not do the construction work at the site of the Plaintiff's accident (R 782-783).

March 6, 1989 - Ricke files Affidavit stating that its files and all files available to it contained no documents identifying

the entity that performed the work other than those documents already produced to the Plaintiff (R **784).**

May 17, 1989 - Green moves for a continuance of trial date to do discovery (R **787-788).**

May 23, 1989 - Plaintiff's counsel filed April 1982 depositions of Dade County/Hargis in opposition to Motion for Summary Judgment; Plaintiff also filed an Affidavit stipulating that the Summary Judgment should be entered in favor of Ricke, if this **1982** statement that Ricke did the work was not sufficient to generate a jury issue (SR **26-92; 93-118; 279-280).**

July 31, 1989 - Hearing on Ricke's Motion for Summary Judgment (R **914-954).**

July 31, 1989 - Order granting Summary Judgment in favor of Ricke (R 955).

August 3, 1989 - Plaintiff's third appeal filed (R **789-790).**

August 20, 1991 - Third District holds that Ricke is estopped from denying it did work at accident site based on litigation which ended in mistrial, and that Ricke was not entitled to Summary Judgment under Slavin Doctrine because hot water which injured Plaintiff was inherently dangerous. Green, **supra.**

Throughout the past 12 years of litigation against Ricke, the Plaintiff apparently relied on all the discovery he conducted in his first lawsuit against the landowner, Dade County, and Florida Gas. As a result of that discovery, the Plaintiff had in his possession the Ricke contract, plus both sets of original

site plans and overlays showing which contractors did the work on the fifty buildings involved.

THIRD MISTRIAL

Prior to trial in April 1986, the Plaintiff sent a "Notice to Produce at Trial," demanding that Ricke produce all plumbing permits it pulled, all CO's received on the project, etc. Attorney Hamilton sent a letter to Plaintiff's counsel, informing him that they were still looking for the plumbing permits and the ***CO's*** because they had been unable to locate any of them (SR 298). Of course, the original permits posted on the job site were discarded when the work was completed, but permits are permanently listed in the Dade County Permit Record.

At trial, Plaintiff's counsel argued that the evidence was going to establish that Ed Ricke entered into a contract with the County, under which Ricke installed the subject water heater and outside pipe without a drain, through its subcontractor, Marr Plumbing (SR 302-303).

Counsel told the jury that the **evidence** would establish that in violation of the South Florida Building Code, a drain was not provided for the hot water, from the pipe, to run off and that hot water started coming out of the drip pipe outside the breezeway as early as January **4**, 1969 (some eight years before Green's injury (SR **303**).

Green's attorney pursued, for the first time in any trial, the theory that Ricke was negligent because it failed to properly pull any plumbing permits for the installation of the water

heater by its subcontractor, at the building where the accident occurred, The Plaintiff introduced the Affidavit and testimony of Donna Romito, the custodian of records for the Dade County Building & Zoning Department, in support of this theory (Plaintiff's Exhibit #41) (SR 297).

Romito stated that she had searched and reviewed the public records of Dade County and ascertained that no plumbing permit had been issued for the building located at the address of 2370 **N.W.** 75th Street (Building #37) in 1966, the year Ricke was working at the project. On cross-examination, it was established that the permits were listed by building numbers and that a permit did exist for Building #37.

Jim Ricke testified that the company did the construction on the heater in question, if it was one included in Ricke's project, pursuant to **its** contract, but that he would need to examine the blueprints to be sure (SR 312-318).

During the direct examination of Jim **Ricke,** the representative of the Defendant, Plaintiffs's counsel asked 21 times, in **13** pages of transcript, whether Ed Ricke & **Sons** had pulled plumbing permits for the work they did on the Scott Homes Project; whether they searched for these plumbing permits; whether their attorneys had searched for these plumbing permits; whether they had copies of the plumbing permits; if they worked without plumbing permits; could the work be approved without plumbing permits, etc. (SR 322-335).

Jim Ricke testified that the company always pulled building

permits for the work that it did; and it had pulled permits for the work it did on the Scott Homes Project, but it no longer had copies of those permits since it had been **20** years since the construction was completed; that he remembered the permits being posted at the building site; that they would have never been allowed to do the work, or been paid for the work, had the permits not been pulled for the work they did (SR **322-328).**

In response to the Plaintiff's evidence that no plumbing permits were pulled by Ricke for the construction work done on Building #37, the Defendants put on the testimony of expert contractor, Mr. Webb (SR 174-189). Mr. Webb was presented with copies of the **plans** (Plaintiff's Exhibits #5 and *#6;* "J" & "K"), for the construction at the Scott Homes Project, as well as copies of the records of the Dade Building & Zoning Department, showing all of the plumbing permits which were pulled for the Scott Homes Project for 1965 and 1966 (SR **179-189).**

Webb testified that by using a magnifying glass, he was able to examine the small "site plan" inserted on the face sheet of Plaintiff's exhibits "J" and "K"; to identify which buildings were being renovated under each set of plans (SR **181-182).** Webb compared the site plans with the cross-hatched, or cross-marked, buildings on each set of plans, with the addresses of the buildings and with the plumbing permits. He testified that, in his expert opinion, the work done on Building #37 located at N.W. 75th Street and N.W. 24th Avenue, was done **in** February of 1965, by Joyner Construction Company (SR **183-188).** This **is** the

LAW OFFICES *RICHARD A. SHERMAN,* P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33316 • TEL (305)525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL (305)940-7557

building which undisputedly was the site of the Plaintiff's accident (SR 189).

The Plaintiff moved to strike the testimony of expert Webb, claiming that he was surprised and that there never had been any such testimony in any of the previous trials (SR 189-190; 191-192; 194).

Counsel for Ricke pointed out that, in its Answer, Ricke had denied all allegations of negligence in the installation of the water heater in Building #37. Defense counsel also pointed out that it was the Plaintiff's burden of proof to show that Ricke had in fact installed the water heater which caused the Plaintiff's injury (SR 190-191). He explained that the reason that the Plaintiff was unable to locate the plumbing permits was because the Plaintiff did not look for them in the right place. Once Ricke was on notice in 1986, that the Plaintiff was going to argue that Ricke was negligent for failing to pull any plumbing permits, defense counsel began a thorough and exhaustive search of all the records at Dade County to determine why the plumbing permits could not be found for the project. Counsel knew that this was a HUD project; that Ricke had testified that they had pulled plumbing permits for all the work it had done; all the work had been approved and paid for by HUD, which would never had occurred had no proper permits been pulled (SR 191-197).

Defense counsel explained he had written numerous letters and had numerous conversations with Plaintiff's counsel prior to trial; discussing the fact that the Defendant was attempting to

LAW OFFICES RICHARD A SHERMAN, P. A
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA 33316 • TEL (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL (305) 940-7557

locate the CO's and the plumbing permits and that in the very last letter written in response to Plaintiff's "Notice to Produce at Trial," just prior to trial, defense counsel stated that if he could find the plumbing permits, he would bring them to court with him, and a witness would testify on this, which he did (SR 197; 298-299).

Attorney Hamilton explained that he personally spent weeks looking into the records of the Dade County Building & Zoning Department in his attempt to locate the plumbing permits in response to the Plaintiff's Notice to Produce at Trial, and in anticipation of the Plaintiff's argument that Ricke could be found negligent because it had failed to pull plumbing permits (SR 197). It was during this time, which was after trial had started, that he in fact finally did discovery the plumbing permits pulled by Ricke listed by building number, instead of address; which clearly demonstrated that Ricke did not do the construction work in 1966 on Building #37, and in fact it had been done in 1965, by Joyner Construction Company (SR 197).

The trial judge then announced that there was no way on "God's green earth" that the court would permit a judgment to be entered against Ricke, if in fact it had not done the construction (SR 198).

The trial judge announced that his position simply was that the Third District had remanded the case for a whole new trial, without limitations on the new trial; that the new trial was ordered simply because of an improper closing argument; and he

recognized that the Defendant had stated that it had no objection to a mistrial, because of the discovery problem (SR 355-357).

The Plaintiff then moved for a mistrial; stating that he was immediately going to take the issue to the District Court of Appeal to have the Mandate enforced, so that the question of who did the construction would be a non-issue at trial (SR 357-358). Defense counsel attempted to explain on the Record why the evidence had not been discovered earlier by either side prior to trial, noting that originally back in 1978, the Plaintiff had kept the original two sets of color coded site plans of the architect, with the face sheets, when they had taken the deposition of Mr. Saymon, the architect's representative (SR 358-359). The court stopped defense saying he was not interested in building a record, he simply wanted to know whether the Plaintiff requested a mistrial or not (SR 359). Mistrial was granted and the Plaintiff was given two years to do discovery to establish that Ricke did the work in question. After the third mistrial was granted, the Plaintiff, for the first time since the accident, took the deposition of Ricke.

Plaintiff's counsel immediately filed a Motion to Enforce the Mandate of the Third District, asserting that the Third District in its opinion in 1983, had found, as a matter of law, that Ricke had done the work and installed the water heater, which caused the Plaintiff's injury (SR 365-370).

The Third District entered an Order on June 16, 1986, ruling on the merits of the Motion to Enforce the Mandate by dismissing

the Motion and stating:

> It is so ordered that the Motion to Enforce Mandate is dismissed, as there is no showing of non-compliance

(SR 396).

In November 1988, the case was once again set for trial for February of 1989 (R 781).

After almost three more years of discovery, Ricke moved for a Summary Judgment on the undisputed evidence that it had not done the construction at the site of the Plaintiff's accident, and alternatively, if the Court denied Summary Judgment on that basis, then it still could not be held liable for the Plaintiff's injuries under the Slavin doctrine (R 782-783). Based on the wealth of undisputed facts establishing that Ricke did not do the construction work at the site of the Plaintiff's accident, Summary Judgment was granted in favor of Ricke (R 955).

The Plaintiff filed his third appeal and Ricke cross-appealed, on its alternative legal argument that it was entitled to summary judgment under the Slavin doctrine (R 789-793).

The Third District reversed the Summary Judgment for Ricke, on the basis that it was estopped from denying it did the construction work, because of its posture in the original trial, and because it did not answer that a third party did the construction. Green, 1103.

The court also affirmed the denial of Ricke's Summary Judgment, finding the case fell within the exception to Slavin, because the hot water was produced by a gas water heater, an

LAW OFFICES RICHARD A. SHERMAN. P. A
SUITE 302, 1777 SOUTH ANDREWS AVE , FORT LAUDERDALE, FLA. 33316 • TEL (305)525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305)940.7557

inherently dangerous system. Green, 1104.

Ricke sought jurisdiction in this Court, as no case has held that hot water is inherently dangerous, forming an exception to the Slavin doctrine. Therefore, Green is in direct and express conflict with Slavin; as the alleged defect, the absence of a drain under an outside discharge pipe and the discharge of hot water through the outside pipe, without a drain, was an open and obvious condition, relieving the contractor from liability. In addition, the Defendant never successfully assumed a factual position on the Record, to the prejudice of the Plaintiff, and therefore was not estopped from proving that it did not do the work in question. The Third District's holding to the contrary, created further direct and express conflict for resolution by this Court.

SUMMARY OF ARGUMENT

There was no reversible error. The trial court's ruling on Summary Judgment was correct and the lower court's ruling should be reinstated for two separate reasons:

This lawsuit was clearly barred by the Slavin doctrine. The Third District's opinion in conflict with Slavin must be reversed. The Record clearly shows that hot water was dripping out, that the residents and Dade County were on notice substantially **before** the Green incident occurred, and another person had been burned previously. (In fact, the Plaintiff settled with the other parties for $400,000.)

There is no hot water exception to the Slavin doctrine. There is no legal basis to impose liability simply because the hot water was from a gas water heater. The Plaintiff was not injured by gas. **The** alleged defect was the absence of an outside **drain** in the ground. The landowner took possession of the property with this patent defect and under Slavin, landowner Dade County was the responsible party. There is no legal or public policy reason to create a new hot water exception to Slavin. The opinion below must be reversed, a d under Slavin, the Judgment affirmed for Ricke.

The public records clearly show that this Defendant company (Ed Ricke & Sons, Inc.) did not install the water heater or drip pipe, without a drain, which was the cause of the Plaintiff's injury. The public records **clearly** show that an entirely different company, Joyner Construction Company, did the work.

LAW OFFICES RICHARD A. SHERMAN. P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE, FORT LAUDERDALE, FLA. 33316 • TEL (305)525-5885
SUITE 206 BISCAYNE BUILDING. 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL (305)940.7557

Therefore, the Summary Judgment in favor of this Defendant was proper and estoppel does not apply.

The Plaintiff was given three years of additional time to discover evidence to establish Ricke's responsibility for the construction work done at Building #37. Having failed to do so, the trial court correctly entered a Summary Judgment in favor of Ricke based on the undisputed evidence that the construction in question was done by Joyner Construction Company, Inc.

It is fully established in the Record below that the trial strategy taken by the Plaintiff in the 1986 trial, of arguing that Ricke was negligent because it failed to pull permits, is what caused defense counsel to make a personal, exhaustive study of all the records in question. Prior to this trial, defense counsel informed Plaintiff's counsel that if he could, in fact, locate the plumbing permits, which Plaintiff's counsel claimed did not exist, then Ricke would bring them to trial and present them at trial. Therefore, all allegations of surprise on this issue are totally meritless. Additionally, the public records were just as available to the Plaintiff as to the Defendant. The Plaintiff never even attempted to establish the identity of the contractor who actually constructed the building in question, as well as installed the water heater, in the mistaken reliance on incomplete and erroneous information obtained from its prior lawsuit. Information which turned out to be flawed, because of Green's failure to locate the only documents that could conclusively establish the identity of the contractor performing

the work.

Furthermore, the trial court correctly found that when this Court issued its opinion in 1985, it ordered a new trial with **no** limitations on any issues, or evidence to be argued or presented. Ricke never successfully assumed a position to the prejudice of Green. Rather, Ricke lost all the way down the line, including reversal of its Summary Judgment by the Third District. Furthermore, there was no prejudice to the Plaintiff, who had at least eleven months after suing Ricke, to **sue** the right contractor, Joyner, but instead he chose to rely on prior discovery from the first lawsuit and did no discovery prior to the 1986 trial on what contractor did the work. Under these **facts** and the correct application of the law, Ricke was not estopped from denying liability and was entitled to Summary Judgment.

The Plaintiff filed two separate lawsuits arising out of the incident where Demetrius Green was injured. He recovered $400,000 against the original set of Defendants; which included Dade County, the entity that was on notice of the open and obvious dangerous condition of hot water spewing out of the discharge **pipe,** without an outside drain, for a period of eight years, from 1969 to 1979, the date of the Plaintiff's accident. In fact, another child had been burned by the water from this pipe just two weeks prior to the Plaintiff's accident and landowner Dade County was aware of this also. After giving **the** Plaintiff an additional three years to do discovery, Ricke moved

for Summary Judgment based on the undisputed evidence that it had not done the work.

The trial court correctly ruled that there were no genuine issues of material fact as to who did the work on Building #37, and that it was not Ed Ricke & Sons, and Summary Judgment was properly granted in Ricke's favor.

LAW OFFICES RICHARD A SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33316 • TEL (305) 525-5888
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET. MIAMI, FLA. 33130 • TEL. (305) 940-7557

ARGUMENT

I. THE DECISION BELOW MUST BE REVERSED AND JUDGMENT ENTERED FOR RICKE, UNDER THIS COURT'S DECISION IN SLAVIN, AS THE ALLEGED DANGEROUS CONDITION, THE ABSENCE OF A DRAIN UNDER AN OUTSIDE DRIP PIPE WAS UNDISPUTEDLY OPEN AND OBVIOUS.

The Third District has created a new hot water exception to the Slavin doctrine. The appellate court ruled that Ricke was not entitled to Summary Judgment, because the Plaintiff was injured by hot water spewing from a drip pipe outside his apartment building, which water came from a heater fueled by gas. The condition, pled and argued, the absence of an outside **drain,** under a **pipe** dripping hot water, was open and obvious for years before the accident (**R** 1-19). **Ricke** was entitled to Summary Judgment, as a matter of law, as there is no hot water exception in Florida law and nor should there be. Water of course, is not inherently dangerous. To draw lines based on how the water is heated, or even based on the temperature of the water, serves no public purpose and will simply impose strict liability on hundreds of thousands of Florida homeowners, who chose to use gas water heaters and hot water.

To impose liability on Ricke, the appellate court stretched the Slavin doctrine beyond recognition. Green was burned in a puddle of hot water on the ground outside his apartment. **The** water came from an outside drip pipe connected to a gas water heater. Gas is inherently dangerous, so the appellate court held that the water from the pipe, connected to the gas heater, was **part of** an inherently **dangerous** system, so Slavin could not be

applied. There is no legal basis for this type of mental gymnastics and the Opinion below must be reversed, especially where the condition complained of was the absence of a drain, not water that was improperly overheated.

It is totally undisputed that Demetrius Green was injured when he fell in a puddle of hot water, from a drip pipe outside the apartment building he lived in. At the second trial, Plaintiff's counsel told the jury in opening statement, and later presented testimony, that Ricke allegedly violated the Building Code in 1965 by failing to place a drain under the outside drip pipe. The other theory of negligence against Ricke was that it failed to pull the proper permits for the construction work it did. Therefore, while the work in question, in general, was the water heater installation, the alleged dangerous condition which was plead and argued, was the failure to place a drain under the outside drip pipe and this was the only alleged code violation. The failure to place an outside drain, under the outside pipe, was an open and obvious condition, as was the spewing of hot water out of the drip pipe for years before the accident. Under the principles in Slavin, which have been repeatedly reaffirmed by this Court, Ricke was free from liability from this open and obvious condition and Dade County, the landowner, was the legally responsible party.

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 fully aware of the open and obvious, dangerous condition, as hot steamy water was spewing forth from the drip pipe on the outside of Building #37 from 1969, to the date of the Plaintiff's accident in 1977. Numerous subsequent requests had been made to repair the heating system 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 corrected the condition.

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

LAW OFFICES RICHARD A SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL (305) 525-5885
SUITE 206 BISCAYNE BUILDING. 19 WEST FLAGLER STREET. MIAMI, FLA. 33130 • TEL. (305)940-7557

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 perform this duty, and a third person is injured it is his negligence that is the proximate cause of the injury.

Slavin, 466.

This is graphically illustrated in the present case, where Green sued Ricke in 1980, **15** 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 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 this 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 hot steamy water, which would **spew**

out of the **drip** 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 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 have 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 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.

The Seitz court discussed the application of the Slavin doctrine to inherently dangerous instrumentalities, noting that if the commodity was not inherently dangerous, but was rendered dangerous by defect, the rule of non-liability still applies if the defect is **patent**. Seitz, 710. The First District explained those situations involving inherently dangerous conditions:

> From all that we can determine, something which is inherently dangerous must be so imminently dangerous in **kind** as to imperil the life or limb of any person who uses it, or as stated in Tampa Drug Company v. Wait, n. **4**, **"a** commodity burdened with a latent danger which derives from the very nature of the article itself." "Inherently dangerous" has also been said to mean a type of danger inhering in an instrumentality or condition itself at all times, requiring **special** precautions to be taken to prevent

> injury, and not a danger arising from mere casual or collateral negligence of others under particular circumstances. See 13 **Am.Jur.2d.,** Building and Construction Contracts, § 139, n. 11, Watts **v.** Bacon & Van Buskirk Glass Co., Ill.App.2d 164, 155 N.E.2d **333** (a glass door is not inherently dangerous).
>
> Seitz, 710.

In the present case, Green was injured when he fell in a puddle of hot water. The Plaintiff claimed that Ricke, the alleged contractor, was negligent for failing to place a drain under the outside drip pipe, to prevent the hot water from pooling on the ground. At no time did the Plaintiff base his claim **on** the allegation that the gas heater caused the water temperature to be too hot. The hot water had been spewing out of the pipe, without a drain, for years. Under the principles stated about the defective condition, hot water dripping into the ground was not an inherently dangerous condition. Of course, water OF hot water does not fit into **any** of the three Seitz categories above, to be inherently dangerous in and of itself. This is why the Third District resorted to the device of claiming Slavin did not apply because the hot water came from a pipe, hooked **up** to a **gas** water heater, and gas is inherently dangerous, thus creating an inherently dangerous system. There was no legal basis for the Third District's holding, since Green was not injured by the gas or the defective condition, the absence of a drain.

Furthermore, there is no public policy reason to label hot water inherently dangerous. This Court would have to draw some

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL (305)525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305)940-7557

arbitrary line between what is "hot," thus inherently dangerous, and what is not. Throughout the State, various building codes require water heaters to produce water for tenants or home-owners at different temperatures. To hold that the "x°" Fahrenheit is inherently dangerous would impose strict liability on millions of Florida homeowners. There simply is no legal or public policy reason to hold that hot water is inherently dangerous, so that it forms an exception to the application of the Slavin doctrine.

As previously mentioned, even if the hot water in this **case** was the result of a defective water heater, the dangerous condition was open and obvious for years before the accident and the landowner, Dade County, accepted the land with the patent condition, was fully aware of it, and eventually repaired it. Under the facts of this case, the Slavin doctrine applied and Summary Judgment should have been entered for Ricke.

Interestingly, the Third District relied on Seitz and two of its own decisions to hold that this **case** fell within an exception to Slavin. Green, 1104. 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 in this case was not injured by an explosion of the gas water heater or by leaking gas.

The Third District also relied on its decision in 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.

The Third District has found for defendants in numerous cases based on Slavin. It affirmed the dismissal of a negligence complaint against a contractor in Alvarez v. DeAguirre, **395** So.2d 213 (Fla. **3d** DCA 1981). That case involved a fire which started in the electric box behind the kitchen stove and it was alleged that the **cause** of the fire was an overload in a faulty circuit breaker. The plaintiffs, like Green, did **not** allege that the defect **was** latent and not discoverable, and based on the Slavin doctrine the court affirmed the dismissal of the complaint against the contractor. Alvarez, 215. The opinion reviewed the public policy behind relieving the original contractor from liability. The general **rule** under Slavin is premised upon the

contractor returning control to the owner, thereby giving the owner the opportunity and duty to remedy a discoverable defect. Upon acceptance of the work, the contractor is put out of possession and therefore is not held **liable** to third parties for conditions which the owner has chosen to accept. Upon learning of the defect, it is the owner's negligence which is the proximate cause of the injury rendering the owner liable and exonerating the contractor. Alveraz, 215. See also, Birch v. Capeletti Brothers, Inc., 478 So.2d 454 (Fla. 3d DCA 1985); Mori v. Industrial Leasing Corporation, 468 So.2d 1066 (Fla. 3d DCA 1985); El Shorafa v. Ruprecht, 345 So.2d 763 (Fla. 4th DCA 1977) (adhering to the Slavin doctrine and noting that the holding of the Slavin case has been followed in a number of Supreme Court and District Court decisions); Mai Kai, Inc. v. Colucci, 205 So.2d 291 (Fla. 1967); Green Springs, Inc. v. Calvera, 239 So.2d 264 (Fla. 1970); Hutchings v. Harry, 242 So.2d 153 (Fla. 3d DCA 1970); Forte Towers South, Inc. v. Hill York Sales Corp., 312 So.2d 512 (Fla. 3d DCA 1975); Roman Spa, Inc. v. Lubell, 334 So.2d 298 (Fla. 1st DCA 1976).

The Fourth District relieved a contractor from liability in Conley v. Coral Ridge Properties, Inc., 396 So.2d 1220 (Fla. 4th DCA 1981), again based on the Slavin doctrine. In Conley, the plaintiffs sued the developer on the theory that the building was poorly designed and that the grill over their air conditioning unit **was** accessible to a burglar, via an unlocked utility closet in a common hallway. That court affirmed the directed verdict in

favor of the defendant, holding that if the air conditioning grill was defective at all, the defect was patent and obvious; thus relieving the contractor from liability to third persons for the obvious defects when the work had been completed, turned over, and accepted by the owner.

Similarly, in the present case, the Plaintiff pled and argued throughout that the defective condition in Building #37 was open and obvious, i.e. the absence of an outside drain under the outside drip pipe. The defective condition was patent and obvious and Summary Judgment for Ricke should have been entered.

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. The Opinion below must be reversed and the Judgment for Ricke affirmed.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL (305)525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305)940-7557

II. THE THIRD DISTRICT HAS MISAPPLIED THE LAW SET FORTH IN PALM BEACH, INFRA, AND IMPROPERLY APPLIED THE THEORY OF ESTOPPEL IN **ORDER** TO REVERSE THE SUMMARY JUDGMENT IN FAVOR OF RICKE AND THE DECISION BELOW MUST BE REVERSED AND THE **JUDGMENT** AFFIRMED FOR **RICKE.**

First, it is undisputed that Ricke never did the construction work at Building **#37** where Green was injured. Second, **Ricke** never successfully assumed a factual position to the prejudice of Green, so it was not estopped from denying liability, as a matter of law.

Green was injured on March 13, 1977. He filed suit against Dade County, HUD, and Florida Gas Company in September of **1977.** Green did extensive discovery obtaining original blueprints and plans for the construction work performed by Joyner Construction and Ed Ricke & Sons, Inc. Throughout, these were Plaintiff's Exhibits J and K. The overlays to these **plans,** if carefully examined, established that **Ricke** did not do the work on Building **#37,** when matched with the building permits.

In May 1980, Green sued the architect, Rader, the plumbing company, Marr Plumbing, and Ed Ricke & Sons, Inc. This **was** three years after his injury, and after doing extensive discovery in the first lawsuit against Dade County. At this point, Green had eleven more months, before the statute of limitations ran, after suing Ricke, to establish who did the work at Building #37. During the lawsuit against Ed Ricke, Green propounded no discovery whatsoever to establish that Ricke did the work. In fact, Ricke was never deposed until after the third mistrial in **1986.** Therefore, there **was** no prejudice to Green, when it **was**

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33316 • TEL (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL (305) 940.7557

established during the 1986 trial, in response to the Plaintiff's new theory of liability raised against Ricke (failure to pull plumbing permits) that the permits and the overlays to the plans clearly established that Ricke did not do the work.

All of this information was available to Green as a matter of public record. It is further established below that the plumbing permits did exist, except they had been listed by the building number. Ricke denied that it did the work on Building #37, it alleged third parties did the work, but Green did absolutely no discovery whatsoever prior to the 1986 trial to establish that Green did the work. There was no factual basis to apply the doctrine of estoppel. More importantly, however, there was no legal basis to apply the doctrine of estoppel, under the decisions of this Court and this misapplication of the law requires reversal as the Third District's Opinion and affirmance of the Summary Judgment in favor of Ricke, as it undisputedly did not do the construction in question.

Summary Judgment was entered in favor of Ricke based on the trial court's determination that the mistrial, granted by this Court, meant that the case would start anew. Therefore, in the 1986 trial Ricke was not estopped from presenting evidence that it did not do the work in question. The trial judge also ruled that he was not going to enter a judgment against the Defendant, who did not do the construction work, unless he was instructed to do so by the appellate court. The two prior mistrials in this case left the 1986 proceeding with no restriction on any of the

issues to be tried. Therefore, when Green argued for the **first** time since the litigation began in 1980, that Ricke was negligent for failing to pull plumbing permits; and where Plaintiff's counsel was on notice that if the plumbing permits were found they would be presented at trial and a witness would testify to it; there was no legal restriction from allowing this evidence to be presented. It was the Plaintiff's burden to prove that Ricke did the construction work, where Ricke had answered the Complaint denying that it did the work, and raised as an affirmative defense that a third party was responsible. Furthermore, the Plaintiff had eleven months, **after** suing Ricke, to discover that Joyner had done the construction work. The Plaintiff had in his possession all the original plans and overlays to establish that Joyner did the construction work for years prior to suing **Ricke.** Therefore, there was no prejudice to the Plaintiff and no reason for the Third District to reverse the Summary Judgment entered in favor of Ricke.

Plaintiff's counsel himself established that Ricke could only testify that the construction work on Building #37 was done by his company, after examining the blueprints, which were not shown to him by the Plaintiff at trial. Ricke could identify no photographs and **could** not affirmatively say that the particular water heater in Building **#37 was** installed by Ricke. The trial judge who presided over the 1986 trial did not find any wrong doing, or estoppel, by Ricke's rebuttal, presenting the plumbing permits themselves, which had been misfiled for years, to

LAW OFFICES RICHARD A. SHERMAN, P A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33316 • TEL (305)525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305)940-7557

establish that not only did Ricke pull plumbing permits for all the work that it did, but that it did not do the work at the site of the Plaintiff's accident. Where the Plaintiff had engaged in an entire lawsuit against Dade County, HUD, and Florida Gas, and after this case was settled for $400,000, then sued Ed Ricke, at which time the Plaintiff still had eleven months to establish that Joyner did the construction and not Ricke; and where the Plaintiff sent no discovery requests to Ricke prior to the 1986 trial, and in fact only deposed Ricke after the 1986 mistrial was declared; there certainly was no prejudice to the Plaintiff whatsoever from the later Summary Judgment based on the undisputed evidence that Ricke did not do the construction.

The Plaintiff filed two separate lawsuits in this case. He recovered against the original set of Defendants, which included Dade County, the landowner who maintained and repaired the water heater, which was undisputedly spewing hot water onto the ground, without a drain for a period of eight years, from 1969 to 1977. There were three mistrials prior to the Summary Judgment for Ricke.

The prior evidence had established that all the work done at the Scott Homes Project was according to plans and specifications drawn up by Rader, and met with all applicable code requirements, and passed all building inspections. Therefore, the Plaintiff sought to impose liability on Ricke, in the 1986 trial by inferring that Ricke had done sloppy and shoddy construction work, as evidenced by the fact that it failed to pull a single

LAW OFFICES RICHARD A SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33316 • TEL (305)525-5885
SUITE 206 BISCAYNE BUILDING. 19 WEST FLAGLER STREET, MIAMI, FLA 33130 • TEL (305) 940-7557

permit for any of its work. This is thoroughly established in the 13 pages of trial testimony in the Plaintiff's case-in-chief; where Plaintiff's counsel asked Jim Ricke **21** times in **13** pages of testimony, whether he had pulled any permits, whether he had found any permits, whether he had **searched** for any permits, whether he had used any permits, etc.

As this Court is clearly aware, anything that took place **in** the first two trials against Ricke could not possibly be used **as some** type **of** estoppel; where the first trial ended in a mistrial; where this Court reversed the second trial Verdict and ordered a new trial; and where an agreed-to Motion fox Mistrial was made and entered in the third trial in **1986.** In other words, there simply has been no binding legal adjudication of any issues raised in this case, on any point, during 12 years of litigation against Ricke, and Ricke had never successfully assumed any factual position on the Record to the prejudice of **Green.** Ricke had lost all the way down the line.

The trial judge below found that it would be a great injustice and contrary to all established legal principles to allow the Plaintiff to go forward against Ricke, if in fact Ricke had not done the construction in question. The trial judge found that issue was properly raised in the 1986 trial and the judge gave Green, three more years to do discovery to establish that Ricke did the work in question.

Therefore, in light of the two mistrials, which meant that the third trial was starting anew, where Ricke had affirmatively

LAW OFFICES RICHARD A SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33316 • TEL (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET. MIAMI, FLA. 33130 • PEL (305) 940-7557

pled that it did not do the work and that a third party was responsible, the Plaintiff did have the burden to prove that Ricke was responsible. The Plaintiff accepted this burden of proving Ricke did the work, when he took a mistrial in 1986, in order to allow himself ample time to do more discovery to establish who the contractor was that did the work.

The trial judge granted a Summary Judgment under the correct impression that since this was a **new** trial in 1986, and the Third District's Mandate did not restrict any of the issues to be tried, that he had properly permitted evidence at the 1986 trial that Ricke was not responsible for the alleged dangerous condition and this undisputed evidence required a Judgment for Ricke.

Regarding the 1982 trial, in the Hargis depositions, Hargis was asked to assume that Ricke had done the work and that Hargis was shown the plans for the renovation to 26 buildings; which was the Ed Ricke work, But those plans did not match the site of the accident, which was listed on the plans for *25* buildings, the Jayner Construction work. In other words, there was no evidence presented in the first trial, that Ricke installed the water heater and the drip pipe in question. For example, on page 12 of Hargis' April 8, 1982 deposition, the question is asked: "If on March 1977, which we have marked as Plaintiff's Exhibit "A," if this heater was on the project in one of the heater roams that were constructed by Ricke, when would that heater have had to have been?" Hargis then testified that it would have had to have

been installed under the original contract and the contract they have been discussing was between Ricke and the Miami Housing Authority (Hargis Depo, page 13; SR 37-38). In other words, all the questions presented to Hargis, where he discussed the installation and construction by Ricke, was under the assumption that the building in question was covered under the Ed **Ricke** construction plans, which was absolutely not true; since the site of the Green accident was in the construction plans covering the Joyner construction.

It is important to remember that Green first sued Dade County, HUD, and the Florida Gas Company in September of 1977. At that point, it was a matter of public record that Joyner had done the construction work in the building where Green was injured. If plumbing permits were an issue back then, it would have been discovered that the permits were misfiled, or filed by building number, and with the permits located, it could be verified with the plans that Joyner did the construction. Green subsequently sued Ed Ricke on May **2**, 1980. However, even though Ricke denied in 1980, that it had done the work there; affirmatively stated in its defenses that a third party had done the work; Green had been litigating the lawsuit for three years before that against Dade County; he still had <u>eleven months</u> before the statue of limitations ran; and Green did absolutely nothing to establish that Ricke, in fact, was the contractor responsible for the building where the accident took place prior to the 1986 trial.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE, FORT LAUDERDALE, FLA. 33316 • TEL (305)525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305)940.7557

The whole purpose of granting a new trial is so that the parties can be afforded the opportunity to take the entire case before another jury. Massey v. State, 50 Fla. 109, 39 So. 790 (1905). An order granting a new trial has the effect of vacating the proceedings and leaving the case as though no trial has been held. Atlantic Coast Line Railroad Company v. Boone, 85 So.2d 834 (Fla. 1956). As this Court held in Atlantic Coast Line, ordering a new trial has the effect of vacating the final judgment and completely revitalizing the entire cause for furth r proceedings in the form of a new trial. This law was correctly cited by the trial judge below when he noted that the Third District Mandate was issued, requiring him to hold a new trial; that there were no limitations on the issues to be raised or tried in the new trial; and therefore Ricke was entitled to present evidence that it had not done the construction in question. This was especially true, where the Plaintiff had presented exhibits and testimony in his case-in-chief that Ricke had not pulled the plumbing permits to do the work on the building, and the rebuttal evidence established that the reason for this was because Joyner had pulled the permits, since it was Joyner who had done the work.

A new trial is a re-examination of the factual issues and is a re-trial of these issues by another jury. Warner v. Goding, 91 Fla. 260, 107 So. 406, overruled on other grounds, Lynch v. Walker, 159 Fla. 188, 31 So.2d 268 (Fla. 1926); Florida Dairies Co. v. Ward, 131 Fla. 76, 178 So. 906 (1938). In other words,

LAW OFFICES RICHARD A SHERMAN. P A
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33316 • TEL (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL (305) 940-7557

when a new trial is granted it gives the parties the right to present the issues in the case to another jury for their determination. Florida East Coast Railway Co. v. Haves, 67 Fla. 101, 64 So. 504 (1914); Carnev v. Stringfellow, 73 Fla. 700, 74 So. 866 (1917). When a new trial is granted in a civil case **all** issues of the case are tried anew. Atlantic Coast Line, supra; 58 Am.Jur.2d New Trial, Section 228, 229; 38 Fla. Jur.2d, New Trial, Section 88.

In an analogous situation, a party attempted to avoid a retrial on a damage issue by raising facts established in a prior trial; which had been reversed. The Third District held that all factual issues must be tried again. In Levine v. Knowles, 228 So.2d 308 (Fla. 3d DCA 1969), this Court held that where a new trial had been granted, it was unfair for a party to be denied his right to try all the issues of both compensatory and punitive damages; after a summary judgment had been entered based only on the evidence submitted in the original trial; which the trial court itself considered so improper as to constitute grounds for a new trial. Levine, 309. The plaintiff in Levine was granted a new trial on his claim for compensatory and punitive damages; in his suit against a veterinarian for negligent treatment resulting in the death of the plaintiff's dog. After the new trial was granted, the defendant moved for summary judgment on the question of punitive damages, based on the transcript of the original trial. The trial judge entered a summary judgment on the punitive damage claim and ordered the new trial on compensatory

damages only. The appellate court reversed the order limiting the new trial to compensatory damages, finding that the plaintiff was entitled to present **all** of his evidence regarding the claim for punitive damages also. Levine, 309. The court observed that **if during** the second trial, the plaintiff failed to present sufficient or proper evidence to establish his punitive damage claim, then the trial court could properly withdraw the issue from the jury and direct a verdict on that point. Levine, 309.

It is undisputed that **Ed** Ricke did 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 **1982** and 1986 trials in this case. Green, supra. Ricke denied installing the water heater in question, expressly in its Answer to the original Complaint. During the 12 years of litigation against Ricke, Ricke has never successfully 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. Green, supra.

This Court held that in Atlantic **Coast** Line, supra, 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 1986 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 12 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; Green never sought discovery from Ricke to prove it did the work prior to the 1986 trial; and, Green had eleven months after suing Ricke to find out that Joyner did the work and sue it,

The Third District's opinion is in direct and express conflict with the decision in Palm Beach, and for this additional reason this Court must reverse and affirm the Summary Judgment for Ricke.

LAW OFFICES RICHARD A SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE.. FORT LAUDERDALE. FLA. 33316 • TEL (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET. MIAMI, FLA. 33130 • TEL. (305)940-7557

CONCLUSION

The Slavin doctrine applied and the opinion below must be reversed and the Judgment affirmed for Ricke. Summary Judgment was correctly entered in this case, based on a voluminous amount of undisputed evidence, both expert and documentary, that Ed Ricke & Sons did not do the construction work at the site of the Plaintiff's accident. As a matter of law, Ricke is not estopped from denying liability and the Judgment below must be affirmed.

Law Offices of
RICHARD A. SHERMAN, **P.A.**
Richard A. Sherman, **Esquire**
Rosemary **B.** Wilder, Esquire
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(305) **525-5885 - Broward**
(305) **940-7557 -** Dade

By: ______________________
Richard A. Sherman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 28th day of February, 1992 to:

John C. Hamilton, Esquire
Wicker, Smith, et al.
5th Floor - Grove Plaza Bldg.
2900 S.W. 28th Terrace
Miami, FL 33133

Donald Feldman, Esquire
Weiss & Handler
1499 W. Palmetto Park Road
Suite 320
Boca Raton, FL 33486

Patrice A. Talisman, Esquire
Daniels & Talisman, P.A.
Suite 2401, New World Tower
100 N. Biscayne Blvd.
Miami, FL 33132

Law Offices f
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(305) 525-5885 - Broward
(305) 940-7557 - Dade

By: ______________________
Richard A. Sherman

LAW OFFICES RICHARD A SHERMAN. P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL (305)525-5885
SUITE 206 BISCAYNE BUILDING. 19 WEST FLAGLER STREET. MIAMI, FLA. 33130 • TEL. (305) 940-7557