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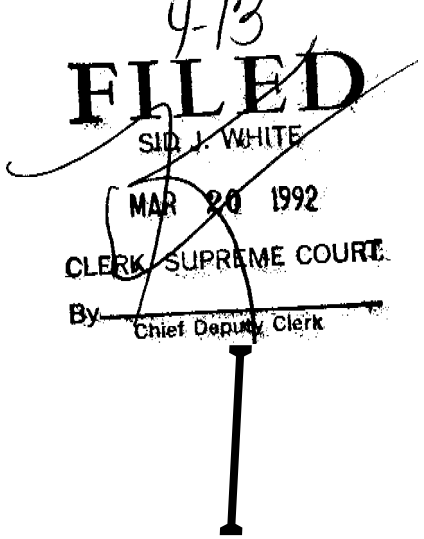

IN THE SUPREME COURT

OF FLORIDA

CASE NO. 78,860

ED RICRE & 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 RESPONDENT ON THE MERITS

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-and-
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STATEMENT OF THE CASE AND FACTS

In its latest incarnation, this case is an appeal from a final summary judgment entered in favor of the defendant Ed Ricke & Sons. This judgment was based on a defense which Ed Ricke did not raise until after the statute of limitations had run and after 6 years of litigation had passed -- years during which an appeal was taken all the way to this Court -- and which defense was entirely inconsistent with the position Ed Ricke had previously taken. Plaintiff Demetrius Green appealed from this judgment and Ed Ricke cross-appealed contending it was also entitled to summary judgment based on the principles of Slavin v. Kay.

The Third District reversed the judgment in favor of Ed Ricke holding it was estopped from asserting that it did not do the work in question based on its prior taking of the contrary position. The court found Ed Ricke's conduct so egregious as to state that: "It is difficult to imagine a case to which estoppel would more clearly apply." It also found that Ed Ricke was not entitled to a summary judgment based on Slavin since the work in question was the installation of a gas water heater system and Florida courts have consistently held that instrumentalities connected with gas are inherently dangerous.

Ed Ricke then sought and was granted discretionary review in this Court. It now contends that the Third District has created a new 'hot water exception' to Slavin and has misapplied the law of estoppel. As will be shown below, neither of these arguments has

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any merit. Rather, they are based on distortions of the record, the law, and the Third District's opinion.

The first distortion is that Ed Ricke has failed to view the facts in the proper light' and has made several misstatements. Therefore, respondent will set forth his own Statement of the Case and Facts.

The accident

In March 1977, three year old Demetrius Octavius Green was playing behind his great grandmother's apartment in the James E. Scott housing project when he fell into a large deep puddle of super-heated boiling water. The water had been recently discharged by the relief valve of a Vulcan gas water heater located in the breezeway adjacent to the apartment. (R.3).[2] Demetrius sustained severe burns over his entire body, permanent internal injuries, and brain damage. (R.13).

The history of this litigation

a. The pleadings

On May 2, 1980, Demetrius filed suit against several defendants, including Ed Ricke & Sons, Inc. and Marr Plumbing Co. (R.l-19). In paragraph 13, the complaint alleged that on January

---

[1] Since this is an appeal from a summary judgment entered in favor of defendant Ed Ricke, the facts must be viewed in the light most favorable to plaintiff Demetrius. All conflicts in the evidence must be resolved in his favor as well as all reasonable inferences which can be drawn therefrom. Byam V. Klopcih, 454 So.2d 720 (Fla. 4th DCA 1984).

[2] "R" refers to the record on appeal. "S.R." to the supplemental records which are included therein. Unless otherwise indicated, all emphasis is supplied.

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12, 1966, Ed Ricke contracted with the Dade County Housing Authority to do renovations to the Scotthousing project, including a conversion from solar to gas water heating; that Ed Ricke sub-contracted this plumbing work to Marr, and that Marr installed the water heater involved in this accident:

> In 1963, however, a decision was made by the Housing Authority to convert Scott Homes from solar heating to gas central water heating. To that end, the Housing Authority retained the defendant, Rader, who prepared detailed plans, blueprints and drawings along with a set of detailed specifications entitled "Specifications for Alterations and Repairs to 26 Buildings in the James E. Scott Homes Project Fla. 5-4, Areas A and B for The Housing Authority of the City of Miami, Florida 1401 N.W. 7th Street, Miami, Florida." After a bidding process, the Housing Authority on or about January 12, 1966, contracted with the defendant, Ricke. to do the work as a general contractor for $123,100.00. The defendant, Ricke. in turn, subcontracted the plumbing work to the defendant, Marr, for $44,497.00. In accordance with its subcontract, the defendant, Marr, installed most, if not all of the commercial 100 sallon gas water heaters needed for the project including the "Vulcan," Serial No. G55292, gas water heater involved herein.

(R.4).[3] In paragraphs 27 through 31, Demetrius then alleged that Ricke was negligent in that the relief valve of the heater was not connected to a drain but allowed to discharge directly on the ground, contrary to the manufacturer's instructions and the South Florida Fire Safety and Building Codes. (R.lO-14).

---

[3] By the time this suit was filed Marr Plumbing had been dissolved. (R.2). As part of a settlement, a consent Final Judgment was entered against it which provided for satisfaction only from existing liability coverage, if any. (R.87-92).

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Ed Ricke finally answered the complaint on December 2, 1980. It admitted that it was a Florida corporation doing business in Dade County as a duly qualified and registered general contractor and that USF & G (its insurer) was a Maryland corporation licensed to and doing business in Dade County. (R.105). It either denied or plead it was without knowledge as to all other allegations of the complaint. (R.105). Contrary to Ed Ricke's assertion in this Court, it specifically plead that it was without knowledge as to paragraph 13 -- the paragraph which asserted that Marr installed the heater in question pursuant to its subcontract with Ed Ricke. (R.105).

In July 1981, Ed Ricke moved for summary judgment on the basis of the Slavin doctrine. (R.404-405). The motion states in part: "1. The defendant contractor built the buildings on the premises where the plaintiff alleges the injuries took pace (i.e., the minor plaintiff fell in a pool of hot water causing severe burns)." (R.404). After this motion was denied, Ed Ricke moved for rehearing again stating: "1. In the latter half of 1965, Ed Ricke & Sons, Inc. installed the gas distribution system at the Scott Home Projects in Northwest Miam , Florida." (R.438).

b. Discovery

In 1982, L.R. Hargis, the director of maintenance for Dade County Housing during the pertinent periods, was deposed. Mr. Hargis had been present at the site while the conversion from solar to gas water heaters was being effected. (S.R. 412, 421,424, 440). He testified as follows:

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Q. Do you know what type of water heaters were in fact installed by Ed Ricke & Sons pursuant to the contract?

A. The original was Vulcan.

Q. Vulcan Water Heaters?

A. Yes.

Q. Was that for all of the work done?

A. All on this contract, yes.

Q. If on March 1977, which we have marked as Plaintiffs' Exhibit 8, if this heater was on the project in one of the heater rooms that were constructed by Ricke, when would that heater have had to have been?

A. That would have to have been installed under the original contract.

Q. The contract we are talking about being between?

A. Ed Ricke and Miami Housing Authority.

Q. How could you tell that?

A. Because of the Vulcan heater.

* * *

MR. SOLMS: Let me object to the form. I think your question was correct and you said this heater was installed pursuant to the contract and my position would be that Mar Plumbing installed the heater according to their responsibility as a subcontractor. I'm not sure so I object to the form.

MR. FELDMAN: As I understand, counsel, you have no problem with the fact that this heater was installed pursuant to the general contract?

MR. SOLMS: I have no evidence that it wasn't.

(S.R. 37-38, 39).

In fact, defendant's own questions stated that Ed Ricke & Sons did the work:

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Q. Sir, do you recall whether Ricke & Sons actually constructed that wall there or was a wall already there before Ed Ricke & Sons was asked to come in and install a gas water heater pursuant to contract?

Q. The walls where the discharge lines were, where the T and P come from was installed by Ed Ricke. The other wall was a living quarters of the tenant.

* * *

Q. Did this particular closet, where the heater was located, have a door on it in 1966, which could be secured?

A. Originally it had a door. At that particular time, there again, I do not know.

Q. When you say originally it had a door, is that in 1966?

A. When the building was built, yes.

Q. We have pictures of a door which looked like it was taken off of its hinges. Would that have been the door to that unit?

A. I don't know if that would be the type of door.

MR. FELDMAN: I'm sorry. The answer is I don't know if that would be the type.

THE WITNESS: I don't know if this is the particular door that came off that heater room. This was the type of door that was installed on all heater rooms.

MR. FELDMAN: Pursuant to the contract in question?

THE WITNESS: By Ed Ricke & Sons.

* * *

Q. When this situation occurred in 1977, are you aware that there were any people at the Federal, State or local level who felt that Ed Ricke & Sons did not comply with the Code Provisions and the contract provisions in 1966, when they installed or had this hot water heater installed?

* * *

A. To my knowledge, no.

(S.R. 48, 69-70, 90).

Later that morning, Hargis again testified as follows:

Q. Now, if we could, we are talking about Scott Homes. We are talking about a specific heater. We are talking abut a Vulcan water heater; is that correct?

A. That is correct.

Q. That Vulcan water heater was one that was installed by and the building built by and the outlet valve constructed and put in by Ed Ricke & Sons; is that correct?

A. Yes. It was the one submitted for approval. It was approved and it was installed.

Q. By Ed Ricke & Sons?

A. Yes.

(S R. 113).

c. **The 1982 Trial**

The matter came on for trial in 1982. Ed Ricke's defense was in no way predicated on the fact that it had not installed the water heater. In fact, it read the deposition of Hargis relating to inspection and approval of Ed Ricke's installation of water heaters. (R.592-596). It also submitted the following two instructions which were read by the court:

> The issues for your determination on the claim of Plaintiff, DEMETRIUS OCTAVIUS GREEN, against Defendant, ED RICKE AND SONS, INC., are whether Defendant ED RICKE AND SONS, INC., was negligent in performing general contacting duties from January, 1966 through May, 1966 concernins the installation of the gas/water heater; and if so, whether such negligence was a legal cause of loss, injury, or damage

> sustained by Plaintiffs DEMETRIUS OCTAVIUS GREEN, then your verdict on that claim should be for Defendant ED RICKE AND SONS, INC.
>
> If, after the installation by ED RICKE AND SONS, INC., there was negligence on the part of another person or entity which legally caused the injuries to DEMETRIUS OCTAVIUS GREEN and said subsequent negligence was not a reasonably foreseeable consequence of the actions of ED RICKE AND SONS, INC., ED RICKE AND SONS, INC., and UNITED STATES FIDELITY AND GUARANTY COMPANY are not responsible nor liable as a matter of law for the injuries to DEMETRIUS OCTAVIUS GREEN.

(R.524,532,581, 583; S.R. 133-134, 137-140). The court also ruled that as a mater of law Ed Ricke was responsible for any negligence of Marr Plumbing Company in installing the gas water heater and so instructed the jury. (R. 529, 581; S.R. 135).

Finally, in closing argument, defendant made the following statements:

> Now, this is not going to be an argument about, "No, not me. Somebody else."
>
> It's going to be a statement that Ricke and Sons followed a plan made by a registered, licensed professional engineering firm.
>
> * * *
>
> Now, I suggest here: There's been no negligence whatsoever on the part of our Defendants, that they were given a plan, they followed the plan, their construction was inspected, their construction was inspected -- their construction was accepted was the word I meant.
>
> They themselves knew that they warranteed it for a year and in a year you ought to be able to find out if there is anything wrong with it and they realized that if they were called to come back, they had to come back and fix it.
>
> * * *

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> **Ed Ricke and Sons** is a small company run by the surviving sons of Mr. Ed Ricke. They are not out to make a big fortune. They are not out to take advantage of anybody.
>
> They were doing their job in complying with the specifications and plans for this job.
>
> They were trying to do a service for the community in providing this housing project with hot water.
>
> * * *
>
> Marr Plumbing is not here now **because** Mr. Marr died.
>
> Marr Plumbing, if they were here, would be saying the same thing we are saying. We did our job. We complied with the code.

(R.575, *577;* S.R. 152-153,155).

A large part of Ricke's defense **was** that Demetrius was injured solely because of the negligence of Dade County -- the entity which had responsibility for maintaining the Scott projects -- and over whom Ricke had no control. (R.577-580; S.R. 149-151, 153, 155-156). This was what Ricke meant by its affirmative defense plead in paragraph 7 of its answer that Demetrius' "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." (R.106).

d. The appeals

The jury returned a verdict for the defendant. Plaintiff appealed on the ground that defendant had made the prior suits, including the one against Dade County, a feature of the case. Defendant raised no points on cross appeal. **The** Third District

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reversed and remanded for a new trial. Green v. Ed Ricke and Sons, Inc., 438 So.2d 25 (Fla. 3d DCA 1983). In so ruling, it stated:

> Appellant, a three-year old child, initially brought suit against Metropolitan Dade County and Florida Gas Company for injuries received when he fell into a deep puddle of boiling water which was discharged from a faulty water heater. That suit was settled. This action was then instituted against the general contractor, Ed Ricke and Sons, Inc. which installed the water heaters, and its insurer United States Fidelity and Guaranty Company, on grounds that the defect which caused the leakage was due to negligent installation.

Defendant was not pleased with this result and invoked the discretionary jurisdiction of this Court. This Court approved the Third District's opinion and expressly stated:

> On March 13, 1977, three-year old Demetrius Green was scalded over most of his body when he fell into a deep puddle of boiling water. The water had accumulated from a drip pipe which discharged super-heated water from a hot water heater. Ed Ricke and Sons, Inc., installed the water heater.

Ed Ricke & Sons, Inc. v. Green, 468 So.2d 908, 909 (Fla. 1985). Accordingly, in 1985 this case returned to the trial court for yet another trial.

e. The 1986 Trial

The trial was begun on April 7, 1986. Ed Ricke took the same position in opening statement it had for the past 6 years -- it installed the water heater in accordance with the plans and was not negligent in so doing. (S.R. 166-170). Larry Ricke, who was the job superintendent for Ed Ricke on this project and was the Ed Ricke employee on the site most steadily, was the corporate

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representative. (S.R. 326, 328). He was called by the plaintiff as an adverse witness and testified as follows:

> Q. Mr. Ricke, did Ed Ricke & Sons, Inc. do the construction involved here?
>
> A. Yes, sir.
>
> Q. The construction of this particular hot water heater, this was done by Ed Ricke & Sons?
>
> A. Yes.

(S.R. 309, 310).

Then, three days later, defendant's expert presented evidence for the very first time that another company, Joyner Construction Co., might have done the work in question. The expert testified that he had found records in the Dade County Building and Zoning Department which showed that Joyner had pulled a permit for the building in question to do the same type of work in 1965. (R.748-750). The expert also testified that he had found two site plans in those same records which, when viewed through a magnifying glass and correlated with the permit records, also seemed to indicate that the heater in question was to be installed under the Joyner - Dade County contract. (R.741-750). These plans were introduced into evidence as Defendant's Exhibits J and K. (T.741-742).[4]

---

[4] Contrary to Ed Ricke's assertion, these site plans were never plaintiff's exhibits. Plaintiff had never seen them until the end of the 1986 trial. Mr. Webb, the expert, was quite clear they are documents taken from the microfilm section of Dade County. (R.742). Ed Ricke's attorney was just as emphatic. During argument over whether Webb's testimony should be permitted, he stated multiple times that he had just recently found the plans and permits at Dade County Building and Zoning. (S.R. 191, 196, 200-202, 209). At one point during argument, counsel did assert that he found in the deposition of Mr. Sayman a reference to a site plan, the original (continued...)

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Plaintiff strenuously objected to this evidence and moved to strike it. (S.R. 189-96). Defense counsel contended that the documents had just been found, (S.R. 191, 196, 200-202, 209). The lower court refused to strike the evidence. However, it granted a mistrial. Plaintiff moved the Third district to enforce its mandate. That motion was dismissed.[5] Plaintiff then moved for partial summary judgment contending that defendant was foreclosed from rasing this issue. (S.R. 216-278). The lower court denied that motion.

Defendant then moved for summary final judgment on two grounds: (1) the Slavin doctrine and (2) it did not install the water heater in question. (R.782-783).

At the hearing, plaintiff aruged that the testimony from the previous trials established that there was a question of fact as to

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[4](...continued)
of which was in color, that plaintiff's counsel was retaining the plan, and that he thought that plan would establish that Ricke did not do the work. (S.R. 359). The trial court cut off argument on this point saying it was not interested in building a record. (S.R. 359). Defendant never again raised this issue until the appellate briefs and plaintiff has never had an opportunity to respond to it. Plaintiff is outraged at the assertions recently made. There is no proof that the site plan in question would have disclosed that Ricke did not do the work. The record on appeal does not contain a copy of either Sayman's deposition or the plan. Plaintiff does not have either in his possession after all these years. Further, any evidence plaintiff had has always been available to defendant for inspection -- if it was not sufficient for Ed Ricke itself to realize it had not done the work in question, it certainly could not put plaintiff on notice of such.

[5] Dismissal of this motion was not a ruling on the merits and does not preclude consideration of this issue on this appeal. Modine Manufacturing Co. v. ABC Radiator, Inc., 367 So.2d 232 (Fla. 3d DCA 1979), cert. denied, 378 So.2d 342 (Fla. 1979); Tibbets v. Tibbets, 406 A.2d 78 (Me. 1979).

who installed the water heater. Plaintiff also pointed out they all of the original permits have themselves been lost or destroyed and the buildings in the Scott project have since been renumbered. (R.938,942). Further, there were three waves of construction, not simply two as indicated by Ed Ricke. There is another set of plans under the name of Marr Plumbing (Ed Ricke's subcontractor) for the same work to be performed on twenty-five, rather than twenty-six buildings. However, other contract documents for all three phases of construction cannot be found. (R.938,945). Thus, he argued that, due to the delay in raising the issue, no conclusive proof could be produced as to the phase of construction during which the work in question was done, who did that work, or even exactly what buildings Ed Ricke worked on.

The lower court granted defendant's motion on the sole ground that there was no issue of material fact that Ed Ricke & Sons did not install the water heater in question. (R.955).

This appeal

Plaintiff appealed from this judgment and defendant cross-appealed. The Third District, carefully reviewed and summarized the evidence set forth above. It then held that:

> The trial court erred in entering summary judgment as Ricke was estopped from introducing evidence inconsistent with the earlier position in the litigation.

(R.965). After explaining the law on estoppel, it went on to find:

> It is difficult to imagine a case to which estoppel would more clearly apply. Green filed a complaint against Ricke in May, 1980,

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> 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"3/ 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).
>
> 3/ The evidence which Ricke claims to be newly discovered was evidence 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 that Ricke never alleged that a third party may have been responsible.

(R.966-967).

The Third District also affirmed the denial of summary judgment based on Slavin:

> 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); Farber 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. (R.967).

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ISSUES ON DISCRETIONARY REVIEW

The issues in this appeal are:

I.

Whether Ed Ricke is entitled to a summary judgment in its favor based on the Slavin doctrine where the work in question was installation of an inherently dangerous system, there are questions of fact as to acceptance and the defendant is precluded from raising the issue by the law of the case?

II.

Whether Defendant is precluded by its 6 year delay, silence in two appeals, previous inconsistent position and the expiration of the statute of limitations from now asserting that it did not install the water heater in question?

SUMMARY OF ARGUMENT

Ever since this Court adopted the Slavin doctrine, it has recognized an exception where the parties are dealing with inherently dangerous elements. Here, Ed Ricke was hired to install a gas water heater system. The Florida courts have consistently held that natural gas is inherently dangerous. Similarly, other courts have held that steam, hot water and hot water heaters are also inherently dangerous. Clearly, this case falls within the exception. Ed Ricke is not entitled to a summary judgment based on Slavin.

This same result is reached for two additional reasons. First, Ed Ricke had the opportunity to raise this issue by cross appeal and failed to take advantage of it. Therefore, this argument is foreclosed by the law of the case. Second, Slavin only

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relieves a contractor of liability after his work has been accepted by the owner. Ed Ricke's contract specifically provides that there is no acceptance of defective work. Thus, at the very least, there are questions of fact as to whether acceptance occurred.

The Third District also correctly held that Ed Ricke is estopped fram claiming that it did not install the water heater in question. For years Ed Ricke took the position it did this work. It presented testimony and argument to the jury that it had done so; it requested and received instructions that it had done so; and, it maintained this position on appeal. Further, it was successful in assuming this position since: 1) plaintiff **accepted** it and never attempted to do discovery on this potential issue; and, **2)** both the Third District **and** this Court wrote opinions expressly adopting it. Since it is now too late for plaintiff to do any meaningful discovery, plaintiff has been prejudiced by defendant's change in position. Accordingly, under the principles set forth by this Court in Palm Beach County v. Palm Beach Estates, Ed Ricke is estopped from now asserting the inconsistent position it did not install the heater. The Third District's opinion so holding properly states and applies the law.

Further, Ed Ricke is precluded from raising this defense by the law of the case doctrine. This Court, the Third District and the trial court's instructions to the jury all expressly **held** that Ed Ricke installed the water heater in question. Although this doctrine has exceptions, this defense does not fit within them. It **does** not qualify as "new evidence" because what Ed Ricke claims **as**

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newly discovered are public records which could easily have been found earlier. However, Ed Ricke, instead of pursuing that investigation and that defense, made a tactical decision to defend on the basis that, even though it installed the heater, another party was liable for Demetrius' injury. Further, as set forth above, to allow this new defense would create a manifest injustice.

Finally, even if the defense can be properly raised, summary judgment would still be erroneous. There are issues of fact as to who installed the water heater. Ed Ricke's new defense is based upon the assertion that it did not pull the permits on this particular building at the housing project. However, there is also testimony that Ed Ricke did install the heater in question. Accordingly, Ed Ricke has not conclusively shown that it is entitled to judgment in its favor.

ARGUMENT

Based on the reasons and authorities set forth below, it is respectfully submitted that the opinion of the Third District Court of Appeal should be affirmed and the summary judgment in favor of defendant should be reversed.

A. Ed Ricke is not entitled to summary judgment based on Slavin v. Kay. - Response to Point I.

Ed Ricke argues that it is relieved of liability under the Slavin doctrine because 1) it is undisputed that the work was accepted in 1966 and the lack of a drain was patent; 2) hot water is not inherently dangerous, and, 3) even though natural gas is inherently dangerous, that is not sufficient to invoke the

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exception. As will be shown below, these arguments are not supported by the caselaw or the record. Further, Ed Ricke is precluded from raising this issue by the doctrine of the **law of the case.**

1. The inherently dangerous exception applies.

In Slavin v. Kay, 108 So.2d 462 (Fla. 1959), this court set forth the general rule that "contractors are not liable far injuries to third parties occurring after the contractor has completed the work and turned the project over to the owner or employer and it has been accepted b him." However, this Court also recognized there are exceptions to that rule. One such exception is the inherently dangerous one:

> The first decision in the footnote represents a clear exception to the ordinary rule by which all parties dealing with inherently dangerous elements are held jointly liable without regard to termination of contact or accestance of the work.

108 So.2d at 465.

The term 'inherently dangerous' has been defined as follows:

> 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, [103 So.2d 603 (Fla. 1958)] 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 rom mere casual or collateral negligence of others under particular circumstances.

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Seitz v. Zac Smith & Co., Inc., 500 So.2d 706, 706 (Fla. 1st DCA 1987). Here, the work in question was installation of a gas water heater system.

The Florida courts have consistently held that instrumentalities connected with gas are inherently dangerous:

> propane gas storage tank is a dangerous instrumentality, Toombs v. Fort Pierce Gas Co., 208 So.2d 615 (Fla. 1968);
>
> one connecting gas to a water heater must use that degree of care which is commensurate with the dangerous character of the element he is handling, Moebus v. Smith, 193 So.2d 34 (Fla. 2d DCA 1966);
>
> natural gas is dangerous commodity, Farber v. Houston Corp., 150 So.2d 732 (Fla. 3d DCA 1963); and,
>
> company repairing a gas range was using a dangerous agency, Russell v. Jacksonville Gas Corp., 117 So.2d 29 (Fla. 1st DCA 1960).

As the Court said in Seitz, 500 So.2d at 710: "In products liability cases, courts have applied the concept of inherently dangerous instrumentality or commodity to explosives, firearms, electricity, natural gas, drugs, highly toxic materials, and cranes or construction hoists."

Instrumentalities connected with steam and hot water have also been held to be dangerous: Argonaut Insurance Co. v. Clark, 267 S.E.2d 797, 800 (Ga. App. 1980); Rosenfeld v. Albert Smith & Sons. Inc., 168 N.Y. Supp. 214 (Sup. Ct. App. Div. 1917), aff'd, 125 N.E. 924 (N.Y. 1919); Hicks v. Peninsula Lumber Co., 220 P. 133 (Or. 1923). Similarly, courts in other states have held that gas water heaters are inherently dangerous or dangerous instrumentalities. Rietze v. Williams, 458 S.W.2d 613 (Ky. App. 1970); American Heating & Plumbing Co. v. Grimes, 4 So.2d 890 (Miss. 1941); Jones

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v. Blossman, 25 So.2d 85 (La. 1946); Del Gaudio v. Inserson, 115 A.2d 665 (Conn. 1955); Hunter v. Quality Homes, 68 A.2d 620 (Del. 1949). In Rietze, as here, the injury occurred as the result of the discharge of hot water. Therefore, the Third District properly held that the nature of the entire system should be considered in applying the Slavin exception. This is required under the Slavin language.

Further, the defect involved in this case is related to the inherently dangerous nature of water heaters. The discharge was from the temperature and pressure relief valve which releases hot water when the pressure inside the heater is too great. This release is necessary in order to prevent an explosion. The increased pressure is, of course, caused by steam building up inside the heater. Accordingly, the water that is released is at its hottest temperature -- 212 degrees F.[6] Yet, at the Scott project, this water was not drained away; rather, it was released directly onto nonporous ground where it collected in a deep puddle. The water was so hot even after standing that three year old Demetrius received second degree burns over most of his body when he fell in the puddle. Clearly, superheated water such as this is so imminently dangerous in kind as to imperil the life or limb of any person using it. Further, the danger - burning - inheres in the substance at all times and requires special precautions to prevent injury to anyone coming in contact with it or using it.

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[6] This is clear since children would gather around the puddle to warm themselves an the rising steam.

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If the hot water in question had not been allowed to escape and an explosion had occurred expelling it onto Demetrius, even defendant Ed Ricke would concede that the heater should be considered inherently dangerous. There is no reason why that result should change when the water was discharged in **order** to prevent an explosion. Certainly, no Florida case has held that superheated water is not inherently dangerous or that an explosion must occur for the exception to apply. If the Third District created a "hot water" exception, it was correct to do so. Its opinion is consistent with Slavin and should be affirmed.

Such a ruling was not arbitrary or contrary to public policy. It does not discriminate against homeowners based on how their water is heated because electricity is also inherently dangerous. Breeding's Dania Drug Co. v. Runyon, 2 So.2d 376 (Fla. 1941). Further, it does not create any greater liability on the part of homeowners. This Court has recently held that even when an activity is considered inherently dangerous, ordinary negligence principles apply. Midyette v. Madison, 559 So.2d 1126, 1128 n.2 (Fla. 1990). All the decision will do is impose upon contractors liability for their own negligence. This is in accord with Florida tort principles -- not contrary to them.

2. There was no acceptance.

Even if the exception to Slavin does not apply (which is denied), Ed Ricke is not entitled to summary judgment in its favor. One of the keys to the Slavin rule is that a contractor is relieved of liability only after he has completed a building and it has been

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accepted by the owner. Here, the contract between Ed Ricke and the Housing Authority specifically stated:

> 21. Permits & Codes
> a. The Contractor shall give all notices and comply with all applicable laws, ordinances, codes, rules and regulations. The intent of this Contact is that the Contractor shall base his bid upon the Drawings and Specifications, but that all work installed shall comply with all applicable codes and regulations as amended by any waivers.
>
> * * *
>
> 45. Defects and Noncompliant Workmanship and Materials
>
> b. Neither final payment nor any provision in the Contract (including the foregoing subparagraph) nor partial or entire use or occusancy of the Premises by the Local Authority shall constitute an acceptance of work not done in accordance with the Contract or relieve the Contractor of liability in respect to any express warranties or in respect to faultv materials or workmanship in accordance with the law of the place of building.

(Addendum No. 1, pp. 6C-15-16,-27.). Thus, the contract provides that all work must comply with the building code and there is no acceptance of work not done in accordance with the contract.

There is evidence that the installation of the water heater in question did not comply with the building code. Thus, there is evidence that the work did not conform with the contract and, therefore, was never accepted. Accordingly, at the very least, there is a question of fact as to whether one of the prerequisites for the application of Slavin has been met. The lower court did not err in denying summary judgment on this ground.

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3. This issue *is* foreclosed by Ed Ricke's failure to raise it on the last appeal.

Finally, even if Slavin does apply (which is denied), it would not support the entry of summary judgment because Ed Ricke is precluded from raising this issue now by its failure to raise it in the first appeal of this case.

Prior to the very first trial in this case, Ed Ricke moved for summary judgment on the ground that the defect involved was a patent one and, therefore, the action was barred under Slavin. (R.404-405). This motion was denied. (R.422). The case went to trial and judgment was rendered for Ed Ricke. Dernetrius then appealed claiming the right to a new trial based on prejudicial comments. Ed Ricke did not raise any issue on cross appeal. Certainly, it had the right and opportunity to raise its entitlement to summary judgment at that time.

The cases are quite clear that Ed Ricke by its failure to raise this issue on the first appeal has foregone its right to do so now. Coast Federal Savings & Loan Ass'n. V. DeLoach, 376 So.2d 1190 (Fla. 2d DCA 1979); McDonough Power Equipment, Inc. V. Brown, 486 So.2d 609 (Fla. 4th DCA 1986); Wrotin V. Wash Bowl, Inc., 456 So.2d 967 (Fla. 2d DCA 1984); Marine Midland Bank Central V. Cote, 384 So.2d 658 (Fla. 5th DCA 1980). The purpose of the law of the case doctrine is to lend stability to judicial decisions, avoid piecemeal appeals and bring litigation to an end as expeditiously as possible. Valsecchi v. Proprietors Insurance Co., 502 So.2d 1310 (Fla. 3d DCA 1987). If Ed Ricke were right (which is denied), and had raised this issue in the first appeal, the last 7 years of

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litigation would have been unnecessary. On the other hand, and as well illustrated by this case, if a defendant were allowed to raise this type of issue a second time, litigation would never end. Utley v. City of St. Petersburg, 163 So. 523 (Fla. 1935). Accordingly, the lower court did not err in denying the motion for summary judgment on this ground.

B. Ed Ricke **cannot now defend on the basis it did not do the work. - Response to Point 11.**

Ed Ricke also contends it is entitled to summary judgment because it has now established by "undisputed evidence" that it did not install the water heater in question.[7] The question thus presented is whether a defendant, after many years of agreeing that it did indeed do the work in question and so representing to the plaintiff, three juries and two appellate courts (including this one), should now be allowed to deny its responsibility, when the plaintiff can no longer engage in any meaningful discovery on the issue and is time barred from suing the responsible party (if it turns out that **defendant** is right).

1. Ed Ricke is estopped.

Ed Ricke argues that it has the right to do this for several reasons. The first is **essentially** that it has not changed its position but has always denied it did the work. This argument is a serious distortion of the **record.**

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[7] As shown infra, at pp. 34-37, responden, **does** not agree with this statement. Rather, there is clearly a question of fact as to which company **did** the work in question.

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suit was filed against Ed Ricke in May 1980. In its answer, it specifically plead that it was without knowledge as to the paragraph which alleged that this heater was installed under its contract. (R.3-4, 105).[8] Ed Ricke did not directly deny that fact

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[8] This allegation was not sufficient to put plaintiff on notice that Ed Ricke was claiming it did not install this heater. In David v. Crompton & Knowles Corp., 58 F.R.D. 444 (E.D. Pa. 1973), a products liability action, defendant answered that it was without knowledge as to whether it manufactured the product in question. After the statute of limitations ran, defendant moved to amend its answer to assert that it was not responsible for the product. The court held that an amendment was necessary to raise this defense because, although the rules provide for such a response,

> A party, however, may not deny sufficient information or knowledge with impunity, but is subject to the requirements of honesty in pleading. See 2A J. Moore, Federal Practice 18.22 (1968). An averment will be deemed admitted when the matter is obviously one as to which defendant has knowledge or information. Mesirow v. Duggan, 240 F.2d 751 (8th Cir.), cert. denied sub nom, Duggan v. Green, 355 U.S. 864, 78 S.Ct. 93, 2 L.Ed.2d 70 (1957). . . [I]f the matte alleged in the averment was a matter of record peculiarly within the control and knowledge of the defendant, an answer that defendant was without knowledge or information sufficient to form a belief did not constitute a denial under Fed.R.Civ.P. 8(b). See also American Photocopy Equipment Co. v. Rovico, Inc., 359 F.2d 745 (7 Cir. 1966); Harvey Aluminum, Inc. v. N.L.R.B., 335 F.2d 749 (9th Cir. 1964); Squire v. Levan, 32 F.Supp. 437 (E.D. Pa. 1940); 2A J. Moore, Federal Practice ¶ 8.22 (1968).

58 F.2d at 446-447. The court also held that leave to amend would be denied due to the prejudice that would result to the plaintiff since the statute of limitations had run. The court found that it was proper to so rule because the defendant was at fault in the present situation, not the plaintiff:

> Plaintiff cannot be considered negligent for not discovering Crompton's alleged defense.

(continued...)

and it certainly never indicated to plaintiff that some other company installed the heater. Rather, during the early stages of discovery, Ricke's counsel informed plaintiff that there was no need to establish more solidly that the heater was installed by Ed Ricke because it was not contending otherwise. (S.R. 39). Further, Ed Ricke affirmatively stated that it installed the heater in both its motion for summary judgment and its motion for rehearing. (R. 404, 438). It presented testimony and argued to the jury in the 1982 trial that it had installed the heater; and, it requested and was granted jury instructions based on its having done so. Further, Ed Ricke did not cross-appeal the giving of an instruction that it was responsible, as a matter of law, for any negligence of Marr in installing the heater. It led this Court and the Third District into issuing opinions expressly stating that Ed Ricke installed the heater in question. Finally, during the 1986 trial, Ed Ricke's own corporate representative testified that the company installed the water heater. Thus, nothing could be further from the truth than to contend that Ed Ricke never asserted the factual position that

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[8](...continued)

> Crompton never gave any indication prior to June, 1972 that it was asserting such a defense. If plaintiff had received timely notice of this alleged defense he would have had sufficient time to investigate the relationship between Crompton and Hunter and determine which is the proper party. That possibility was denied to him by defendant's long delay.

58 F.2d at 448. See also Jones v. Ambler Quarry, Inc., 64 F.R.D. 696 (E.D. Pa. 1974); Gardner v. Allstate Insurance Co., 595 F.Supp. 824 (S.D. Miss. 1984).

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it installed the water heater in question. It clearly took that position for the first six years of litigation.

It is just as clear that plaintiff Demetrius relied on that assertion. Since defendant never made an issue of its responsibility for the work, plaintiff never tried to further tie down the issue during the first six years of the litigation. Once defendant did so, it was impossible for plaintiff to gather any additional information due to the extraordinary lapse of time and intervening loss and destruction of many records. (S.R. 279-280).[9] Thus, plaintiff has been prejudiced by the defendant's assertion of inconsistent positions. See David, 58 F.R.D. 44; Jones, 64 F.R.D. 696; and Gardner, 595 F.Supp. 524.

In this regard, it must be made quite clear that plaintiff did not have in his possession either the site plans or building permit records which Ed Ricke now asserts establish that it did not do the work.[10] At the time these documents were first presented to the

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[9] The original permits have themselves been lost or destroyed and the buildings have been renumbered. (R.938,942). Additionally, there were three waves of construction, not simply two. There is another set of plans under the name of Marr Plumbing (Ed Ricke's subcontractor) for the same work to be performed on twenty-five, rather than twenty-six buildings. However, other contract documents for all three phases of construction cannot be found. (R.938,945). Thus, at this point, no conclusive proof can be produced as to the phase of construction during which the work in question was done, who did that work, or even exactly what buildings Ed Ricke worked on.

[10] Although Ricke's counsel implies that these same site plans were attached to Saymon's deposition, there is no evidence what the one site plan allegedly so attached shows. Neither Saymon's deposition nor such plan is in the record and plaintiff does not have a copy of either. Further, plaintiff was never given an opportunity below to respond to the assertion that it should have known -- the court cut off all argument on the issue.

court, Ed Ricke's counsel and expert both stated that they had just found them in the Dade County public records after two weeks of searching. During that trial, these documents were labeled Defendant's Exhibits J and K. They have been known as such ever since.

This Court set forth the law on estoppel against inconsistent positions in Palm Beach County v. Palm Beach Estates, 148 So. 544, 548 (Fla. 1933):

> It is a general rule that, where a party to a suit has assumed an attitude on a former appeal, and has carried his case to an appellate adjudication on a particular theory asserted by the record on that appeal, he is estopped to assume in a pleading filed in a later phase of that same case, or another appeal, any other or inconsistent position toward the same parties and subject matter.
>
> The foregoing is the doctrine of estoppel against inconsistent positions in judicial proceedings, not the doctrine of res judicata. It is based upon the theory that, where a party has mads a record of his own case, from which record he has sought and secured from a court a final judicial order or judgment based on the allegation made by him that the facts of his case as alleged by him in his own pleadings are true, which allegation as to the issuable facts have been likewise accepted by the opposite party as true, for the purpose of having rendered by the court its final decision or judgment on such record, thereafter each of the parties is estopped to alter his position on the record to the prejudice of an adverse party, where the parties and the subject matter involved in the litigation remain the same. [cites omitted].

148 So. at 548. In order for this doctrine to apply, the party estopped need not prevail by way of a judgment against his adversary; all that is necessary is that he successfully assume a

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factual position on the record -- whether by verdict, findings of fact or admissions. Palm Beach Co.. See also Salcedo v. Asociacion Cubana, Inc., 368 So.2d 1337 (Fla. 3d DCA 1979), cert. denied, 378 So.2d 342 (Fla. 1979); Grauer v. Occidental Life Insurance Co., 363 So.2d 583 (Fla. 1st DCA 1978), cert. denied, 372 So.2d 468 (Fla. 1979).

Here, as shown, for years defendant took the position it had installed the water heater: it told the jury that; it requested the court to so instruct the jury; and it maintained this position on the appeals. Plaintiff accepted these assertions and, therefore, never attempted to establish that any other party was responsible or did discovery as to such potential issue. Thus, defendant successfully assumed a factual position and carried it through appeal. Only after remand, did it attempt to present this was inconsistent with its prior position, too late, and, prejudicial to the plaintiffs. Therefore, the evidence should have been precluded. Sobel v. Jefferson Stores, Inc., 459 So.2d 433 (Fla. 3d DCA 1984).

This is the result that was reached in several federal cases. In Cowgill v. Raymark Industries, 832 F.2d 798 (3d Cir. 1987), an asbestos related wrongful death action, summary judgment was entered for the defendant on statute of limitation grounds. The plaintiff, in the trial court and the first appeal, took the position that the decedent first knew he had an asbestos related disease in November of 1981. The Third Circuit reversed the summary judgment holding that there were questions of fact as to

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whether the decedent should have discovered this condition two years prior to filing his complaint on August 26, 1983. On remand, plaintiff attempted to prove that the decedent did not have an asbestos related injury until after August, 1981. The district court refused to allow this evidence and the Third Circuit affirmed:

> Mrs. Cowgill had a full and fair opportunity to litigate the issue of whether her husband had an asbestos-related injury prior to November of 1981 and she chose to concede that he did, contesting only whether he knew or should have known of its existence. Having made that election and pursued her theory of limitations through an appeal, consideration of finality and efficiency mandate that she be barred from relitigating the limitations issue on a different theory factually inconsistent with the one she elected to pursue.

832 F.2d at 803. See also Baumer v. United States, 685 F.2d 1318 (11th Cir. 1982)(where party made deliberate tactical decision not to present evidence in first trial and did not establish such was unavailable, it could not be presented in second trial). Here, defendant made the tactical decision to defend on the sole issue that the negligence of Dade County was the entire cause of the accident. It must bear the burden of that choice.

2. Law of the case bars this issue.

This same result is reached under a law of the case analysis. As stated, this doctrine precludes relitigation of all issues necessarily ruled upon by the court in a prior appeal as well as of all issues upon which an appeal or cross-appeal could have been taken but were not. Airvac, Inc. v. Ranger Insurance Co., 330 So.2d 467 (Fla. 1976); State v. Stabile, 443 So.2d 398 (Fla. 4th

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DCA 1984); Wroten, supra; Marine Midland Bank Central, supra; Coast Federal Savings & Loan Ass'n., supra. It applies to both conclusions of fact and interpretations of law. Goodman v. Olson, 365 So.2d 393 (Fla. 3d DCA 1978), cert. denied, 376 So.2d 74 (Fla. 1979); Alsup v. Your Graphics Are Showing, Inc., 531 So.2d 222 (Fla. 2d DCA 1988).

Reconsideration of any point is only as a matter of grace and not a right. Such reconsideration should not be made at all except in unusual circumstances and for the most cogent reasons -- and always, of course, only where manifest injustice will result from a strict and rigid adherence to the rule. Strazzulla v. Hendrick, 177 So.2d 1, 4 (1965).

Here the law of the case as expressed by the Third District Court and this Court is that Ed Ricke installed the water heater in question. Green, 438 So.2d at 26; Ed Ricke, 468 So.2d at 909. In addition, the trial court instructed the jury:

> The Court has determined and now instructs you, as a matter of law, that the defendant, Ed Ricke & Sons, Inc., is responsible for any negligence of Marr Plumbing Company in installing the gas water heater.

(S.R. 529, 581). Defendant did not claim error as to this instruction on cross appeal. Thus, it is the law of the case that Ed Ricke installed the water heater in question.

The law of the case may be modified in unusual circumstances, including where the presentation of new evidence dictates a different result. Ed Ricke claimed below that it fell within this exception. However, the courts are quite clear that

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> the exception to law of the case where 'evidence on a subsequent trial is substantially different' is inapplicable where by the prior appeal the issue is not left open for decision. Paull v. Archer-Daniels-Midland Company, 313 F.2d 612 (8th Cir. 1963); Zdanok v. Glidden Company, Durkee Famous Foods Division, 327 F.2d 944 (2d Cir. 1964), cert. denied, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed. 2d 298 (1964).

National Airline, Inc. v. International Association of Machinists & Aerospace Workers, 430 F.2d 957, 960 (5th Cir. 1970), cert. denied, 400 U.S. 992 (1971). Accord: Goodpasture, Inc. v. M/V Pollux, 688 F.2d 1003, 1006 n. 4 (5th Cir. 1982), cert. denied, 460 U.S. 1084 (1983). As shown above, the issue was foreclosed by the opinions of this Court and the Florida Supreme Court. Accordingly, Ed Ricke had neither the right to present its "new" evidence as a defense nor the right to have the lower court enter summary judgment based thereon.

Further, the federal courts hold that evidence which is "new evidence" simply because a party neglected to present it at a prior point in the proceedings does not justify an exception to the law of the case. Al Haddad Bros. Enterprises, Inc. v. M/S Agapi, 635 F.Supp. 205 (D. Del. 1986), affirmed, 813 F.2d 396 (3d Cir. 1987). See also Lyons v. Fisher, 888 F.2d 1071 (5th Cir. 1989), cert. denied, 110 S.Ct. 2209 (1990)(where party flatly fails to present evidence in prior proceeding despite having both reason and opportunity to do so, he does not suffer manifest injustice simply because the law of the case doctrine precludes his tardy introduction of that evidence).

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Here, the evidence which defendant claims to be newly discovered are public records, plain and simple. They were found exactly where one would expect plans and records of building permits to be -- the Dade County Building & Zoning Department. Why defendant chose not to look through these files for the two years the action was pending before the first trial is never explained. However, again it should be the one to bear the burden of its choice.

Further, to allow Ed Ricke to now assert this defense would not prevent a manifest injustice but create one. Here, plaintiff filed suit against Ed Ricke in May 1980, also 11 months before the statute of limitations ran. Yet, Ed Ricke never raised even the possibility of the defense that it did not install the heater 5 years after the statute of limitations had run. Not only was that after the time plaintiff could sue the company Ed Ricke now says is the proper defendant but also, due to the loss or destruction of documents by the different public agencies, after the time plaintiff could effectively discover information that would establish that Ed Ricke is in fact the corporation that installed the water heater in question. (R. 938, 942; S.R. 279-280). Accordingly, defendant should not be allowed to raise this issue now.

3. Defendant's assertions have no merit.

Defendant, however, contends that its prior actions should not be held against it under the doctrine of either estoppel or law of the case, because a new trial was ordered and, therefore, it had

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the right to retry all issues -- even if they are contrary to the express language of the appellate opinions. Defendant cites no case which reaches such a conclusion. Of the seven cases relied on by Ed Ricke, six[11] deal solely with the grant of a new trial by the trial court. In the last, Levine v. Knowles, 228 So.2d 308 (Fla. 3d DCA 1969), the Court simply held that where it had expressly granted a new trial on punitive damages in its opinion on rehearing, the trial court had to allow the punitive damages issue to be tried.

In the case sub judice, the Third District did reverse and remand for a new trial and this Court affirmed that ruling. Green v. Ed Ricke & Sons, Inc., 438 So.2d 25 (Fla. 3d DCA 1983), aff'd sub nom, Ed Ricke & Sons, Inc. v. Green, 468 So.2d 908 (Fla. 1985). In the course of so doing, the Third District found "This action was then instituted against the general contractor, Ed Ricke & Sons, Inc. which installed the water heaters." 438 So.2d at 26. Likewise, this Court expressly stated: "Ed Ricke & Sons, Inc. installed the water heater." 468 So.2d at 909. This was in accord with the position Ed Ricke had taken in the litigation. Thus, the Third District and this Court fully addressed and decided the issue of Ed Ricke's responsibility for the work in question. It was not a matter left open for a new trial upon remand. Accordingly, Ed Ricke is not entitled to a summary judgment based

[11] Massey v. State, 39 So. 790 (Fla. 1905); Atlantic Coastline RR Co. v. Boone, 85 So.2d 834 (Fla. 1956); Warner v. Goding, 107 So. 406 (Fla. 1926); Florida Dairies Co. v. Ward, 178 So. 906 (Fla. 1938); Florida East Coast Railway Co. v. Hayes, 64 So. 504 (Fla. 1914); Carney v. Stringfellow, 74 So. 866 (Fla. 1917).

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on this defense. Cowgill v. Raymark Industries, Inc., 832 F.2d 798 (3d Cir. 1987); Lyons v. Fisher, 888 F.2d 1071 (5th Cir. 1980), cert. denied, 109 L.Ed.2d 535 (U.S. 1990); Henry v. Quackenbush, 12 N.W. 634 (Mich. 1882)(where Supreme Court has based its judgment upon the concessions of counsel, parties are not at liberty to dispute the ground of the judgment but must be governed throughout by the rule first laid down). See also Alford v. Summerlin, 423 So.2d 482 (Fla. 1st DCA 1982); Goodman v. Olson, 365 So.2d 393 (Fla. 3d DCA 1978), cert. denied, 376 So.2d 74 (Fla. 1979).

Whatever doctrine applies, it is respectfully submitted that it would be contrary to justice and equity to allow Ed Ricke to prevail in this matter based on an issue that it agreed was a non issue through two trials, two appeals, and most of a third trial, especially where by such action it prevented the plaintiff from achieving effective discovery on this issue. The opinion of the Third District precluding Ed Ricke from this defense should be approved.

4. There is a question of fact as to who did the installation.

Even if Ed Ricke can raise this issue (which is denied), it is still not entitled to summary judgment because there are questions of fact as to who installed the water heater in question.

The 1982 depositions of Lavelle Hargis, the Dade County director of maintenance, are replete with statements that Ed Ricke installed the water heater in question. (S.R. 37-38, 48, 69-70, 90, 113). Specifically, he testified:

Q. Now, if we could, we are talking about Scott Homes. We are talking about a specific heater. We are talking about a Vulcan water heater; is that correct?

A. This is correct.

Q. That Vulcan water heater was one that was installed by and the building built by and the outlet valve constructed and put in by Ed Ricke & Sons; is that correct?

A. Yes. It was the one submitted for approval. It was approved and it was installed.

Q. By Ed Ricke & Sons?

A. Yes.

(S.R. 113). In responding as set forth above, Mr. Hargis was not asked to assume anything. He was simply asked whether or not Ed Ricke installed the water heater in question and he responded that it did. This is sufficient to create a question of fact.

Mr. Hargis' subsequent waffling about his testimony does not erase it, although it may diminish its weight or Mr. Hargis' credibility. But those are not questions a court should be concerned with on summary judgment. The only question is whether the record shows that genuine issues of material fact exist or raises even the slightest doubt in this respect. Since such appears here, the summary judgment should not have been granted.

The testimony of Larry Ricke also renders any entry of summary judgment improper. Mr. Ricke testified as the corporate representative in the 1986 trial as follows:

Q. Mr. Ricke, did Ed Ricke & Sons, Inc. do the construction involved here?

A. Yes, sir.

> Q. The construction of this particular hot water heater, this was done by Ed Ricke & Sons?
>
> A. Yes.

(S.R. 309, 310). Thus, the defendant admitted under oath that it installed the water heater in question.[12]

Further, the evidence presented by Ed Ricke merely shows who pulled the permits on the different jobs -- not who actually did the work. It also ignores the fact that there were three waves of construction - not two. Considering that the numbering of these buildings is anything but consistent and that the work, even as Ed Ricke shows it to be assigned, jumped around amazingly (under the defendant's version of the plans, Ed Ricke was supposed to do many of the buildings around the one in question including the one directly east of it) it is just too speculative to assume that work was only done on the buildings on which permits were pulled. Although the affidavit of Larry Ricke states this, it is not

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[12] Although plaintiff's counsel filed an affidavit saying that if Hargis' testimony was not sufficient to create a question of fact summary judgment would be appropriate, courts need not and often do not recognize stipulations as to evidence which are not reflective of the true facts. Schriver V. Tucker, 42 So.2d 707 (Fla. 1949); Special Disability Trust Fund v. Myers, 492 So.2d 788 (Fla. 1st DCA 1986); Windward Traders, Ltd. v. Fred s. James & Co., 855 F.2d 814 (11th Cir. 1988). Further, it has been held that a stipulation for use of summary judgment proceedings is not binding on the court where the threshold requirements of summary judgment rules are not met. Van Arsdale v. DiMil Land Co., 264 So.2d 85 (Fla 4th DCA 1972); Osceola County v. Goodman, 276 So.2d 210 (Fla. 4th DCA 1973). Accordingly, the Court is clearly entitled to consider this evidence in ruling on the propriety of the motion for summary judgment -- especially since Ed Ricke itself relies on Mr. Ricke's testimony so heavily.

sufficient to establish this proposition as a matter of law. Ricke previously testified he was not present while the construction was going on and that the company had no records concerning the job. (S.R. 123, 271-272). Accordingly, his conclusory affidavit has no basis in fact and is not sufficient to support the summary judgment. Carter v. Cessna Finance Corp., 498 So.2d 1319 (Fla. 4th DCA 1986).

In order for Ed Ricke to be entitled to the summary judgment granted by the trial court, it had to conclusively prove that it did not install the water heater in question. It failed to carry this burden.

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CONCLUSION

Based on the foregoing reasons and authorities, it is respectfully submitted that the opinion of the Third District should be approved and the summary judgment should be reversed and the tardily raised defense stricken.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on the Merits was mailed this 19th day of March, 1992 to:

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