O.A.6-492 047

IN THE FLORIDA SUPREME COURT

CASE NO. 78,860

Florida Bar No: 184170

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

Petitioner,

vs.

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

Respondent.

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

REPLY BRIEF OF PETITIONER ON TEE MERITS
ED RICKE & SONS, INC., a Florida corporation

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REPLY ARGUMENT

The Slavin doctrine was designed precisely for cases like the present one, where Ricke was sued 13 years after the alleged defective construction took place, the events span nearly 30 years, and the alleged defect had been open, obvious, and known by the owner for years prior to the incident which resulted in injury to Green. Slavin v. Kay, 108 So.2d 462 (Fla. 1958). Green concedes that there is no "hot water" exception to the Slavin doctrine, but asks this Court to now adopt the Third District's creation of this new exception which is without precedent in this state.

Conspicuously absent from Green's Brief is any mention whatsoever of the alleged defective condition that he sued for, i.e. the absence of a drain under an outside drip pipe.

In the 1988 trial, Green argued for the first time that Ricke was negligent for failing to pull plumbing permits and obtaining certificates of occupancy for the work done on Building #37 where Demetrius Green was injured, and that the method chosen for the path of discharged water was not in compliance with the Dade County Plumbing Code. Ricke, in order to rebut this new claim and the affidavit of Donna Romito which claimed there were no permits for the work on this building, was finally able to discover the plumbing permits and presented this evidence through the live testimony of Ms. Romito and Ricke's expert which established that Ricke did not do the construction work at Building 37, the site of Green's accident.

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Based on the wealth of direct evidence presented to the trial court that Ricke did not do the construction work at the site of the accident and the Stipulation of Green that he had absolutely no other evidence to present to the court other than the Hargis depositions to support his allegation that Ricke had done the work, the trial court properly entered Summary Judgment in favor of Ricke.

Slavin Requires Reversal

In order to avoid the clear application of the Slavin Doctrine, Green argues that since the work in question involved the installation of a gas water heater system and since gas is inherently dangerous, Slavin should not apply. Green's logic is as follows: a gas water heater was installed, which was connected to, among other things, a valve, which when activated allowed water to discharge outside of the building through a pipe, which eventually resulted in the accumulation of a pool of hot water into which Demetrius Green fell and was injured; therefore, Demetrius Green was injured by gas. Under this approach, if this heater had been fueled by solar power, the court would be placed in the position of declaring that the sun's rays are inherently dangerous and therefore constitute an exception to the Slavin Doctrine, i.e. the rays of the sun caused the injury. Understandably, Green cannot cite a single case in Florida to support this tortured logic. In all cases where the plaintiff was not injured by the inherently dangerous commodity itself, such as gas, the courts have not permitted recovery. Nor

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has any court permitted recovery in a case such as this one, where the Plaintiff was injured by a pool of hot water which was not connected to, but was discharged from, a pipe which was connected ultimately to a heater which used gas as a fuel. This is because there is no such case law, since this Court has never held that these types of exceptions to the Slavin doctrine exist.

Green asks this Court to accept the "hot water" exception claiming it is not contrary to public policy. However, Green does not discuss at all how this hot water exception is to be applied, what constitutes hot water, or why homeowners will not be subject to ordinary tort liability for having hot water. Clearly, the Slavin doctrine would not apply to the ordinary homeowner, but if hot water is held to be inherently dangerous, then homeowners will be inundated with liability suits if anyone in their home is injured because of "hot water."

Because it is so clear that the Slavin doctrine daes apply, Green now argues for the first time a fall back position as to why Summary Judgment should not have been granted in favor of Ricke. Green now asserts that if the absence of an outside drain is a code violation then there was no "acceptance" of the work by the Housing Authority pursuant to its contract with Ricke. Conspicuously absent from the Brief of Respondent are any Record references regarding the question of acceptance. That is because the Record clearly establishes without factual dispute that the local governmental entity, the landowner, and the federal government inspected the work, found it to be in complete code

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compliance, accepted the work, and paid off on all the contracts (SR 53-55; 90; 91; 99-100; 426; 427; 428; 435-437).

Green's argument has other major flaws. The first flaw is that Green was not a party or third party beneficiary to the contract between the Housing Authority and Ricke, and therefore has no standing or right to assert any alleged lack of compliance with the contract.

The second major flaw with the argument is that it ignores the factual circumstances in which Slavin has always been applied. As the Court is well aware, Slavin has always applied in situations where the plaintiff has alleged some type of code violation in order to establish that the contractor was negligent. Virtually every construction contract has a provision which requires the contractor to comply with all applicable codes. If it were true that the presence of a code violation bars the application of Slavin under a "theory of non-acceptance" then Slavin would never have barred an action by the injured party. Such a ruling by this Court would completely eviscerate the Slavin doctrine.

There is no case law or public policy reason for allowing this "newly found" contract argument to bar the application of the Slavin doctrine. Even if this Court were to accept this theory, the **Record** in **this case is undisputed** that it was the same entity who owned the property, inspected it, accepted the work, found that it was in compliance with the code, and then paid all contract amounts. In fact, because this **was** a joint

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project between local and federal governmental entities, additional inspections were done and the work was accepted by the federal government who performed its own inspections and accepted the work as being within code.

The second fall back position argued by Green is "law of the case." Green conveniently ignores the fact that both the trial court and Third District rejected this argument and expressly ruled on the application of the Slavin doctrine. The trial judge in this case entertained the subsequent Motion for Summary Judgment based on the Slavin doctrine and entered a Summary Judgment in favor of Ricke on the grounds that it did not do the construction work, but denied Ricke's Motion for Summary Judgment based on the application of Slavin. This was the Summary Judgment that was appealed to the Third District and which, in reversing the Judgment, the Third District expressly ruled that Slavin did not apply to the present case, under its newly created "hot water" exception. Green v. Ed Ricke & Sons, Inc., 584 So.2d 1101 (Fla. 3d DCA 1991). Green argued below that the law of the case compelled the trial judge and the Third District to find that the Slavin doctrine did not apply. However, both the trial judge and the Third District expressly ruled on this interlocutory matter on the merits and the trial judge entered a Summary Final Judgment finding as a matter of law that Slavin did not apply and the Third District affirmed this legal determination. Green, supra.

These two alternative arguments by Green are simply a last

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ditch effort to avoid the inescapable conclusion that the Slavin doctrine relieves Ed Ricke of any and all liability; where the landowner inspected the premises, accepted the work; and, where the alleged defective condition was open, obvious, and known to the owner. Furthermore, Green has given this Court absolutely no real reason why a "hot water" exception should exist or any reason to hold that hot water is inherently dangerous. This case is the perfect example of why this and other courts have consistently upheld the Slavin doctrine.

Estoppel

Green concedes that in order to apply the doctrine of estoppel as set out by this Court in Palm Beach County, a party must successfully assume a factual position on the Record. Palm Beach County v. Palm Beach Estates, 110 Fla. 77, 148 So. 544 (Fla. 1933). Green "claims" that it "relied" on the position allegedly taken by Ricke that it did the work and has been prejudiced since it is "too late to do any meaningful discovery." This completely ignores the Record which demonstrates that Ricke denied that it did the work in its response to the Complaint (thereby creating no reliance), and that Green did absolutely no discovery during the period remaining under the applicable statute of limitations. It ignores the Record that establishes that Ricke made no representations either by deposition or in responses to Green's discovery on the issue of who performed the work. In fact, it was not until six years after this case was filed and long after the statute of limitations had expired, that

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Green conducted any discovery on this issue. Any prejudice experienced by Green is the result of his own actions and not Ricke's. The fact that Green chose to rely on the inadequate investigation and discovery from his first lawsuit against the landowner, to which Ricke was not a party, is not the fault of Ricke. Moreover, Ricke has never successfully prevailed on this factual issue since it has lost on virtually every issue since the inception of this lawsuit until the Summary Judgment was granted and then reversed by the Third District.

Green's law of the case argument was rejected by the trial court and the Third District, which relied solely on the doctrine of estoppel as set forth in this Court's opinion in Palm Beach County. Green, 1103. Jim Ricke's testimony in the 1986 trial cannot be the basis for an estoppel argument for two reasons: First, his testimony clearly shows that he stated he could not tell if Building 37 had been worked on by Ricke based on the pictures shown him by counsel for Green, and that he would probably need a blue print, which he had not been shown, in order to show exactly what buildings were worked on by Ricke (SR 311-316); and, secondly, Green can demonstrate no prejudice because the statute of limitations for an action by Green against any other party had long since expired.

Summary Judgment

The trial judge, based on direct evidence presented at the time of the Motion for Summary Judgment, ruled that Ricke did not do the construction work in question and entered the Judgment

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accordingly. This Summary Judgment proceeding was three years after Green took a mistrial in **1986,** during a trial at which conclusive evidence was presented demonstrating that Ricke did not do the construction work. The trial court magnanimously gave Green three additional years to conduct discovery to attempt to establish that Ed Ricke did the work in question. After three years, the best that the counsel for Green could do was to file an Affidavit stating that if the **1982** depositions of **Hargis** did not create a genuine issue of material fact regarding who did the construction, then Summary Judgment would be proper in favor of Ricke **(R** 564; SR **279-280).** Furthermore, at the time of the Summary Judgment hearing, counsel for Green similarly stipulated that if the testimony of Hargis taken in **1982,** did not raise a genuine issue of material fact as to who did the construction work, then Green could not prove otherwise (R **946).** Vast amounts of direct evidence were presented at the Summary Judgment hearing by Ricke substantiating the fact that **Ricke** did not do the construction work on Building **37,** the site **of** Green's accident.[1] All of this evidence in combination with the site **plans,** building

[1] The evidence included the Affidavit of Sheila Dawkins; Affidavit of Ed Malcer; Affidavit of Larry Ricke; sworn statement of Lavelle R. Hargis; Depositions of Hargis taken April **8, 1982;** sworn statement of Francisco M. Trujillo; excerpts of the **1986** trial proceedings; Depositions of Hargis **taken** January **15, 1979** and **May 10,** 1978; Deposition of Donald Kausal; Deposition of Thurl Corson; Depositions of Lavonne Carlie taken March **16, 1978** and September **14 1981;** Deposition **of** Queeny Brown; Deposition of Geraldine Paxton; and trial excerpts of the testimony of Elmer Webb and Donna Ramito April **10, 1986 (R 953; 954; 794-887; 888-900; 901-913; 914-954).**

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permits, building numbers, and building addresses established that the work on Building 37 was done by Joyner Construction.[2]

Green claims that Ricke's Answer did not put it on notice that it had not done the work, because Ricke pled it was without knowledge as to the general paragraph that the heater had been

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[2] In response to Plaintiff's "outrage" to Ricke's reference to the fact that the site plans were Plaintiff's Exhibit 5 and 6 and in the Plaintiff's possession, suffice it to say that on May 10, 1978, the Plaintiff took the deposition of Hargis in his lawsuit against Dade County and Florida Gas (SR 397-406). At that deposition the Plaintiff identified his Exhibit 5 as "Alterations and Repairs to 26 Buildings, James E. Scott Homes Project, Florida 5-4, Areas A & B" (SR 405). Part of that same face page and to the left of the portion read into the Record is one of the site plans in question.

Similarly, Plaintiff's Exhibit 6 at Hargis' Deposition was identified as "Alterations and Repairs to 25 Buildings in the James E. Scott Homes, Florida 5-4 areas A & B...plans and specifications of five pages dated January 12, 1965 job prepared by Radar Associates" (SR 406). Again, to the left on that same face page is the other site plan in question. Moreover, all of the plans which were entered as Defendant's Exhibit J and K, which are the previously described Plaintiff's Exhibit 5 and 6 to the Hargis Deposition, were a matter of public record and were available to the Plaintiff at any time. Not only has the Plaintiff seen them, but the Plaintiff voiced no objection whatsoever when these plans were entered into evidence prior to the testimony of Elmer Webb at trial. Therefore, the Plaintiff has waived any objections or claim that he ever saw these plans, raising it for the first time in the Supreme Court. Obviously, what the Plaintiff meant to say was that what he had not seen in the 1986 trial were the building permits which were finally located during trial, which in combination of the addresses, building numbers, and site plans, conclusively established that Joyner Construction did the work on Building 37. Furthermore, if there had been any argument regarding the fact that the Plaintiff did not retain the original plans, it would have been a simple matter to supplement the Record with Saymon's Deposition with the other 500 or so documents supplemented to the Record in this appeal. Finally, the site plans were filed with the County, and all site plans must be filed with each contract with the County, and therefore all of this information was a matter of public record.

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installed under its contract. Completely absent from Green's Brief is any reference to the fact that Ricke in its initial Answer to Green's Complaint expressly denied the allegation that it did the work and raised as an affirmative defense the fact that **Green's** injuries were the result of the negligence of third parties (R 105-127).

Also being raised **for** the **first** time in Green's appellate argument, is the assertion that there is a genuine issue of material fact regarding **who** did the construction work which requires a trial. The Affidavit and Stipulation of the counsel for Green and Record evidence presented at the Summary Judgment hearing clearly demonstrate that if the "Hargis deposition" taken in 1982 is not sufficient to create a genuine issue of material fact, then the Summary Judgment in favor of Ricke was properly entered. Because Green now raises for the first time in its appellate argument, that a genuine issue of material fact requires reversal of the Summary Judgment, Ricke will briefly review the evidence regarding Hargis' testimony.

Hargis was **produced** for deposition as the representative of Dade County (the landowner) as the person who had the most information regarding Dade County's role in the lawsuit by Green against Florida Gas, Dade County, and HUD (SR 399-406). He reviewed **no** plans, blueprints, etc. before testifying in these depositions. Two depositions were taken of Hargis in April 1982, with Hargis being specifically instructed within the questions posed to him, to "assume" that Ricke had done the construction

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work. However, by the time of the Summary Judgment, Hargis' Sworn Statement had been **obtained** by **Ricke** and was entered into the Record. He had been shown the documentation that was not provided or reviewed by him before his deposition testimony and he testified that **after** reviewing the contracts, site plans **and** other pertinent documents, it was his opinion that Ricke did not do the construction work on Building 37, the site of Green's accident (R 888-900).

The depositions of Hargis can best be summarized as follows:

> **April 8**, 1982 - The deposition of Dade County was once again taken through Mr. Hargis (SR 118). By this time, Mr. Hargis had retired from the HUD division of Dade County (SR 29).
>
> Once again, he testified that the responsibility for the Scott Homes Project had switched from Miami Housing Authority to the Dade County Housing Authority in 1968, after the installatian of the subject water heater (SR 29-30).
>
> Hargis was then shown a copy of the contract between Ed Ricke and the City of Miami Housing Authority, to do change over work from solar to gas heating (SR 30-31; 34).
>
> He was shown the letter from the Housing Authority of January 31, 1966, informing Ricke that it was to proceed with its contract according to the plans and specifications (SR 34-35).
>
> Hargis testified that Ricke's work was completed between January 31, 1966 and May 20, 1966 (SR 36-37).
>
> Hargis then went on to testify that the water heaters installed by Ricke were Vulcan Water heaters; that they were installed for all of the work done (SR 37). Having been presented **with** only the contract for Ed Ricke, and not the contract for Joyner, and without the benefit of the "site plans" or any of the permits pulled for the project by either Ricke or Joyner which are absolutely necessary for a determination of the identity of the contractor who worked on

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any of the specific buildings in the **51** buildings which were renovated at the Scott Homes Project, Hargis was then presented with the following question:

> **Q.** (MR. FELDMAN): If on March **1977,** which we have marked as Plaintiff's 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 [sic]?
>
> A. (MR. HARGIS): That would have to have been installed under the original contract.
>
> Q. The contract we are talking about between --
>
> A. Ed Ricke and Miami Housing Authority.
>
> Q. How can you tell?
>
> A. Because of the Vulcan Heater. (SR **38-39).**

Hargis testified that the work performed by **Ricke,** at the Scott Homes Project, was approved by the City Housing Authority as well as the federal government, that the inspections were made by these parties and the work was approved (SR 53-55; 90; **91; 99-100).**

Hargis also testified that he was not involved in any manner whatsoever in the change from the old water heater to the new water heater (SR 104).

Hargis testified that Dade County was responsible for all repairs to the gas water heaters, that it would contact Florida Gas if the repair required an underground distribution line or something of that nature (SR 110).

He was then asked, that if they were talking about a specific water heater being a Vulcan Heater that would mean that the heater was installed by Ed Ricke, and Hargis answered, **"Yes"** (SR **113).**

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After being shown the contract documents, plumbing permits, the site plans, etc. Hargis made the following Sworn Statement:

> A. According to the contract documents, and the numbers, and the site plans, it appears to me that Joyner done the work on Building 37.
>
> Q. Have you ever seen any document at all which would indicate to you that Ed Ricke & Sons did the work on Building No. 37, which is the building at the Northwest corner of the project at the intersection of Northwest 75th Street and Northwest 24th Avenue?
>
> A. To the best of my knowledge, no.
>
> **(R 899).**

At the hearing on Summary Judgment, Green stipulated that if Hargis' testimony was not sufficient to defeat a Motion for Summary Judgment, there was no other basis to say that Ricke did the work and therefore judgment had to be entered for Ricke (R 932). Ricke asserted that the two Hargis depositions were not sufficient to create a genuine issue of material fact (R 932-935). Ricke's position was that under the Florida Evidence Code any testimony from Hargis was "opinion" testimony and therefore required either personal knowledge of the facts and competence to testify in terms of opinion or inference (lay witness) or if an expert, the expertise must be established and if challenged, the underlying facts establishing the predicate must be shown. Hargis was never qualified as an expert in his depositions. Additionally, Hargis admitted in these depositions that he had no personal knowledge of who did the construction work. Despite this, he was asked, without reviewing any plans or the necessary

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documents, whether or not it was his opinion that Ricke had done the work in 1965 (R 933). There was no underlying factual basis for that opinion other than the direction to Hargis to assume that Ricke had done the construction work (R 933). Obviously this is not sufficient, under the Florida Evidence Code, to create a genuine issue of material fact.

More importantly, in Hargis' subsequent Sworn Statement, he testified he never meant to indicate in any prior testimony that he knew Ricke had done the work; he did not have the underlying documents to allow him to make that decision when he testified in the depositions; and, after a review of all the proper documents that had not been available to him previously, it was now his opinion that it was Joyner and not Ricke that had done the work on Building 37 (R 933). The trial court entered Judgment in favor of Ricke on the basis that it was clear and undisputed that Ricke did not do the construction work at the site of Green's accident (R 955). Based on the Record, the Judge was clearly correct in entering Judgment for Ricke. The Summary Judgment was also based on direct evidence presented at the time of the hearing through numerous depositions and affidavits, including that of Trujillo, the head of repairs and alterations at HUD (R 917-935). This would explain why Green never argued below that there should be a trial on the issue of who did the construction work at Building 37.

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CONCLUSION

Based on the authorities and arguments cited above and in the Petitioner's Brief, the opinion of the Third District Court of Appeal should be reversed and the Summary Judgment for Ricke should be affirmed.

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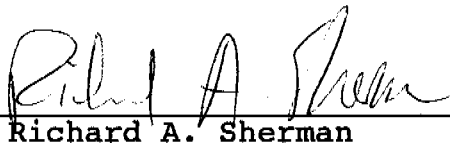
By: 
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CERTIFICATE OF SERVICE

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