

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1003

MARISHIA SCOTT,

Petitioner,

vs.

FORELINE SECURITY CORPORATION,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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I. STATEMENT OF THE CASE AND FACTS

Foreline Security Corporation designed, sold, and installed a bank security system at the Mount Dora branch of the United Southern Bank.^{1/} In the original design, the video surveillance system's monitor and VCR were placed in a secure area out of sight of the public. After the bank officer in charge of procuring the system requested that the *monitor* be placed in the manager's office, Foreline moved both the monitor *and the VCR* into the manager's glassed-in office, in full view of the public. This placement of the VCR was a departure from industry standards. Placement of the VCR in an area readily observable and accessible to the public presented a soft target to a bank robber because the videotape of a robbery could be confiscated.

After selecting this particular bank for a robbery because of the accessibility of the VCR, Fred Anderson robbed the bank and shot both of the tellers to eliminate the witnesses (killing one of them and rendering the petitioner quadriplegic). He was apprehended while leaving the bank with the stolen cash and with the only other witness to his crime -- the VCR, which he had removed from the manager's office. The evidence also proved that Foreline had fraudulently misrepresented its system to the bank officer in charge of its procurement.

Miss Scott sued Foreline. After a lengthy trial, the jury returned a verdict in her favor on six causes of action. The jury also assessed Miss Scott's total damages at

^{1/} The statement that follows is taken from the face of the decision sought to be reviewed: *Foreline Security Corp. v. Scott*, 871 So.2d 906 (Fla. 5th DCA 2004). The Court will find a more complete statement of the facts in *Anderson v. State*, 863 So.2d 169 (Fla. 2003), in which it affirmed the conviction and death sentence of the shooter.

\$26,917,000.00. Although the issue of the bank's comparative fault had been submitted to the jury at Foreline's insistence and the jury had found the bank 50% at fault, the trial court determined post-trial -- as required by this Court's decision in *Merrill Crossings Assocs. v. McDonald*, 705 So.2d 560 (Fla. 1997) -- that §768.81, Fla. Stat., was inapplicable because the action was based on an intentional tort, and it entered a judgment in Miss Scott's favor for the full amount of her damages.

Foreline appealed. The district court reversed the judgment, holding that the trial court had erred in declining to instruct the jury on Foreline's *Slavin* doctrine defense, and ordering a new trial of four of Miss Scott's causes of action for that reason: negligence; strict liability; breach of implied warranty of fitness; and breach of implied warranty of merchantability. The district court also ordered the entry of judgment in Foreline's favor on the counts for fraudulent misrepresentation and negligent misrepresentation because the misrepresentation had been made to the bank officer in charge of procurement of the security system rather than directly to Miss Scott.

Because Foreline raised no issue concerning the damage award, the district court found no error in the amount of damages awarded by the jury. It also found no error in the trial court's conclusion that *Merrill Crossings* required entry of a judgment in the full amount of the verdict. Nevertheless, it ordered a retrial of the damage issues as well because the trial court had instructed the jury in the language of Fla. Std. Jury Instr. (Civ.) 6.1.b(2) that, in determining the total amount of damages, it should not make any reduction because of the negligence of the bank, and that the court would take its allocation of negligence into account in entering judgment. According to the district court, this standard instruction "misled" the jury by preventing it from adjusting

its damage award based on comparative fault principles. In our judgment, each of these holdings is legally indefensible. It remains for us to demonstrate that the Court has jurisdiction to review the decision and make that pronouncement itself.

II. SUMMARY OF THE ARGUMENT

Because the district court's decision erroneously disposes of six separate causes of action, it is in express and direct conflict with decisions of this Court and other district courts too numerous to squeeze into a mere 10-page brief. We can therefore provide the Court with only a representative sampling of the conflicting decisions, and our discussions of them must be very brief. Respectfully requesting the Court's indulgence, we turn directly to our demonstration of conflict.

III. ARGUMENT

A. THE DECISION CONFLICTS WITH DECISIONS DEFINING AND APPLYING THE *SLAVIN* DOCTRINE.

Reduced to its essentials, the *Slavin* doctrine is this: in premises liability cases, where a contractor, architect, or engineer has negligently created a defect in the owner's premises which subsequently causes an injury to a third person, the contractor will be liable to that person if the defect was latent; but where the contractor has turned the project over to the owner and is no longer associated with it, and the defect is either known to the owner or is patent -- *i. e.* open and obvious and discoverable by casual inspection -- the contractor will be relieved of liability, and the owner who has accepted the defect in its obviously dangerous condition will be liable

to the plaintiff for its negligent failure to correct the defect. *See, e. g., Slavin v. Kay*, 108 So.2d 462 (Fla. 1959); *Easterday v. Masiello*, 518 So.2d 260 (Fla. 1988).^{2/}

Although the doctrine apparently remains alive and well, it has been limited to premises liability cases involving structural improvements to real property; it has not been applied in other contexts -- and it does not apply in products liability cases:

Our research indicates the *Slavin* doctrine applies to contractors, architects, and engineers in a limited factual context, for the most part involving building and road construction. . . . We have located no case indicating that [the] doctrine would apply in a case of alleged negligent installation of a product similar to the cage in the present case. We conclude that *Slavin* does not apply

White v. Whiddon, 670 So.2d 131, 134-35 (Fla. 1st DCA 1996). To essentially the same effect is *Florida Freight Terminals, Inc. v. Cabanas*, 354 So.2d 1222 (Fla. 3d DCA 1978) (declining to extend doctrine beyond construction defects in buildings).^{3/}

^{2/} The rationale for the *Slavin* doctrine is that “[b]y occupying and resuming possession of the work the owner deprives the contractor of all opportunity to rectify his wrong.” *Slavin, supra* at 466. *Accord Easterday, supra*. As a result, where there is a continuing relationship between the contractor and the owner, the *Slavin* doctrine does not apply. *See Howard, Needles, Tammen & Bergendorf v. Calvin*, 473 So.2d 1365 (Fla. 3d DCA 1985). If we are given an opportunity to brief the merits, we will demonstrate that Foreline did *far* more than merely design and install the security system in issue -- that it designed the system, sold the component parts, installed the system, performed biannual inspections of the system, maintained and repaired the system, and provided 24/7 monitoring of the system, all for a substantial price. In our motion for rehearing, we asked the district court to include these undisputed facts in its opinion to provide us with a fairer shot at discretionary review, but it denied the request.

^{3/} In footnotes, the district court noted that the *Slavin* doctrine is an outdated minority rule, and that the majority of courts now apply the “modern rule,” a “foreseeability doctrine” much like the “foreseeable zone of risk” test that this Court has applied to every other duty question it has more recently considered. *See, e. g., McCain v.*

In addition, there are a number of decisions that strongly suggest (in reverse, by declining to apply products liability law to premises liability cases) that the doctrine applies only to structural improvements to real property, and not to actions for strict liability, breach of implied warranties, or negligent design of products.^{4/}

To shoehorn this case within the narrow confines of the *Slavin* doctrine, the district court concluded that the doctrine applied because the video surveillance system, including its VCR, was, in its words, “not movable,” was “a component part of the building,” and an “improvement to real property.” Of course, the principal thrust of Miss Scott’s case was that the VCR should not have been located in plain view and readily accessible for easy removal by a bank robber, where it presented a soft target that caused Anderson to choose this particular bank for his crime. And most respectfully, the VCR was *readily* removable, it was *not* a component part of the building, and it was most certainly *not* an improvement to real property.

Because the VCR was simply sitting in the manager’s office and was fully portable, it was plainly not a “fixture,” and the *Slavin* doctrine therefore should not have been implicated at all. This obvious misapplication of the *Slavin* doctrine is perhaps the most expansive manner in which the doctrine has been applied in the last several decades, and because the doctrine has been narrowly limited to structural

Florida Power Corp., 593 So.2d 500 (Fla. 1992); *Whitt v. Silverman*, 788 So.2d 210 (Fla. 2001). An argument can therefore be made that the district court’s reliance on *Slavin* conflicts with these more modern decisions as well.

^{4/} See *Easterday, supra*; *Edward M. Chadbourne, Inc. v. Vaughn*, 491 So.2d 551 (Fla. 1986); *Seitz v. Zac Smith & Co., Inc.*, 500 So.2d 706 (Fla. 1st DCA 1987); *Forte Towers South, Inc. v. Hill York Sales Corp.*, 312 So.2d 512 (Fla. 3d DCA 1975).

improvements to real property to deflect the criticism that has been roundly and soundly directed at it over the years, the decision creates a conflict in application and a conflict of decisions that simply cry out for correction by this Court.

B. THE DECISION CONFLICTS WITH DECISIONS ABOLISHING “OPEN AND OBVIOUS DANGER” DEFENSES IN PRODUCT LIABILITY ACTIONS.

Whether the district court correctly applied the *Slavin* doctrine to Miss Scott’s negligence action or not, the fact remains that it ordered a new trial at which the jury will be instructed that the *Slavin* defense also applies to the counts for strict liability, breach of implied warranty of fitness, and breach of implied warranty of merchantability. In doing so, the district court misapprehended the law. The *Slavin* doctrine, which insulates contractors from liability for negligence where the defects they create are patent or obvious, is not available as a defense to any of them -- and the district court’s decision plainly conflicts with two landmark decisions of this Court.

Although the “open and obvious danger” defense was once available as an absolute defense to these counts, it was abolished by this Court 25 years ago in *Auburn Machine Works Co., Inc. v. Jones*, 366 So.2d 1167 (Fla. 1979), and the obviousness of a defect is now simply one factor to be considered in assessing the comparative fault of the plaintiff and others. And in strict liability actions, “contributory negligence of the user or consumer or bystander in the sense of a failure to discover a defect, or to guard against the possibility of its existence, is not a defense.” *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80, 90 (Fla. 1976). The *Slavin* doctrine may have survived over the years despite its vigorous criticism, but it has

survived as an absolute defense only in negligence actions. The decision sought to be reviewed is the *only* decision that has ever applied the doctrine to actions for strict liability and breach of implied warranties, and because *Auburn Machine Works* and *West* make it perfectly clear that the doctrine is not an absolute defense to such causes of action, we respectfully submit that the conflict is undeniable.

C. THE DECISION CONFLICTS WITH A DECISION OF THIS COURT DISPENSING WITH THE REQUIREMENT OF PRIVACY IN INTENTIONAL MISREPRESENTATION CASES.

The district court disposed of the count for fraudulent misrepresentation by holding that Foreline was entitled to a directed verdict because the misrepresentation was made to Miss Scott's employer rather than to Miss Scott herself, and she therefore could not prove reliance upon it. In short, the district court concluded that, absent privity between Foreline and Miss Scott, the misrepresentation was not actionable. We respectfully submit that the district court misapprehended the law. As this Court stated in *First Florida Bank N.A. v. Max Mitchell & Co.*, 558 So.2d 9, 14 (Fla. 1990), privity is *not* a necessary element of an action for *fraudulent* misrepresentation:

Upon consideration, we have decided to adopt the rationale of section 552, *Restatement (Second) of Torts* (1976), as setting forth the circumstances under which accountants may be held liable in negligence to persons who are not in contractual privity. The rule shall also apply to allegations of gross negligence but *the absence of privity shall continue to be no bar to charges of fraud . . .*

(Emphasis supplied). Had this decision been followed, Miss Scott's judgment should have been affirmed -- and in reversing the judgment on the ground that Foreline's

misrepresentation was made to the bank officer in charge of procuring the security system for Miss Scott's benefit, rather than directly to Miss Scott herself, the district court undeniably brought itself into conflict with the statement quoted above.

D. THE DECISION CONFLICTS WITH A DECISION OF THE FOURTH DISTRICT HOLDING THAT PRIVACY IS NOT A REQUIREMENT IN NEGLIGENT MISREPRESENTATION CASES INVOLVING PHYSICAL HARM.

The district court disposed of the count for negligent misrepresentation by holding once again that Foreline was entitled to a directed verdict because the misrepresentation was made to her employer rather than to Miss Scott herself, and she therefore could not prove reliance upon it. In support of this conclusion, it relied upon three misrepresentation cases involving *pecuniary losses*, and it did not even address our position that privity has never been a requirement in misrepresentation cases involving *physical harm*. This was not an insubstantial position, because it was supported by the leading commentators on the law of torts. It was supported by the separate treatment given to the two types of cases by the *Restatement (Second) of Torts*, in which misrepresentations involving pecuniary losses are treated in §§525-552C, and misrepresentations resulting in physical harm are treated in §§310 and 311, where neither privity nor reliance by the ultimate victim is a requirement. And it was supported by numerous decisions of other jurisdictions following §§310 and 311 of the *Restatement*. It was also supported by this Court's recent decision in *Clay Electric Coop., Inc. v. Johnson*, 28 Fla. L. Weekly S866 (Fla. Dec. 18, 2003), in which the Court reiterated that privity is generally not a requirement in tort cases involving physical harm.

Our position was also squarely supported by a decision of the Fourth District: *Albertson v. Richardson-Merrell, Inc.*, 441 So.2d 1146 (Fla. 4th DCA 1983). In that case, a drug company’s “detail man” misrepresented the safety of a drug to a physician, who then prescribed the drug to a patient for use during her pregnancy. She later gave birth to a child with severe birth defects. Both the mother and the child sued the “detail man” for the misrepresentation. The trial court dismissed the claims for lack of privity. The district court reversed, holding that privity was not required because of the nature of the foreseeable physical injuries to the mother and child resulting from the misrepresentation to the physician. Sections 310 and 311 of the *Restatement* fit that case like a glove, and they fit the instant case like a glove as well. By bottoming its privity requirement upon negligent misrepresentation cases involving *pecuniary losses*, the district court plainly brought itself into conflict with the *Albertson* decision and the weight of authority across the nation.

E. THE DECISION CONFLICTS WITH A DECISION OF THE FOURTH DISTRICT CONCERNING THE PROPRIETY OF FLA. STD. JURY INSTR. (CIV.) 6.1.b(2).

The district court found no error affecting the amount of Miss Scott’s damage award or the propriety of the trial court’s entry of judgment in the full amount of that award. Under ordinary circumstances, the retrial required by its rulings on the liability issues should have been limited to the liability issues alone.^{5/} Yet the district court

^{5/} That point is settled. *See, e. g., Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262 (Fla. 1996); *Martinello v. B & P USA, Inc.*, 566 So.2d 761 (Fla. 1990); *Purvis v. Inter-County Tel. & Tel. Co.*, 173 So.2d 679 (Fla. 1965); *Eggers v. Narron*, 254 So.2d 382 (Fla. 4th DCA 1971), *approved*, 263 So.2d 213 (Fla. 1972); *Griefer v. DiPietro*, 625 So.2d 1226 (Fla. 4th DCA 1993).

found a way to order a retrial of the damage issues as well by concluding that the jury was “misled” by Fla. Std. Jury Instr. (Civ.) 6.1.b(2) -- that the jury might have reached a different verdict on damages had it known that the trial court would ultimately disregard its legally superfluous finding on the comparative fault issue, follow the law as required by *Merrill Crossings*, and enter a legally correct judgment. Most respectfully, this holding makes no sense to us at all.

Special interrogatory verdicts are required in comparative fault cases. *Lawrence v. Florida East Coast Railway Co.*, 346 So.2d 1012 (Fla. 1977). The jury is supposed to apportion the blame, but not the damages. The jury is supposed to award the total amount of the plaintiff’s damages, and the legal effect of an apportionment of blame is a question reserved for the trial court in fashioning an appropriate judgment. That is precisely what the “Note on Use” to 6.1.b(2) explains -- that the instruction is necessary to “alert the jury to the appropriate procedure, so the jury does not make inappropriate adjustments to its verdict.” This instruction is routinely given in every case in which the comparative fault of a party or non-party is an issue, and the Fourth District has squarely held that a trial court commits reversible error if it declines to give the instruction in such a case. *Slawson v. Fast Food Enterprises*, 671 So.2d 255, 260 (Fla. 4th DCA 1996) (“[W]e find prejudicial error . . . in failing to instruct the jury that apportionment of fault does not permit any reduction by the jury in the assessment of damages”).

In this case, however, the district court held that a jury may *permissibly* arrive at its damage award based upon its perception of how the trial court will allocate damages in the final judgment. Put another way, the district court held that a jury may

permissibly do exactly what the instruction is designed to *prevent* it from doing. Most respectfully, either the instruction is correct or the third holding in the district court's decision is correct. Our money is on the instruction -- and if the holding is not corrected by this Court, we predict that it will ultimately create enormous confusion and mischief in the jurisprudence of this state.

IV. CONCLUSION

The Court has jurisdiction, a number of important questions are presented, and we respectfully urge the Court to grant review.

By: _____
JOEL D. EATON

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 17th day of June, 2004, to: Robert E. Biasotti, Esq., Carlton Fields, P.A., Post Office Box 2861, St. Petersburg, FL 33731-2861.

**CERTIFICATE OF COMPLIANCE WITH
RULE 9.210(a)(2)**

I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

JOEL D. EATON