

IN THE SUPREME COURT OF FLORIDA

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4TH DISTRICT  
PENSACOLA, FLORIDA

DARLENE EASTERDAY as personal  
representative of the Estate of  
ALLEN L. EASTERDAY, Deceased,

Petitioner,

vs.

CASE NO: 70,082  
4TH DCA NO: 4-86-0562

FRANK MASIELLO, MASTER DESIGN  
GROUP, INC., and REYNOLDS, SMITH  
& HILLS, INC.

Respondents,

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REPLY BRIEF OF AMICUS CURIAE THE ACADEMY OF  
FLORIDA TRIAL LAWYERS  
SUPPORTING POSITION OF PETITIONER

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CHARLES J. KAHN, JR.  
Levin, Warfield, Middlebrooks, Mabie,  
Thomas, Mayes & Mitchell  
226 S. Palafox Street  
P. O. Box 12308  
Pensacola, Florida 32581  
904/435-7000

Attorney for The Academy of  
Florida Trial Lawyers

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## ARGUMENT

A RULE OF LAW TOTALLY INSULATING A CONTRACTOR FROM LIABILITY FOR A PATENT DESIGN DEFECT THAT IS INCORPORATED INTO A BUILDING SHOULD BE ABANDONED IN FAVOR OF A RULE WHICH RECOGNIZES THE CURRENT STATE OF THE LAW CONCERNING COMPARATIVE NEGLIGENCE AND INTERVENING CAUSE.

In urging the vitality of Slavin v. Kay, 108 So. 2d 462 (Fla. 1958) respondents observed that the completed jail structure was accepted by the sheriff of Palm Beach County who then became the only one with the realistic ability to correct obvious design defects. (Masiello Brief 9, Reynolds, Smith and Hills, Inc. Brief 3-4). These contractors accordingly would have the taxpayers shoulder the burden of their negligence. Indeed they have discovered the ultimate insurance policy. It is precisely this type of argument and reasoning which points out the illogic of Slavin.

Respondents Masiello and Master Design go to great lengths to distinguish this Court's rejection of the patent danger defense in Auburn Machine Works Co., Inc. v. Jones, 366 So. 2d 1167 (Fla. 1979) from the Slavin rule, stating categorically that Auburn has "nothing whatsoever to do with the Slavin rule". (Masiello Brief 10). This conclusion cannot stand. The contractor's inability to correct his

poor work, if indeed such inability exists, is irrelevant. The analytic thrust should be toward the responsibility for creating a dangerous condition, not failure to remedy a known defect. The product manufacturer, subject to the rule of Auburn Machine Works, supra, has little if any opportunity to remedy an obvious defect once the product is in the hands of the ultimate user, generally two or more transactions removed from the manufacturer. The architect, designer, or building contractor, on the other hand, can easily locate the building, and determine who owns or occupies it.

The rule of Slavin, supra, simply cannot be reconciled with Auburn Machine Works. In Auburn Machine Works, this Court recognized that the most cogent statement of the patent danger doctrine is found in Campo v. Scofield, 301 N.Y. 468, 95 N.E. 2d 802 (1950). This Court went on to observe that Campo has since been overruled by the New York Court of Appeals in Micallef v. Miehle Company, 39 N.Y. 2d 376, 384 N.Y.S. 2d 115, 348 N.E. 2d 571 (1976). Accordingly, this Court followed what it found to be the modern trend in this country which is to abandon the strict patent danger doctrine as an exception to liability and to find that the obviousness of the defect is only a factor to be considered as mitigating defense in determining whether a

defect is unreasonably dangerous. Auburn Machine Works Co., Inc. v. Jones, supra at 1169. This Court thus recognized New York's abandonment of the patent danger doctrine of Campo, supra, as significant.

It is interesting to note that, while the rule in Campo still obtained in New York, the courts of that state applied the rule to protect an architect or a builder from any liability beyond that for hidden or latent defects. Inman v. Binghamton Housing Authority, 3 N.Y. 2d 137, 164 N.Y.S. 2d 699, 143 N.E. 2d 895 (1957). Once the New York court overruled Campo, the rule applicable to architects changed accordingly. In Cubito v. Kreisberg, 69 A.D. 2d 738, 419 N.Y.S. 2d 578 (Appellate Division 1979), affirmed 51 N.Y. 2d 900, 434 N.Y. 2d 991, 415 N.E. 979 (1980), the court found that under Micallef, supra, the test of patent or latent defect is not to be applied, and the question of liability depends rather on whether the architect exercised due care in preparing his plans. Thus, in the state which is responsible for the patent danger doctrine, the courts do not distinguish a products liability case such as Auburn Machine Works from an architect's liability case such as the present one. See also, Totten v. Gruzen, 52 N.J. 202, 245 A. 2d 1 (N.J. 1968) (where a three year old child was burned by uninsulated radiator pipe in an apartment, the

obviousness of an architectural defect does not necessarily preclude the architect from liability toward third persons).

Contractors both now argue that this Court should dwell very carefully upon the fact that the underlying injury of petitioner Easterday's decedent involved a suicide. AFTL would urge this Court to consider those issues within the parameters of the decision of the Fourth District Court of Appeal and specifically the question certified by that Court. AFTL would also note that the trial court based its ruling solely upon the patent defect doctrine, without any consideration of other questions of duty or proximate cause. While AFTL, obviously does not agree with the result reached by the trial court, its scope of consideration was appropriate, since the matter came before him on a Motion to Dismiss. This Court should not make an excursion into factual matters beyond the face of the Complaint.

A rule of law which diminishes legal responsibility in an inverse proportion to the outrageousness of the defect brought about by the tortfeasor's negligence is not logical. The contractors in this case were retained based upon their representations of expertise in prison design. They were not hired to provide a defective building.

If facts are alleged to show that the neglect or want of care in design led to a defective structure, and that

such defect was a legal cause of the death, petitioner should be allowed to proceed with her case. This does not, of course mean that she automatically wins on the issue of negligent design. She is simply afforded the opportunity to prove her case. The focus on latent or patent defect is an undue hinderance to Mrs. Easterday's right to so proceed. Contractors' suggestion that the tax payers should assume all responsibility for their negligence goes beyond a mere obstacle to Mrs. Easterday's rights, and borders upon the unconscionable.

CONCLUSION

If this Court continues to uphold the rule of Slavin v. Kay, such would seem to call into question the vitality of Auburn Machine Works, supra. If Auburn Machine Works is abandoned, what has become of what Justice Alderman referred to as the "general philosophy" of this Court in Hoffman v. Jones 280 So. 2d 431 (Fla. 1973); West v. Caterpillar Tractor Company, 336 So. 2d 80 (Fla. 1976); and Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1987)? As AFTL pointed out in its initial brief, by overruling Slavin, this Court would still maintain a reasonable balance between the liabilities and remedies of the defendant contractor, through the means of an action for contribution.

By answering the certified question in the negative, this Court may, as it has so many times in the past, take a step in the great march of the common law -- a march toward fairness and responsibility.



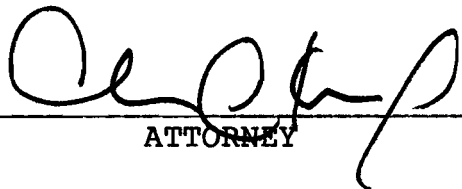
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CHARLES J. KAHN, JR.  
Levin, Warfield, Middlebrooks, Mabie,  
Thomas, Mayes & Mitchell  
226 S. Palafox Street  
P. O. Box 12308  
Pensacola, Florida 32581  
904/435-7000

Attorney for The Academy of  
Florida Trial Lawyers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Amicus Curiae the Academy of Florida Trial Lawyers Supporting Position of Petitioner has been furnished to Jeff Tomberg, Esquire, P. O. Drawer EE, Boynton Beach, Florida 33435, Pamela Chamberlain, 2700 SE Financial Center, 200 South Biscayne Blvd., Miami, Florida 33131-2395 and Winslow D. Hawkes, III, Esquire, P. O. Drawer 3604, West Palm Beach, Florida 33402, by U. S. Mail, postage prepaid, on this 26 day of May, 1987.

  
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ATTORNEY