IN THE SUPREME COURT OF FLORIDA

EDWARD M. CHADBOURNE, INC.

Petitioner/Defendant,

vs.

ALGIE F. VAUGHN, as Personal Representative of the Estate of MARY EMMA VAUGHN, and ALGIE F. VAUGHN, Individually,

Respondent/Plaintiff.

DOCKET NO. 66,418

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS (AFTL) SUPPORTING POSITION OF RESPONDENT

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PRELIMINARY STATEMENT

The Academy of Florida Trial Lawyers appears in this case as amicus curiae supporting respondent's position,, by leave of the court. The Academy will be referred to in this brief as AFTL. Petitioner, Edward M. Chadbourne, Inc. was the defendant in the trial court and appellee in the District Court of Appeal. AFTL will refer to Edward M. Chadbourne, Inc. as "petitioner" or "Chadbourne. Respondent Algie F. Vaughn was plaintiff in the trial court and appellant in the District Court of Appeal. AFTL will refer to Algie F. Vaughn by name or as "respondent."

STATEMENT OF THE CASE AND FACTS

AFTL does not have access to the entire record on appeal, and must defer to respondent's statement before this Court, as well as to the opinion of the First District Court of Appeal. AFTL does have a copy of the complaint filed in the trial court, and attaches this complaint as an appendix to the amicus brief.

Plaintiff brought this action against Chadbourne alleging that the death of respondent's wife was proximately caused by Chadbourne's breach of the implied warranty of fitness accompanying the manufacture and sale of the products contained in and constituting a paved roadway, by Chadbourne's negligence in the manufacture of materials and

construction of the road or by a defect in the paving material rendering the roadway unreasonably dangerous to the motoring public.(A1-5) The trial court entered summary judgment in favor of Chadbourne on all three counts of the complaint.

Chadbourne is a corporation that constructs roadways and manufactures paving materials. In 1978 Chadbourne manufactured a sand-asphalt mix, and utilized this mix to pave Walton County Road 1087 under a contract with the Florida Department of Transportation. DOT tested the sand-asphalt mix at Chadbourne's plant and at the paving site. The mix and the construction met state tests and specifications. As of April 24, 1979, the state turned the roadway over to Walton County for maintenance.

In late 1980 a Walton County commissioner inspected the section of County Road 1087 where plaintiff's decedent would ultimately be killed. This commissioner noticed a wearing away of the southbound lane and reported to the county's engineering consultant. The county took no steps to repair the worn away area before the accident.

Very shortly after this inspection by the county commissioner, Mr. & Mrs. Vaughn, while traveling north on County Road 1087 in their car, encountered a two inch drop-off in the center of the two lane road. Mrs. Vaughn lost control of the car and went into a roll. This accident caused Mary Vaughn's death and severely injured Algie

Vaughn. According to respondent, Chadbourne's improper construction and its use of defective materials proximately caused Mary Vaughn's death and Algie Vaughn's injuries.

The First District Court of Appeal, in a decision authored by Chief Judge Ervin, reversed the summary judgment and held that Chadbourne may be held strictly liable under Section 402A of the Restatement (Second) of Torts, in that a defect in the materials manufactured by Chadbourne may, should a jury so conclude, have been a proximate cause of plaintiff's loss and injuries. Vaughn v. Edward M. Chadbourne, Inc., 462 So. 2d 512 (Fla. 1st DCA 1985).

This Court granted Chadbourne's petition for review on May 17, 1985. AFTL appears as amicus curiae by leave of this Court.

ISSUES PRESENTED FOR REVIEW

I. (RESTATED) WHETHER THE STRICT LIABILITY PRINCIPLES OF SECTION 402A OF THE RESTATEMENT SECOND OF TORTS APPLY TO THE MANUFACTURER OF A SAND-ASPHALT MIX USED BY SUCH MANUFACTURER TO CONSTRUCT A ROADWAY.

II. (RESTATED) WHETHER WALTON COUNTY' ACCEPTANCE OF COUNTY ROAD 1087 BARS AN ACTION AGAINST THE MANUFACTURER OF DEFECTIVE PAVING MATERIALS USED IN THE ROAD, EVEN AFTER EVIDENCE OF THE DEFECT HAS BEEN DISCOVERED.

SUMMARY OF ARGUMENT

The District Court of Appeal correctly observed that prior decisions of several courts have implicitly recognized a cause of action in strict liability for improvements to real estate. The underlying policy for strict liability in tort, is to protect innocent parties who encounter and are injured by a defective product, and may not be in contractual privity with the manufacturer of the product. The fact that a product has been incorporated into real estate does not present a compelling argument to abandon strict liability in tort.

This state has for some time recognized that an implied warranty of fitness and merchantability applies to certain improvements to real property. This state applies such a warranty, even though at the time it was was first adopted in Florida, the majority of states did not extend applied warranties to improvements on real estate.

This Court should not adopt the extremely broad immunity urged by Chadbourne. The Court should not hesitate to extend liability to a manufacturer whose defective product has resulted in a condition that is highly dangerous to foreseeable users of the improvements on real estate.

The rule of Slavin v. Kay, 108 So. 2d 462 (Fla. 1959) should not be extended to the manufacturer of a defective product which is then incorporated into real estate. The Slavin rule predates strict liability, and fails to take

into account the public policy considerations that led to the adoption of strict liability in tort in this state.

Furthermore, the patent defect of rule of Slavin, supra is in conflict with a more recent decision of this court holding that an open and obvious danger does not act to bar a strict liability action against the original manufacturer.

Not only does the Slavin rule conflict with the principles of strict liability in tort, it is not in harmony with the law of intervening causation as developed by the court and as set out in the Florida Standard Jury Instructions. If an intervening cause is foreseeable, it does not act to break the chain of proximate causation going back to the original manufacturer of a defective product. The question of foreseeability if for the trier of fact all but the most exceptional cases. Continued application of the Slavin rule will unjustifiably result in fault without legal responsibility.

I.

ARGUMENT

I. (Restated)

THE STRICT LIABILITY PRINCIPLES OF SECTION 402A OF THE RESTATEMENT (SECOND) OF TORTS APPLY TO THE MANUFACTURER OF A SAND-ASPHALT MIX USED BY SUCH MANUFACTURER TO CONSTRUCT A ROADWAY.

The District Court correctly noted the cases of Hardin v. Montgomery Elevator Company, 434 So. 2d 331 (Fla. 1st DCA 1983), Halpryn v. Hyland Insurance Company, 426 So. 2d 1050 (Fla. 3rd DCA 1983), and Gory Associated Industries, Inc. v. Jupiter Roofing and Sheetmetal, Inc., 358 So. 2d 93 (Fla. 4th DCA 1978), which imply that a product first manufactured and incorporated into an improvement to real property may be the basis of Section 402A liability. 462 So. 2d at 515. Accordingly, the court held that the question of Chadbourne's strict liability in tort may be properly submitted to a jury.

Chadbourne now counters that holding with a threefold argument. First, Chadbourne argues that real property, and items incorporated thereon, are not "products" for purposes of strict liability. Next, Chadbourne urges that strict liability does not apply to services. Finally, Chadbourne contends that strict liability will not apply since the Department of Transportation did "extensive testing" both in Chadbourne's plant and at the construction site itself. The third argument is peculiar to the facts of this case, and might support a reversal, even if this Court rules that strict liability does apply to the manufacturer of paving materials. For this reason AFTL will address only the two arguments which go directly to the threshold issue of strict liability.

AFTL sharply disagrees with Chadbourne's contention that the underlying policies of strict liability do not support application of that doctrine in the present case.

The strict liability doctrine was proposed by Dean Prosser and others in response to the antiquated concept of privity which some courts and lawyers tended to apply to the implied warranty theory in tort cases. Dean Prosser contended that the "illusory contract mask" should be stripped away from strict liability in tort. Prosser, The Assault upon the Citadel, 1960, 69 Yale L.J. 1099. The drafters of the the second Restatement of Torts proposed a new section as follows:

> "402A. Special Liability Of Seller Of Product For Physical Harm To User Or Consumer.
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
> (a) The seller is engaged in the business of selling such a product, and
> (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in subsection (1) applies although
> (a) The seller has exercised all possible care in the preparation and sale of his product, and
> (b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

The Rule as adopted by the Restatement, does away with privity and with the requirement of demonstrating

negligence. Those jurisdictions that have adopted strict liability in tort, including Florida, have merely recognized that it is far more equitable for a loss to be born by the manufacturer of a defective or dangerous product than by the person who innocently uses or comes into contact with the product, irrespective of the manufacturer's negligence. The California Supreme Court adopted strict liability in Greeman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P. 2d 897 (Calif. 1962) with Justice Traynor concisely setting out the rationale of the theory:

> "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers who put such products on the market rather than the injured persons who are powerless to protect themselves."
> 377 P. 2d at 901.

Chadbourne's attempt to surgically excise all improvements to real property from the ambit of strict liability is artificial and unconvincing.

Chadbourne argues that since real property is not a product mass produced and distributed to the general public, the manufacturer of improvements to real property is not able to spread the risk of injuries caused by those products over the costs of many sales. Petitioners Brief 8. Mass production is not a sine qua non of strict liability. Certainly no one would seriously argue that a manufacturer producing highly sophisticated aircraft at the rate of 20

to 30 aircraft per year, and for very narrow distribution, might not be subject to strict liability for a product defect. The manufacturer of paving materials is in a very real way distributing his product to tens of thousands of people. These are the many motorists who travel the public highways of this state each year. The motorists are as much users of the product as are passengers on an airliner who have purchased a ticket. It is not logical to suggest that a manufacturing and construction firm the size of Edward M. Chadbourne, Inc. is any more helpless to "spread the risk of injuries" than is any other firm, small or large, that is subject to strict liability.

Florida's adoption of strict liability in West v. Caterpillar Tractor Company, Inc., 336 So. 2d 80 (Fla. 1976) is broad enough to encompass the facts of this case. In addition to the cases relied upon by the District Court of Appeal, AFTL would note the case of Adobe Building Centers, Inc. v. L. D. Reynolds, 403 So. 2d 1033 (Fla. 4th DCA), petition for review dismissed, 411 So. 2d 380 (Fla. 1981). In that case the Fourth District Court of Appeal applied Section 402A liability to the distributor of a material used to produce stucco. This material was used by various developers and contractors, not in privity with Adobe for a stucco finish on their homes under construction. Upon application to the homes, a "popout" phenomenon occurred, thus ruining the exterior of the house. The court held that

strict liability would apply to the distributor of the stucco material, after the stucco had been incorporated into the improvements on real property.

While citing many cases from other jurisdictions, Chadbourne fails to acknowledge that this state extends implied warranties of fitness and merchantability to improvements to real property in the form of homes or condominiums. Gable v. Silver, 258 So. 2d 11 (Fla. 4th DCA) cert. discharged, 264 So 2d 418 (Fla. 1972). This Court, in discharging certiorari adopted the District Court of Appeal decision as its own. The court in Gable specifically held that despite the majority rule that implied warranties do not apply to realty, Florida would extend such warranties to fixtures and improvements on real estate. Prosser has characterized strict liability as warranty without the contractual requirement of privity, and notes that warranty cases are still important precedents in deciding strict liability issues. W. Prosser, Law of Torts (4th Ed., 1971) 655-656.

Although Chadbourne cites the case of Schipper v. Levitt and Sons, Inc., 207 A. 2d 314 (N.J. 1965), this landmark case seems to hold contrary to Chadbourne's present contentions. In Schipper, a sixteen month old child was severely scalded by excessively hot water from a bathroom faucet. The child's parents had leased the house from the owner. Levitt built the house. Prior to plaintiff's

injury, other family members and guests had been burned in a similar way on more than one occasion. On these facts the New Jersey court extended strict liability to the field of real estate. The court observed that if improper construction results in a defective ceiling, stairway, or the like, the well being of the home purchaser and others is endangered, and injury is foreseeable. Thus, public interest dictates that strict liability apply to such defective improvements on real estate. 207 A. 2d at 326. The New Jersey courts have extended this concept to a builder whose sewage system spewed raw effluent onto the yard of a residence. Patitucci v. Drelich, 379 A. 2d 797 (N.J. Super. 1977). In O'Laughlin v. Minnesota Natural Gas Company, 253 N.W.2d 826 (Minn 1977), the court held that it was error not to instruct the jury on strict liability in a claim against a contractor who installed a floor furnace for use in a private residence, where the respondent was injured when she fell down while walking over the furnace grate and was severely burned.

AFTL agrees that strict liability under Section 402A does not apply to services. It is not, however, necessary for this court to decide whether construction of a roadway is more akin to a service than to a product, since it is undisputed that Chadbourne manufacturered the asphalt used in the roadway. In making its "services" argument at pages 11 and 12 of its brief, Chadbourne has not grappled with

this distinction so clearly noted by the District Court of Appeal. While architects, engineers and planners may deal in services, and thus be insulated from strict liability, the manufacturer of the product incorporated into real estate is not entitled to such protection. See, Del Mar Beach Club v. Imperial Contracting Company, 176 Cal. Rptr. 886 (Cal. App. 1981). Chadbourne's argument that walkways and roads are not products is inapposite, due to Chadbourne's undeniable status as the manufacturer of roadway materials.

This court need not hold that strict liability applies to real estate per se. AFTL does not perceive respondent as asking this court to do so. The question is simply whether the mere fact of incorporation into real estate totally insulates the manufacturer of the product from strict liability in tort. Chadbourne seems to have no problems with the hot water faucet in Schipper, supra, but somehow perceives a distinction in the case of a faulty fuse box as in Alvarez v. DeAguirre, 395 So. 2d 213 (Fla 3rd DCA 1981). The line Chadbourne invites this court to draw is waivering and indistinct at best. AFTL would urge this court not to deny access to the courts to those who are injured by defective products on the basis of an artificial and ill-defined distinction.

II. (Restated)

WALTON COUNTY'S ACCEPTANCE OF COUNTY ROAD 1087 DOES NOT BAR AN ACTION AGAINST THE MANUFACTURER OF DEFECTIVE PAVING MATERIALS USED IN THE ROAD, EVEN AFTER EVIDENCE OF THE DEFECT HAS BEEN DISCOVERED.

Acknowledging that our tradition of the common law is great and enduring, AFTL believes that this Court should be wary of a rule that is memorialized not by reason and logic, but simply by reference to the case which lent its name to the rule. The case under consideration here of course is Slavin v. Kay, 108 So. 2d 462 (Fla. 1959). While the rule of Slavin is generally cited as a limitation on liability, the very case said to have originated the rule in Florida upheld liability against the contractor. Justice Drew, the author of the Slavin opinion could find no compelling, or even valid reason for enforcing any so-called public policy against liability on the part of a contractor "further than to relieve him of liability on account of dangerous conditions which an owner or intermediate party could discovery and remedy." 108 So. at 467. In other words it is not simply discovery of a dangerous condition that insulates the contractor, it is fault of the discovering party in failing to remedy the situation. Chadbourne cites no cases in which the Slavin doctrine has been extended to the manufacturer of a defective product. AFTL would urge the

court not to extend the doctrine to cover the facts at bar. If the doctrine is somehow broad enough to cover the manufacturer of the defective product, then the doctrine should be discarded in view of developments over the last 25 years.

A. Slavin Should Not Extend To A Strict Liability Action Against A Manufacturer.

In looking at the basis of the rule of non-liability of contractors, the Slavin court extracted the following quotation from Casey v. Wrought Iron Bridge Company, 114 Mo. App. 47, 89 S.W. 330 (Mo. 1905):

> "By occupying and resuming possession of the work the owner deprives the contractor of all opportunities to rectify his wrong. Before accepting the work as being in full compliance with the contract, he is presumed to have made a reasonably careful inspection thereof, and to know of its defects, and if he takes it in defective condition, he accepts the defects and the negligence that caused them as his own, and thereafter stands forth as their author."
>
> 108 So. 2d at 466.

Given the emergence in Florida of strict liability in tort, the foregoing quotation loses all relevance. The Restatement clearly recognizes that liability may be imposed although the manufacturer exercised all possible care in preparing his product, and although the ultimate victim is far removed, in terms of privity, from the manufacturer.

The point critical to Chadbourne's argument is not the transfer of the road from contractor to owner. Rather, Chadbourne must focus on the distinction between patent and latent defect, arguing that in the present case the defect was not only patent, it was actually discovered by the owner. In response to this, the District Court of Appeal cited Auburn Machine Works Co., Inv. Jones, 366 So. 2d 1167 (Fla. 1979) for the proposition that a patent danger or defect does not automatically bar liability under Florida law. In Auburn Machine Works, supra, plaintiff was severely injured by a an unguarded trench digging device. This court noted that the trencher was "obviously dangerous". This court rejected the manufacturer's argument that since the danger was patent and obvious, it owned no legal duty to the injured plaintiff. Justice Alderman rejected this position as being inconsistent with the trend of this court's decisions including Hoffman v. Jones, 287 So. 2d 431 (Fla. 1973) (adopting the doctrine of comparative negligence), West v. Caterpillar Tractor Company, supra, (adopting strict liability), and Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977) (holding that the affirmative defense of implied assumption of the risk is merged into comparative negligence).

If an open and obvious hazard which is actually discovered by the victim himself will not bar recovery, it is very difficult to understand how a patent defect discoved

by a party other than the victim would operate to totally bar recovery. The innocent victim would then be at the mercy of a third party over which he has no control whatsoever. In this case, for instance, there is absolutely no evidence presented as to the diligence of Walton County in repairing dangerous conditions on its roadways. There is also no evidence that Walton County actually had time to put into motion whatever governmental mechanisms are required to undertake the repair itself or to contract out the repair to another firm. Query: What if the Vaughn accident had occurred 4 hours after the "inspection"? Would Chadbourne still argue for immunity?

Since patent danger or defect does not act to bar a strict liability action, Auburn Machine Works, supra, the patent defect of County Road 1087 does not bar recovery by respondent.

B. The Court Should recede From The Rule Of Slavin v. Kay.

Chadbourne characterizes the doctrine of Slavin v. Kay, supra as an intervening cause doctrine. This being the case, the court should examine the law of legal causation and intervening cause as it has developed since the decision in Slavin, supra.

A defendant's negligence or product defect need not be the only cause of injuries to the plaintiff. What is

required is an actual causal connection between the negligent act and the injury. The proper inquiry, as this Court has observed, is whether the defendant's negligence was "a" material contributing cause of plaintiff's damages. If this inquiry can be answered in the affirmative, the finder of fact may impose liability. Asgrow-Kilgore Company v. Mulford Hickerson Corp., 301 So. 2d 441 (Fla. 1974); Fla. Std. Jury Instr. (CIV.) 5.1(a).

Contrary to Chadbourne's assertions, the existence of an intervening cause does not, as a matter of law, break the chain of proximate causation. This is clearly recognized by the the Florida standard jury instruction approved by this Court:

> "In order to be regarded as a legal cause of loss, injury or damage, negligence need not be its only cause. Negligence may also be a legal cause of loss injury or damage even though it operates in combination with the act of another, some natural cause, or some other cause occurring after the negligence occurs if such other cause was itself reasonably foreseeable and the negligence contributes substantially to produce such loss, injury or damage, or the resulting loss, injury or damage was a reasonably foreseeable consequence of the negligence and the negligence contributes substantially to producing it.
>
> Fla. Std. Jury Instr. (CIV.) 5.1(c). (Emphasis supplied)

In Vining v. Avis Rent-A-Car Systems, Inc., 354 So. 2d 54 (Fla. 1977), the issue was whether the owner of a car may be liable for the conduct of a thief who steals the car and subsequently injures someone while negligently operating the

stolen vehicle. Clearly the act of theft is an intervening cause. The question, then, is whether such intervening cause operates to break the chain of legal causation. This Court in Vining, supra, held that if the theft is foreseeable, the owner's original negligence in leaving his keys in the ignition may be the proximate cause of the damages sustained. The court further held that the determination of foreseeability should rest with the jury, and should only be taken from the jury and decided as a matter of law in a case where reasonable men could not differ.

This court expanded upon its analysis of intervening cause in Gibson v. Avis Rent-A-Car Systems, Inc., 386 So. 2d 520 (Fla. 1980) and reaffirmed the holding of Vining, supra, that the question of whether an intervening cause is foreseeable is for the trier of fact. In Gibson, the plaintiff was forced to stop on a highway, because the intoxicated operator of the Avis car had negligently stopped, thus blocking traffic. As soon as plaintiff stopped his car, he was struck from behind by yet another vehicle. The question on appeal was whether the injured plaintiff had a cause of action against Avis and the intoxicated driver of its leased car. The trial court had directed a verdict in favor of Avis. This Court reversed, observing that one who is negligent is not absolved of liability when his conduct sets in motion a chain of events

resulting in injury to the plaintiff. If an intervening cause is foreseeable, the original negligent party may still be held liable. 386 So. 2d at 522.

In the present case Chadbourne has made an argument very much like the argument made by Avis in the Gibson case. Specifically, Chadbourne argues that its conduct has merely created a passive, static condition which only furnished the occasion for a third party's supervening negligence. Petitioner's Brief 15. The facts of this case, however, support an inference that Chadbourne's defective materials created a dangerous situation, i.e. the drop-off, which set in motion a chain of events resulting in Mrs. Vaughn's death.

Recent cases have analyzed proximate and intervening cause in terms of foreseeability, concluding that intervening cause does not break the chain of causation if the intervening cause is foreseeable, and whether the intervening cause is reasonably foreseeable depends on whether the harm that occurred is within the scope of danger or risk attributable to the original negligent act. Padgett v. West Florida Cooperative, Inc., 417 So. 2d 764 (Fla. 1st DCA 1982), and cases cited therein. Chadbourne has not argued that the Vaughn accident was not a foreseeable consequence of the drop-off in the roadway.

In light of the intervening cause cases discussed here, and the law of Florida as set out in the standard jury

instruction on intervening cause, the Slavin rule can survive only as an exception. This exception would allow the manufacturer of a defective paving or building material benefit of an exceedingly short statute of limitations. In allowing the manufacturer of a defective product to escape liability, the rule seems to run counter to a concern expressed by this Court in the Slavin opinion itself:

> "(To deny recovery) would result necessarily in the anomaly of fault without liability and wrong without a remedy, contrary not only to our sense of justice but directly conflicting with the express mandate of the Florida Constitution, Declaration of Rights, Section 4 FSA, that "every person for any injury done him...shall have remedy... "
>
> Slavin v. Kay, supra at 467.

Since Slavin v. Kay, supra, provides an immunity which totally denies recovery, notwithstanding the defendant's fault, it should be receded from, in favor of the more rational line of intervening cause opinions authored by this court.

CONCLUSION

AFTL urges the court to affirm the holding of the District Court of Appeal.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on Norton Bond, at 300 East Government Street, Pensacola, Florida 32501, Millard L. Fretland and Donald Partington at 714 South Palafox Street, Pensacola, Florida by hand delivery on this 1st day of July 1985.

CHARLES J. KAHN, JR.