OA 10-11.85

IN THE SUPREME COURT OF FLORIDA

EDWARD M. CHADBOURNE, INC.,

Petitioner/Defendant,

v.

DOCKET NO. 66,413

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

Respondent/Plaintiff,

PETITIONER'S RESPONSE TO THE AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS, Continued

OTHER AUTHORITIES

INTRODUCTORY STATEMENT

Due to the fact that the procedural background of this case and the facts underlying the plaintiff's cause of action have been presented to this court several times in previous briefs, the Petitioner will omit yet another review of these matters in this submission to the court. The issues presented to the court and set forth below are as originally framed in the Petitioner's initial brief.

I. COUNTY ROAD 1087 IS NOT A PRODUCT SUBJECT TO STRICT LIABILITY UNDER THE PRINCIPLES OF WEST v. CATERPILLAR TRACTOR COMPANY, INC., 336 So.2d 80 (Fla. 1976) AND SECTION 402(A) OF THE RESTATEMENT OF TORTS (SECOND).

Brief comment should be addressed to the argument of the AFTL that strict liability should apply to a road. The attempted analogy between Chadbourne and an aircraft manufacturer is not persuasive under the facts of this case or the arguments of Petitioner's brief. This is so not only because an aircraft has an "identity" separate and apart from real estate at the time control of the aircraft is turned over to the purchaser, See Boddie v. Litton Unit Handling Systems,

455 N.E. 2d 142, 148 (Ill. App. 1983), but also because an aircraft is a chattel and not a total incorporation into real estate. Real property and total incorporations therein are not products which fall within the ambit of Chapter 14 of the Restatement of Torts (Second) which contain Section 402(A). Abdul-Warith v. Arthur G. McKee & Company, 488 F.Supp. 306, 312 (E. D. Pa. 1980); See, Chapter 14 Restatement of Torts (Second) (titled "Liability of Persons Supplying Chatels ...").

The cases of Adobe Building Centers, Inc. v. L. D. Reynolds, 403 So. 2d 1033 (Fla. 4th DCA 1981) and Gable v. Silver, 258 So. 2d 11 (Fla. 4th DCA 1972), fail to support the AFTL's argument as well. Adobe Building Centers did not address the issue of whether or not strict liability applied to the adobe finishing material in question, and does not so hold. To the contrary, Adobe Building Centers, like all of the cases cited by the Respondent in his answer brief, deals only with issues other than the application of strict liability to the particular product. The arguments advanced by the defendant in Adobe Buildling Centers

were that strict liability did not apply to a "seller" of a product and was also not applicable because the plaintiff was not a consumer or user of the adobe material. 403 So. 2d at 1034.

The AFTL's reliance on Gable is inappropriate since it does not constitute the most recent holding on the applicablity of implied warranties to new residential homes. In Conklin v. Hurley, 428 So. 2d 654 (Fla. 1983), this court expressly adopted implied warranties of amenability or merchantability pertaining to the sale of new residences. In rejecting the plaintiff's claim that such a warranty should apply to a seawall under Gable, the court noted that these warranties were not to extend to sophisticated purchasers such as investors. 428 So. 2d at 659. Also, the implied warranties were strictly limited to the home itself. Id. at 658-59.

Importantly, Conklin noted that the policy reasons for imposing the implied warranties on new residences included the "chattel-like quality of such mass produced houses." Id. at 658. Furthermore, this court's holding in Conklin has recently been held not

to apply to roads. Port Sewall Harbor & Tennis Club Owners Association, Inc. v. First Federal Savings & Loan Association of Martin County, 463 So. 2d 530, 531 (Fla. 4th DCA 1985).

Consequently, the authorities cited by the AFTL do not support the extension of strict liability to a road which is totally incorporated into real estate.

II. THE CHARACTERIZATION OF CHADBOURNE AS A "MANUFACTURER" AND THE ATTACHMENT OF STRICT LIABILITY PRINCIPLES DOES NOT JUSTIFY A FAILURE TO APPLY THE INTERVENING CAUSE DOCTRINE OF SLAVIN V. KAY WHEN THE UNCONTROVERTED FACTS SHOW THAT THE OWNER OF REAL PROPERTY INTO WHICH THE "MANUFACTURER'S" WORK HAS BEEN INCORPORATED HAD, AFTER ACCEPTANCE, ACTUAL KNOWLEDGE OF A DEFECT IN THE WORK AND FAILED TO TAKE ANY CORRECTIVE ACTION PRIOR TO THE PLAINTIFF'S INJURY.

The AFTL incorrectly argues that Petitioner has cited no case where the doctrine of Slavin v. Kay, 108 So. 2d 462 (Fla. 1959) has been applied to the manufacturer of a defective product. Slavin has been applied to a factual situation virtually identical to that of the present case in Echols v. Hammet Company, Inc., 423 So. 2d 923 (Fla. 4th DCA 1982). To reiterate from the Petitioner's initial brief, the Echols court

stated that the defendant contractor would be entitled to summary judgment under Slavin if

> ... [t]here was no evidence that the condition of the road caused (or contributed to) the accident or, in the alternative, that whatever defect in the road caused the accident was a patent (rather than a latent) condition thereby placing the duty and thus the burden of observing and remedying that condition on the Department of Transportation.

423 So. 2d at 924 (Emphasis added).

Petitioner's initial brief sets forth numerous cases where the concept of intervening cause has been applied to strict liability cases.

The complete inapplicability of the case of Auburn Machine Works v. Jones, 366 So. 2d 1167 (Fla. 1979) has been discussed in the Petitioner's reply brief, and therefore will not be reiterated here.

Finally, the AFTL's argument that this court should recede from Slavin based upon the cases of Vining v. Avis Rent-A-Car Systems, Inc., 354 So. 2d 54 (Fla. 1977) and Gibson v. Avis Rent-A-Car Systems, Inc. 386 So. 2d 520 (Fla. 1980) is untenable since the holdings in Vining and Gibson are perfectly consistent with that of Slavin on the issue of intervening cause.

Vining and Gibson hold merely that the alleged intervening act must be scrutinized in order to determine whether or not it was reasonably foreseeable to the defendant that the intervening act could be produced by the original act of negligence. Gibson, 386 So. 2d at 522; Vining, 354 So. 2d at 55-56.

In Vining the alleged intervening act was the criminal theft of the car in question after its owner had left it unlocked with the keys in the ignition. 354 So. 2d at 55. This court held that a reasonable man could conclude that the defendant could foresee that its original negligence in leaving the keys in the ignition might produce the alleged intervening cause, i.e., the subsequent theft, and that such a theft would lead to an increased risk of harm to other persons on the highways of Florida. Id. at 55-56.

In Gibson, the alleged intervening act was negligence on the part of a following automobile driver in rear-ending the plaintiff's vehicle after the plaintiff had stopped in response to a second defendant's placing of his car in the middle of the road for no apparent reason. Gibson, 386 So. 2d at 522. This court held

that reasonable men could conclude that collisions by following drivers were a reasonably foreseeable product of the original negligence, i.e.: the stopping of the other defendant's car in the center of the road. Id. at 522-523. Consequently, Vining and Gibson do nothing more than set forth the parameters of the traditional requirement that an intervening cause be "independent" of the original negligence. See, Cone v. Intercounty Telephone & Telegraph Co., 40 So. 2d 148, 149 (Fla. 1949) (in order to break chain of proximate causation, intervening cause must be independent).

The doctrine of Slavin v. Kay as applied to the facts of the present case is perfectly consistent with Vining and Gibson. Here, the intervening act is the complete dereliction by Walton County of its duty to render property under its control safe for persons lawfully using that property after both constructive and actual notice of the erosion of County Road 1087. No reasonable man could find on the record before this court that Walton County's failure to take any step to remedy the erosion problem or warn travelers of it could be foreseeable to Chadbourne, especially since

Walton County is a sophisticated purhcaser of roads, has its own road maintenance department, and expressly accepted responsiblity for maintenance and supervision of this road almost four years prior to the Respondent's accident.

Certainly, no argument can be made that Walton County's failure to take even the most rudimentary action to fulfill its duty to protect travelers was produced by Chadbourne's construction of that road to begin with. As stated by this court, the term "reasonably foreseeable" does not encompass the far reaches of the pessimistic imagination. Rawls v. Ziegler, 107 So.2d 601, 607 (Fla. 1958).

Rawls is strong support for the position on intervening cause advocated by the Petitioner in this case. This is so because Rawls cites with approval the case of Stultz v. Benson Lumber Co., 59 P. 2d 100, 103 (Cal. 1936). In Stultz suit was brought against the supplier of an allegedly defective plank. The plank was used by a third party to construct a scaffold after the third party had express knowledge of the defect in the plank. The supplier was held not liable to a painter who was

injured when the scaffold collapsed. This court cited with approval this quote from Stultz:

> There is nothing stated in the text last cited [Restatement of Torts Section 388 et seq.], nor in the other authorities or decided cases which under the facts here alleged would justify the imposition upon the defendant lumber company of the burden of anticipating that [the third party] would be negligent. That is, that those defendants, at least after they knew of the faulty nature of the plank, would nevertheless use such a plank as the main support in the construction of the scaffolding.

107 So. 2d at 607.

Although the opinion in Rawls was written eighteen years before this court's decision in West, Justice Roberts cited with approval several authorities on products liability and applied these principles to the product in question in that case. Id. at 606. As in Vining, Rawls scrutinized the alleged intervening negligence of the scaffold builder under the standard of whether the likelihood of that conduct was one of the foreseeable hazards that made the defendant's original actions negligent. Id. The Rawls court held that the knowing use of a defective plank by the third party in the scaffold furnished to the plaintiff was only remotely foreseeable and thus an intervening cause. Id. at 606-607.

As in Rawls, it could not be foreseeable to Chadbourne that, particularly after express notice of the erosion problem in Road 1087, Walton County would then continue to allow travellers such as the Respondent to utilize the road without even a warning sign for their protection. The likelihood of Walton County's negligence in this regard cannot by any stretch of the imagination be said to be one of the hazards that allegedly makes Chadbourne's construction of the road four years before the accident negligent. Id. at 606.

Therefore, there is no need to recede from Slavin v. Kay and even the application of general intervening cause principles as stated in Gibson and Vining require reversal of the opinion of the Court of Appeal. For these reasons, the decision of the Court of Appeal should be reversed and the trial court's summary judgment in favor of the Petitioner, reinstated.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was furnished to Norton Bond, Esquire of 300 East Government Street, Pensacola, Florida 32501, Attorney for Respondent/Plaintiff, and Charles J. Kahn, Jr., Esquire of 226 South Palafox Street, Pensacola, Florida 32501, Attorney for The Association of Florida Trial Lawyers, by United States mail, postage prepaid this 26th day of July, 1985.

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