IN THE SUPREME COURT OF FLORIDA

DOCKET NO. 66,413

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.

AMICUS CURIAE BRIEF OF THE FLORIDA TRANSPORTATION BUILDERS ASSOCIATION, INC. SUPPORTING THE POSITION OF THE PETITIONER

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INTRODUCTION

The Florida Transportation Builders Association, Inc., appearing as amicus curiae in support of the petitioner's position by stipulation of the parties to this action, will be referred to in this brief as "Builders". The petitioner, Edward M. Chadbourne, Inc., will be designated as "Chadbourne". The respondent, Algie F. Vaughn, will be referred to as "Vaughn". The Academy of Florida Trial Lawyers, appearing as amicus curiae in support of Vaughn's position, will be known as "the AFTL".

STATEMENT OF CASE AND FACTS

Builders adopts as its own the Statement of the Case and Facts asserted by Chadbourne in Petitioner's Initial Brief.

ISSUES PRESENTED FOR REVIEW

I. (RESTATED) WHETHER THE STRICT LIABILITY PRINCIPLES, AS ADOPTED IN WEST V. CATERPILLAR TRACTOR COMPANY, INC., 336 SO.2D 80 (FLA. 1976), APPLY TO THE CASE AT BAR.

II. (RESTATED) WHETHER WALTON COUNTY'S ACCEPTANCE OF COUNTY ROAD 1087 AND ITS DISCOVERY OF THE ALLEGED DEFECT IN THE HIGHWAY PRIOR TO THE ACCIDENT ABSOLVES THE CONTRACTOR-MANUFACTURER FROM LIABILITY.

SUMMARY OF ARGUMENT

The lower court erred in expanding the principle of strict liability to the situation that was present in this case. Strict liability, as adopted by West v. Caterpillar Tractor Company, Inc., 336 So.2d 80 (Fla. 1976), does not apply to products which undergo subsequent inspections by a disinterested party for the type of defect which might cause an injury. The lower court also erroneously determined that strict liability applied to items which are incorporated into real estate.

The trial court properly granted summary judgment on Chadbourne's behalf. A plaintiff must prove that the defect in a product proximately caused his injuries in order to recover under a strict liability theory. A third party's negligent maintenance of the product can break the chain of proximate causation, as a matter of law, and absolve the manufacturer from liability. Additionally, a patent construction defect of which an owner is aware, but does not remedy, relieves the contractor from further liability.

ARGUMENT I

THE PRINCIPLES OF STRICT LIABILITY, AS ADOPTED IN FLORIDA BY WEST V. CATERPILLAR TRACTOR COMPANY, INC., 336 So.2d 80 (Fla. 1976), DO NOT APPLY TO THE CASE AT BAR.

The decision of this Court in West v. Caterpillar Tractor Company, Inc., 336 So.2d 80 (Fla. 1976) is properly acknowledged as expanding strict liability in tort to manufacturers of defective products. The Court recognized that the strict liability remedy enhanced public policy in forcing the costs of consumers' injuries or damages to be borne by the companies which placed the defective products into the stream of commerce. Id. at 92. The Court in West acknowledged, however, that a manufacturer is not expected to be an insurer for all injuries caused by its products.

> We therefore hold that a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.

Id. at 92 (emphasis added).

The above analysis of West reveals that strict liability should not be expanded to the situation which is present in the case at bar. In this case, the asphalt mix underwent extensive testing by a governmental body before the mix was allowed to be incorporated into real property. Additionally, the highway was inspected by the county before it accepted the road. Finally, the highway was periodically inspected by the owner of the road

after it had been accepted. Therefore, no serious contention can be made that the asphalt was manufactured and placed on the market, "knowing that it was to be used without inspection for defects," as required by West.

The unequivocal language of West reveals that a manufacturer can be strictly liable only when it places a product in the stream of commerce knowing that the item will not be inspected. This is consistent with the public policy of protecting unsuspecting consumers from today's marketing environment, where mass-produced products are rapidly taken off the production lines, immediately packaged by machines, and rushed off for ultimate consumption. Despite the straightforward and clear language in West, the district court in Hardin v. Montgomery Elevator Company, 435 So.2d 331 (Fla. 1st DCA 1983) nonetheless determined that a manufacturer could be held liable even when the product was to undergo inspections by a third party. The district court's decision, however, was contrary to the explicit holding of West. Any attempt by the appellees to rely on Hardin, therefore, must be viewed with skepticism since the district court in that case refused to apply the express, unequivocal holding of West.

Even the Hardin court realized that a manufacturer might be free from liability if the product is to be inspected for the precise type of defect which caused the harm. As the court stated, a manufacturer's liability attaches "...if the product is not to be inspected for the particular type of defect, or if the particular component of the product is not to be inspected. The

merchandiser's liability exists, even though some inspection of some part of the chattel is expected and is, in fact, made." Hardin, 435 So.2d at 335 (emphasis in original). Additionally, the Hardin Court adopted the analysis of Haragan v. Union Oil Co., 312 F.Supp. 1392 (D. Alaska 1970), wherein "(t)he Court must therefore conclude that 'without inspection for defects' means without that type of inspection which would reasonably be expected to uncover the sort of hidden defects that cause accidents." Id. at 336. Therefore, even applying the Hardin decision, the undisputed facts in this case support the release of liability for Chadbourne, since a disinterested third party thoroughly examined and tested the asphalt mix and subsequently examined the incorporated "product" for evidence of the precise "defect" which allegedly caused the accident.

Florida courts have rarely addressed the issue of whether strict liability principles apply to items which are incorporated into real estate. The only Florida court to have expressly addressed this issue definitively refused to apply strict liability to structural improvements to real estate. Neumann v. Davis Water and Waste, Inc., 433 So.2d 559 (Fla. 2d DCA 1983). (The assembler of a sewage treatment tank was not strictly liable for the death of a child who fell into the tank.)

The lower court in Vaughn v. Edward M. Chadbourne, Inc., 462 So.2d 512 (Fla. 1st DCA 1985) attempted to distinguish Neumann by noting that the defendant was an installer or assembler, not a manufacturer and contractor, like Chadbourne. This dubious distinction must fail for two reasons. First,

nowhere in the Neumann decision does the court even hint that its refusal to apply strict liability hinges on a "manufacturer versus installer" distinction. Secondly, the lower court's attempted distinction overlooks the basic fact that parties other than a manufacturer can be liable in a suit based on strict liability in tort when the remedy is available. Indeed, an installer or assembler, as well as other "middlemen", can be strictly liable in Florida for defective products. Cunningham v. Lynch - Davidson Motors, Inc., 425 So.2d 131 (Fla. 1st DCA 1982). The fact that the assembler in Neumann escaped strict liability, therefore, can not be explained on the grounds that no manufacturer was involved. Instead, the court obviously meant precisely what it said when it refused "...to extend the strict liability principle of West v. Caterpillar Tractor Company, Inc., 336 So.2d 80 (Fla. 1976), to structural improvements to real estate." Neumann, 433 So.2d at 561. See also Alvarez v. DeAguirre, 395 So.2d 213 (Fla. 3d DCA 1981) (general contractor could not be held strictly liable for alleged construction defects in a residence).

The lower court cited only three Florida cases in support of its decision. Vaughn, 462 So.2d at 514, 515. The inapplicability of Hardin v. Montgomery Elevator Co, 435 So.2d 331 (Fla. 1st DCA 1983) has already been discussed. The court also relied upon Halpryn v. Highland Insurance Company, 426 So.2d 1050 (Fla. 3d DCA 1983) and Gory Associated Industries, Inc. v. Jupiter Roofing & Sheet Metal, Inc., 358 So.2d 93 (Fla. 4th DCA 1978). Even the lower court admitted, however, that neither of

these cases offered a direct holding upon which the court could rely. Instead, the court held that these decisions gave implicit authority to hold the manufacturer of a material incorporated into real property strictly liable. It is obvious that in the Halpryn and Gory cases, the issue of whether strict liability applied to the facts in question was never even discussed by the respective courts.

In its brief, the AFTL argues that strict liability should be expanded to cover the facts in this case. The AFTL notes that Florida extends implied warranties of fitness and merchantability against the builder-seller of a new residence. However, Florida courts have been unwilling to expand implied warranties to other types of real estate. This Court, in Conklin v. Hurley, 428 So.2d 654 (Fla. 1983) refused to expand the implied warranties of fitness and merchantability to situations not involving the sale of a new residence. At issue in Conklin was whether implied warranties applied to a defectively constructed seawall abutting unimproved real estate. In ruling against the landowners, the Court determined that the policy reasons for protecting consumers of a new residence relying on the expertise of the builder-seller were not present in a setting where the land itself was the main element of the sale.

The AFTL cites authority that warranty cases are important precedents in resolving strict liability issues. Brief of the AFTL at 10. If the AFTL is indeed correct on this point, then this Court's attention must be drawn to The Port Sewall Harbor and Tennis Club Owners Association, Inc. v. First Federal

Savings and Loan Association of Martin County, 463 So.2d 530 (Fla. 4th DCA 1985), where the court refused to extend implied warranties of fitness or merchantability to allegedly defective roads and drainage in a subdivision. Thus, if implied warranty cases are important for strict liability principles, as the AFTL suggests, then the Port Sewall decision reveals that strict liability definitely does not attach to a road in Florida.

ARGUMENT II (Restated)

WALTON COUNTY'S ACCEPTANCE OF COUNTY ROAD 1087 AND ITS DISCOVERY OF THE ALLEGED DEFECT IN THE HIGHWAY PRIOR TO THE ACCIDENT ABSOLVES THE CONTRACTOR-MANUFACTURER FROM LIABILITY.

In determining whether Chadbourne can be held liable for the injuries suffered by Vaughn, once again it is necessary to examine the decision of West v. Caterpillar Tractor Company, Inc., 336 So.2d 80 (Fla. 1976). In adopting strict liability in tort against manufacturers of defective products, this Court abandoned certain elements that were necessary to prove liability up to that time. Proof of the manufacturer's negligence, implied warranties, or privity requirements were no longer required. However, the Court expressly concluded that proximate causation, as required in all negligence actions, must be proven in a suit based on strict liability.

> In order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish the manufacturer's relationship to the product in question, the

> defect and unreasonably dangerous condition of the product, and the existence of the proximate causal connection between such condition and the user's injuries or damages.

Id. at 87 (emphasis added). In order to hold Chadbourne liable, therefore, any alleged defect in the asphalt at the time it was manufactured must be the proximate cause of Vaughn's injuries. See Watson v. Lucerne Machinery and Equipment, Inc., 347 So.2d 459 (Fla. 2d DCA 1977).

Florida courts have been quick to hold that the intervening negligent acts of a third party, even when this party is the consumer, can break the chain of proximate causation and thereby relieve a manufacturer from liability. In Clement v. Rousselle Corporation, 372 So.2d 1156 (Fla. 1st DCA 1979) a plaintiff-employee sued the manufacturer of a punch press machine for injuries sustained while operating it. The employee alleged, in a suit based partly on strict liability, that the machine was defective because it was sold without a guard device. The manufacturer countered with evidence that it was the duty of the plaintiff's employer to install the guard because of industry regulations adopted after the sale of the machine. The manufacturer prevailed at trial, and this judgment was affirmed on appeal as the court determined that the manufacturer's sale of the machine without the guard was not the proximate cause of the injury. The intervening industry regulations placed the duty of equipping the machines with guard devices on the employer. Therefore, the negligent conduct of the employer, who was not

even a party to the proceedings, severed the manufacturer from all liability.

In accordance with the above decision is Jiminez v. Gulf & Western Manufacturing Company, 458 So.2d 58 (Fla. 3d DCA 1984). The court concluded once again that a third party's negligence can break a manufacturer's chain of causation in a suit based on strict liability in tort. At issue in Jiminez was whether the manufacturer was liable for injuries sustained by an operator of a machine which lacked a guard device. Evidence was presented at the trial revealing that it was industry-wide practice to place the responsibility on the employer for placing a guard on machines of this type. The employer was aware of the need for a guard device for the machine. Despite this awareness, the employer just "had not gotten around to doing it (placing the guard on the machine)". Id. at 60. On the basis of this evidence, the manufacturer's chain of causation was broken.

The Clement and Jiminez decisions lead to the inescapable conclusion that a party charged with the responsibility of maintenance and keeping a product safe can relieve the manufacturer from liability. In the case at bar, the uncontroverted facts reveal that the road had been turned over to and accepted by the county. It has long been the law in this state that the responsibility for the maintenance of a highway is on the county, once it has accepted the highway. Melville v. Miami Shores, 155 So.2d 739 (Fla. 3d DCA 1963). Furthermore, the acceptance of a road by the county relieves other parties from liability. Schonfield v. City of Coral Gables, 174 So.2d 453 (Fla. 3d DCA 1965).

> It would appear that where the county has by resolution assumed responsibility for the maintenance of a street within the municipal limits of a city, and has in fact maintained that street, and when the city has been relieved of its duty of maintenance by such a resolution, the sole responsibility for the proper maintenance of the street was that of the county and not of the city.

Id. at 455.

In the case at hand, it is undisputed that the county had actual knowledge of the wearing or erosion on the roadway. In complete dereliction of its responsibility, the county took no steps in repairing the worn areas in the road. The Clement and Jiminez decisions support a determination that the failure of the county to perform its duties, after actual notice of the problem, was the proximate cause of any injuries later incurred by Vaughn.

In Florida, "(t)he question of proximate cause is one for the court where there is an active and efficient intervening cause". Kwoka v. Campbell, 296 So.2d 629, 631 (Fla. 3d DCA 1974). A court, on a motion for summary judgment, can determine that improper maintenance of a product can absolve a manufacturer from a suit founded on strict liability. Perez v. National Presto Industries, Inc., 431 So.2d 667 (Fla. 3d DCA 1983). Additionally, it is clear that summary judgment is a proper remedy in determining that a party's negligent acts insulate the manufacturer from strict liability. See Kroon v. Beech Aircraft Corporation, 628 F.2d 891 (5th Cir. 1980) (the court, applying Florida law, granted summary judgment when the plaintiff's own negligence was the proximate cause of the injury); Watson v. Lucerne Machinery and Equipment, Inc.. 347 So.2d 459 (Fla. 2d DCA

1977) (summary judgment granted to a manufacturer when an employee's negligent conduct proximately caused his injuries); Savage v. Jacobsen Manufacturing Company, 396 So.2d 731 (Fla. 2d DCA 1981) (summary judgment granted to a manufacturer when an employer was on notice that a product needed repairs).

The foregoing analysis reveals that courts are unwilling to penalize the manufacturer of a product when a party acts negligently to break the chain of proximate causation. This principle has been uniformly applied to absolve a contractor from liability for another party's negligence. In Slavin v. Kay, 108 So.2d 462 (Fla. 1958), this Court determined that a contractor would be relieved from further liability when the owner of the premises had knowledge of a patent defect and did not remedy the defect.

> The Slavin court ...held that if the defect were patent or if the owner learned of it and did not rectify the condition then the owner's negligence is the proximate cause of the injury rendering the owner liable and exonerating the contractor.

El Shorafa v. Ruprecht, 345 So.2d 763, 764 (Fla. 4th DCA 1977)(emphasis added).

The principles espoused in Slavin recently have been applied in situations substantially similar to the issue at hand. In Echols v. The Hammet Company, Inc., 423 So.2d 923 (Fla. 4th DCA 1982), the plaintiff sued Hammet, the contractor, for defects arising from the construction of a highway.

> Under the Slavin test Hammet could prevail as a matter of law only if there 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 D.O.T.

Id. at 924 (parenthesis in original).

The Echols court went on, however, to reverse a directed verdict on Hammet's behalf only because of conflicting and imprecise evidence. In the issue at hand, there is no dispute as to the relevant, material facts. It is uncontested that any wearing in the road was patent and that the county was on actual notice of the alleged defects prior to the accident. Vaughn, 462 So.2d at 515. The decision in Echols, therefore, demands that the burden of remedying the patent condition be placed on the county and that Chadbourne must be released from any liability, as a matter of law.

The court in Gross v. Asphalt Material & Paving Co., Inc., 382 So.2d 854 (Fla. 3d DCA 1980) clearly recognized that a road contractor's liability for obvious defects ends once the road has been completed, turned over to, and accepted by the owner of the road. In short, the contractor's liability ends where the owner's liability begins. Id. at 855.

Summary judgment in favor of the contractor was improper in Gross because there was a dispute as to whether the road had been formally accepted by the Department of Transportation. Obviously, this is not an issue in the case at hand, since it is undisputed that the county received the road nearly two years prior to Vaughn's accident. The uncontested facts of this case, revealing that the county was aware of defects in the pavement of

the road after it had accepted the highway, yet took no steps to repair them, warrant a reinstatement of the trial court's summary judgment for Chadbourne. The holdings in Slavin, Echols, and Gross require such a decision.

The AFTL, Vaughn, and the lower court attempt to distinguish Slavin on the basis that it applied only to a contractor, and Chadbourne in this case is both a manufacturer and contractor. This distinction is tenuous and illogical, at best. As previously indicated, the rationale behind the Slavin decision is that a contractor's action is no longer the proximate cause of an injury occurring after the owner has become aware of a defect, yet does nothing to remedy the situation. "Upon learning of the defect, it is the owner's negligence which is the proximate cause of the injury..." Alvarez v. DeAguirre, 395 So.2d 213, 215 (Fla. 3d DCA 1981). The holding in Slavin is entirely consistent and compatible with the many cases cited herein where a manufacturer in a strict liability suit was absolved from liability because of the negligence of a third party charged with the responsibility of maintenance and repairs. See Jiminez v. Gulf & Western Manufacturing Company, 458 So.2d 58 (Fla. 3d DCA 1984); Savage v. Jacobsen Manufacturing Company, 396 So.2d 731 (Fla. 2d DCA 1981); Clement v. Rousselle Corporation, 372 So.2d 1156 (Fla. 1st DCA 1979).

The district court also concluded that Auburn Machine Works Co., Inc. v. Jones, 366 So.2d 1167 (Fla. 1979) defeated Chadbourne's summary judgment at the trial court. Vaughn, 462 So.2d at 515. The facts in Auburn Machine Works make that case

impertinent to the issue at hand. In Auburn Machine Works, the manufacturer attempted to avoid liability by completely shifting the responsibility of inspecting for manufacturing defects to an injured plaintiff. The Court determined that a plaintiff's lack of care or inspection of a product could be a factor in determining comparative negligence rather than acting as a complete bar to recovery. In the issue at hand, however, the comparative negligence or knowledge of the plaintiff is simply not relevant. Instead, this case deals with the knowledge of a defect by a party charged with the legal duty of maintaining county roads. Instead of remedying a defect of which it was actually aware, the county did absolutely nothing. This gross negligence is precisely like the situations existing in Savage, Jiminez, and Clement, which were decided after Auburn Machine Works, where the negligent acts of those charged with maintenance broke the manufacturer's chain of proximate causation.

CONCLUSION

The trial court was correct in entering summary judgment in favor of Chadbourne. This judgment should be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by United States Mail to Norton Bond, 300 East Government Street, Pensacola, Florida 32501; to Millard L. Fretland and Donald Partington, 714 South Palafox Street, Post Office Drawer 12585, Pensacola, Florida 32573; and to Charles J. Kahn, Jr., 226 Palafox Street, Pensacola, Florida 32501, this 29th day of August, 1985.

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