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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 INITIAL BRIEF

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INTRODUCTION

The parties will be referred to herein by name as they stood in the trial court. The symbol "R.__" will be used to denote citations to the record as indexed for the Court of Appeal. The symbol "A.__" will be used to denote citations to the appendix to this brief. All emphasis and bracketed matter in quotations cited herein has been added unless otherwise noted.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

In October or November, 1978, the defendant, Chadbourne, paved County Road 1087 in Walton County, Florida, pursuant to contract with the Florida Department of Transportation. (R.245.) Chadbourne applied the specified sand/asphalt mix to that portion of Road 1087 in question sometime during the week of October 5, 1978. (R.249.) The Florida Department of Transportation tested the asphalt mix applied by Chadbourne both at the plant and at the job site. After the paving work met all State tests and specifications, the State returned the road to Walton County for maintenance on April 24, 1979. (R.271-272.) Core samples of the asphalt taken after the accident in

question also revealed that the paved surface was within the specifications of the State Highway Department. (R.280, 282-83.)

After County Road 1087 was returned to Walton County, Chadbourne was not responsible for inspection or maintenance. Chadbourne had no further responsibility for the road after this date, and was not called upon at any time to return to the road to make repairs, or for any reason. (R.260-262, 279.)

Late in 1980, a Walton County Commissioner, on official business, inspected the section of Road 1087 (a curve in the road) where plaintiff's accident would later occur. (R.92, 94-97.) The Commissioner noticed that a drop-off on the pavement due to erosion of the southbound lane had developed, the County Engineering Consultant was notified; but Walton County did nothing to remedy the condition of the roadway. (R.91-92.)

In January of 1981, over two years from the date Chadbourne surrendered possession of the roadway, the plaintiffs, going around the curve, were involved in a one-car accident allegedly caused by the drop-off in the center of Road 1087. The instant suit was filed on

the theories of negligence, warranty and strict liability. The trial court granted a summary judgment in the defendant's favor. (R.291.) The facts set out above were found to be uncontroverted by both the trial court and the First District Court of Appeal. (A.4.)

The First District Court of Appeal reversed the trial court's summary judgment in favor of Chadbourne, holding that the strict liability principles enunciated in Section 402(A) of the Restatement of Torts (Second) applied fully to structural improvements to real property. (A.4) Furthermore, the Court of Appeal, by characterizing Chadbourne as a "manufacturer" as well as a "contractor" and "builder," held that the intervening cause principle applied by this court in the case of Slavin v. Kay, 108 So.2d 462 (Fla. 1959), and its progeny did not operate to sever the chain of proximate causation stemming from a subsequently discovered defect which was latent if present in the road's surface at the time Chadbourne relinquished control of the construction project to Walton County, some two years prior to the plaintiff's accident. (A.5.)

This court granted Chadbourne's petition for review on May 17, 1985.

ISSUES PRESENTED FOR REVIEW

1. WHETHER COUNTY ROAD 1087 IS A PRODUCT SUBJECT TO THE STRICT LIABILITY PRINCIPLES ADOPTED BY THIS COURT IN WEST v. CATERPILLAR TRACTOR COMPANY, INC., 336 So.2d 80 (Fla. 1976)?

2. WHETHER THE COURT OF APPEAL'S CHARACTERIZATION OF CHADBOURNE AS A "MANUFACTURER" RATHER THAN AS A "BUILDER" JUSTIFIES DISREGARD OF THE INTERVENING CAUSE DOCTRINE OF SLAVIN v. KAY, 108 So.2d 462 (Fla. 1959) AND ITS PROGENY WHEN THE UNCONTROVERTED FACTS ESTABLISH THAT THE OWNER OF REAL PROPERTY INTO WHICH THE "MANUFACTURERS" WORK HAS BEEN INCORPORATED HAD EXPRESS KNOWLEDGE OF A DEFECT IN THE WORK WHICH BECAME PATENT AFTER ACCEPTANCE, AND WHO THEN FAILED TO TAKE ANY CORRECTIVE ACTION PRIOR TO THE PLAINTIFF'S INJURY?

SUMMARY OF ARGUMENT

The facts of this case are uncontroverted. Chadbourne built a road in compliance with all State specifications and relinquished control of that road to Walton County some two years prior to the plaintiff's accident. After acceptance, Walton County gained express knowledge of a drop-off which had become observable in two years of use, and failed to act in

any manner to correct the defect to protect persons, such as the plaintiff, lawfully using the road.

The District Court expanded the concept of strict liability beyond all reasonable parameters by applying that doctrine to a road that was built in strict compliance with State specifications, and which constituted an almost total incorporation into real property. A road cannot by any stretch of the imagination be equated with the mass-produced, mass distributed chattels to which strict liability was meant to apply.

Furthermore, strict liability has never applied to services, and the building of a road for one purchaser in compliance with precise specifications cannot be anything but the furnishing of a service, as has been recognized by several courts.

Finally, strict liability cannot apply to a product which the manufacturer knows is subject to precise inspections for the exact sort of defect allegedly causing the harm in question. The tests for compaction, temperature and surface smoothness performed by the Department of Transportation were an attempt to discover exactly the sort of flaws allegedly

causing the drop-off in question. The District Court erred in applying strict products liability to the road in question.

Even if strict liability in tort somehow attaches to County Road 1087, no recovery can be had if the chain of proximate cause stemming from a defect in the road is broken by an intervening cause. Equally well settled is the duty of a land owner to render known defects on his property safe for third parties.

Walton County was negligent in failing to correct the drop-off in Road 1087 despite express knowledge of that condition prior to the plaintiff's accident. That such negligence constitutes an intervening cause was uncontroverted under Florida law until the District Court's opinion below to the contrary.

In refusing to apply the doctrine of Slavin v. Kay which admittedly would absolve Chadbourne from liability in this case, the Court of Appeal thus disregarded fundamental rules of both premises liability and proximate cause.

Furthermore, in creating a questionable distinction between Slavin and the present case based upon

the defendant's characterization as a "manufacturer" and consequent subjection to strict liabililty, the District Court held, in effect, that a plaintiff relying on a negligence or warranty theory must show proximate cause, while a plaintiff bringing a strict liability claim need not. The District Court of Appeal's purported distinction creates an anomaly unsupported by Florida law and should be rejected.

ARGUMENT

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).

The District Court of Appeal disregarded the policy considerations underlying strict liability in concluding that County Road 1087 was a "product" subject to that doctrine. See Boddie v. Litton Unit Handling Systems, 455 N.E. 2d 142, 147 (Ill. App. Ct. 1983) (in deciding whether or not an item is subject to strict liability, underlying policies must be considered). Primary among these considerations is the unique ability of a manufacturer selling mass-

distributed products to the public at large to spread the risk of injuries caused by those products over the cost of many sales. Id.; West v. Caterpillar Tractor Company, Inc., 336 So.2d 80, 85, 88 (Fla. 1976); Held v. 7-Eleven Food Store, 438 N.Y. Supp.2d 976, 978 (S.Ct. 1981); Restatement of Torts (Second), Section 402(A) (Comment c). See Green v. American Tobacco Company, 154 So.2d 169 (Fla. 1963) (applying absolute liability to manufacturer of a commodity which was available indiscriminately to the public generally).

Real property is not a product mass produced and distributed to the general public. Consequently, real property (as opposed to a chattel) is properly beyond the purview of Section 402(A) by the very terms of Chapter 14 of the Restatement, which includes that section. Abdul-Warith v. Arthur G. McKee & Co., 488 F.Supp. 306, 312 (E.D. Pa. 1980); see Chapter 14, Restatement of Torts (Second) (titled "Liability of Persons Supplying Chattels ...").

Logically then, when an item is sufficiently incorporated into real property so as to become part and parcel of the realty itself, strict liability

should not apply.[1/] See Neumann v. Davis Water & Waste, Inc., 433 So.2d 559, 561 (Fla. 2 DCA 1983) (declining to extend the strict liability principle of West to structural improvements to real estate in the form of a sewage treatment tank); Walker v. Shell Chemical, Inc., 428 N.E.2d 943, 946 (Ill. App. Ct. 1981) (if construction guardrail actually a component

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1/ One court has set out an interesting test to determine whether or not an item is sufficiently identified with realty so as to be exempt from strict liability. In Boddie v. Litton Unit Handling Systems, 455 N.E.2d 142 (Ill. App. 1983), the court held that a series of conveyors in a post office building were subject to strict liability. Noting that strict liability did not extend to cover buildings and other structural improvements to realty per se, the Boddie court stated that the doctrine could apply to an item associated with a building if the item had not become an indivisible part of the structural improvement. 455 N.E.2d at 148. Boddie went on to hold that:

> [prior precedent] imposes a limitation on the application of strict liability only with regard to those items which are an indivisible part of the building structure itself, such as the bricks, supporting beams and railings. Such items are significantly different than a conveyor system housed in a building since they do not have an indivisible identity prior to installation but are rather indivisible component parts of the building itself.

and indivisible part of entire building structure, it would not be subject to strict liability); Immergluck v. Ridgeview House, Inc., 368 N.E.2d 803, 806 (Ill. App. Ct. 1977) (building housing sheltered care facility not a "product" subject to strict liability); Lowrie v. City of Evanston, 365 N.E. 2d 923, 930 (Ill. App. Ct. 1977), (multi-level parking garage not a "product" subject to strict liability); Cox v. Shaffer, 302 At.2d 456, 457 (Pa. Super. Ct. 1973) (grain silo not a "product" subject to strict liability). Compare Schipper v. Levitt & Sons, Inc., 207 A.2d 314 (N.J. 1965) (applying strict liability to the manufacturer of a prefabricated home containing a defective product installed therein) with Alvarez v. DeAguirre, 395 So.2d 213, 216 (Fla. 3d DCA 1981) (no cause of action in strict liability will lie against builder of home containing allegedly faulty fuse box).

Appellees cite no case applying strict products liability to a road, and with good reason. There is no way the policy of strict liability can be stretched to cover such a "product." In Maddan v. R. A. Cullinan & Son, Inc., 411 N.E.2d 139, 140-141 (Ill. App. Ct. 1980), the court stated:

> We cannot agree with the contention of the plaintiff that the law of product liability should be applicable in a situation where a plaintiff is injured when his motor vehicle has a collision with a guardrail. We are of this opinion regardless of whether construction of the rail was completed or incompleted. Classify a guardrail as a product and the courts will next be confronted with the assertion that State planted trees, culverts, bridges and highways themselves are products. We do not believe that the doctrine of products liability which has evolved and expanded was ever intended to encompass such items. To say that such items are in the "stream of commerce" defies logical reasoning.

411 N.E.2d at 104-41.

Further, strict liability under Section 402(A) of the Restatement has been uniformly held not to apply to services. Courts addressing the issue have held that walkways and roads, and the construction thereof, are more akin to a service than the furnishing of a "product" which precludes the application of strict liability. Fisher v. Morrison Homes, Inc., 109 Cal. App. 3rd 131, 138 n.2 (Cal. App. 1980) (highways and pathways are not "products" placed in the stream of commerce, but are more akin to a service); VanIdersteine v. Lane Pipe Corp., 455 N.Y. Supp. 2d 450, 453 (App. 1982) (cause of action in strict

liability fails because design and assembly of highway guardrail was essentially the performance of a service as distinguished from manufacture or sale of a product); Held v. 7-Eleven Food Store, 438 N.Y.Supp.2d 976, 978 (S.Ct. 1981) (strict liability inapplicable to a concrete walkway in front of a store); see Milam v. Midland Corporation, 665 S.W.2d 284, 285 (Ark. 1984) (builder and designer of a street not subject to strict liability).

Because County Road 1087 and the construction thereof is more akin to the furnishing of a service by Chadbourne than the sale of a product, strict liability is not applicable under the facts of the present case.

But if County Road 1087 were in fact a "product" for strict liability purposes, this court's opinion in West itself sets out the express limitation that its principles are not to apply when the article in question is placed on the market by a manufacturer who knows that it is to be used only after inspection for defects. West, supra, 336 So.2d at 84, 86, 92. This limitation presumes a "... detailed or expert inspection." Id. at 92. Therefore, the First District

Court of Appeal has correctly interpreted West as follows:

> Obviously, this language ['without inspection for defects'] is not literally true. The liability will attach 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.

Hardin v. Montgomery Elevator Co., 435 So.2d 331, 335 (Fla. 1 DCA 1983). In Hardin the First District went on to hold that an elevator which was subject only to routine or periodic inspections after installation continued to be subject to strict liability under Section 402(A) and West. Id. at 334, 337.

The uncontroverted facts of the case at bar show that County Road 1087 falls within the exception to strict liability set out in West and noted in Hardin. The materials which eventually became County Road 1087 were subjected to extensive testing by the Florida Department of Transportation both in Chadbourne's plant and at the construction site itself. (R.271-272.) These testings consisted of sampling the ingredients used to make County Road 1087, the testing of temperatures at which the pavement was mixed, and straight

edge rolling tests prior to approval by the State and acceptance by Walton County. Id. at 272, 279, 282. These tests were made mandatory by the State of Florida in an obvious attempt to discover deficiencies in the road-making process which would lead to the uneven wear of road surfaces, as well as to other problems. Therefore, strict liability under West is not applicable, and the District Court of Appeal erred in so holding for this reason as well.

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.

It is only when injury to a person has resulted directly, in an ordinary and natural sequence, from a negligent act without the intervention of any independent efficient cause, that the injured person is entitled to recover damages as compensation for his

injury. Cone v. Inter County Telephone & Telegraph Company, 40 So.2d 148, 149 (Fla. 1949). Thus, if the defendant has created a passive, static condition which furnishes only the occasion for a third party's supervening negligence, the defendant is not liable. General Telephone Company of Florida v. Choate, 409 So.2d 1101, 1103 (Fla. 2 DCA 1982); Whitehead v. Linkous, 404 So.2d 377, 379 (Fla. 1 DCA 1981); see W. Prosser, Law of Torts 247 (4th Ed. 1971).

The case of Melton v. Estes, 379 So.2d 961 (Fla. 1 DCA 1979) illustrates this point. In Melton, the decedent was employed to move a mobile home unit onto a lot in a mobile home park owned by the defendant. The defendant failed to inform the decedent's employer of the existence of a septic tank in the path of the mobile home. Upon crossing the area where the septic tank was buried, the wheels of the mobile home caused the septic tank to collapse and the trailer became stuck as a result. The decedent was killed while attempting to jack the trailer up when the inadequate boards he had put under the jacks gave way and he was crushed beneath the trailer.

Although the defendant mobile home park owner was negligent in failing to inform the decedent of the location of the septic tank, the court held that the decedent's failure to use reasonable care was the sole legal cause of the accident which killed him. Melton, 379 So.2d at 963. The court went on to state:

> The activity of Lord and Melton in the procedures followed by them in their effort to extract the house trailer constituted an independent intervening cause that completely disintegrated the causal connection between Estes's prior negligence and the claimant's injuries.

Id.

In the case of a party who turns over work containing a latent defect which is completed on the realty of another, the contractor furnishing the work is liable for injuries stemming from the defect only as long as the defect remains latent. When the defect becomes observable, or, as in the present case, actually observed by the owner of the premises, however, the duty then devolves upon the owner under normal premises liability rules to make the defect safe.

The owner's failure to render an observed defect safe for persons lawfully entering his property is a

superseding cause which breaks any chain of proximate causation otherwise stemming from the contractor's performance of the work, and exonerating the contractor from liability. Slavin v. Kay, 108 So.2d 462 (Fla. 1958); Mai Kai, Inc. v. Colucci, 205 So.2d 291, 293 (Fla. 1967); Lubell v. Roman Spa, Inc., 362 So.2d 922, 923 (Fla. 1978).

The Slavin rule is founded upon the longstanding duty of an owner of real property to correct or warn of a dangerous condition existing on that property. Mai Kai, supra 205 So.2d at 293. The Mai Kai court discussed the normal premises liability rule requiring the use of reasonable care in maintaining one's property in a reasonably safe condition, and noted that the duty of care is usually nondelegable by the owner except in cases where that duty is shifted to a third party due to a latent defect created by the third party. 205 So.2d at 293. Mai Kai went on to state that

> There is not, in our opinion, any inconsistency between this rule of nondelegability and the decision in the Slavin case, supra, requiring that liability [on behalf of the landowner] for the independent negligence of the third party contractor be based on acceptance of defective work under circumstances imputing notice or a duty to correct.

Id. An earlier case focusing on this same principle is Leveridge v. Lapidus, 105 So.2d 207 (Fla. 3 DCA 1958).

In Leveridge, a waitress was injured while walking over a portion of the floor of the restaurant where she was employed. The injured party sued several defendants charging negligence in connection with the planning, installation, supervision and maintenance of the portion of the premises where she was injured. Although relying on the doctrine of contributory negligence, the court did state that the contractor constructing the premises

> ... has liability coextensive with that of the possessor of the land for conditions created by him while the work remains in his charge and where the harm results 'from that particular work entrusted to him as though he were the possesser of the land.'

105 So.2d at 208. The court held that the rule set forth above was not applicable under the facts, however, since the precedent cited

> ... should not be construed as imposing coextensive liability on a builder for harm resulting from an open and obvious defect in a portion of the premises which is completed and which has been accepted and placed into use by the owner.

Id.

In the case at bar, the District Court of Appeal candidly admitted that

> If appellee were simply a contractor or builder, then Slavin v. Kay, 108 So.2d 462 (Fla. 1959), and its progeny absolve appellee's liability because the uncontroverted evidence reflects that the drop-off became patent and observable by Walton County before the accident. See Echols v. Hammet Co., Inc., 423 So.2d 923 (Fla. 4 DCA 1982). Since, however, appellee manufactured the sand/asphalt mix in his own plant, it should be characterized as a contractor and a manufacturer. As a manufacturer, appellee can be distinguished from the defendants in Slavin and Echols.

(A.4-5) (Emphasis in original). The characterization of Chadbourne as a "manufacturer" could only be relevant in applying strict liability principles. However, the application of strict liability does not justify disregard for the well-established rules of proximate and intervening causation.

To return to West, strict liability does not make a "manufacturer" an insurer of his products. Rather, strict liability establishes the existence of negligence as a matter of law, the effect of which is to remove the plaintiff's burden of proving specific acts of negligence. West, supra, 336 So.2d at 90. Critically, this court held in West that

> The ordinary rules of causation and the defenses applicable to negligence are available under our adoption of the Restatement rule.

Id. West specifically holds that a plaintiff utilizing strict liability must prove

> ... the existence of a proximate causal connection between [a defective condition] and the user's injuries or damages.

Id. at 86-87; accord, Giddens v. Denman Rubber Manufacturing Co., 440 So.2d 1320, 1322 (Fla. 5 DCA 1983) (strict liability requires showing of proximate causal connection between defect and injury); Builders Shoring & Scaffolding Equipment Co. v. Schmidt, 411 So.2d 1004, 1006 (Fla. 5 DCA 1982) (following West and requiring proximate causal connection); Morton v. Abbott Laboratories, 538 F.Supp. 593 (M.D. Fla. 1982) (even under strict liability, Florida requires normal showing of causation); Watson v. Lucerne Machinery & Equipment, Inc., 347 So.2d 459, 451 (Fla. 2 DCA 1977) (despite adoption of strict liability, manufacturer may not be held liable absent showing of proximate cause).

If the chain of proximate causation stemming from a product defect has been severed by the negligence of

a third party, as in this case, the manufacturer is exonerated from liability. Jimenez v. Gulf & Western Manufacturing Company, 458 So.2d 58, 60-61 (Fla. 3 DCA 1984) (where evidence supported intervening negligence on the part of plaintiff's employer, manufacturer of defective product held not liable); Kohler v. Medline Industries, Inc., 453 So.2d 908, 909 (Fla. 4 DCA 1984) (where evidence sustained trial court's finding that negligence of nurse's aid, rather than manufacturer's design of urine bag, caused spill onto floor, manufacturer of bag absolved from liability for second nurse's slip and fall); Clement v. Rousselle Corporation, 372 So.2d 1156, 1157 (Fla. 1 DCA 1979) (jury entitled to find, and defendant entitled to argue, that plaintiff's employer's negligence constituted intervening cause severing chain of proximate causation from product defect).

In Mueller v. Jeffrey Manufacturing Co., 494 F.Supp. 275 (E.D. Pa. 1980), the plaintiff sued the designer and builder of a series of conveyors, elevators and other devices which were arranged in a fashion to remove sand from an automatic iron molding

machine. One part of this series of devices consisted of the floor of the building in which they were housed, which was a normal concrete floor, except that it contained a three-foot square opening. The plaintiff fell through the opening and sued the designer and builder of the machine and floor, alleging strict liability and negligence. Absolving the builder of liability, the court held:

> Even assuming that defendant had a legal duty to warn plaintiff or [the plaintiff's employer] of any dangers connected with the operation of the sand handling system and that defendant breached that duty, the apparent negligence of [the plaintiff's employer] and/or its employees constituted a superseding cause of plaintiff's injury.

_Id_. at 277. The _Mueller_ court went on to hold that

> [a] third person's failure to prevent harm may become a superseding cause
>
> > Where, because of lapse of time or otherwise, _the duty to prevent harm_ to another threatened by the actor's negligent conduct _is found to have shifted from the actor to a third person_ ...

_Id_.

Thus, _Slavin_ and its progeny do nothing more than apply standard premises liability principles to

supplant or sever the proximate causal link when injury is caused by a latent defect in work performed by a contractor or builder, which defect subsequently becomes discoverable to the owner of the realty where the work is located. In the present case, the Slavin doctrine demands a holding that the duty imposed upon Walton County to protect against a known defect on its property under unquestioned premises liability rules, coupled with Walton County's failure to take any affirmative act to fulfill this duty, constituted negligence which severed the chain of proximate causation stemming from creation of the latent defect. The District Court's contrary holding leads inexorably to the conclusion that the Court of Appeal would have proximate cause apply in negligence or warranty cases but not apply in strict liability cases, a proposition totally without support in precedent and indeed directly contrary to this court's holding in West.

A case applying Slavin to facts virtually identical to those of the present case is Echols v. Hammet Company, Inc., 423 So.2d 923 (Fla. 4 DCA 1982). In Echols, the plaintiff was injured in an automobile

accident caused in part by a defect in the roadway consisting of a drop-off onto the road's shoulder. The plaintiff brought suit against the Florida Department of Transportation and the contractor who constructed the roadway. 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_.

_Id_. at 924.

The _Echols_ court reversed the entry of summary judgment for the defendant contractor based on an issue of fact as to whether or not the defect in the roadway was observable by the Department of Transportation. _Id_. No such issue exists under the admittedly uncontroverted facts of the present case. (A.4).

The artificiality of the distinction made between _Slavin_, _Echols_, and the present case by the District Court of Appeal based upon a categorization of

Chadbourne as a "manufacturer" is made clear by the fact that the principles of proximate and intervening causation apply equally to strict liability, negligence and warranty claims, as stated by the First District in its opinion below. (A.4) Indeed, this court rejected the ephemeral distinction created by the Court of Appeal in a companion case to Slavin when it was stated:

> The argument of counsel is directed pro and con to the well-settled rule that contractors, vendors and manufacturers are not liable for injuries to third parties occurring after the contractor has completed the work and turned the project over to the owner or employer and it has been accepted by him.

Slavin v. McCann Plumbing Company, 73 So.2d 902 (Fla. 1954). Compelling in this regard also is the case of Forte Towers South, Inc. v. Hill York Sales Corp., 312 So.2d 512 (Fla. 3 DCA 1975).

In Forte Towers, suit was brought under the theories of negligence and breach of warranty against a subcontractor for installation of a faulty air conditioning system. The Court of Appeal held that Slavin would have applied to absolve the subcontractor from

liability had the defects been patent and discoverable. 312 So.2d at 514. Obviously, had strict liability been available in Florida at the time of Slavin or had it been pled in Forte Towers, causes of action against the contractors involved as either "assemblers" or "suppliers" would have been stated under strict liability. Cunningham v. Lynch-Davidson Motors, Inc., 425 So.2d 131, 133 (Fla. 1 DCA 1983) (assembler strictly liable); see Cassisi v. Maytag Corp., 396 So.2d 1140, 1143 (Fla. 1 DCA 1981) (supplier/seller as well as manufacturer strictly liable). Indeed, the original complaint in Slavin alleged that a wash basin was a defective product, and, in the alternative, that the bracket attaching it to the wall was defective. Mai Kai, supra, 205 So.2d at 294-95 (White, Jos., concurring).

Consequently, the label of "manufacturer" affixed to Chadbourne by the District Court of Appeal does not create a valid distinction between the facts of the present case and the Slavin and Echols cases, and does not absolve the plaintiff from having to comply with normal rules of proximate and intervening cause.

Because the appearance of a defect in County Road 1087 occurred after its acceptance by Walton County, any negligence of Chadbourne in creating the defect created only a static condition which afforded the occasion for Walton County's supervening negligence. This supervening negligence was established beyond question when the duty devolved upon Walton County to make its realty safe for persons lawfully traveling upon it, and Walton County failed to take any step to warn persons on the road of, or to correct, the known defect. Consequently, the Court of Appeal erred in reversing the trial court's summary judgment in Chadbourne's favor.

CONCLUSION

The District Court of Appeal erred in applying strict liability to a County Road because a road is not a mass-produced product sold and distributed to large numbers of consumers. The policy justification for strict liability simply does not pertain to roads. Also, the building of a road is a service not subject to strict liability. Finally, the road was subjected to a battery of State tests prior to acceptance, which

tests were designed to discover just the sort of defect which allegedly caused the plaintiff's harm, and strict liability was similarly not created to apply to products subjected to expert scrutiny by the purchaser.

Even if strict liability applies, the District Court erred in holding that a chain of proximate causation continued to exist stemming from the creation of the defect by Chadbourne when the negligence of Walton County in failing to remedy the known drop-off constituted an intervening cause under well-settled Florida law and the undisputed facts.

For these reasons, Petitioner respectfully requests that the decision of the First District Court of Appeal be reversed and that the trial court's summary judgment for Petitioner be reinstated.

Respectfully Submitted,

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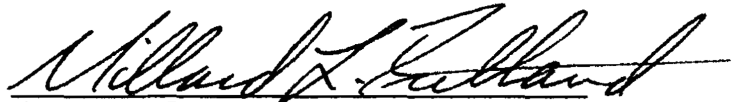
CERTIFICATE OF SERVICE

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, by United States mail, postage prepaid this 5th day of June, 1985.



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