O/a 10-11-85

IN THE SUPREME COURT OF FLORIDA

EDWARD M. CHADBOURNE, INC.,

Petitioner/Defendant,

vs.

DOCKET NO. 66,413

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

Respondent/Plaintiff.

RESPONDENT'S INITIAL BRIEF

NORTON BOND
300 East Government Street
Pensacola, Florida 32501
(904) 432-0945
Attorney for Respondent/Plaintiff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The parties will be referred to herein as plaintiff and defendant. The symbol "R.____" will be used for citations to the record as prepared for the Court of Appeal. The symbol "A.____" will be used for references to the Appendix to this brief.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

On the night of January 12, 1981, plaintiff Algie F. Vaughn and his wife, Mary Emma Vaughn, were traveling by automobile from Pensacola, Florida, to Opp, Alabama, with Mrs. Vaughn driving. (R. 16, 20) Mr. and Mrs. Vaughn exited Interstate 10 east of Crestview and were traveling north on Walton County Road 1087. Neither Mr. Vaughn nor his wife had traveled on Walton County Road 1087 for many years prior to this time. (R. 22) Walton County Road 1087, where this accident happened, is a two-lane road approximately eighteen feet wide. (R. 199)

As the plaintiffs' vehicle approached a curve in this roadway from the south at less than the speed limit, the left wheels of the vehicle encountered a drop-off in the center of the roadway between the northbound and southbound lanes, causing Mrs. Vaughn to lose control of the car with the result that Mrs. Vaughn was killed, and Mr. Vaughn

was seriously injured in the ensuing accident. (R. 23-25) At precisely where this accident occurred, there is a two inch drop-off in the center line of the highway between the northbound and southbound lanes. (R. 121-122, 179-180) In other words, between the northbound and southbound lanes in the curve where this accident happened, there was an abrupt two inch drop-off from the northbound lane to the southbound lane right in the center of the roadway.

The uncontroverted evidence before the Court is that this two inch drop-off in the center of the roadway caused Mrs. Vaughn to lose control of her vehicle, and thereby caused or substantially contributed to causing the accident which resulted in her death and serious injuries to her husband, Algie F. Vaughn. (R. 197-199) This two inch drop-off in the middle of the roadway resulted from the fact that the paving materials on the southbound lane of this curve were "gone" in that the paving material that had been applied to the southbound lane had eroded away. (R. 228, 258) The paving material that had been applied to the northbound lane in that curve at the same time, meanwhile, had not eroded away with the result that in the center of the roadway where the northbound lane should have met the southbound lane, there was a two inch drop-off from the northbound to the southbound lane. (R. 233-234, 258)

For many years prior to this accident, defendant Edward M. Chadbourne, Inc., had been in the business of manufacturing paving materials in its own plants, and had also been in the business for years of applying those paving materials that it manufactures to roadways and

parking lots. (R. 252) In other words, defendant was for years, and still is, in the business of selling both the paving materials that it manufactured and the service of applying those paving materials that it had manufactured to roadway and parking lot surfaces. (R. 252)

Pursuant to a contract with the State of Florida, defendant paved Walton County Road 1087 in a paving project that was accepted by the State in April of 1979. (R. 278) In carrying out the paving contract, defendant manufactured in its own plant the paving materials to be used in paving this road and then used these paving materials that it had manufactured to resurface the roadway in question. (R. 248-253)

Following his wife's death, plaintiff filed suit as personal representative of his wife's estate and individually against defendant on the basis, among others, that the paving materials manufactured by defendant were defective when manufactured by defendant, and that defendant was thereby liable under product liability principles including strict liability for the damages suffered in this accident. (R. 1-5) Thereafter, defendant moved for summary judgment on the basis, among others, that defendant, even though a manufacturer of paving materials, is somehow exempt from the strict liability principles of Section 402(A) of the Restatement (Second) of Torts (1965). (R. 215) Although the Order Granting Summary Judgment in favor of defendant is silent on this point, the trial court obviously agreed with the defendant that the manufacturer of paving materials is exempt from strict liability principles as applied in Florida. (R. 291)

The First District Court of Appeal reversed the trial court's summary judgment in favor of defendant, holding that strict liability principles do apply to the manufacturer of a product which is later incorporated into an improvement on real property. The First District further held that knowledge of the defect in that product by the user did not absolve the manufacturer from liability under Section 402(A) of the Restatement of Torts (Second). (A. 4-5)

ISSUES PRESENTED FOR REVIEW

1. IS THE MANUFACTURER OF A DEFECTIVE PRODUCT WHICH IS LATER INCORPORATED INTO AN IMPROVEMENT TO REAL PROPERTY IMMUNE FROM LIABILITY UNDER SECTION 402(A) OF THE RESTATEMENT OF TORTS (SECOND)?

2. DOES THE DISCOVERY OF A DEFECT IN A PRODUCT ABSOLVE THE MANUFACTURER OF THAT PRODUCT FROM LIABILITY FOR DAMAGES CAUSED BY THAT DEFECTIVE PRODUCT?

SUMMARY OF ARGUMENT

Defendant below was the manufacturer of a defective product, asphaultic concrete, which was later incorporated into an improvement on real property, a county road. This asphaultic concrete manufactured by defendant was defective, and the defect in the product caused a death and a serious injury. Notwithstanding defendant's protestations to the contrary, a manufacturer of a defective product which is later incorporated

into an improvement on real property must answer under strict liability principles for that defective product just as manufacturers of products which are not incorporated into improvements on real property must answer for defective products under strict liability principles.

If the defendant is correct in its position on this issue and the First District is incorrect, every single manufacturer of products which are manufactured for incorporation into houses, hotels, courthouses, roads, and every other kind of structure would be absolutely immune from suits based on strict liability principles. In other words, if the defendant prevails on this appeal, the manufacturers of everything from defective air conditioners to defective elevators which are later incorporated into improvements on real estate will be absolutely immune to actions founded on strict liability principles.

The First District did not hold in this case that Section 402(A) applies to structural improvements to real estate. The First District in this case did not hold that County Road 1087 is a product subject to strict liability principles. The First District did not, and this Court does not, need to even address the question of whether Section 402(A) applies to structural improvements to real estate. Again, despite defendant's protestations to the contrary, that is simply not the question before this Court.

The question before this Court is whether or not the manufacturer of a product which is later incorporated into an improvement on real property is subject to strict liability principles. The First District in this case held that the manufacturer of a product which is

later incorporated into a structure must answer under Section 402(A) if that product it manufactured was defective. Under any interpretation of Florida law, this Court must also reach that conclusion.

The First District also held that discovery of the defect in the product by a user of that product does not absolve the manufacturer of that defective product from responsibility or liability under Section 402(A). This holding of the First District is perfectly consistent with and required by this Court's holding in Auburn Machine Works, Co. v. Jones, 366 So. 2d 1167 (Fla. 1979).

ARGUMENT

1. THE MANUFACTURER OF A DEFECTIVE PRODUCT WHICH IS LATER INCORPORATED INTO AN IMPROVEMENT INTO REAL PROPERTY IS SUBJECT TO STRICT LIABILITY PRINCIPLES.

At the outset, it should be emphasized that this is a products liability case against the manufacturer of paving materials based upon defects in the paving materials manufactured by defendant in its own manufacturing plant. Specifically, plaintiff seeks to recover, inter alia, from this defendant under the strict liability principles enunciated in Section 402(A) of the Restatement (Second) of Torts (1965), because this defendant manufactured defective paving materials which caused injury to plaintiff.

The only possible way defendant could have been entitled to summary judgment in this case was if the strict liability principles of

Section 402(A) for some reason to not apply to the manufacturer of paving materials. In other words, the summary judgment entered in this cause below is patently incorrect unless this defendant for some reason is exempt from the liability imposed upon manufacturers of defective products by Section 402(A).

Defendant contended below (R. 215), without citation of authority, and the trial court obviously agreed, that defendant was exempt from the liability imposed by Section 402(A) because, "Strict liability principles set forth in West v. Caterpillar Tractor Company, Inc., 336 So.2d 80 (Fla. 1976), do not apply to cases involving structural improvements to real estate." Stated another way, the defendant is contending that notwithstanding the fact that it is a manufacturer of construction materials, it is exempt from strict liability principles because the product the defendant manufactures is thereafter taken out of the manufacturing plant and incorporated into some improvement on real estate, a roadway. Defendant claims that it is entitled to summary judgment in this case, because the law relating to products liability simply does not apply to this defendant.

The strict liability principles enunciated in Section 402(A) of the Restatement clearly do apply to a manufacturer of paving materials such as defendant in this case. Comments b and f to Section 402(A) state in pertinent part:

> Beginning in 1958 with a Michigan case involving cinder building blocks, a number of recent decisions have discarded any limitation to intimate association with the body, and have extended the rule of strict liability to cover the sale of any product which, if it should prove to be defective, may be expected to cause physical harm to the consumer or his property.
>
> * * * * *
>
> The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products.

During the past few years, the courts of Florida and other states have encountered several situations where defendants for one reason or another contended that Section 402(A) did not apply to their particular type of product. In response to such an argument in Hartman v. Opelika Machine and Welding Company, 414 So.2d 1105 (1st DCA 1982), the First District stated clearly that Section 402(A) applies to any product arising from a situation which is "essentially commercial in nature". The manufacturer of paving materials in the state of Florida is certainly "essentially commercial in nature" and involves millions of dollars and the exposure of every living human in this state to the perils of defectively manufactured paving materials.

It should be noted again that the defendant contends that notwithstanding the fact that it is indeed a manufacturer of paving materials, Section 402(A) strict liability principles should not apply to it because these paving materials that it manufactures are later taken out and

incorporated into an improvement on real property. In that connection, the defendant's entire argument rests upon the premise that strict liability principles in Florida do not apply to cases "involving" structural improvements to real estate. This contention made by defendant is totally false.

If Section 402(A) does not apply to cases involving structural improvements to real estate, then the First District's opinion in Hardin v. Montgomery Elevator Co., 435 So.2d 331 (1st DCA 1983), must not mean what it says. In Hardin, the defendant had manufactured an elevator which was installed in 1969 in a building on the campus of Florida Junior College in Jacksonville, Florida. Following a 1981 accident in that elevator, the injured party brought an action against Montgomery Elevator Company on the basis that the elevator manufactured by Montgomery in 1969 was defective and that Montgomery was liable to the plaintiff on strict liability principles. In other words, just as in the instant case, the product in Hardin v. Montgomery Elevator Co., that had been manufactured by the defendant there had been incorporated into a structure on real property. Based on "future inspection for defects" theory, the defendant in Hardin argued that Section 402(A) did not apply to the manufacturers of elevators. The First District in Hardin stated unequivocally that Section 402(A) does in fact apply to the manufacturers of elevators.

The analogy between Hardin v. Montgomery Elevator Co., and the instant case, is inescapable. In Hardin , the product manufactured by the defendant was thereafter taken out and incorporated into an improvement on real property. In the instant case, the paving materials

manufactured by the defendant were thereafter taken out and incorporated into an improvement on real property. If Section 402(A) applies to elevators manufactured and then later incorporated into an improvement on real property, then Section 402(A) certainly applies to paving materials manufactured and then later taken out and incorporated into improvements on real property.

There are many other decisions from Florida and other states recognizing the application of products liability principles to the products which after being manufactured are incorporated into improvements on real property. In Halpryn v. Highland Insurance Co., 426 So.2d 1050 (Fla. 3rd DCA 1983), the Third District, although ruling against the plaintiff in that case, clearly recognized the application of strict liability principles to products later incorporated into structural improvements on real estate. There the product was paint. Likewise, in Gory Associated Industries, Inc. v. Jupiter Roofing and Sheet Metal, Inc., 358 So.2d 983 (4th DCA 1978), the Fourth District approved a judgment against the manufacturer of roofing tile for damages resulting from defects in those roofing tiles that had been incorporated into plaintiff's house. Again, there can be no real question that Section 402(A) clearly applies to products which are manufactured to be later incorporated into improvements on real property.

The cases in other jurisdictions likewise overwhelmingly approve the application of strict liability principles to manufacturers of construction materials just as we have in the case presently before the Court. For

instance, in Reeves v. Dixie Brick, Inc., 403 So.2d 792 (La. 1981), the Court of Appeal of Louisiana recognized the application of products liability principles to the manufacturer of bricks which were ultimately incorporated into a structural improvement on real property. In Hartford v. Associated Construction Co., 384 A.2d 390 (Conn. 1978), the Superior Court of Connecticut applied Section 402(A) strict liability principles to a roof coating product which was manufactured by the defendant and thereafter incorporated into a structural improvement on real property. In a well-reasoned opinion in Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979), the Supreme Court of Utah applied Section 402(A) strict liability principles to the manufacturer of roof joists which were incorporated into a structural improvement on real property. These are just a few of the numerous examples of courts across the nation that without hesitation apply Section 402(A) strict liability principles to manufacturers of building materials.

Indeed, the Fourth District as recent as this March again dealt with a situation where strict liability was applied to the manufacturer of building materials. In that case, strict liability had been applied to a defective roof truss which had caused damage to the plaintiff in that case. Tri-County Truss Co. v. Leonard, 467 So.2d 370 (Fla. App. 4th DCA 1985).

Just as in these other cases, the defendant in the instant case manufactured the paving materials that failed in the instant case and caused death and serious injury. Just like every other manufacturer in the state of Florida that manufacturers a defective product, defendant and the paving materials it manufactures are subject to the strict liability principles enunciated in Section 402(A).

The argument by defendant on this issue consists of nothing other than the construction of a strawman and the destruction thereof. Defendant repeatedly contends that the First District held that County Road 1087 was a product and that Section 402(A) applies to structural improvements to real estate. The truth is that neither of these holdings can be found anywhere in the First District opinion. The First District held, purely and simply, that Section 402(A) applies to a manufacturer of a product which is later incorporated into an improvement on real property. Indeed, the First District below did not even address the issues of whether or not the road was a product and whether Section 402(A) applied to structural improvements to real property. Likewise, notwithstanding defendant's efforts to the contrary, this Court need not even address those issues to affirm the decision of the First District.

In the posture of this case, the only question before this Court on this issue is whether the manufacturer of a defective product which is later incorporated into an improvement on real property can be accountable under strict liability principles for the damage caused by that defective product. If this Court reverses the decision of the First District on this question, this Court will carve out an enormous area of immunity in which causes of action on strict liability principles would simply vanish. If this Court reverses the First District in this case, every manufacturer of defective products which are incorporated into an improvement on real property will be immune as a matter of law from liability under strict liability principles. This is what defendant is asking this Court to do.

If this Court agrees with the defendant in this case, every single manufacturer of every single product and component that has been incorporated into structural improvements on real property in the state of Florida will instantly be immune to causes of action based upon Section 402(A) of the Restatement. Plaintiff respectfully submits that the absurdity of such a result is obvious and that such a result would be totally contrary to Florida law. The manufacturer of a defective product in Florida is subject to strict liability principles whether that product is used alone or is later combined with other products and incorporated into improvements on real property. The holding of the First District on this issue must be affirmed.

2. THE DISCOVERY OF A DEFECT IN A PRODUCT DOES NOT RELIEVE THE MANUFACTURER OF THAT PRODUCT FROM LIABILITY FOR DAMAGES CAUSED BY THAT DEFECT.

Defendant's reliance upon the causation concept enunciated in Slavin v. Kay, 108 So.2d 462 is totally misplaced, and causes defendant's total failure to address the critical question addressed by this appeal. Slavin deals solely with causation problems in the context of "contractors/possessors" and has absolutely nothing to do with the liability of a manufacturer of a defective product. See, Gross v. Asphault Material and Paving Co., Inc., 382 So.2d 854 (Fla. 3rd DCA 1980). In other words, Slavin and its progeny deal only with builders of structural improvements to real property. Neither Slavin nor one single case

which follows Slavin in any way even mentioned the potential liability of a defendant who has manufactured a defective building material.

If defendant in the instant case had been only the contractor and had not been the manufacturer of the building materials involved, the contorted causation reasoning of Slavin might very well absolve the defendant of liability in this case. This defendant, however, cannot escape the fact that it was both the manufacturer of the building materials involved and the contractor which constructed the improvement to the real property.

As the manufacturer of the defective building materials involved in the instant case, defendant must rise or fall with the causation principles involved in a strict liability situation. In relying upon Slavin, defendant appears to be contending that so long as the user of its defectively manufactured product discovers the defect in the product prior to the accident and takes no corrective action, the manufacturer of that defective product gets off. Such is simply not the law of Florida or any other state. See, Auburn Machine Works Company, Inc. v. Jones, 366 So.2d 1167 (Fla. 1979).

Perhaps the Florida case which deals most precisely with this argument put forth by defendant in the instant case is Clement v. Rousselle Corporation, 372 So.2d 1156 (Fla. 1st DCA 1979). In Clement, the manufacturer of a punch press had failed to place a guard device on the press when it was manufactured. The issue before the court was whether the fact that the employer of plaintiff knew about the problem

and also failed to place a guard on the machine, "was even admissible into evidence". The court in Clement held that the jury in a strict liability case was entitled to consider the subsequent fault of the plaintiff's employer in not correcting the defect in the product. The court in Clement did not even hint that such subsequent fault on the part of the employer absolved the manufacturer of the product from liability as a matter of law as defendant argues here.

That is exactly what defendant is asking this Court to do in the instant case. Defendant is asking this Court to absolve it from liability for a defectively manufactured product as a matter of law simply because Walton County officials discovered the defect prior to the accident and did not fix it. Such a result would distort strict liability causation principles beyond recognition and would have absolutely no basis in reason.

Likewise, the cases of Neumann v. Davis Water and Waste, Inc., 433 So.2d 559 (Fla. 2nd DCA 1983) and Alvarez v. DeAguirre, 395 So.2d 213 (Fla. 3rd DCA 1981), do not hold what defendant would have this Court believe. Neither Neumann nor Alvarez deal with a manufacturer of building materials. They both deal with defendants who constructed improvements to real estate and are in no way inconsistent or in conflict with the First District's decision in the instant case. Indeed, the opinion in Alvarez clearly states that the supplier of the defective building material (the electrical circuit box) was not even involved in the decision. Specifically, neither Neumann nor Alvarez deals in any way with the application of strict liability principles to the manufacturer of building

materials. Under the principles enunciated by this Court in Auburn Machine Works Co., Inc. v. Jones, 366 So.2d 1167 (Fla. 1979), the discovery of the defect does not absolve the defendant of liability under strict liability principles and the question of causation is to be determined by the jury.

CONCLUSION

Plaintiff respectfully submits that the decision of the First District Court of Appeal in this case was imminently correct and should be affirmed.

Respectfully submitted,

NORTON BOND
300 East Government Street
Pensacola, Florida 32501
(904) 432-0945
Attorney for Respondent/Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to Millard L. Fretland, Esquire, 715 South Palafox Street, Pensacola, Florida 32501, by U.S. Mail/Hand Delivery this 24th day of June, 1985.

NORTON BOND
300 East Government Street
Pensacola, Florida 32501
(904) 432-0945
Attorney for Respondent/Plaintiff