IN THE SUPREME COURT OF FLORIDA

EDWARD M. CHADBOURNE, INC.,

Defendant/Petitioner,

v.

DOCKET NO. 66,413

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

Plaintiff/Respondant.

JURISDICTIONAL BRIEF OF PETITIONER

Millard L. Fretland, Esquire
Donald H. Partington, Esquire
CLARK, PARTINGTON, HART, HART & JOHNSON
715 South Palafox Street
Post Office Box 12585
Pensacola, Florida 32573
Telephone: (904) 434-3273
Attorneys for Defendant/Petitioner

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INTRODUCTION

The parties will be referred to herein by name as they stood in the trial court. The symbol (A.__) will be used to denote citations to Petitioner's Appendix to this brief. All emphasis in quotations cited herein has been added.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

In October or November of 1978, the Petitioner, Edward M. Chadbourne, Inc. (hereinafter referred to as "Chadbourne") paved County Road 1087 in Walton County, Florida, pursuant to a contract with the Florida Department of Transportation. (A-2) The Florida Department of Transportation tested the asphalt mix applied by Chadbourne both at the plant and at the jobsite. Id. After the paving work met all state tests and specifications, the State returned the road to Walton County for maintenance on April 24, 1979. After that date, Chadbourne was not responsible for inspection or maintenance of Road 1087. Id.

Late in 1980, a Walton County Commissioner, on official business, inspected the section of Road 1087 where the plaintiffs' accident would later occur. Id. at 1-2. Although the Commissioner noticed that a drop-off due to erosion of the southbound lane had

occurred, and although the county's engineering consultant was notified, Walton County did nothing to remedy the condition of the roadway. Id.

In January of 1981, over two years from the date Chadbourne surrendered possession of the roadway, the plaintiffs 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, and the trial court granted a summary judgment in the defendant's favor. Id.

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, and that the doctrine announced by this court in the case of Slavin v. Kay, 108 So.2d 462 (Fla. 1959), (A.6), and its progeny did not operate to sever the chain of proximate causation stemming from any latent defect which may have been 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 plaintiffs' accident. Id. at 3-5.

This cause is before this court pursuant to Article V, Section 4 of the Florida Constitution and Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure because the decision of the First District Court of Appeal is in direct conflict with several decisions of this court, as well as with several decisions of sister courts of appeal, as will be demonstrated in the agrument portion of this brief.

ISSUES PRESENTED FOR REVIEW

I. WHETHER THE HOLDING OF THE FIRST DISTRICT COURT OF APPEAL THAT STRICT LIABILITY UNDER SECTION 402(A) OF THE RESTATEMENT OF TORTS AND THE FLORIDA LAW THEREUNDER APPLIES TO STRUCTURAL IMPROVEMENTS TO REAL PROPERTY IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE SECOND AND THIRD DISTRICT COURTS OF APPEAL IN THE CASES OF NEUMANN v. DAVIS WATER AND WASTE, INC., 433 So.2d 559 (Fla. 2 DCA 1983) and ALVAREZ v. DeAGUIRRE, 395 So.2d 213 (Fla. 3 DCA 1981).

II. WHETHER THE HOLDING OF THE FIRST DISTRICT COURT OF APPEAL THAT THE DOCTRINE ANNOUNCED BY THIS COURT IN THE CASE OF SLAVIN v. KAY, 108 So.2d 462 (Fla. 1959) AND ITS PROGENY DID NOT APPLY TO THE UNCONTROVERTED FACTS OF THIS CASE IS IN DIRECT CONFLICT WITH THE SLAVIN CASE AND THE CASE OF ECHOLS v. HAMMETT COMPANY, INC., 423 So.2d 923 (Fla. 4 DCA 1982).

III. WHETHER THE HOLDING OF THE FIRST DISTRICT COURT OF APPEAL THAT, UNDER THE UNCONTROVERTED FACTS, THE CHAIN OF PROXIMATE CAUSATION FROM ANY DEFECT PRESENT IN THE ROAD WAS NOT BROKEN BY THE INTERVENING FAULT OF WALTON COUNTY IS IN DIRECT CONFLICT WITH THE OPINION OF THIS COURT IN CONE v. INTER COUNTY TELEPHONE & TELEGRAPH CO., 40 So.2d 148 (Fla. 1949), AND ITS PROGENY.

IV. WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL THAT STRICT LIABILITY PRINCIPLES APPLY TO THE ROAD'S SURFACE IN THE PRESENT CASE DESPITE THE ROAD'S INSPECTION FOR DEFECTS ON AT LEAST TWO SEPARATE OCCASIONS IS IN DIRECT CONFLICT WITH THE OPINION OF THIS COURT IN WEST v. CATERPILLAR TRACTOR COMPANY, INC., 336 So.2d 80 (Fla. 1976) AND ITS PROGENY.

SUMMARY OF ARGUMENT

The First District Court of Appeal below applied the doctrine of strict liability to an improvement to real property. This holding is in direct conflict with the opinions of sister courts of appeal in Alvarez v. DeAguirre, 395 So.2d 213 (Fla. 3 DCA 1981) (A.13), and Neumann v. Davis Water and Waste, Inc., 433 So.2d 559 (Fla. 2 DCA 1983) (A.18), which hold exactly the opposite.

Furthermore, the decision of the First District Court of Appeal directly conflicts with this court's decision in Slavin v. Kay, 108 So.2d 462 (Fla. 1959), (A.6), which held that a contractor is not liable for injuries to third parties stemming from defects in his work if the owner for whom the contractor did the work discovers the defect after acceptance and fails to correct it. The First District's holding is also in conflict with the decision of the Fourth District Court of Appeal in Echols v. Hammett Company, Inc., 423 So.2d

923 (Fla. 4 DCA 1982) (A.23), which held that Slavin would preclude liability on facts virtually identical to those of the instant case.

Also, the First District Court of Appeal's holding that the chain of proximate causation in the present case was not severed by the independent intervening negligence of Walton County in failing to remedy the dangerous condition existing on its property after said condition was actually observed is in conflict with the principles of proximate causation and intervening cause set out in Cone v. Inter County Telephone & Telegraph Co., 40 So.2d 148 (Fla. 1948) (A.26), and General Telephone Company of Florida v. Choate, 409 So.2d 1101 (Fla. 2 DCA 1982) (A.29).

Finally, the First District Court of Appeal's application of strict liability to a product which was clearly subject to a required inspection for defects is in direct conflict with this court's opinion in West v. Caterpillar Tractor Company, Inc., 336 So.2d 80 (Fla. 1976) (A.34).

ARGUMENT

I.

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE SECOND AND THIRD DISTRICT COURTS OF APPEAL IN THE CASES OF NEUMANN v. DAVIS WATER AND WASTE, INC., 433 So.2d 559 (Fla. 2 DCA 1983) and ALVAREZ v. DeAGUIRRE, 395 So.2d 213 (Fla. 3 DCA 1981).

In Neumann v. Davis Water and Waste, Inc., (A.18), suit was brought against the installer or assembler of a sewage treatment tank into which a small boy fell and drown. The Second District Court of Appeal held that it would

> ... decline 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.

433 So.2d at 561.

In Alvarez v. DeAguirre, (A.13), the Third District Court of Appeal held that it was well settled that no cause of action in strict liability or implied warranty would lie against a contractor for damages caused by a defective fuse box incorporated into a house. 395 So.2d at 216. Because both of these cases hold that strict liability is not applicable to a structural improvement to real estate, they are in direct and express conflict with the opinion of the First District Court of Appeal in the present case holding that strict liability does so apply.

II.

> THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN SLAVIN v. KAY, 108 So.2d 462 (Fla. 1959), AND ITS PROGENY, PARTICULARLY, ECHOLS v. HAMMETT COMPANY, INC., 423 So.2d 923 (Fla. 4 DCA 1982).

In Slavin v. Kay, (A.6), this court held that when a property owner

> ... accepts work that is in a dangerous condition, the immediate duty devolves upon him to make it safe, and if he fails to perform this duty, and a third person is injured, it is his negligence that is the proximate cause of the injury.

108 So.2d at 466. When a latent defect becomes patent and discoverable, the owner's failure to remedy the defect constitutes the proximate cause of a later injury and the original contractor is absolved from liability under the normal rules regarding intervening causes. Id. at 466-467; Echols v. Hammett Company, Inc., 423 So.2d 923, 934 (Fla. 4 DCA 1982) (A.23). This court reaffirmed the Slavin doctrine most recently in the case of Lubell v. Roman Spa, Inc., 362 So.2d 922 (Fla. 1978) (A.47).

The decision of the First District Court of Appeal in the instant case acknowledged that the Slavin doctrine would absolve Chadbourne of liability under the uncontroverted facts if that doctrine were applied, (A.4), yet failed to do so based upon its characterization of Chadbourne as a "manufacturer."

Furthermore, the decision of the First District Court of Appeal in the instant case expressly conflicts with the decision of the Fourth District Court of Appeal in Echols v. Hammett Company, Inc., 423 So.2d 923 (4th DCA 1982) (A.23). In Echols, the plaintiff

was injured in a car accident caused in part by a defect in the roadway which consisted of a drop-off leading onto the shoulder of the road. The plaintiff filed suit against the contractor who constructed the roadway. The Fourth District Court of Appeal stated that the contractor would be entitled to summary judgment under Slavin 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 Department of Transportation.

Echols, 432 So.2d at 924.

In refusing to apply Slavin to the facts of the present case despite a factual background indistinguishable from that of Echols, the decision of the First District Court of Appeal is in direct conflict with Echols as well as Slavin and this court has jurisdiction of this appeal.

III.

> THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IS IN DIRECT CONFLICT WITH THE OPINION OF THIS COURT IN CONE v. INTER COUNTY TELEPHONE & TELEGRAPH CO., 40 So.2d 148 (Fla. 1949), AND ITS PROGENY.

In discussing the concept of proximate cause, this court in Cone v. Inter County Telephone & Telegraph Co., (A.26), held that

> It is only when injury to a person who himself is without contributing fault has resulted directly in an ordinary, natural sequence from a negligent act without the intervention of any independent efficient cause, or is such as ordinarily and naturally should have been regarded as a probable, not merely possible, result of the negligent act, that such injured person is entitled to recover damages as compensation for his loss.

40 So.2d at 148.

The First District Court of Appeal below held that the chain of proximate causation from the plaintiffs' injury to Chadbourne continues to exist notwithstanding the existence of Walton County's intervening fault. Therefore, the opinion of the First District Court of Appeal is in express and direct conflict with this court's opinion in Cone.

IV.

> THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL BELOW IS IN DIRECT CONFLICT WITH THE OPINION OF THIS COURT IN WEST v. CATERPILLAR TRACTOR COMPANY, INC., 336 So.2d 80 (Fla. 1976).

In West v. Caterpillar Tractor Company, Inc., (A.34), this court adopted strict liability as set forth in Section 402(A) of the Restatement of Torts (Second). 336 So.2d at 87. In doing so, however, this court held that strict liability would be imposed only when the manufacturer places its product on the market

knowing that it is to be used without inspection for defects. Id.

The opinion of the First District Court of Appeal below is in direct conflict with this court's opinion in West because it held that strict liability applies to the road's surface in question notwithstanding the fact that the road's surface was required to be, and in fact was, inspected and tested by the State Department of Transportation (A-2), and indeed by Walton County itself who had assumed maintenance responsibility two years before the accident. Id.

CONCLUSION

For the reasons set forth above, this court has jurisdiction under Article V, Section 4 of the Florida Constitution, and the Petition for Review of Edward M. Chadbourne, Inc. should be granted.

Respectfully Submitted,

Millard L. Fretland, Esquire
CLARK, PARTINGTON, HART, HART
& JOHNSON
715 South Palafox Street
Post Office Box 12585
Pensacola, Florida 32573
Telephone: (904) 434-3273
Attorneys for Defendant/Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished to Norton T. Bond, Esquire, 300 East Government Street, Pensacola, Florida 32501, by hand delivery this 23d day of January, 1985.

Millard L. Fretland, Esquire
CLARK, PARTINGTON, HART, HART
& JOHNSON
715 South Palafox Street
Post Office Box 12585
Pensacola, Florida 32573
Telephone: (904) 434-3273
Attorneys for Defendant/Petitioner