O/a 10-11-85

IN THE SUPREME COURT OF FLORIDA

EDWARD M. CHADBOURNE, INC.,

Petitioner/Defendant,

v. DOCKET NO. 66,413

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

Respondent/Plaintiff,

PETITIONER'S REPLY BRIEF

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

TABLE OF CONTENTS

TABLE OF CITATIONS

ISSUE 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 Respondent argues that this Court's refusal to apply strict liability principles to a road would ultimately result in the denial of relief to countless persons injured by items somehow associated with real estate. This argument grossly exaggerates the proper scope of what this Court's holding should be.

This Court need hold no more than that the principles of strict liability do not apply to a road which is to be maintained by the state who inspected the road's composition and construction prior to acceptance. This is so because of the failure of such an application to satisfy the policy rationale for strict liability.

Individual items allegedly subject to strict liability should be separately examined in light of the policy foundations of that doctrine in order to make the determination as to whether or not strict liability should apply. If individual items are scrutinized on a case-by-case basis, the spector of untold future

plaintiffs without a strict liability remedy disappears.

The cases cited by the plaintiff do not support the argument that strict liability applies to a road, since not one case has even remotely addressed the issue of whether or not strict liability applied to the product in question. See, e.g. Hardin v. Montgomery Elevator Company, 435 So.2d 331, 333-35 (Fla. 1st DCA 1983). Instead, these cases implicitly assumed that strict liability applied because the issue framed by the appellate pleadings was whether or not an element of that cause of action had been proven under the evidence. Id.

The plaintiff's argument that the summary judgment rendered by the trial court can be upheld only if strict liability does not apply is absolutely unfounded. The trial court could have reached the same conclusion by holding that the intervening fault of Walton County in not remedying the erosion problem on its property after both actual and constructive knowledge thereof constituted an intervening cause sufficient to break the chain of proximate causation

stemming from any defect in the road which may have been latent and unobservable at the time it was accepted by the County.

The plaintiff throughout the history of this suit has consistently ignored the fact that an intervening cause which severs the original chain of proximate causation renders the defendant free from liability under any tort theory recognized in Florida. Thus, the plaintiff's statement that this Court must affirm unless strict liability is not applicable is simply incorrect.

Because strict liability was not created to have roads fall within its parameters, and since even the application of strict liability does not mandate reversal of the trial court's summary judgment, the holding of the District Court of Appeal should be reversed and the trial court's summary judgment reinstated.

ISSUE 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 UNCONTRO-

VERTED FACTS SHOW THAT THE OWNER OF REAL PROPERTY INTO WHICH THE "MANUFACTURER'S" WORK HAS BEEN INCORPORATED HAD, AFTER ACCEPTANCE, ACTUAL KNOWLEDGE OF A DEFECT IN THE WORK AND FAILED TO TAKE ANY CORRECTIVE ACTION PRIOR TO THE PLAINTIFF'S INJURY.

The defendant wholeheartedly agrees with the plaintiff's statement that this case must "stand or fall with the causation principles involved in a strict liability situation." Brief of Respondent at 14. The plaintiff, however, has overlooked the holding of West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976), and every case dealing with product liability subsequent to West as to what those causation principles are. West explicitly holds that the normal principles of causation and the defenses applicable to negligence continue to apply even in a case where strict liability is invoked. 336 So.2d at 90.

The reliance placed upon the case of Auburn Machine Works Co., Inc. v. Jones, 366 So.2d 1167 (Fla. 1979) by both the plaintiff and the First District Court of Appeal is misplaced. Auburn Machine Works dealt with the legal effect of the observability of a product defect to the injured plaintiff in light of

this Court's holding adopting comparative negligence in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). 366 So.2d at 1171. In light of Hoffman, Auburn Machine Works correctly held that the observability of a product defect to the injured plaintiff is appropriately factored into the comparative negligence analysis unless it can be said that the plaintiff's actions were the sole proximate cause of his injury. Id. at 1172.

Auburn Machine Works is completely inopposite to the case at bar because the observability to the plaintiff of the erosion of County Road 1087 at the time of the accident has never been argued to either the trial court or the court of appeal in support of the summary judgment granted the defendant. In fact, there is no evidence to indicate that the plaintiff or the driver of the plaintiff's vehicle ever saw the erosion in the center of County Road 1087.

Instead, the entire focus of the defendant's intervening cause argument under the seminal case of Slavin v. Kay, 108 So.2d 462 (Fla. 1958), is not the observability of the erosion from the perspective of the injured plaintiff, but rather the observability of that erosion to the owner or occupier of the property

where the erosion is located, which owner was required to maintain the road and correct problems after the road was accepted. This court reaffirmed the Slavin doctrine two years after adopting strict liability in West and five years after the inception of comparative negligence in Hoffman. Lubell v. Roman Spa, Inc., 362 So.2d 922, 923 (Fla. 1978).

Walton County was in control of the property where the road was located in this case, and since the erosion of Road 1087 was observable to a reasonable inspection long before it was expressly observed by an official of Walton County in the course and scope of his employment, the immediate duty arose both under Slavin v. Kay and uncontroverted premises liability law to render the premises safe for persons who were lawfully using the road. See, Night Racing Association, Inc. v. Green, 71 So.2d 500, 502 (Fla. 1954) (duties of landowner to correct or warn regarding defects of which he is or should be aware). Whether or not the plaintiff or his decedent observed or could have observed the erosion has absolutely nothing to do with the defendant's intervening cause argument.

In fact, in the premises liability arena, the observability of most conditions from the injured

plaintiff's point of view is also factored into the comparative negligence analysis under Hoffman v. Jones. See, Pittman v. Volusia County, 380 So.2d 1192 (Fla. 5th DCA 1980). Consequently, Auburn Machine Works cannot serve as proper authority for the District Court of Appeal's holding.

Similarly, the case of Clement v. Rousselle Corp., 372 So.2d 1156 (Fla. 1st DCA 1979), cited by the plaintiff in both this court and the Court of Appeal, actually supports the defendant's position regarding intervening cause. Clement holds that it was proper for a jury to consider whether or not a third party's failure to remedy a dangerous condition created by a defective machine located on the third party's premises was an intervening cause severing the chain of proximate causation running from the manufacturer of the machine. 372 So.2d at 1157. Crucially, Clement is distinguishable on its facts from the present case because the Clement court was reviewing a jury verdict for the manufacturer based upon the intervening fault of the third party. 372 So.2d at 1157-58. Clement was not dealing with a summary judgment and did not hold that summary judgment was inappropriate if there were no factual disputes to be resolved by a jury.

The Clement court specifically noted that a question of fact for the jury was presented on the issue of whether or not the third party had been guilty of negligence by not complying with OSHA standards which arguably required the third party to place a guard on the machine in question rather than placing this duty on the manufacturer of the machine. Id. at 1160. In the present case, the Court of Appeal specifically found that the facts were uncontroverted. Vaughn v. Edward M. Chadbourne Material, Inc., 462 So.2d 512, 513 (Fla. 1st DCA 1985).

In the case at bar, there is no issue of fact regarding Walton County's express knowledge that the erosion existed at least three weeks prior to the plaintiff's accident; no issue of fact that the erosion existed and would have been discovered by a reasonable inspection long before the County's actual knowledge; no issue of fact regarding Walton County's failure to take even rudimentary steps to remedy the erosion or warn of its existence prior to the plaintiff's accident. Id. Therefore, there is no issue in the present case to be submitted to the jury as there was in Clement, and the trial court was eminently correct

in granting the defendant's motion for summary judgment.

To reverse the summary judgment granted by the trial court is to overlook the fact that Slavin did nothing more than to apply normal principles of premises liability and intervening cause to a factual situation where the contractor/builder/manufacturer of an item containing an alleged defect relinquishes control of that item to a third party who owns or occupies the real estate where the item is located and where the alleged defect subsequently manifests itself. Slavin does not represent a departure from the common law principles of premises liability and intervening cause which had been well settled for many years prior to the time the Slavin opinion was handed down by this court. Slavin only addressed the interplay between premises liability and proximate causation in a scenario where the defect allegedly created by the defendant became observable on realty owned or possessed by another, after acceptance of the item containing the defect by the property owner.

CONCLUSION

A case by case approach should be taken when determining whether or not strict liability applies to

a given item in light of the policy rationale for that doctrine. Strict liability should not apply to a road which is constructed to state specifications, subjected to testing prior to acceptance to determine the presence of construction defects, and then turned over to a third party who expressly assumes responsibility for maintenance and control of the work.

Even if strict liability were to apply, the doctrine only absolves the plaintiff from the burden of proving specific acts of negligence by the defendant which resulted in the erosion of County Road 1087. The requirement of proximate causation remains intact under strict liability.

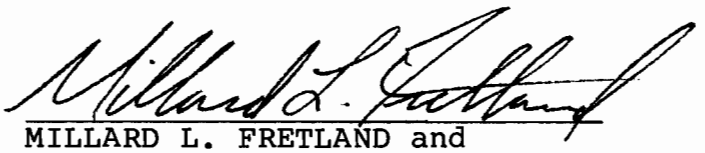
Walton County had actual and constructive knowledge of the erosion of County Road 1087 long before the plaintiffs' accident, and therefore had the duty to remedy the problem or warn persons using the road of its existence. Had Walton County desired to fulfill its duty, it could have undertaken repairs, erected flashing lights or even a simple sign warning travelers of the erosion occurring in the corner of County Road 1087.

The County's failure to take even the simplest step to remedy the erosion or warn drivers of its

existence is an intervening cause sufficient to sever the chain of proximate causation from any latent defect which may have been present in County Road 1087 at the time Walton County assumed responsibility and control some four years prior to the accident in question. Thus, even the application of strict liability cannot warrant reversal of the trial court's summary judgment under the uncontroverted facts.

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

Respectfully Submitted,



MILLARD L. FRETLAND and
DONALD H. PARTINGTON
CLARK, PARTINGTON, HART, HART
& JOHNSON
713 South Palafox Street
Post Office Drawer 12585
Pensacola, FL 32573
(904) 434-3273
Attorneys for Petitioner

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, and to Charles Kahn, Esquire, of 226 South Palafox Street, Pensacola, Florida, by delivery, this 15th day of July, 1985.

MILLARD L. FRETLAND
Clark, Partington, Hart,
Hart & Johnson
715 South Palafox Street
P.O. Box 12585
Pensacola, Florida 32573
(904) 434-3273
Attorney for Petitioner/
Defendant