SUPREME COURT OF FLORIDA

DARLENE EASTERDAY, etc.,

Petitioner — Case No. 70,082

v — DCA Case No. 4-86-0562

FRANK MASIELLO, et al,

Respondent.

_____/

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IN THE SUPREME COURT OF FLORIDA

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Defendant.
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ADDENDUM TO BRIEF -- SUMMARY OF ARGUMENT

The patent defect rule as set forth in Slavin v Kay is incompatible with the current state of the law. The Supreme Court of Florida has adopted the strict liability by adopting Section 402 A, Restatement of Torts (Second), in West v Caterpillar Tractor Company, Inc.. The Court then extended Section 402 A by refusing to apply the patent danger (open and obvious hazard) doctrine to preclude liability on the part of the manufacturer simply because the defect was patent. Slavin v Kay is inconsistent with Jones v Auburn Machine Works Company, Inc.; and the enlightened position of Jones v Auburn Machine Works Company, Inc. should control Slavin v Kay as anachronistic, and should be rejected.

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 14th day of April, 1987 to:

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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 remark "A__" indicates the Appendix to this Brief.

STATEMENT OF THE FACTS

The Decedent, Allen L. Easterday, was incarcerated in the new Palm Beach County Jail Facility when he hung himself on July 26, 1983. R. 44, 46.

The new Palm Beach County Jail facility had been designed and engineered by these Defendants. R. 43, 44.

Plaintiff alleges in Count I of the Second Amended Complaint that the Defendants were guilty of negligence in the design, engineering and construction of the Palm Beach County Jail by violating Department of Correction Regulations concerning specifications and design standards as promulgated by the Department of Corrections. R. 44, 45, 46.

Plaintff alleges in Count II of the Second Amended Complaint strict liability for the defect of failing to provide a guard grill over te ar conditioning vent where it penetrated a secure wall. R. 45, 47, 47 and 48.

Plaintiff acknowledges that the defect was patent. A. 2. But alleges that the "owner"/Sheriff was not aware of said defect. Paragraph 16 G, R 45, and Paragraph 20 G of Second Amended Complaint, R 48.

STATEMENT OF THE CASE

This matter is before this Court on the Second Amended Complaint. R. 43 through 48. The Defendants filed a Motion to Dismiss the Second Amended Complaint based upon Slavin v. Kay, 108 So.2d 462 (Fla. 1958); R. 49 through 52. After hearing the Court enter its Order on March 6, 1986 dismissing the Second Amended Complaint with prejudice and entering a Final Judgment on behalf of the Defendants, R. 53, 54, the Plaintiff timely filed its Notice of Appeal to the District Court of Appeal, Fourth District, R. 55.

The District Court of Appeal, Fourth District, affirmed the trial court's dismissal with prejudice under Slavin v. Kay, A 1 through 3.

ISSUES PRESENTED FOR REVIEW

The recent pronouncement of this Court in Edward M. Chadbourne, Inc. v. Vaughn, et. al., 491 So.2d 551 (Fla. 1986), the first issue on appeal is did Slavin v. Kay preclude the recovery against the architects and their engineers for a personal injury to a third party caused by a patent design defect in a structure?

ARGUMENT

Slavin v. Kay was decided in 1958 by the Supreme Court. On re-hearing in 1959, the Supreme Court modified its decision as follows.

In Slavin v. Kay, the Supreme Court found that the guest of one of the defendants/landowner sustained injury when a basin

fell from a wall of the bathroom in the unit occupied by him. The other defendant, McCann Plumbing Company, had installed the fixture. Liability was thought to be imposed against it for negligence in improperly attaching same against the motel for failure to maintain the premises in a safe condition.

In 1958, under the Contributory Negligence Rule then prevalent in the State of Florida, if the plaintiff was at all himself negligent he was precluded from recovery. Additionally, the Supreme Court of Florida had, at that time, only two recognized exceptions to the rule that contractors 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. See Breedings Dania Drug Company v. Runyon, 147 Fla. 123; 2 So.2d 376; and Carter v. Livesay Window Company, Fla. 73 So.2d 411.

"Carter v. Livesay Window Company may have been decided as an application of this so-called dangerous instrumentality exception to the Rule above stated, but it cannot logically be so limited. The opinion states the principal that liability has been extended to building contractors who create inherently dangerous conditions, and is a further predicate for the decision referred with apparent approval to §385 Restatement of Torts, ALI." 108 So.2d at 466.

The Court goes on to criticize the Kurtin v. Somerset case, a Pennsylvania decision relied upon by the dissenting opinion that a contractor who performs work does not owe a duty to the

whole world to ensure against hidden defects, else the extent of his responsibility would be difficult to measure. The Supreme Court recognized that logically the liability would be terminated by acceptance of the owner, only so far as the acceptor is to assume responsibility. Otherwise, the extent of the contractor's responsibility is precisely that of any tort feasor's, and the hazards he faces are no greater or more discouraging.

It is alleged that the defect, although patent in this case, was such that because of the superior knowledge, training and experience of the architects and engineers, and in their responsibility to comply with the Department of Correction regulations, did wholly fail to incorporate a design or other use of skill, training and experience to comply with the Department of Correction regulations. R. 45, 48. If that is not the case, then it is presumed that this Court will permit the establishment of a new tort that the landowner would be negligent for failure to discover a patent defect and to correct same; and as a result of said correction, the plaintiff would be entitled to such a jury instruction in a jury trial. See A. 4 through 17.

The Court went on to hold that the Kurtin v. Somerset case relied upon by the dissent in the Slavin v. Kay case contained a patent fallacy in that the duty to the whole world was simply limited by the Doctrine of Foreseeability and ordinary principals of tort law. A close review of Slavin v. Kay nowhere indicates the accepted work doctrine as a bar to litigation.

Slavin v. Kay, however, is not sufficient basis to preclude

recovery against architects and engineers for design defects. Nearly 15 years after Slavin v. Kay the Supreme Court of Florida, in Hoffman v. Jones, substantially altered tort law in Florida. No longer was contributory negligence the basis of tort law in the State of Florida, but through the decisions of the Supreme Court, Florida adopted the more compassionate, more rational and more fair doctrine of comparative negligence.

The analysis of the Slavin doctrine has been criticized as being no longer applicable in Florida, and a well thought out treatise entitled Vaughn v. Chadbourne, Strict Liability and the Road that Faded Away, 40 UM Law Review at 359 at 384. The criticism of Slavin in the Law Review article should be well taken. Confer dissenting opinion, Justice Atkins, Chadbourne v. Vaughn, supra.

After the decision in Hoffman v. Jones, supra, the progeny of cases following demonstrate the Supreme Court addressing each of the issues that have been placed before it to broaden the scope and establish all of the principals of comparative negligence in a case-by-case basis.

The evolution of the body of tort law in Florida continued in 1976 when the Supreme Court decided West v. Caterpillar Tractor Company, Inc., 336 So.2d 80 (Fla. 1976). The Court went on to hold that a manufacturer could be liable on the theory of strict liability in tort, if the user can establish the manufacturer's relationship to the product in question, the defect, an unreasonable dangerous condition of product and existence of proximal

causal connection between such condition and user's injuries or damage. This is the so-called "Strict Liability" theory, and in the opinion the Supreme Court adopted the statement of law adopted by the American Law Institute Restatement of Torts (Second) in §402 A.

The Supreme Court's analysis in West clearly demonstrates that Florida has long-recognized great in-roads into the elimination of privity when the product involved was dangerous or inherently dangerous instrumentality. The Court went on to hold that that was no longer a deciding issue upon which products liability suits against the manufacturer of a commercial product by an ultimate user or consumer would be valid. It went on to hold that the sole test was whether or not the product was reasonably safe for its intended use as manufactured and designed, when it left the plant of the manufacturer. The Supreme Court went on to state that it is the public policy which protects the user and consumer of a manufactured article and should also protect the innocent bystander. The Court went on to hold that the duty of a manufacturer's breach of liability will attach runs only to those who suffer personal injury or property damages as a result of using or being within the vicinity of the use of a dangerous instrumentality furnished by a manufacturer which fails to give notice of the danger.

In this particular case, we are alleging, in a Motion to Dismiss, the well-pleaded facts of the Complaint are assumed to

be true; that the defendants were the manufacturers of the jail facility, and through their efforts, design and supervision, allowed the Palm Beach County Jail to be built in violation of a Department of Corrections regulation governing guard grills over duct work where it penetrated a secure wall or ceiling; that they failed to inspect the services, and they legally provided a defective product to the Sheriff of Palm Beach County, knowing that the Sheriff would not be in a position to discover said defect in the ordinary course and scope of his employment and duties. West essentially removes the issue of privity from the vestige of strict liability and looks at the questions set forth in 402 A, Restatement of Torts (Second) concerning strict liability. "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

The Court went on to adopt that contributory negligence was no longer a defense where the contributory negligence is the

failure to discover a defect or guard against the possibility of its existence. Contributory negligence of the consumer or user by unreasonable use of a product after discovery of the defect and danger is a valid defense. Prior to the adoption of Comparative Negligence Doctrine and plaintiff's conduct as a sole proximate cause of his injuries would constitute a total defense. Under contributory negligence, the Court meant that if the plaintiff's conduct was a proximate cause of his injuries, the plaintiff would be without remedy under the Contributory Negligence Doctrine; under the Comparative Negligence Doctrine, he would be entitled to remedy if the defendant was also negligent. The Court went on to hold that because we have comparative negligence under Hoffman v. Jones, the defense of contributory negligence is available in determining the apportionment of the negligence by the manufacturer of the alleged defective product and the negligent use made thereof by the consumer. The Court, by definition, relied upon the distinction between that contributory negligence which is based upon the failure of the user to discover the defect in the product or the failure of the user to guard against the possibility of its existence as being unavailable and unreasonable or misuse of the product by the consumer. West 336 So.2d at 89, 90. The latter being the type of contributory negligence which would constitute a defense. Ibid. The ordinary rules of causation and defenses applicable to negligence are available under our adoption of the Restatement of Torts (Second). 336

So.2d at 90.

The Supreme Court of Florida decided the Auburn Machine Works Company, Inc. v. Jones in 1979. The Supreme Court had to review the decision in Jones v. Auburn Machine Works Company, Inc., 353 So.2d 917, in which the Second District refused to apply the Patent Danger or Open and Obvious Hazard Doctrine so as to preclude liability on the part of a manufacturer. That decision conflicted with Farmhand, Inc. v. Brandies, 327 So.2d 76, (Fla. 1 DCA 1976), in which the First District applied the Doctrine and held that it created an exception to a manufacturer's liability. To resolve that conflict, the Court must either accept or reject the Patent Danger Doctrine. This is exactly the situation in Slavin as Easterday v. Masiello, talking about a patent danger.

The Court went on to hold that "we reject the Doctrine and hold that the obviousness of the hazard is not an exception to the liability on the part of the manufacturer, but rather is a defense by which the manufacturer may show that the plaintiff himself did not exercise a reasonable degree of care as required by the circumstances. We also conclude that the principals of comparative negligence apply with this defense is raised." The Court goes on to explain the history of the Farmhand case to show that the First District Court of Appeal, in adopting the Patent Danger Doctrine, as enunciated in the Campo v. Scofield case in New York State, had passed upon a question of great public inter-

est, and because of this concern, the First District Court of Appeal in Farmhand certified the question for consideration by the Supreme Court. However, because there was no petition for writ of certiorari filed, the Supreme Court was without jurisdiction to decide the issue. The Court went on to point out that Farmhand was decided before the New York Court of Appeals, which established the Patent Danger Doctrine, overruled Campo, as well as the fact that the modern trend in the nation is to abandon the strict Patent Danger Doctrine as an exception to liability, to find that the obviousness of the defect is only a factor to be considered as a mitigating defense in determining whether or not a defect is unreasonably dangerous and whether or not plaintiff used that degree of reasonable care required by the circumstances. 366 So.2d at 1169. For this reason, Slavin cannot justify dismissal of the Plaintiff's Second Amended Complaint.

The Court went on in great detail to point out why the Patent Danger Doctrine is bad policy. The Court went on to establish that it was inconsistent with the general philosophy that this Court has espoused in Hoffman v. Jones, West v. Caterpillar and Blackburn v. Dorta.

The most recent case decided by the Supreme Court in the area of product liability is Chadbourne v. Vaughn, 491 So.2d 551. In Chadbourne, the Court starts out with an analysis of what 402 A is and what the test in the West v. Caterpillar case is. The Court then digresses into a determination of whether or not a

road is a product. It is obvious, in light of Justice Overton's concurrence in Chadbourne, Auburn and West, that the Supreme Court's holding in Chadbourne can only be narrowly construed in order to be consistent with their prior decisions of this Court that a road is not a product. There is no other way that this case can be reconciled with West, Auburn and 402 A, Restatement of Torts Second.

This can be seen clearly as the focus for Chadbourne v. Vaughn, and as a result, the Court's comments under the facts in Chadbourne that Chadbourne was not proximately responsible for the injuries sustained by the Vaughns and going on and pointing out what Slavin v. Kay meant is purely dictum.

The Court went on to hold that it is contrary to public policy to hold a person, whether characterized as a manufacturer or contractor, strictly liable when the defect is patent or known to the owner. There is nothing in this record to support the Court's determination that the patentness of the defect was known to the owner. That the defect is patent is not the deciding or critical factor. See Auburn. This Court must determine that the issue is whether or not, under West and Auburn, that the patentness was known to the owner. Inasmuch as this is a Complaint and a Motion to Dismiss, this Court, as a reviewing court, must accept the pleadings of the plaintiff as being true and correct. There is nothing in the plaintiff's Complaint to demonstrate that the knowledge of the owner was apparent. R. 43 through 48; A. 4

through 16.

It is obvious from Justice Atkins' dissent in Chadbourne that he disagreed with the analysis that the road was not a product; that the central issue before the Supreme Court in Chadbourne is not whether or not Slavin is good law, but whether or not a road was a product.

Petitioner in the instant case submits this Court, in reviewing the case sub judice, carefully examine and analyze the dissenting opinion of Justice Atkins in relationship to that same, fine opinion produced in West, and in Justice Alderman's opinion in Auburn. That this position is well taken can be demonstrated by reviewing Chief Justice McDonald's footnote in the Chadbourne case. The Court went on to hold that ... "Chadbourne would not, in every sense or instance, be immune to a strict liability suit for the manufacture and sale of asphalt mix, or even a roadway, but under the facts and circumstances of the Vaughn case, involving a county road, public policy would seem to necessitate developing an immunity from the Department of Transportation and governmental entities for a service which is purely governmental in function, i. e., a road. As to whether or not the decision would apply to a private road or to other manufacturing entities or products, I believe that the majority opinion of the Supreme Court simply stands for the very narrow decision that a road is not such a product, unlike a building." See Adobe Building Centers, Inc. v. Reynolds, 403 So.2d 1033, (Fla. 4DCA); re-

view denied 411 So.2d 380, (Fla. 1981).

Justice Atkins correctly points out that the majority opinion based its determination upon public policy to protect the State of Florida and the Department of Transportation, as well as the county road maintenance departments of the various counties.

The policy reasons for this Court now eliminating Slavin v. Kay are ably argued in the note in Vaughn v. Chadbourne: Strict Liability and the Road that Faded Away 40 UM Law Review, 359, 1985, as cited by Justice Atkins and by this writer. The analysis applied by Justice Atkins in his dissenting opinion, as well as the policy reasons for eliminating Slavin v. Kay, as enunciated in the Law Review article, should clearly sound the death knell for Slavin v. Kay.

CONCLUSION

For the foregoing reasons, the trial court and the appellate court erred as a matter of law in dismissing the Plaintiff's complaint based upon Salvin v Kay. The Second Amended Complaint clearly states a cause of action alleging an unforeseen or unknown patent danger or defect sufficient to sustain a cause of action under Auburn Machine Works Company, Inc. v Jones. To the extent that Chadbourne v Vaughn appears in conflict, it is not, as Chadbourne v Vaughn clearly stands for the proposition that a road is not a product. To the extent that Slavin v Kay is in conflict with Auburn Machine Works Company, Inc. v Jones, it should be overruled and this matter should be remanded to the trial court with instructions to deny the motions to dismiss and reinstitute the Second Amended Complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 9th day of April, 1987 to:

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