Original

IN THE SUPREME COURT OF FLORIDA

NO. 73,124

FIRST DCA DOCKET NO.: 87-01571

ALMAND CONSTRUCTION CO., INC. a Florida corporation, and A. F. ALMAND, JR., and DORIS J. ALMAND, his wife, individually,

Petitioners,

vs.

JOHN A. EVANS and IRMA L. EVANS, his wife,

Respondents.

ON APPEAL TO INVOKE DISCRETIONARY JURISDICTION OVER A DECISION OF THE COURT OF APPEAL FOR THE FIRST DISTRICT ON GROUNDS OF EXPRESS AND DIRECT CONFLICT

JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondents, Evans, Fifth Amended Complaint came before the trial court in Green Cove Springs on Petitioners, Almands', Motion for Summary Judgment. The trial court considered the Affidavit of Mr. Almand in support of Motion for Summary Judgment and the interrogatory answers of Evans.

The trial court entered summary judgment on Count I, negligence and misrepresentation in the sale of the lot, in that the lot was unsuitable for use as a building lot; on Count II, negligence in clearing and preparing the lot prior to construction; and on Count V, breach of implied warranty. Counsel for respondents argued orally at the hearing on motion for summary judgment the contents of a 1982 engineer's report which established the structural problems which caused damage to the residence were caused by unsuitable soil and fill. The trial court, relying upon the pleadings of the respondents that they notified petitioners of the structural problems in 1978, found that Counts I, II and V were barred by the four year statute of limitations, §95.11(3)(c), Fla. Stat., (1977).

The District Court, in its opinion reversing summary judgment, relied extensively upon the arguments of respondents' counsel as to the 1982 engineer's report being the first notice respondents had of the actual cause of the structural problems. The arguments of respondents' counsel were not supported by affidavit or deposition as to the contents of any engineer's report, D.Ct. 3-4*.

*The Opinion of the First District Court of September 1, 1988 appears herein in the Appendix attached to this Jurisdictional Brief and the pages of the Opinion shall be referred to as "D.Ct."

In reversing the summary judgment, the District Court held that although the respondents knew as early as 1978 that they had structural problems with the house, they did not have actual or constructive knowledge prior to 1982 when they received the engineer's report of the cause of the settling, and, accordingly, the trial court was in error in determining that the statute of limitations commenced to run in 1978 when they had notice of the structural problems. The District Court held that there was an issue of fact precluding summary judgment as to whether or not the respondents could prove to the satisfaction of the trier of fact that the damage to their house was caused by a latent defect of which they neither knew or should have known prior to 1982 so as to toll the running of the four year statute of limitations, D.Ct. 4-5.

SUMMARY OF ARGUMENT

Petitioners seek discretionary review of the District Court's reliance upon hearsay evidence as a basis for finding a genuine issue of material fact as to whether or not the damage to the house resulted from a latent defect of which the respondents either knew or should have known prior to 1982 so as to toll the running of the four year statute of limitations prior to that time. Prior decisions of this Honorable Court and other district courts have consistently held that Fla.R.Civ.P. 1.510(c) requires competent evidence to rebutt allegations in support of a motion for summary judgment.

Petitioners seek discretionary review of the District Court's finding that the statute of limitations did not commence to run until the respondents had actual knowledge of the cause of the structural problems with the house in 1982. This statement of the law conflicts with the decisions of this Honorable Court and other district courts holding that notice of the defective condition and not knowledge of the actual cause of the defective condition commences a running of the statute of limitations for the purposes of §95.11(3), Fla. Stat. (1977).

JURISDICTIONAL STATEMENT

This Honorable Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with the decision of the Supreme Court or another district court of appeal on the same point of law, Fla.R.App.P. 9.030(a)(2)(A)(IV).

ARGUMENT

I THE DISTRICT COURT'S RELIANCE UPON HEARSAY EVIDENCE UNSUPPORTED BY SWORN TESTIMONY OR AFFIDAVIT TO CREATE AN ISSUE OF FACT TO REVERSE SUMMARY JUDGMENT CONFLICTS WITH PRIOR DECISIONS OF THIS COURT REQUIRING ISSUES OF SUMMARY JUDGMENT TO BE SUPPORTED BY COMPETENT EVIDENCE.

The Fifth Amended Complaint showed on its face that the respondents had notice of the structural problems and the unsuitability of the lot in 1978 and the basis of the motion for summary judgment was that the four year statute of limitations had expired, §95.11(3)(c), Fla. Stat. (1977). Petitioners moving for summary judgment had sustained their initial burden by demonstrating on the face of the pleadings that the cause of action was time barred. It became incumbent upon the respondents to come forward with competent evidence revealing a genuine issue of fact which they failed to do. The District Court supplied the missing facts by relying upon the oral arguments of respondents' counsel which were not supported by affidavit or deposition testimony as the basis for its opinion, D.Ct. 3-4.

The same point of law was involved in the case of **Landers v. Milton**, 370 So.2d. 368 (Fla. 1979), wherein the district court reversed summary judgment entered by the trial court finding the statute of limitations had expired. In **Landers**, defendants attempted to support their defense to the running of the statute of limitations by their affidavit and this Court found the affidavits to be insufficient to provide competent evidence to create a genuine issue of material fact to preclude summary judgment. This Court, in reversing the decision of the district court and affirming the summary judgment, stated at page 370 of the opinion:

> "In this case petitioners, as movants for summary judgment, sustained their initial burden by demonstrating on the face of the pleadings that the cause of action was time barred. It then became incumbent upon respondent to come forward with competent evidence revealing a genuine issue of fact. This respondent failed to do. Mr. and Mrs. Milton's affidavits, based largely on supposition, were clearly inadequate to create an issue of fact. Had the affiants specifically alleged, based on personal knowledge, that Mr. Landers was a resident of Florida and had been absent from the state for certain periods from the date of the accident to the filing of the complaint, the district court would have been correct in finding that a material fact existed."

The decision of the District Court which relies upon the unverified allegations of the Fifth Amended Complaint to create genuine issues of material fact conflicts with the decisions of other district courts of appeal holding that in the face of affidavits denying the pertinent allegations of a complaint the failure to support the allegations of the unsworn complaint with any proof does not demonstrate a genuine issue of material fact to preclude summary judgment, **Pandorf v. Longo**, 510 So.2d. 1112 (Fla. 4th DCA 1987).

II THE HOLDING OF THE DISTRICT COURT THAT THE RESPONDENTS DID NOT HAVE KNOWLEDGE OF THE ACTUAL CAUSE OF THE STRUCTURAL PROBLEMS RELIEVED THEM OF THE OBLIGATION TO FILE THEIR COMPLAINT FOR DAMAGES WITHIN FOUR YEARS OF NOTICE OF THE STRUCTURAL PROBLEMS DIRECTLY AND EXPRESSLY CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS HOLDING THAT NOTICE OF THE NEGLIGENT CONDITION NOT KNOWLEDGE OF THE ACTUAL CAUSE OF THE NEGLIGENT CONDITION BEGINS RUNNING OF THE STATUTE OF LIMITATIONS.

The pertinent portion of the statute of limitations dealing with causes of action founded upon negligent construction of improvements to real property is contained in §95.11(3)(c), Fla. Stat. (1977), which reads in part:

> "(3) Within four years. -
> (c) An action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer; except that when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. . . ."

The District Court held that while the respondents admittedly knew as early as 1978 that there was a structural problem with the house, that they had no actual or constructive knowledge of the cause of the settling prior to 1982 which constituted a latent condition tolling operation of the statute of limitations, D.Ct. 4.

The District Court in reversing summary judgment said that if the respondents were able to prove their allegations, i.e., if they could prove to the satisfaction of the trier of fact that the damage to their house was caused by latent defects of which they neither knew nor should have known prior to 1982, the four year statute of limitations would not constitute a bar to their action, **Board of**

Trustees of Santa Fe Community College v. Caudill Rowlett Scott, Inc., 461 So.2d. 239 (Fla. 1st DCA 19) rev.den. 472 So.2d. 1180 (Fla. 1985).

The District Court found that notice of a structural problem with the house in 1978 did not commence the running of the statute of limitations, which conflicts with the opinion of this Court on the same issue. In **Kelley v. School Board of Seminole County**, 435 So.2d. 804 (Fla. 1983), this Honorable Court rejected the logic of **School Board of Seminole County v. Gaf Corp.**, 413 So.2d. 1205 (Fla. 5th DCA 1982) to the extent that it required knowledge of the specific nature of the defects causing the defective condition before the statute of limitations commenced to run on construction negligence cases and held the notice of the defective condition commenced the running of the statute.

In **Conquistador Condominium VIII Association, Inc. v. Conquistador Corporation**, 500 So.2d. 346 (Fla. 4th DCA 1987), the the Fourth District Court of Appeal noted that the condominium association knew the roof leaked and had made repairs and, as a result, had notice of the defective condition of the roof regardless of whether or not they had notice of the specific defect and this notice met the discovery requirements of the statute and commenced running of the statute of limitations, §95.11(3)(c), Fla. Stat. (1985).

CONCLUSION

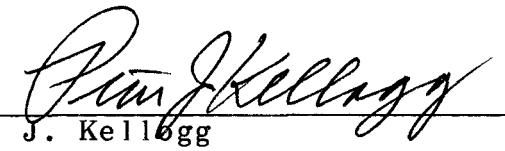
The decision of the District Court of Appeal, First District, that the petitioners, Almand, seek to have reviewed is in direct and express conflict with the decisions of this Court and other district courts as to the burden upon the respondents to contest summary judgment by competent evidence as required by Fla.R.Civ.P. 1.510(c).

The decision of the District Court of Appeal, First District, that the petitioners, Almand, seek to have reviewed is in direct and express conflict with the decision of this Honorable Court and other district courts of appeal on the issue of what constitutes notice of defective construction as provided by §95.11(3)(c), Fla. Stat., to commence the running of the statute of limitations.

The petitioners, therefore, request this Court to exercise its discretionary jurisdiction in this cause to review the decision of the District Court.

Respectfully submitted,

HUMPHRIES, KELLOGG & OBERDIER, P. A.

BY: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been provided to David B. Lee, Esquire, P. O. Box 400, Orange Park, Florida, 32067-0400, by U. S. Mail, this October 7, 1988.

Peter J. Kellogg