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Simmons v. Owens, 363 So. 2d 142 (Fla. 1st Dist. Ct. App. 1978)

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Torts—CONTRACTOR LIABILITY—CONTRACTOR HELD LIABLE TO REMOTE PURCHASER FOR PROPERTY DAMAGE ATTRIBUTABLE TO LATENT DEFECTS IN CONSTRUCTION—*Simmons v. Owens*, 363 So. 2d 142 (Fla. 1st Dist. Ct. App. 1978).

Billy Owens is a general contractor in Tallahassee, Florida. In 1971, Owens constructed and sold a house to Snead. Three years later, Snead sold the house to Stanley and Jane Simmons. After occupying the house for approximately three years, the Simmonses filed a complaint against Owens alleging that he had negligently constructed the house in violation of the City of Tallahassee Building Code.[1] On an exterior portion of the house less than six inches of clearance existed between the wood siding and the ground. As an alleged latent defect which was neither readily discernable, nor reasonably discoverable by inspection, the flaw was not discovered by Snead or the Simmonses.[2]

The Simmonses sought damages, alleging that Owens' negligence was the proximate cause of the house being damaged by water rot and termite infestation. Owens moved to dismiss the complaint for failure to state a cause of action. The trial court granted the motion on the grounds that the complaint failed to allege facts disclosing a dangerous condition or an unreasonable risk to third persons.[3] The Simmonses appealed and the First District Court of Appeal reversed. The issue in *Simmons v. Owens* was whether a remote purchaser of a house may recover in tort for property damages resulting from the negligence of a building contractor.[4] Holding for the appellant, the court recognized that a cause of action exists against the building contractor where remote purchasers sustain property damage attributable to latent defects in construction.[5] The purpose of this note is to examine the rule of contractor liability in Florida as it has developed over the years and to consider a possible alternative to the rule as it presently exists.

In Florida, the traditional rule is that a contractor is not liable for injuries to third parties occurring after the contractor has completed the work and turned it over to the owner.[6] This rule, how-

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1. TALLAHASSEE, FLA., CODE § 9-11 (1957). This section adopts Chapters II through XXIX of the Standard Building Code of 1976. STANDARD BUILDING CODE § 1702.7 (1976), requires a minimum six-inch clearance between exterior wood siding and the earth.
2. Simmons v. Owens, 363 So. 2d 142 (Fla. 1st Dist. Ct. App. 1978).
3. *Id.* at 143.
4. *Id.*
5. *Id.* at 143-44.
6. Carter v. Livesay Window Co., 73 So. 2d 411, 413 (Fla. 1954) (citing Ford v. Sturgis, 14 F.2d 253 (D.C. Cir. 1926)).

ever, has been subjected to numerous exceptions. In *Slavin v. Kay* the appellant, a motel guest, sustained injury when a sink basin fell from the wall of his room and struck him.[7] Consequently, the appellant brought an action against the plumbing company who had installed the sink. The appellant sought to impose liability on the grounds that the plumbing company had been negligent in attaching the sink to the wall. Holding for the appellant, the Florida Supreme Court noted two instances in which exceptions to the rule of "nonliability after acceptance" had been recognized by the court.[8] The first exception arose in *Breeding's Dania Drug Co. v. Runyon,* where an electrical contractor was held liable for negligent wiring which resulted in electrical shock to a third person.[9] This decision formulated the exception that all parties dealing with inherently dangerous elements are held jointly liable without regard to termination of the contract or acceptance of the work.[10] The second exception was developed in *Carter v. Livesay Window Co.*[11] In that case, a four-year-old boy was killed when a precast concrete window frame fell on him. The complaint alleged that the contractor had negligently installed the window frame. That decision, predicated on The Restatement of Torts, extended liability to building contractors who create inherently dangerous conditions.[12]

To understand the basis of these exceptions, it is helpful to explore the principle behind the traditional rule. Basically, the rationale is that the contractor has no present duty to a third person if the premises were in possession and in control of another at the time of injury.[13] Furthermore, by accepting the defective work, the owner imposes upon himself an immediate duty to correct the defect. If he does not, then his own negligence becomes the proximate cause of the resulting injury.[14] Following this logic, the *Slavin*

7. 108 So. 2d 462, *rev'd in part on rehearing,* 108 So. 2d 465 (Fla. 1959).
8. *Id.* at 467.
9. 2 So. 2d 376 (Fla. 1941).
10. *Id.* at 377.
11. 73 So. 2d 411 (Fla. 1954).
12. *Id.* at 412-13. RESTATEMENT OF TORTS § 385 (1934) provides as follows:
> One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others within or without the land for bodily harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor under the same rules as those stated in §§ 394 to 398, 403 and 404 as determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.
13. 108 So. 2d at 466.
14. *Id.*

court reasoned that the underlying principle did not apply where there had been no acceptance by the owner or where the dangerous condition was latent, *i.e.* not discoverable by reasonable inspection.[15] The court futher concluded that in the case of latent defects, the contractor's original negligence remains as the proximate cause of plaintiff's injury.[16]

Over a decade later, the Third District Court of Appeal in *Calvera v. Green Springs, Inc.* employed the *Slavin* rationale where a nine-year-old girl was killed when a planter on the side of a used house fell on her.[17] In a suit against the contractor, the court held, based on the "dangerous condition" exception noted in *Slavin,* that the complaint was sufficient to state a cause of action for negligence. Utilizing this exception, the court extended liability to the contractor, concluding that if the contractor failed to attach or adequately support the planter that crushed the child, then he created a condition of greater inherent danger than that created by the contractor in *Slavin.*[18] As a further basis for extension of liability, the *Calvera* court cited the Florida Constitution which stated: "every person for any injury done him . . . shall have remedy . . . ."[19]

A fact situation similar to *Calvera* appeared before the Third District Court of Appeal in *Hutchings v. Harry.*[20] In that case, a minor was injured when she ran into a sliding glass door that broke and fell on her. She was a guest in the home at the time of the injury. The child's mother, on behalf of her daughter, sued the contractor alleging that he had negligently failed to install sliding glass doors properly marked by decals and constructed of "breakaway" glass. The court held that no negligence could be found, and, therefore, that no cause of action existed against the contractor.[21] In support of this conclusion, the *Hutchings* court, citing *Slavin* and *Calvera,* determined that in order to extend the liability of a contractor to third parties, it is necessary that the alleged facts show: "(1) a dangerous latent defect for which the contractor is responsible and (2) negligence of the contractor in failing to dis-

15. *Id.*

16. *Id.*

17. 220 So. 2d 414 (Fla. 3d Dist. Ct. App. 1969).

18. *Id.* at 416.

19. *Id.* The *Calvera* court cited FLA. CONST. art. I, § 4 (1967, amended 1968) (current version at FLA. CONST. art. I, § 21).

20. 242 So. 2d 153 (Fla. 3d Dist. Ct. App. 1970).

21. *Id.* at 155-156.

cover and remedy the latent defect."[22] The court found that neither of these requirements had been satisfied according to the alleged facts.[23]

The differing requirements for liability set by the preceding decisions tended to confuse the traditional rule. *Forte Towers South, Inc. v. Hill York Sales Corp.* was no exception to this trend.[24] In that case, Hill York Sales Corporation contracted to design and install an air conditioning system in Forte Towers South Apartments. Several years after installation, water lines to individual apartments ruptured causing damage to carpets, floors, and furnishings. Examination revealed defects in the air conditioning system which could not have been discovered by ordinary inspection. Consequently, the district court found that these facts met the requirements of the latent defect exception set down in *Slavin*.[25] The court failed, however, to comment on two distinguishing facts of this case. First, the latent defect in *Slavin* was specifically qualified by the court as a "dangerous condition."[26] The question raised here, of course, is whether the air conditioning defects qualify as a dangerous condition. Second, the damage occurring in *Forte Towers* was exclusively property damage, whereas all of the prior decisions involved personal injury. Apparently, the *Forte Towers* exception to the traditional rule indicates the court's desire to further extend contractor liability to include property damage.[27] Because it was in fact only an exception, and not a revised rule, the *Forte* decision threw the general rule even more out of focus. Consequently, the traditional rule, along with its numerous exceptions, survived to plague the court in *Simmons v. Owens* where it was subjected to still further expansion.[28]

The *Simmons* decision merged the logic of *Slavin* with the property damage exception of *Forte Towers* to establish a cause of action against a contractor by remote purchasers of a used house for property damages resulting from negligent construction. In so doing, the court further distorted the traditional rule by introducing a new requirement—unreasonable risk. The *Simmons* court determined that a contractor remains liable where "he creates a danger-

22. *Id.* at 155.
23. *Id.* at 155-56.
24. 312 So. 2d 512 (Fla. 3d Dist. Ct. App. 1975).
25. *Id.* at 514.
26. 108 So. 2d at 465.
27. *See* 312 So. 2d at 514.
28. 363 So. 2d 142 (Fla. 1st Dist. Ct. App. 1978).

ous condition of *unreasonable risk* which is latent . . . ."[29] Having laid this framework for the type of condition needed in order to extend liability, the court relied on *Forte Towers* to justify the further extension of liability to property damages.[30] In support of this decision, the court stated that there was no logical reason why the rule of *Forte Towers* should not extend to subsequent purchasers of the building.[31] Furthermore, despite holding that the facts alleged in the complaint disclosed a latent dangerous condition or an unreasonable risk,[32] the *Simmons* court failed to explain how it reached this determination.

This "patchwork" reasoning represents the growing difficulty in applying the exception-riddled traditional rule. In fact, the *Simmons* opinion relied heavily on realistic policy considerations aimed at protecting the ordinary home purchaser who is not qualified to determine when and where defects exist.[33] The court recognized that home purchasers are making the biggest and most important investments of their lifetimes. Purchasers cannot afford to suddenly discover latent defects; the cost of repair may severely burden family budgets.[34] Moreover, the court employed firm language emphasizing the need to depart from the traditional rule as a means of determining contractor liability:

> The careless work of contractors, who in the past have been insulated from liability, must cease or they must accept financial responsibility for their negligence. In our judgment, building contractors should be held to the general standard of reasonable care for the protection of anyone who may foreseeably be endangered by their negligence.[35]

Simmons is highly indicative of a trend toward equating contractor liability with manufacturer liability. In fact, the development of building contractors' liability has closely paralleled that of the products liability field. In the products liability area, the English case of *Winterbottom v. Wright* introduced the requirement of privity of contract between manufacturer and the party injured by

29. *Id.* at 143 (emphasis added).
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* (citation omitted).

a defective chattel.[36] As a defense to negligence actions, the privity rule soon trickled from products liability into contractor liability.[37] Despite the erosion of the privity rule in both fields over the years,[38] it is still recognized to some degree in a few jurisdictions.[39] Basically, builders have been held liable to initial purchasers for defects after acceptance of the work under two theories, implied warranty and negligence.[40] Generally, however, remote purchasers have been denied recovery.[41]

The decision by the New York Court of Appeals in the products liability case of *MacPherson v. Buick Motor Co.* established the general principle that a plaintiff can sue in negligence regardless of privity where he has shown that the defect in the product created a dangerous condition.[42] The traditional rule of contractor nonliability after acceptance of work was first modified when courts began applying the negligence doctrine established in *MacPherson* to contractors who created inherently dangerous conditions.[43]

In the area of products liability, the *MacPherson* doctrine was later extended to include actions for property damage, in addition to the already established action for personal injury.[44] Similarly, the general trend in contractor liability is to implement a standard of reasonable care and foreseeability as a yardstick for determining contractor liability to third persons after the owner accepts the work. In a Wisconsin case, *Fisher v. Simon,* the purchaser of a

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36. 152 Eng. Rep. 402 (Ex. 1842). In *Winterbottom,* the driver of a mail coach was injured when he was thrown from the vehicle which had collapsed due to its negligent state of repair. The driver sued the defendant who had contracted with the post office to keep the coach in good repair. The court held that since the defendant's duty under the contract extended only to the post office, the driver lacked privity with the defendant, and, therefore, could not recover in contract or tort. *Id.* at 406.

37. *See, e.g.,* City of Albany v. Cunliff, 2 N.Y. 165 (1849). Here, a third party was injured when a negligently constructed bridge collapsed. The court held that there was no connection between the wrong done and the injured person, *i.e.* no privity of contract. *Id.*at 172-73.

38. *See, e.g.,* Fisher v. Simon, 112 N.W.2d 705 (Wis. 1961).

39. *See, e.g.,* Chesser v. King, 428 S.W.2d 633 (Ark. 1968); Shepherd Constr. Co. v. Watson, 154 S.E.2d 388 (Ga. Ct. App. 1967).

40. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, §§ 96-98 (4th ed. 1971).

41. *See, e.g.,* Duncan v. Schuster-Graham Homes, Inc., 563 P.2d 976 (Colo. Ct. App. 1977); Oliver v. City Builders, 303 So. 2d 466 (Miss. 1974).

42. 111 N.E. 1050, 1053 (N.Y. 1916).

43. *See, e.g.,* Carter v. Livesay Window Co., 73 So. 2d 411 (Fla. 1954); Breeding's Dania Drug Co. v. Runyon, 2 So. 2d 376 (Fla. 1941); Calvera v. Green Springs, Inc., 220 So. 2d 414 (Fla. 3d Dist. Ct. App. 1969); Schipper v. Levitt & Sons, Inc., 207 A.2d 314 (N.J. 1965).

44. *See, e.g.,* Todd Shipyards Corp. v. United States, 69 F. Supp. 609 (S.D. Me. 1947); Dunn v. Ralston Purina Co., 272 S.W.2d 479 (Tenn. Ct. App. 1954); Fisher v. Simon, 112 N.W.2d 705 (Wis. 1961). *See also,* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 101 (4th ed. 1971).

house brought action under a theory of negligence against the contractor for the cost of repairing latent defects.[45] In analyzing the extent of contractor liability, the court found no difference in principle regardless of whether the contractors' negligence resulted in personal injury or property damage.[46] Similar extensions to property damage have been made by other courts under the negligence theory. For example, in the New Mexico case of *Steinberg v. Coda Roberson Construction Co.*, the remote purchaser of a house sued the contractor under a negligence theory for the cost of repairs necessitated by an alleged defective roof.[47] In holding the contractor liable, the court recognized that the existence of privity is wholly immaterial in a negligence action involving a contractor and a remote purchaser.[48] Also, in support of the modern trend, the court noted that the question of liability should be approached from a standard of reasonable care and that such an approach would eliminate the necessity of determining whether a particular condition is inherently dangerous.[49] Other jurisdictions have invoked similar rationale in extending contractor liability to third persons.[50] The California Supreme Court in *Stewart v. Cox*, instituted a balancing test in resolving the question of a contractor's liability to a remote purchaser for property damage.[51] Adhering to the rationale of *Stewart*, other case holdings indicate that under the negligence theory remote purchasers are members of a class of persons who could reasonably be foreseen as users of the property.[52]

The rulings in California,[53] New Mexico,[54] and Wisconsin[55] typify a movement toward more consumer-oriented law in the area of contractor liability to third persons. Most states have introduced

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45. 112 N.W.2d 705 (Wis. 1961).

46. *Id.* at 709.

47. 440 P.2d 798 (N.M. 1968).

48. *Id.* at 799.

49. *Id.*

50. *See, e.g.*, Stewart v. Cox, 362 P.2d 345 (Cal. 1961); Cosgriff Neon Co. v. Mattheus, 371 P.2d 819 (Nev. 1962); Russell v. Arthur Whitcomb, Inc., 121 A.2d 781 (N.H. 1956).

51. 362 P.2d 345, 348 (Cal. 1961). This test involves the balancing of various factors, such as foreseeability of harm to the plaintiff, the degree to which the original transaction was intended to affect him, and the policy of preventing future harm. *Id.* A test of this type suggests that public policy should play a large part in the determination of contractor liability.

52. *See, e.g.*, Sabella v. Wisler, 377 P.2d 889 (Cal. 1963); Temple Sinai—Suburban Reform Temple v. Richmond, 308 A.2d 508 (R.I. 1973).

53. *See* Sabella v. Wisler, 377 P.2d 889 (Cal. 1963); Stewart v. Cox, 362 P.2d 345 (Cal. 1961).

54. *See* Steinberg v. Coda Roberson Constr. Co., 440 P.2d 798 (N.M. 1968).

55. *See* Fisher v. Simon, 112 N.W.2d 705 (Wis. 1961).

recovery under the negligence theory by slowly chipping away at the established "nonliability after acceptance" rule. Courts have justified the imposition of liability on the contractor through a variety of rationales. For instance, the court in *Kriegler v. Eichler Homes, Inc.* extended application of the *MacPherson* doctrine by finding a lack of meaningful distinction between the mass production and sale of homes and that of automobiles.[56] Meanwhile, the opinion in *Schipper v. Levitt & Sons, Inc.* indicated that a controlling factor in the extension of liability was the greater capacity of the builder to absorb the loss.[57]

Unfortunately, Florida has avoided the progressiveness displayed by other states. Instead of eliminating the "nonliability after acceptance" rule in favor of a foreseeability standard, Florida courts have elected to erode the rule's application by promulgating exceptions. Although this process of generating new rules through exceptions is common to our legal system, at some point the traditional rule must be abandoned by the courts in favor of a decisive new rule. To let the process continue until the exceptions outweigh the rule is poor judicial practice. Unfortunately, Florida today is nearly two decades behind many other states in establishing avenues of recovery for remote purchasers.

As recently as 1972, a Florida court recognized that the law dealing with contractor liability was based on anachronistic distinctions which make no sense in today's society.[58] The court emphasized current concepts of morality as forming the basis of law and the judicial need for constant vigilance to keep the common law "abreast" of the times.[59] Most Florida courts, however, maintain their allegiance to the traditional rule by declining to equate the standard for liability of contractors with that of manufacturers in products liability cases.[60]

The question of whether the modern trend will inflict an unlimited amount of liability on the contractor is implicit in discussion of the issue. Three factors argue against such a proposition. First, by definition, a test of foreseeability and reasonable care under the circumstances supplies parameters for determining liability. By virtue of this test, purveyors of shoddy work will be penalized while responsible, competent builders will avoid liability. Second,

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56. 74 Cal. Rptr. 749, 752 (Dist. Ct. App. 1969).
57. 207 A.2d 314, 323 (N.J. 1965).
58. Gable v. Silver, 258 So. 2d 11, 17 (Fla. 4th Dist. Ct. App. 1972).
59. *Id.*
60. *See* El Shorafa v. Ruprecht, 345 So. 2d 763 (Fla. 4th Dist. Ct. App. 1977).

the passage of time, in and of itself, will create buffers to shield the contractor since the difficulty of producing reliable evidence increases over time. In addition, contributing and intervening causal factors, which may arise as time passes, will impede a plaintiff's ability to litigate successfully. While at first glance, these factors may seem to equally hinder the contractor in the structuring of his defense, the Florida Supreme Court has specifically recognized that "the difficulty of proof would seem to fall at least as heavily on injured plaintiffs who must generally carry the initial burden of establishing that the defendant was negligent."[61] Last, it should be noted that the advent of insurance has prevented the implementation of such a liability standard from impairing the livelihood of manufacturers in the products liability area.

Hopefully, *Simmons* will be the last exception added to the traditional rule "slate" in Florida. The time has arrived for the Florida Supreme Court to wipe this slate clean by declaring unequivocally that the question of a contractor's liability to remote purchasers, whether for personal injury or property damage, will be determined according to a standard of foreseeability and reasonable care under the circumstances.

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61. Unfortunately, Florida builders have been denied the comfort of a statute of limitations dealing with contractor liability. *See* Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979). In *Overland*, the court held the statute of limitations dealing with contractor liability, FLA. STAT. § 95.11(3)(c) (1979), unconstitutional to the extent that it absolutely bars lawsuits commenced later than 12 years after construction. 369 So. 2d at 574.