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***Vaughn v. Chadbourne*: Strict Liability and the Road that Faded Away**

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Vaughn v. Chadbourne: Strict Liability and the Road that Faded Away

I. INTRODUCTION	359
II. PERSPECTIVE	361
A. <i>Strict Product Liability</i>	361
B. <i>Defective Improvements and Product Liability</i>	365
C. <i>Defective Improvements in Florida</i>	371
III. ANALYSIS	377
A. <i>The Paver Is a Manufacturer, the Paving Mix Is a Product</i>	377
B. <i>The Stream of Commerce</i>	380
C. <i>Causation</i>	381
D. <i>The Slavin Doctrine</i>	384
E. <i>What Is Slavin Doing Here?</i>	385
F. <i>Slavin Is Misapplied to a Product Liability Action</i>	386
G. <i>Slavin Must Go</i>	389
H. <i>Policy Reasons and Results</i>	390
IV. CONCLUSION	392

I. INTRODUCTION

Mary Emma Vaughn and her husband, Algie, left Pensacola, Florida, bound by car for Opp, Alabama, on the night of January 12, 1981.¹ As Mrs. Vaughn drove northbound on Walton County Road 1087 and approached a curve at a lawful rate of speed, the left wheels of the car went over a two-inch drop-off in the center of the two lane road. Mrs. Vaughn lost control of the car, which twice skidded across the road before rolling over. Mary Vaughn died and her husband suffered serious injuries as a result of the accident.²

Edward M. Chadbourne, Inc., is a paving contractor and manufacturer of the materials with which it paves roads and parking lots. In October and November of 1978, under a contract with the Florida Department of Transportation (DOT), Chadbourne paved Walton County Road 1087, using a paving mix of sand and asphalt it prepared in its plant. The DOT tested the sand-asphalt mix at Chadbourne's plant and at the work site.³ Six months after Chadbourne paved the stretch of road on which the Vaughns later crashed,⁴ the State of Florida accepted the project and turned it

1. Appellant's Initial Brief at 1, *Vaughn v. Edward M. Chadbourne, Inc.*, 462 So. 2d 512 (Fla. 1st DCA 1985), *review granted*, No. 66,413 (Fla. May 17, 1985) (argued Oct. 11, 1985).

2. 462 So. 2d at 513.

3. *Id.*

4. In the week of October 5, 1978, Chadbourne paved what later would become the

over to Walton County for maintenance.⁵ Chadbourne did no further work on the road and had no further responsibility for its upkeep.⁶

Late in 1980, a Walton County Commissioner on official business inspected county road 1087 and observed that the pavement on the southbound lane was wearing away at the curve in question. The commissioner notified the county engineering consultant, but the county took no action to correct the erosion problem before the accident.⁷

Algie Vaughn brought an action against Chadbourne for his injuries and the wrongful death of his wife. He asserted negligence, breach of implied warranty, and strict liability theories based on an alleged defect in Chadbourne's paving mix.⁸ Chadbourne moved for summary judgment, which the court granted on all three counts.⁹ Vaughn appealed. The First District Court of Appeal reversed and remanded. Chief Judge Ervin, writing for a unanimous panel, held that, first, because Chadbourne is a manufacturer of building supplies, it is a seller within the meaning of Florida's strict liability doctrine as expressed in Section 402A of the Restatement (Second) of Torts,¹⁰ and is thus subject to strict liability for injury-causing defects in its products; second, as a manufacturer of its own paving mix and not merely a contractor who purchased the mix from another, Chadbourne is not absolved of liabil-

dangerous curve. Answer Brief of Appellee at 1, Vaughn v. Edward M. Chadbourne, Inc., 462 So. 2d 512 (Fla. 1st DCA 1985).

5. The DOT tested the pavement with a rolling straightedge before accepting the road. Inspectors found it satisfactorily level. Core samples taken after the accident were within DOT tolerances. *Id.* at 1-2.

6. 462 So. 2d at 513.

7. *Id.*

8. *Id.* at 514.

9. *Id.* at 513-14.

10. Section 402A states:

(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.

RESTATEMENT (SECOND) OF TORTS § 402A (1965) (hereinafter cited as RESTATEMENT (SECOND)) (adopted by Florida in *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976)).

ity by the proximate cause fiction of the accepted-work doctrine as expressed in *Slavin v. Kay*,¹¹ although the drop-off in the pavement indisputably had become patent and observable before the accident.¹² *Vaughn v. Chadbourne*, 462 So. 2d 512 (Fla. 1st DCA 1985), *review granted*, Sup. Ct. Case No. 66,413 (Fla. May 17, 1985) (argued Oct. 11, 1985).

II. PERSPECTIVE

A. *Strict Product Liability*

In 1976, in *West v. Caterpillar Tractor Co.*,¹³ the Supreme Court of Florida adopted a strict liability cause of action, based upon Section 402A of the Restatement (Second), for one whose injury to person or property is proximately caused by a defective product.¹⁴ The case arose when a road grader backed into and over a pedestrian who was looking into her purse as she crossed the street to catch a bus. Her husband sued the manufacturer of the road grader for negligent design, specifically, the lack of an audible warning signal when the vehicle backed up, inadequate rear view mirrors, and a blind spot if the driver tried to look behind when backing up. A second count alleged a breach of implied warranty or strict liability based upon the alleged design defects.¹⁵ Upon certification of questions from the United States Court of Appeals for the Fifth Circuit, the court held, *inter alia*,¹⁶ that:

In order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish the manufacturer's relationship to the product in question, the defect and unreasonably dangerous condition of the product, and the existence of the proximate causal connection between such condition and the user's injuries or damages.¹⁷

The *West* opinion acknowledged that Florida courts had developed various theories of recovery for personal injury or property

11. 108 So. 2d 462 (Fla. 1958).

12. *Vaughn*, 462 So. 2d at 514-15.

13. 336 So. 2d 80 (Fla. 1976).

14. *Id.* at 87. *See supra* note 10.

15. 336 So. 2d at 82.

16. The *West* court also held that an injured party's failure to discover the defect would not be contributory negligence, but that unreasonable use of the product after discovering the danger or lack of ordinary care could be defenses to a breach of warranty or strict liability action. The strict liability right of action is not limited to ultimate users and extends to foreseeable bystanders within the zone of danger. *Id.* at 90-92.

17. *Id.* at 87.

damage caused by defective products, including negligence, breach of express and implied warranties, and fraud.¹⁸ It asserted that these theories were now refined and consolidated to the point where distinctions among them had taken on more theoretical than practical significance.¹⁹ The courts had expanded actions for negligence and breach of implied warranty beyond contractual boundaries to allow recovery by one not in privity with the seller for injury caused by defective food products²⁰ or products recognized as inherently dangerous.²¹ Courts had relaxed the privity requirement not only because of the nature of products in question, but also because of the foreseeability of their use by injured parties.²²

In adopting Section 402A, the *West* court stated that its decision would, in most cases, mark a change in nomenclature and not a radical departure from prior case law.²³ As a result, the established actions would coexist with the new one.²⁴

18. *Id.* at 84.

19. *Id.* A list of twenty-nine different ways in which courts circumvented lack of privity in breach of implied warranty cases from the 1920's and 1930's well illustrates the preservation of form over substance. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *YALE L.J.* 1099, 1124 n.153 (1960).

20. *See, e.g.,* *Reese v. Florida Coca-Cola Bottling Co.*, 256 So. 2d 392 (Fla. 1st DCA 1972) (exploding soda bottle); *Blanton v. Cudahy Packing Co.*, 154 Fla. 872, 19 So. 2d 313 (Fla. 1944) (poisonous canned meat product).

21. *See, e.g.,* *Toombs v. Ft. Pierce Gas Co.*, 208 So. 2d 615 (Fla. 1968) (propane gas); *Matthews v. Lawnlite Co.*, 88 So. 2d 299 (Fla. 1956) (defective lawn chair); *Keller v. Eagle Army-Navy Dept. Stores, Inc.*, 291 So. 2d 58 (Fla. 4th DCA 1974) (insect repellent patio torch); *see also* *Slavin v. Kay*, 108 So. 2d 462 (Fla. 1958) (applying the latent danger exception to a dangerous condition created by a building contractor to permit a negligence action by an invitee who was out of privity with the contractor).

22. *See, e.g.,* *McBurnette v. Playground Equip. Corp.*, 137 So. 2d 563 (Fla. 1962) (child of purchaser); *Barfield v. Atlantic Coastline R.R. Co.*, 197 So. 2d 545 (Fla. 2d DCA 1967) (employee of purchaser); *see also* *McCarthy v. Florida Ladder Co.*, 295 So. 2d 707 (Fla. 2d DCA 1974) (holding that privity is no longer required in an action by the ultimate user against the manufacturer and that the elements of an action for breach of implied warranty are: plaintiff must show he was a foreseeable user of the product, he used the product in the intended manner at the time of the injury, the product was defective when transferred from the warrantor, and the defect caused his injury).

23. *West*, 336 So. 2d at 86. For the notion that the strict liability cause of action (as adopted by New York) was not a new cause of action, but a new name for the existing action for breach of implied warranty, *see* *Victorson v. Bock Laundry Mach. Co.*, 37 *N.Y.2d* 395, 335 *N.E.2d* 275, 373 *N.Y.S.2d* 39 (1975). Such a warranty is not a sales warranty, but sounds distinctly in tort. It evolved from the extension of a remedy to those who were neither buyers nor users of the defective product, and is based on considerations of social policy. *Id.*

24. The *West* opinion noted that the strict liability action could be a vehicle for recovery if no contractual relationship exists between the injured user and the product's manufacturer, but an action for breach of implied warranty remains available where a contract exists. *West*, 336 So. 2d at 91. *See* *GAF Corp. v. Zack Co.*, 445 So. 2d 350 (Fla. 3d DCA 1984) (When neither personal injury nor property damage was suffered, a strict liability action did not lie despite contractual privity. An action for breach of implied warranty is .

What *was* a radical departure in *West* was the court's acknowledgment that strict liability in tort for injuries caused by defective products is bottomed on public policy and not doctrine. The manufacturer's obligation is an "enterprise liability . . . one which should not depend upon the intricacies of the law of sales."²⁵ The cost of injuries from defective products is a cost of doing business. It should be borne by the "makers of the products who put them in the channels of trade," rather than by those injured or damaged "who are ordinarily powerless to protect themselves."²⁶ The manufacturer undertakes a special responsibility to the consuming public when it encourages use of its potentially dangerous product by inducement and promotion.²⁷

West relied upon the leading case of *Greenman v. Yuba Power Products, Inc.*,²⁸ in which California became the first jurisdiction to adopt a cause of action for strict product liability in tort. *West* approvingly cited *Greenman* for the proposition that a manufacturer is subject to strict liability when it puts a product on the market with knowledge that the product is to be used without inspection for defects.²⁹ Subsequent Florida case law makes clear that the converse of this proposition is not true, and rejects the argument that a manufacturer is immunized from strict liability when it knows its product is to be inspected for defects.³⁰ Section 402A holds a seller of a defective product that is unreasonably dangerous³¹ subject to liability for injury to the ultimate user or to his property if the seller is engaged in the business of selling such a

proper when only economic loss is suffered.).

25. *West*, 336 So. 2d at 92.

26. *Id.*

27. *Id.* at 84.

28. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (defective wood-turning lathe feature of combination power tool).

29. *West*, 336 So. 2d at 86.

30. The court held an elevator manufacturer subject to strict liability for defects in its elevator despite the fact that elevators are regularly inspected. *Hardin v. Montgomery Elevator Co.*, 435 So. 2d 331 (Fla. 1st DCA 1983) (Chief Judge Ervin writing for a unanimous court); see *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (holding car manufacturer remains strictly liable for defects despite its knowledge that car dealer performs final inspection and preparation of car prior to sale).

31. This case note does not address whether "unreasonably dangerous" in Section 402A means something more than defective, and if so, what that something is. Nor does it consider what should be the proper test for unreasonable danger in a product that causes injury. For a look at Florida's treatment of this issue, see RESTATEMENT (SECOND) § 402A comment i (dangerous beyond the expectations of the ordinary consumer); see also *Auburn Mach. Works, Inc. v. Jones*, 366 So. 2d 1167 (Fla. 1979) (advancing the Harper & James balancing test of risk and utility using Professor Wade's criteria); *Cassisi v. Maytag*, 396 So. 2d 1140 (Fla. 1st DCA 1981) (Chief Judge Ervin advancing the use of either standard, espe-

product and the product is expected to and does reach the user without substantial change in its condition as sold.³²

Justice Traynor made the classic statement of the policies that undergird strict product liability nineteen years before he wrote the *Greenman* opinion in his concurrence to *Escola v. Coca-Cola Bottling Co. of Fresno*.³³ The basic policy priority is protecting the public from defective products and creating an incentive to safety by assigning the cost of defects to manufacturers and others in the chain of distribution.³⁴

Consumers are lulled into an expectation of quality by modern marketing techniques.³⁵ They often are unable to identify and prove acts of negligence responsible for the defect,³⁶ but "even if there is no negligence . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."³⁷ Manufacturers of products are the best cost avoiders because they have superior knowledge and control of the condition of the products that they offer for sale.³⁸ Further, manufacturers can

cially for defective design cases).

32. *West*, 336 So. 2d at 84; see *supra* note 10.

33. 24 Cal. 2d 463, 150 P.2d 436 (1944) (Traynor, J., concurring). For a list of the policy reasons that undergird strict product liability, see *Lechuga, Inc. v. Montgomery*, 12 Ariz. App. 32, 37-38, 467 P.2d 256, 261-62 (Ct. App. 1970) (Jacobson, J., concurring) (truck lessor should be subject to strict liability); RESTATEMENT (SECOND) § 402A comment c.

34. "It is to the public interest to discourage the marketing of products having defects that are a menace to the public." *Escola*, 24 Cal. 2d at 462, 150 P.2d at 441. In many instances, the ultimate user is unable to inspect for product defects. He is brought, from far away places, products of ever increasing complexity. Modern manufacturing processes are beyond the ken of the general public which has neither the means nor skill to investigate for itself the soundness of (all but the simplest) products. *Id.* at 467, 150 P.2d at 443.

35. The consumer's "erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and trade-marks." *Escola*, 24 Cal. 2d at 467, 150 P.2d at 443; see *West*, 336 So. 2d at 86.

36. *Escola*, 24 Cal. 2d at 462, 150 P.2d at 441. See Prosser, *supra* note 19, at 1114-18; *infra* note 73.

37. *Escola*, 24 Cal. 2d at 460, 150 P.2d at 440.

38. The risk of injury from defective products whose manufacturers may not have been negligent is "a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection." *Id.* at 462, 150 P.2d at 441. New Jersey courts have developed the policy of casting the burden of loss to the party in the position of superior knowledge and control of the product's quality and safety. See *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 212 A.2d 769 (1965) (holding truck lessor impliedly warrants the fitness of its vehicle to the lessee because lessor is in the better position to know and control the condition of the truck and to distribute losses that may result from its dangerous condition); *Hennigsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 384, 161 A.2d 69, 83 (1960) (car buyer relies on the manufacturer, who controls construction, and to a lesser extent, upon the dealer, who inspects and services the car before delivery to consumer, to protect him from injury-causing defects);

spread among the consuming public the cost of purchasing insurance or self-insurance against the risk of defective products.³⁹ Finally, retailers and wholesalers also should be subject to strict liability that they may serve as a conduit to reach the manufacturer, who is ultimately responsible.⁴⁰

B. *Defective Improvements and Product Liability*

One can hardly argue that the need to protect the public from defective products has diminished since Section 402A was drafted. In Florida and elsewhere, almost irresistibly, the sweep of strict liability doctrine has filled in the shadowy outline of Section 402A.⁴¹

In jurisdictions that have adopted Section 402A or its equivalent, judges frequently must decide whether strict liability principles apply to actions for injuries caused by defective struc-

Gentile v. MacGregor Mfg. Co., 201 N.J. Super. 612, 493 A.2d 647 (Super. Ct. 1985) (reconditioners of school districts football helmets subject to strict liability for high school player's injuries).

39. "[T]he risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." *Escola*, 24 Cal. 2d at 462, 150 P.2d at 441. Some say that this rationale may have dissipated as a result of a marked increase in product liability claims coinciding with the adoption of strict product liability actions in many jurisdictions in the 1970's. A nationwide crisis of prohibitively costly or unavailable liability insurance for manufacturers has been widely reported and debated. See generally Model Uniform Product Liability Act, 44 Fed. Reg. 62,714 (1979) (Dep't of Commerce recommended act arising out of the insurance crisis) [hereinafter cited as MODEL ACT]; R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW (1980); Reed & Watkins, *Product Liability Tort Reform: The Case for Federal Action*, 63 N.E. L. REV. 389 (1984). But see *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288, 293, 294 (N.H. 1983) (In holding product liability statute of repose violative of state constitution's due process/guarantee of remedy provision, the court noted state legislative committee's finding that the panic rise in manufacturer's insurance rates had ended nationwide by 1980.); Vandall, *Undermining Torts' Policies: Products Liability Legislation*, 30 AM. U.L. REV. 673 (1981). For an assertion that loss spreading is a makeweight argument in the first place, see *Magrine v. Krasnica*, 94 N.J. Super. 228, 235-37, 227 A.2d 539, 545-46 (City Ct. 1967), *aff'd*, 100 N.J. Super. 223, 241 A.2d 637 (1968).

40. The *Lechuga* court cited *Vandermark* for the proposition that a retailer, who may be the only readily available defendant, is an integral part of the overall producing and marketing enterprise. The retailer's strict liability serves as an added incentive to safety and affords maximum protection to the consumer, the cost of which the retailer and manufacturer can adjust in their ongoing business relationship. *Lechuga, Inc. v. Montgomery*, 12 Ariz. App. 32, 38, 467 P.2d 256, 262 (Ct. App. 1970) (citing *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964)).

41. For example, Section 402A left open the question whether a bystander could hold a manufacturer strictly liable for injuries resulting from another's use of the product. Eleven years later, that question was answered in the affirmative in the opinion that adopted Section 402A in Florida. See *West*, 336 So. 2d at 82-83, 92; see also *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

tures,⁴² fixtures,⁴³ or improvements⁴⁴ to real property ("improvements") that cause bodily harm or property damage.⁴⁵ Injured parties bring these actions against vendors, owners, building contractors, architects, and engineers. Courts usually use one of three approaches to analyze the threshold issue: whether the improvement is a product within the meaning of Section 402A.

First, a court may use a definitional approach to arrive at the tautological holding that an improvement to realty is not a product because it is not personalty. A good example of such ipse dixit is found in *Neumann v. Davis Water and Waste, Inc.*,⁴⁶ in which the Second District Court of Appeal, without further reasoning, stated, "[we] decline to extend the strict liability principle of *West v. Caterpillar . . .* to structural improvements to real estate."⁴⁷ When they reject strict liability, courts most often hold that the improvement is not a product within the meaning of Section 402A.⁴⁸ The

42. A structure has been defined as "any construction . . . artificially built up or composed of parts joined together in some definite manner . . . an edifice or building of any kind." BLACK'S LAW DICTIONARY 1592 (4th ed. 1968). Case law illustrations include poles that support electric wires, railroad tracks, mines, or pits. *Id.*

43. A fixture has been defined as "a chattel attached to realty . . . [b]ecoming accessory to it and part and parcel of it." *Id.* at 766.

44. An improvement has been defined as "a valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs . . . costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it to new or further purposes." *Id.* at 890. Because fixtures and structures are types of improvements, the latter term generally will be used herein.

45. See, e.g., *McClanahan v. American Gilsonite Co.*, 494 F. Supp. 1334, 1348 (D. Colo. 1980) (An oil refinery is not a product because strict liability policies are not applicable to defective structures. A negligence remedy is adequate because builders cannot easily limit their liability by disclaimers, improvements can be inspected more meaningfully for defects than can products, and defects can be traced more easily to builders than to manufacturers.); *Neumann v. Davis Water & Waste, Inc.*, 433 So. 2d 559 (Fla. 2d DCA 1983) (sewage treatment tank is not a product). But see *Abdul-Warith v. Arthur G. McKee & Co.*, 488 F. Supp. 306 (E.D. Pa. 1980), *aff'd mem.*, 642 F.2d 440 (3d Cir. 1981) (skip bridge in a blast furnace is a product).

46. 433 So. 2d 559 (Fla. 2d DCA 1983).

47. *Id.* at 561.

48. In reaching such a conclusion, a court may resort to interpreting Section 402A as if it were a statute. For example, it has been reasoned that defective buildings, if not improvements generally, might not engender strict liability because the chapter of the Restatement (Second) in which Section 402A is found is entitled "Suppliers of Chattels." *Abdul-Warith*, 488 F. Supp. at 312 (distinguishing cases where buildings were held not to be products within the meaning of section 404A from those dealing with a "piece of equipment"). But the Restatement, by its own terms, places section 402A in the chapter on suppliers of chattels for "convenience of reference." See RESTATEMENT (SECOND) § 402A comment a (1965). At least one court, in *Lowrie v. City of Evanston*, has relied upon the fact that the Restatement treats with builders of improvements and sellers or owners of real property in other sections, and that buildings are missing from an illustrative list of products in comment d to section 402A. 50 Ill. App. 3d 376, 365 N.E.2d 923 (App. Ct. 1977). But comment d states

definitional approach is the easy way out.

Second, the court may ask by what method the product came before the public and what role the defendant played in putting it there. This question is usually couched in terms of whether the improvement was put into the "stream of commerce," and it really addresses whether the defendant can be called a seller within the meaning of Section 402A. The court may thus avoid the question whether the improvement is a product.⁴⁹

that the rule of Section 402A extends to "any product" before it gives illustrations drawn from well known cases. See RESTATEMENT (SECOND) § 402A comment d (1965). The *Lowrie* court purported to rely on "policy reasons" for denying a strict liability claim for defective design of a public parking garage. It cited only the availability of other remedies, as did the *McClanahan* court, and it could not resist designating cases that applied strict liability to defective homes as those dealing with products incorporated into homes and not homes as products per se. Neither could it resist relying upon the intent of the "framers" of section 402A. *Lowrie*, 50 Ill. App. 3d at 383, 365 N.E.2d at 928.

49. One court has stated:

The phrase "stream of commerce" is not found in the text of § 402A, nor in the accompanying comments. However, the phrase has been used by the courts to make the distinction between the one time or casual seller to whom strict products liability does not apply and a defendant engaged in the business of selling products as required by Section 402A(1)(a).

Boddie v. Litton Unit Handling Sys., 118 Ill. App. 3d 520, 530, 455 N.E.2d 142, 149 (App. Ct. 1983). See *supra* note 10.

Without reaching the issue whether the improvement is a product, while acknowledging that the defendant is not an occasional seller, a court may hold that the contractor has not put the improvement into the stream of commerce if construction is not finished or the owner retains control over it when injury occurs. One Illinois court engaged in mind-bending reasoning to justify dismissal of a strict product liability complaint against a manufacturer/installer of a highway guardrail. In *Maddan v. R.A. Cullinan & Son, Inc.*, a highway guardrail had been partially installed, without an offset deflector on the end facing oncoming traffic. 88 Ill. App. 3d 1029, 411 N.E.2d 139 (App. Ct. 1980). As a result, when a car struck the guardrail, the length of the car was impaled upon it and the driver's leg was severed. It may be that the installer could have avoided the problem had he installed his guardrails in the direction of traffic (so the deflector was installed first) instead of in some other fashion. The court rested on the notion that because the state had not yet accepted the guardrail, the manufacturer had not placed it in the stream of commerce because it was still within the manufacturer's control. *Id.* at 140. The court attempted to distinguish "strong language" by its supreme court to the effect that a highway sign *was* a product subject to strict liability principles by pointing out that the state had accepted the sign in *Hunt v. Blasius* and that the sign had been fully finished. *Id.* at 141 (construing *Hunt v. Blasius*, 74 Ill. 2d 203, 384 N.E. 2d 368 (1978)). A cursory glance at the "manufacturer's control" language of Section 402A indicates that it relates to proof of defectiveness, causation, and misuse of the product. See RESTATEMENT (SECOND) § 402A comment g, h; see also *Cassisi v. Maytag Co.*, 396 So. 2d 1140 (Fla. 1st DCA 1981) (Chief Judge Ervin writing for the panel). Nowhere in Section 402A is it suggested that an unfinished product, *offered for use as if it were finished*, is not in the stream of commerce. See *Maddan*, 88 Ill. App. 3d at 1032, 411 N.E.2d at 142 (Barry, J., dissenting). This is an especially important point where the public has no choice but to use the unfinished guardrail as if it were finished, and its unfinished state makes it much more dangerous than it would be if completed. *Cf. Van Iderstine v. Lane Pipe Corp.*, 107 Misc. 2d 981, 436 N.Y.S.2d 183 (Sup. Ct. 1981), *aff'd*, 89 A.D.2d 459, 455 N.Y.S.2d 450 (App.

The third and most forthright approach is to question whether holding *this* defendant strictly liable in *these* circumstances will serve or disserve the policies that undergird the strict product liability cause of action. If strict liability policies will be advanced, the court will hold that the defective "thing" is a product.⁵⁰ The hidden policy reason, seldom articulated, is the fear that strict liability will drive up unreasonably the cost of the item. This reason finds its best expression in cases rejecting strict liability for essential products, the cost of which may already be high, such as products used in medical care.⁵¹ One might argue that private housing and public facilities such as highways are too essential and too costly to allow either passing along to the public increased settlement costs that are assumed to result from applying strict liability, or impairing the defendant's ability to provide the necessary product if he cannot pass along the costs.

Whether they take a definitional or policy approach to reading Section 402A, courts nonetheless conclude that they should categorize *some* improvements as products, that is, that strict liability is appropriate.⁵² The resultant line of cases in a single jurisdiction may be difficult to reconcile.⁵³

Div. 1982) (court granted dismissal of breach of warranty and strict liability counts against county where plaintiff had alleged guardrail was defective, but manufacturer remained subject to liability on both theories).

50. For an analysis of the approaches to categorizing improvements and "things" of other sorts, see *What Is Or Is Not A Product Within The Meaning Of Section 402A*, 57 MARQ. L. REV. 625 (1974). For an excellent analysis of the Illinois cases, see Wunsch, *The Definition Of A Product For The Purposes Of Section 402A*, 50 INS. COUNSEL J. 344 (1983).

51. See, e.g., *Brody v. Overlook Hospital*, 127 N.J. Super. 331, 317 A.2d 392 (Super Ct. 1973) (blood bank supplying, at no charge, blood that was possibly contaminated, to private, nonprofit hospital was "charitable, voluntary organization"); *Magrine v. Krasnica*, 94 N.J. Super. 228, 227 A.2d 539 (Super. Ct. 1967) (dentist not strictly liable for defective hypodermic needle that broke in patient's jaw).

52. One Illinois appellate court has suggested what sounds like a sales law approach, wherein the court considers the separate "identity" of the improvement, much like the severability test of the Uniform Commercial Code. See *Boddie v. Litton Unit Handling Sys.*, 118 Ill. App. 3d 520, 530, 455 N.E.2d 142, 149 (App. Ct. 1983) (mail sorter in postal facility is a product for strict liability purposes because it is not an "indivisible component part of the building or structure" itself). Ironically, the UCC comment states that "[t]he word 'fixtures' has been avoided because of the diverse definitions of this term, the test of 'severance without material harm being substituted.'" FLA. STAT. ANN. § 672.2-107 UNIFORM COMMERCIAL CODE (West 1966).

53. See Wunsch, *supra* note 50. Illinois courts, for example, have held that a grain storage tank was a product, paying lip service to strict liability policies and asserting that the availability of other theories of recovery does not weaken the policies supporting application of strict liability, in an action to recover for purely economic loss (the tank leaked, but did no damage to other property) where no one suffered bodily harm. *Moorman Mfg. Co. v. National Tank Co.*, 92 Ill. App. 3d 136, 414 N.E.2d 1302 (Ct. App. 1980). Compare *id.* with

Injured persons frequently seek to hold designers, architects, and engineers strictly liable for defective improvements that cause injury. Using a goods/services analysis resembling that used under Article Two of the Uniform Commercial Code,⁵⁴ a court may avoid deciding whether the improvement is a product.⁵⁵ Thus, if a product sale is incidental to the sale of services,⁵⁶ no strict liability action will lie. Likewise, if a design alone is sold, and the designer does not take any profit from sales of materials or the finished improvement, no strict liability action will lie.⁵⁷

Cox v. Shaffer, 223 Pa. Super. 429, 302 A.2d 456 (Super. Ct. 1973) (silo is not a product). The court in *Lowrie* held that the parking garage from which a patron fell to his death, was not a product. *Lowrie v. City of Evanston*, Ill. App. 3d 376, 365 N.E.2d 923 (App. Ct. 1977). This decision was likewise said to have a policy basis, but the stated reasons were the availability of other theories of recovery and a stunted reading of section 402A in light of its "framers" intent. *Id.* When a suicidal patient fell from the fourth floor of a sheltered care facility and then alleged a defect in the windows without guardrails to which she had access, the court asserted that policies prevented it from holding the facility was a product because the defendant was not a mass producer of such facilities and could not spread the cost of the loss. *Immergluck v. Ridgeview House, Inc.*, 53 Ill. App. 3d 472, 368 N.E.2d 803 (1977). Although the court in *Boddie* held the bulk mail sorter that injured a worker to be a product, and discussed previous Illinois cases in terms of policy reasons, the basis for the *Boddie* decision was a test of "indivisible identity." *Boddie*, 118 Ill. App. 3d at 529, 455 N.E. 2d at 149. See *Heller v. Cadral Corp.*, 84 Ill. App. 3d 677, 406 N.E. 2d 88 (1977) (holding condominium unit is not a product, other remedies exist, no mass production, only economic loss suffered). These cases are all over the map, and talented counsel can use them in the best common law tradition. *Boddie* attempts to reconcile them, but ends up with a formalistic definition. The two most serious injuries were suffered in falls from buildings that were held not to be products. The hidden hand of policy was at work. The defendants were a mental health facility (*Immergluck*) and a city (*Lowrie*) performing public functions with little capacity for loss spreading in areas where loss spreading might not be desirable.

54. The test for inclusion under the UCC is whether the contract's primary thrust or purpose is the rendition of a service with goods incidentally involved, such as a contract with an artist for a painting, or a sale with the rendition of a service incidentally involved, such as installation of a water heater in a bathroom. *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974).

55. See *infra* note 106; note 57.

56. See, e.g., *La Rossa v. Scientific Design Co.*, 402 F.2d 937 (3d Cir. 1968) (engineers-carcinogenic dust); *Magrine v. Krasnica*, 94 N.J. Super 228, 227 A.2d 539 (Super. Ct. 1967) (dentist-hypodermic needle). Compare *Newmark v. Gimbel's Inc.*, 54 N.J. 585, 258 A. 2d 697 (1966) (because beautician is not a professional, and is engaged in a commercial enterprise, an action will lie for strict liability or breach of implied warranty for sale of permanent wave that causes dermatitis) with *Epstein v. Giannatasio*, 25 Conn. Sup. 109, 197 A.2d 342 (Conn. C.P. 1963) (because contract with beautician is primarily for a service, no action will lie for breach of implied warranty for sale of permanent wave that causes dermatitis).

57. Where nothing but a design is sold, the policies of strict product liability support *not* holding the designer strictly liable. Design services are not mass-marketed as are products, and the designer cannot easily pass on the assumed increased settlement costs of strict liability. Perhaps more importantly, the designer who sells only a design gains only incidental benefit from the manufacturer's success with the resultant product. See *Gagne v. Bertran*, 43 Cal. 2d 481, 275 P.2d 15 (1954) (Those who sell services for the guidance of others

Despite judicial reluctance to categorize improvements as products, many jurisdictions have applied strict liability or implied warranties to mass produced homes and their appurtenances.⁵⁸ The New Jersey case of *Schipper v. Levitt and Sons, Inc.*⁵⁹ followed soon after *Greenman* and held a developer of tract housing strictly liable for a defective hot water system. The *Schipper* court reasoned that mass builders of homes and manufacturers of chalets are similarly situated in that both impliedly represent the fitness of their products to purchasers who are in a subordinate bargaining position and are capable of only a superficial inspection. Mass builders, like manufacturers, "are in the better economic position to bear the loss . . . than [is] the injured party who justifiably relied on the developer's skill and implied representation."⁶⁰

Custom builders of homes that incorporate injury-causing de-

are not liable in the absence of negligence or intentional misconduct.); *Del Mar Beach Club Owners Ass'n v. Imperial Contracting Co.*, 123 Cal. App. 3d 898, 176 Cal. Rptr. 886 (Ct. App. 1981) (architects, soil, and structural engineers of defective planned unit development were not subject to strict liability); *Fisher v. Morrison Homes, Inc.*, 109 Cal. App. 3d 131, 167 Cal. Rptr. 133 (Ct. App. 1980) (developer who designs and builds dedicated subdivision roads is providing something more akin to a service than a product); *Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Assoc. Inc.*, 168 So. 2d 333 (Fla. 2d DCA 1964) (building engineer merely warrants that he has exercised his skills according to a reasonable standard of care; the "tangible evidence" of his skill is not warranted). For a look at a society that held professionals *absolutely* liable without fault, see G.DRIVER & J. MILES, 2 THE BABYLONIAN LAWS at 83 (1955) (citing the LAWS OF HAMMURABI § 229-32: a builder who designs a building that falls down and causes the death of the householder shall be put to death).

58. See *Del Mar Beach Club Owners Ass'n v. Imperial Contracting Co.*, 123 Cal. App. 3d 898, 176 Cal. Rptr. 886 (Ct. App. 1981) (holding condo developer subject to strict liability for numerous defects, including subsidence of grading and paving, rusty doors and windows, leaky parking garages, tennis courts that chipped and peeled); *Hyman v. Gordon*, 35 Cal. App. 3d 769, 111 Cal. Rptr. 262 (Ct. App. 1973) (holding custom builder strictly liable for defective design of garage with respect to placement of hot water heater); *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (Ct. App. 1969) (holding mass builder of homes subject to strict liability for defective radiant heating system); *Berman v. Watergate W. Inc.*, 391 A.2d 1351 (D.C. 1978) (holding builder, sponsor, and company that marketed cooperative apartments each played an integral part in placing a defective unit in the stream of commerce and thus each was accountable to ultimate consumer on strict liability or warranty principles).

59. 44 N.J. 70, 207 A.2d 314 (1965).

60. *Id.* at 89-93, 207 A.2d at 325-26. See *Hennigsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 150 P.2d 436 (1944); *supra* text accompanying notes 33-38. The California courts have developed this application of strict liability. See *Del Mar Beach Club Owners Ass'n v. Imperial Contracting Co.*, 123 Cal. App. 3d 898, 176 Cal. Rptr. 886 (Ct. App. 1981) (pools, decks, and improvements that go with the sale of a home); *Stuart v. Crestview Mutual Water Co.*, 34 Cal. App. 3d 802, 110 Cal. Rptr. 543 (Ct. App. 1973) (water supply systems); *Avner v. Longridge Estates*, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (Ct. App. 1969) (building lots); see also *supra* note 58.

facts may be subject to strict liability. In *Hyman v. Gordon*,⁶¹ a water heater installed in a garage by the designer/builder caused a fire that injured a child at play. A California court of appeal held the builder strictly liable for the design defect in the "larger" product (the garage) because of the placement of the heater.⁶² The court reasoned that a "defect may emerge from the mind of the designer as well as from the hand of the workman."⁶³ The builder was not a mass builder or seller of homes, but the policy of casting the burden of the loss upon the one who created the defect supervened.

If only mass builders of homes or mass producers of goods are subject to strict liability, it pays to be a custom builder. The teaching of *Hyman* is that parties injured by defective custom built improvements should get the same protection as parties injured by defective mass produced improvements and, to that end, courts should hold custom builders to the same standard of liability as mass builders.

C. Defective Improvements in Florida

In Florida, first purchasers of residences receive from the seller an implied warranty of fitness and merchantability with respect to the home, its contents, and the building lot upon which it stands.⁶⁴ In *Conklin v. Hurley*,⁶⁵ the Supreme Court of Florida noted the chattel-like quality of mass-produced homes and the lack of knowledge and bargaining power of the typical home buyer, who may commit the family's savings to one or two homes in a

61. 35 Cal. App. 3d 769, 111 Cal. Rptr. 262 (Ct. App. 1973).

62. "[A]n article or a machine may function safely in one location in the design but not another." *Id.* at 771, 111 Cal. Rptr. at 264.

63. *Id.* (citing *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) (en banc) (defective design of locking mechanism for trays in bread truck)). See *Ford Motor Co. v. Hill*, 404 So. 2d 1049 (Fla. 1981) (holding car manufacturer subject to strict liability for design defects).

64. See FLA. STAT. § 718.03 (1985); *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983) (holding no implied warranty remedy for defective seawalls inured to investors who purchased lots sans residences); *Port Sewall Harbor & Tennis Club Owners Ass'n v. First Fed. Sav. & Loan Ass'n of Martin County*, 463 So. 2d 530 (Fla. 4th DCA 1985) (holding subdivision roads, footbridges, and related drainage areas are not impliedly warranted); *Hesson v. Walmsley Constr. Co.*, 422 So. 2d 943 (Fla. 2d DCA 1982) (holding building lot is impliedly warranted when home and lot are bought together); *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th DCA), cert. discharged, 264 So. 2d 418 (Fla. 1972) (holding first purchaser of condo unit receives implied warranty of habitability, which is shorthand for implied warranties of fitness and merchantability as applied to residences).

65. 428 So. 2d 654, 658-59 (Fla. 1983).

lifetime.⁶⁶ The homeowner's warranty remedy in Florida focuses on the home, which is merchantable or fit for its intended purpose because "it works."⁶⁷

Because Florida's courts and legislature have limited the implied warranty for improvements to residences⁶⁸ and the availability of the remedy to first purchasers,⁶⁹ the scope of the warrantor's duty has resisted expansion beyond its contractual origins into the larger tort zone where privity is not necessary. There has been virtually no application of the otherwise well established action for breach of implied warranty absent privity to personal injuries caused by defective improvements.⁷⁰

Implied warranties are associated with chattels and sales law, and although the privity rule that lingers in Florida's residential warranty law is hardly justifiable, the party injured by a defective improvement in Florida will seldom have a remedy for breach of implied warranty. He or she must rely on a negligence action against the seller, building contractor, or architect.⁷¹ Consequently,

66. *Id.* at 659.

67. The jurisdictions are split on applying strict liability to homes. A majority of jurisdictions extend an implied warranty or strict liability remedy to first purchasers of mass produced homes or condominiums. For a list of jurisdictions extending an implied warranty or strict liability remedy to first purchasers of new homes, see *Berman v. Watergate W., Inc.*, 391 A.2d 1357, 1358 (D.C. 1978); *Conklin*, 428 So. 2d at 658-59 (list of 33 states recognizing an implied warranty in the sale of new homes).

68. See *supra* note 64.

69. *Id.* See *Alvarez v. DeAguirre*, 395 So. 2d 213 (Fla. 3d DCA 1981) (implied warranty remedy not available to lessee of home); *Simmons v. Owens*, 363 So. 2d 142 (Fla. 1st DCA 1978) (implied warranty remedy not available to second owner of home).

70. See *Armor Elevator Co. v. Wood*, 312 So. 2d 514 (Fla. 3d DCA 1975), *cert. denied*, 330 So. 2d 14 (Fla. 1976) (pre-*West* breach of implied warranty action against manufacturer for wrongful death of a workman where the locking mechanism of an elevator was defective, causing it to fall *during installation*). The other reported cases allowing an action for breach of implied warranty based on defective improvements in Florida virtually all allege economic loss or property damage and seek the cost of correction as damages. See, e.g., *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983) (seawall collapsed); *Hesson v. Walmsley Constr. Co.*, 422 So. 2d 943 (Fla. 2d DCA 1982) (house settled on lot, cracks resulted); *Biscayne Roofing Co. v. Palmetto Fairway Condominium Ass'n*, 418 So. 2d 1109 (Fla. 3d DCA 1982) (leaky roof); *Drexel Properties, Inc. v. Bay Colony Club Condominiums, Inc.*, 406 So. 2d 515 (Fla. 4th DCA 1981) (decorative fencing, roof assembly, aluminum awning windows); *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th DCA 1972) (replacement of air conditioner). *But see Hutchings v. Harry*, 242 So. 2d 153, 156 (Fla. 3d DCA 1971) (In a case that was pre-*Gable* and pre-*West*, the court held that a visitor had no implied warranty action against the architect, building contractor, and seller of a home for injuries caused by an allegedly defective glass door that shattered. It stated only that "there is no action for breach of warranty under the facts of this case.").

71. See, e.g., *Conklin v. Cohen*, 287 So. 2d 56 (Fla. 1973) (action against architect for negligence in wrongful death of workman who fell during construction of apartment building); *Le May v. USH Properties, Inc.*, 338 So. 2d 1143 (Fla. 2d DCA 1976) (shopping mall

proof of a defect is not sufficient. Because the plaintiff must prove negligence, the chances of recovery are less than in an action for breach of implied warranty or strict liability, where proof of an unreasonably dangerous⁷² defect has the effect of a prima facie showing of negligence.⁷³ The chances of recovery are *further* reduced because Florida law makes the injured party's suit a malpractice action.⁷⁴ The malpractice action can be defended by a showing of conformity to a professional standard of care, an insufficient defense to a simple negligence action.⁷⁵

Florida courts prefer not to face squarely the question whether the policies of strict liability require categorizing a particular defective improvement as a product, that is, whether *this* improvement and *this* defendant in *these* circumstances should be subject to strict liability. Definitional solutions are customary. The *Neumann* court hid behind a chattels/improvements distinction.⁷⁶ In

patron tripped and fell over steps that were difficult to see, sued architect for negligent design of mall).

72. See *supra* note 31.

73. Strict liability means negligence per se, "the effect of which is to remove the burden from the user of proving specific acts of negligence." *West*, 336 So. 2d at 90. Removing that burden was a major impetus to the emergence of the cause of action in the first place. See Prosser, *supra* note 19, at 1114-18. Even with the aid of a *res ipsa* instruction on negligence, proof of a defect will not alone win a case or a settlement. Consequently, manufacturers have less incentive to make safer products because they have more incentive to defend lawsuits. To exacerbate matters, sellers or jobbers who might otherwise be "strictly" liable may simply not be negligent at all. *Id.*

74. See, e.g., *Hutchings v. Harry*, 242 So. 2d 153, 155 (Fla. 3d DCA 1970) (negligence of professional [architect] is the failure to comply with recognized standards of good practice in the same locality at the same time). The Supreme Court of Florida has stated:

[A]n architect may be liable for negligence in failing to exercise the ordinary skills of his profession, which results in the erection of an unsafe structure whereby anybody lawfully on the premises is injured . . . all that was said in the foregoing discussion of the immunities and liabilities of architects also may be said of the immunities and liabilities of engineers, or, for that matter, any other independent contractors.

Conklin v. Cohen, 287 So. 2d 56, 61 (Fla. 1973). See *Navajo Circle, Inc. v. Development Concepts*, 373 So. 2d 689 (Fla. 3d DCA 1979); *Le May v. USH Properties, Inc.*, 338 So. 2d 1143 (Fla. 2d DCA 1975).

75. For an argument that malpractice standards should not control negligence actions by those out of privity with professional defendants, see *Cubito v. Kreigsberg*, 69 A.D.2d 738, 419 N.Y.S.2d 578 (App. Div. 1979). Malpractice, in its strict sense, means the negligence of a professional in his relations with his client or patient. An action for malpractice springs from the correlative rights and duties assumed by the parties through the relationship, and the wrongful conduct of a professional (architect), in rendering services to his client, that causes injury to a party outside the relationship, is simple negligence. *Id.* at 742, 419 N.Y.S.2d at 580.

76. 433 So. 2d at 559. See *supra* text accompanying note 46.

Alvarez v. DeAguirre,⁷⁷ the Third District Court of Appeal gave short shrift to a strict liability count brought by the lessee of a house damaged by fire against the contractor who installed an allegedly defective circuit breaker. The court relied upon the rule that the homeowner's implied warranty remedy requires privity, and it stated merely that it was "settled that no cause of action will lie."⁷⁸ But the homeowner's implied warranty remedy is based on contract policies of inequality of bargaining power and inability to inspect.⁷⁹ In Florida, the strongest public policy emerging from the warranty cases is protecting a family from having its pocket picked of its savings by purveyors of shoddy work.⁸⁰

Strict liability, like all tort law, has compensation of the innocent injured party as its strongest policy.⁸¹ Unlike implied warranty, strict product liability shifts losses from injuries caused by defective products to manufacturers as an incentive to market *safer products*. It only incidentally focuses on the transaction between the seller and the user of the product.⁸² The *Alvarez* court's conclusion, that strict liability is not applicable *because* implied warranty is not applicable, is discount jurisprudence.

The policies underlying strict liability require that it subsume the contractual implied warranty and its privity rule. It makes no sense that the visitor injured by a defective water heater in a motor home has a strict liability remedy, but the visitor to a home without wheels, injured by the same defective water heater, has no remedy at all if he cannot prove malpractice.⁸³

Policies generally are no better explored when Florida courts hold that strict liability *is* applicable to a case involving a defective improvement. The courts have, however, been more receptive to strict liability actions for personal injury or property damage caused by defective building supplies (or other items that might be regarded as components of the larger product) than for defective

77. 395 So. 2d 213 (Fla. 3d DCA 1981).

78. *Id.* at 216 (citing cases rejecting strict liability actions for defective residences brought by owners who were not first purchasers and had no warranty remedy because they were out of privity with the sellers or contractors).

79. See *supra* notes 64-66 and accompanying text.

80. See, e.g., *Conklin*, 428 So. 2d at 658, n.8, 659.

81. "He that is injured should be recompensed." *The Case of The Thorns*, 1466 Y.B. 6 Ed. 4, 7a, pl. 18, easily found in KEETON, KEETON, SARGENTICH & STEINER, *TORT AND ACCIDENT LAW* 134 (West 1983) (The original tort liability was absolute liability without fault, and cast the burden of proof (of exculpation) upon the defendant.).

82. See *supra* notes 33-39 and accompanying text.

83. See *Hutchings v. Harry*, 242 So. 2d 153, 155 (Fla. 3d DCA 1970); *supra* notes 73-75 and accompanying text.

improvements per se.⁸⁴ Roof tiles⁸⁵ and trusses,⁸⁶ driveway paint,⁸⁷ stucco mix,⁸⁸ and elevators⁸⁹ have been subjects of strict liability actions.

The curious result is that a piece of untempered glass that shatters before installation may subject its manufacturer and seller to strict liability, but a piece that shatters after installation will not, even though all parties involved know that its ultimate use begins upon installation in a building.⁹⁰

Another apparent inconsistency results from the customary treatment of industrial machinery. In Florida, strict liability actions for defective industrial equipment do not receive such close scrutiny on the "improvement" issue, and it generally passes unno-

84. Water heaters and gas stoves are on the illustrative list of products in the comments to Section 402A. These items are "improvements" for the purposes of this case note and are usually regarded as fixtures by virtue of "permanent" installation. See RESTATEMENT (SECOND) § 402A comment d.

85. Gory Associated Indus. v. Jupiter Roofing & Sheet Metal, Inc., 358 So. 2d 93 (Fla. 4th DCA 1978).

86. Tri-County Truss Co. v. Leonard, 467 So. 2d 370 (Fla. 4th DCA 1985).

87. Halpryn v. Highland Ins. Co., 426 So. 2d 1050 (Fla. 3d DCA 1983).

88. Adobe Bldg. Centers, Inc. v. L.D. Reynolds, 403 So. 2d 1033 (Fla. 4th DCA 1981).

89. Hardin v. Montgomery Elevator Co., 435 So. 2d 331 (Fla. 1st DCA 1983); *Armor v. Wood*, 312 So. 2d 514 (Fla. 3d DCA 1975). See *Insurance Co. of N. Am. v. Radiant Elec. Co.*, 55 Mich. App. 410, 222 N.W.2d 323 (Ct. App. 1974) (the leading case for arguing that implied warranties apply to building contractors' services as well as the goods they install). In *Radiant Electric*, the electrical wiring was statutorily warranted, before and after installation, under the UCC. The manner of installation was also impliedly warranted, although it was a service, especially in view of the fact that the goods were to handle a "dangerous force," electricity. See *City of Hartford v. Associated Constr. Co.*, 384 A.2d 390 (Conn. 1978) (roof base mixture that leaked); *Radiation Technology, Inc. v. Ware Constr. Co.*, 445 So. 2d 329, 331, n.332 (Fla. 1983) (In a breach of warranty action for contamination of foodstuffs in a warehouse based on a defective chemical hardening agent which failed in repairs to concrete floor and sent noxious fumes into the air, Florida's supreme court noted that a strict liability count was conspicuous by its absence with no discussion of any "incorporated into improvements rule."); *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958) (oft-cited case applying implied warranty absent privity to suit for property damage based on defective cinder blocks); see also *Ernest W. Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152 (Utah 1979) (steel roof joists). Compare *Worrell v. Barnes*, 484 P.2d 573 (Nev. 1971) (holding contractor strictly liable for defective gas fitting which he installed) with *Alvarez v. DeAguirre*, 395 So. 2d 213 (Fla. 3d DCA 1981) (denying strict liability action against electrical contractor for defective fusebox or wiring).

90. See *Becker v. IRM Corp.*, 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985) (en banc) (The Supreme Court of California recently held that a tenant had a strict liability action against a landlord for injuries caused by untempered glass in shower door.). Compare *Hutchings v. Harry*, 242 So. 2d 153 (Fla. 3d DCA 1970) (no reason given for holding that plaintiff had no action for breach of implied warranty against seller, builder, or architect where visiting child was injured by glass door that shattered) with *Hyman v. Gordon*, 35 Cal. App. 3d 769, 111 Cal. Rptr. 262 (Ct. App. 1973) (visiting child has strict liability action against builder for injuries from fire caused by hot water heater). See generally *supra* notes 61-63 and accompanying text.

ticed, even if the machine is permanently affixed.⁹¹

Strict liability in tort upon proof of an unreasonably dangerous defect⁹² has the effect of negligence per se, and the action is standing in, if not bottomed on, the predecessor action of implied warranty absent privity.⁹³ A hybrid doctrinal basis and the fact that public policy is really the engine of the cause of action⁹⁴ have made it difficult to sort out the case law. Not surprisingly, the result line is wavy where defective improvements are involved. Protecting the otherwise defenseless public from defective products should take priority. Courts withholding an equal measure of protection from those injured by defective improvements usually rely upon formalistic distinctions that are paper-thin.⁹⁵

91. See *Clement v. Rouselle Corp.*, 372 So. 2d 1156 (Fla 1st DCA 1979) (punch press); *Watson v. Lucerne Mach. & Equip., Inc.*, 347 So. 2d 459 (Fla. 2d DCA 1977) (fruit sampling machine); see also *Deleon v. Commercial Mfg. & Supply Co.*, 148 Cal. App. 3d 336, 195 Cal. Rptr. 867 (Ct. App. 1983) (A worker lost an arm while cleaning a custom designed and built-in-place fruit bin used in a cannery. In a strict liability action, summary judgment for the defendant manufacturer was reversed, because the manufacturer failed to show that the unsafe cleaning method was unforeseeable, even if the bin was misused.).

92. See *supra* note 31.

93. The *West* court used the negligence per se analogy. Proof of a defect is sufficient to get to the jury on causation. See *supra* note 73. A court might view a strict product liability action as a breach of implied warranty action by another name. See *supra* note 23.

94. The courts closely identified the traditional warranty with contract principles, that is, reliance on a seller's express or implied assertions, notice of breach, and disclaimers. Implied warranty absent privity was the "freak hybrid born of the illicit intercourse of tort and contract." The Restatement (Second) started over with an essentially clean slate in Section 402A, borrowing from established actions in tort which recognized a strict liability, such as those based on abnormally dangerous activities, keeping wild animals, or libel. See Prosser, *The Fall of the Citadel (Strict Liability To The Consumer)*, 50 MINN. L. REV. 791, 799-805 (1966); RESTATEMENT (SECOND) § 402A comment m; *supra* notes 33-39 and accompanying text.

95. Florida's legislature has enacted one statute of repose for actions based on defective products, FLA. STAT. § 95.031(2) (1985), and another for actions based on defective improvements, FLA. STAT. § 95.11(3)(c) (1985). Both statutes had absolute claim periods of 12 years from first purchase or occupancy, until, in 1980, the legislature changed the claim period for a defective improvement to 15 years, FLA. STAT. § 95.11(3)(c), and added a preamble which recited the need for such a repose period (because of the insurance crisis) after the supreme court held the predecessor statute unconstitutional in *Overland Constr. Co. v. Sirmons*, 369 So. 2d 572 (Fla. 1979). See Ch. 80-322, Laws of Fla. (1980). The supreme court has held the "new" statute facially valid and has taken the bizarre view that it is constitutional as applied so long as a plaintiff's cause of action is not time-barred before it accrues. *Universal Eng'g Corp. v. Perez*, 451 So. 2d 463 (Fla. 1984). The supreme court has likewise held the product liability repose statute facially valid but unconstitutional as applied to bar an action before accrual. *Diamond v. E.R. Squibb & Sons, Inc.*, 397 So. 2d 671 (Fla. 1981), *on remand*, 399 So. 2d 530 (Fla. 2d DCA 1981); *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874 (Fla. 1980). The supreme court's recent opinion in *Pullum v. Cincinnati, Inc.*, states that the court now retreats from *Battilla* and that the product liability repose statute does not violate the Florida constitution. No. 66,198 (Aug. 29, 1985) (10 F.L.W. 427 (Aug. 30, 1985)). If it has decided that an action may be barred before it accrues, the court has reached

III. ANALYSIS

A. *The Paver Is a Manufacturer, the Paving Mix Is a Product*

Using a definitional approach, which Florida courts have favored, the First District Court of Appeal correctly held that Chadbourne was a manufacturer. Under Section 402A and the principles of *West* and its progeny, manufacturing need not be a complex process.⁹⁶ Mixture of two products to make a third is sufficient.⁹⁷ Supplying unprocessed products is also sufficient.⁹⁸

The building supply cases decided by Florida courts require a holding that paving mix is a product for strict liability purposes.⁹⁹ *Adobe Building Centers Inc. v. L.D. Reynolds*¹⁰⁰ largely resolves this issue. There, a supplier of Portland cement and mortar mix sold them to contractors who combined them with sand and water to make a stucco mix. The stucco damaged the exteriors of the houses to which it was applied, and the residential developers who owned the houses (and who had hired the contractors) sued the supplier on a strict liability theory for property damage. The Fourth District Court of Appeal affirmed the trial court's directed verdict against the supplier, and the supreme court dismiss a peti-

beyond the facts of *Pullum*, where the product caused injury before the repose period expired, but the plaintiff filed his action after the period expired. *Id.* The effect of these repose statutes, which courts have respected, is to similarly protect suppliers of defective products and defective improvements. But the courts themselves are responsible for the dissimilar treatment of the victims of defects. Courts may deny those injured by defective improvements the strict liability remedy available to those injured by defective chattels, and may, in some circumstances, deny any remedy. See *Neumann v. Davis Water & Waste Co.*, 433 So. 2d 559 (Fla. 2d DCA 1983) (*Neumann* is the only Florida case that has seized upon a "structural improvements to real property" notion to justify dismissing a strict liability action.). The water tank in *Neumann* would clearly be a product under the MODEL ACT. See *infra* note 96; cf. *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572 (7th Cir. 1976) (holding one million gallon, built-in-place water tank was impliedly warranted as goods under the UCC and Illinois law); *Hutchings v. Harry*, 242 So. 2d 153 (Fla. 3d DCA 1970).

96. RESTATEMENT (SECOND) § 402A comment f. See MODEL ACT § 102(e), at 62,717 ("Product" means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce.).

97. *Adobe Bldg. Centers, Inc. v. L. D. Reynolds*, 403 So. 2d 1033 (Fla. 4th DCA 1981).

98. RESTATEMENT (SECOND) § 402A comment e.

99. See *Radiation Technology, Inc. v. Ware Constr. Co.*, 445 So. 2d 329 (Fla. 1984); *Tri-County Truss Co. v. Leonard*, 467 So. 2d 370 (Fla. 4th DCA 1985); *Hardin v. Montgomery Elevator Co.*, 435 So. 2d 331 (Fla. 1st DCA 1983); see also *Halpryn v. Highland Ins. Co.*, 426 So. 2d 1050 (Fla. 3d DCA 1983); *Gory Assoc. Indus. v. Jupiter Roofing & Sheet Metal*, 358 So. 2d 93 (Fla. 4th DCA 1978).

100. 403 So. 2d 1033 (Fla. 4th DCA 1981).

tion for review.¹⁰¹

That the developers in *Adobe* were not ultimate users (in the sense of those who buy homes to live in them) did not foreclose the supplier's liability. Thus, the supplier of building materials of simple origin is subject to strict liability for defects that appear upon their mixture and application to the surface of an improvement.¹⁰² Where bodily harm and not property damage occurs, strict liability is more, not less, appropriate. The strict product liability action developed, after all, to protect against products whose defects cause injury to *human beings*.¹⁰³

Chadbourne performed the functions of both the supplier and contractor in *Adobe*. He made the sand-asphalt mix and applied it to the road. Under *Adobe*, the DOT or Walton County would have a strict liability action against Chadbourne for any property damage which resulted from a defect because they were users of the paving mix.¹⁰⁴ The motorist injured by the defect should be no less protected. The motorist is, after all, the ultimate user contem-

101. *Adobe Bldg. Centers, Inc. v. Reynolds*, 411 So. 2d 380 (Fla. 1981).

102. *Adobe*, 403 So. 2d at 1035, 1036 (Hurley, J., concurring). *Neumann* and *Alvarez* are not sensibly distinguishable from the instant case because the defendants therein were sellers and not manufacturers, despite Chief Judge Ervin's attempt to so distinguish them. See *Vaughn*, 462 So. 2d at 515, 516. Strict product liability is a *seller's* liability. See RESTATEMENT (SECOND) § 402A. *Neumann* is really a design case, where the plaintiff should have alleged that design defects in the tank and the larger product, the treatment complex itself, allowed a three-year-old access to the area and enabled the child to get atop the treatment tank. Even if the court applied strict liability to *Neumann's* facts, it seems that there was no proof the tank was defectively manufactured or assembled. See *Neumann v. Davis Water & Waste, Inc.*, 433 So. 2d 559, 561 (Fla. 2d DCA 1983). The designer or architect who lays out a complex such as the one in *Neumann* is probably not subject to strict liability for design defects under the architect's rule. See *supra* note 57. If a governmental agency is the designer, it also has a planning/discretionary immunity. See *infra* note 106. *Alvarez* was a sales warranty case, enforcing the privity requirement of the homeowner's implied warranty against a lessee's argument that he should be regarded as if he was a purchaser, and further, that he should be regarded as if he was a *first* purchaser. The *Alvarez* court assumed that no strict liability action would lie unless a warranty action did, although the policies supporting each are different. Because the plaintiff suffered property damage and not bodily harm, the strict liability action may have seemed less compelling to the court. See *Alvarez v. DeAguirre*, 395 So. 2d 213 (Fla. 3d DCA 1981). *Alvarez* comes out differently with no privity rule. It should.

103. See *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 60, 377 P.2d 897, 902, 27 Cal. Rptr. 697, 700 (1963); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 92 (Fla. 1976); *infra* note 105.

104. "Consumers include not only those who in fact consume the product, but also those who prepare it for consumption . . . consumption includes all ultimate uses for which the product is intended." RESTATEMENT (SECOND) § 402A comment i. The stream of commerce terminates in a delta, wider at its mouth than at its source. *Adobe*, 403 So. 2d at 1036 (Hurley, J., concurring). Note that Chadbourne's strict liability does not require that he be a manufacturer. *Id.* at 1033.

plated by all parties.¹⁰⁵

In order to affirm the decision of the First District Court of Appeal, it is unnecessary for the Supreme Court of Florida to hold that Walton County Road 1087 is a product. It must merely hold that the paving mix is.¹⁰⁶ A development-conscious state such as Florida must give incentives for creating safe improvements without giving disincentives to creating any improvements, but few are the situations in which the public is at greater risk than when it takes to the highway.¹⁰⁷

The facts of the instant case are unusual. It is not an action alleging the defective design or construction of the county road (the larger product). It will not expose the state to liability, and even if it did, the state would be shielded by a planning/discretionary immunity and a professional services argument.¹⁰⁸ Finally and

105. Section 402A is entitled "Special Liability of Seller of Products for Physical Harm to User or Consumer." The reference to property damage is in the text of the rule. RESTATEMENT (SECOND) § 402A.

106. A desire to keep the state's exposure under control largely motivates judicial reluctance to categorize highways as products. See *Maddan*, 411 N.E.2d at 140-41 ("Classify a guardrail as a product and the courts will next be confronted with the assertion that state planted trees, culverts, bridges and highways themselves are products."). But the state has a two-tiered defense. Courts typically characterize designing and supplying highways as a planning function protected by a discretionary immunity. See, e.g., *Department of Transp. v. Neilson*, 419 So. 2d 1071 (Fla. 1982); *Hall v. State*, 106 Misc. 2d 860, 435 N.Y.S.2d 663 (Ct. Cl. 1981). Beyond the immunity hurdle, the state may defend with a professional services argument. If only design defects are alleged, the architect's defense is available. See, e.g., *Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Assoc., Inc.*, 168 So. 2d 333 (Fla. 2d DCA 1964). If the plaintiff alleges construction defects, courts have held providing roads, including design and manufacture, to be a mixed transaction, but primarily a service, with an incidental transmission of a product. See, e.g., *Hall*, 435 N.Y.S.2d at 665. Developers may resort to the same defense theory. See *Milam v. Midland Corp.*, 282 Ark. 15, 665 S.W.2d 284 (1984) (not holding dedicated subdivision road *not* to be a product, but holding residential developer not to be a manufacturer of roads, so services issue not reached, except in the sense of mixed transaction in which the road was incidentally supplied); *Fisher v. Morrison Homes, Inc.*, 109 Cal. App. 3d 131, 167 Cal. Rptr. 133 (Ct. App. 1981).

107. Defectively designed and maintained or obsolete roads are overlooked mass killers. Each year, deaths equal to the total of personnel killed in Vietnam or Korea take place on highways. As of 1977, 90% of United States roads had been created prior to the 1950's, that is, before standards of road design began to emerge. Kuhlman, *Legal Problems Created by the Killer Roads of the United States*, 19 FORUM 269 (Winter 1984). "It is seldom that an accident results from a single cause. There are usually several influences affecting the situation at any given time. These can be separated into three groups: the human element, the vehicle element and the highway element." *Id.* at 270, n.21 (citing AASHO, *A POLICY ON GEOMETRIC DESIGN OF RURAL HIGHWAYS* 122 (1965)).

108. See *supra* note 85. Louisiana's civil code permits strict liability actions against the state for defective highways. See, e.g., *Jones v. City of Baton Rouge*, 388 So. 2d 737 (La. 1980); *Tischler v. City of Alexandria*, 471 So. 2d 1099 (La. Ct. App. 1985) (shoulder drop off and a utility pole placed too close to the road); *Howell v. State Dep't of Transp.*, 467 So. 2d 629 (La. Ct. App. 1985) (road surface slippery when wet).

fundamentally, applying the case law to the narrow issue before the supreme court requires a holding that building supplies remain products upon incorporation into an improvement.

B. *The Stream of Commerce*

Although the phrase sometimes seems shrouded in mystery, the "stream of commerce" is just another name for the "channels of trade" described by the *Schipper* court or the "overall marketing enterprise" considered by the California courts.¹⁰⁹ Ultimate users are exposed to products by suppliers in business to make such exposure happen. Although certain circumstances may stretch the concept of a sale by a seller, such is not the case here.

Under Florida law, the contractor clearly put the paving mix into the stream of commerce. Chadbourne sold the mix to the state. In Florida, custom building a product for a single purchaser results in a sale under Section 402A if the transaction is essentially commercial in nature and the supplier engages in such transactions with regularity.¹¹⁰ The purpose of the stream of commerce concept is not to create some new "constructive" privity, but to address the question whether a product has been sold at all within the meaning of Section 402A.¹¹¹

Custom builders, especially those who build products for use by the general public, have no less a responsibility to the intended

109. See *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 90, 207 A.2d 314, 325 (1965); see also *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 259, 391 P.2d 168, 173, 37 Cal. Rptr. 896, 899-90 (1964); *supra* note 49.

110. *Hartman v. Opelika Mach. & Welding Co.*, 414 So. 2d 1105, 1106-07 (Fla. 1st DCA 1982). The California courts have looked at whether the supplier is an integral part of the overall marketing enterprise that should bear the cost of defective products. *Vandermark*, 61 Cal. 2d at 262, 391 P.2d at 171, 37 Cal. Rptr. at 899. In categorizing the manufacturer of a custom made, built-in-place skip bridge used for trolley movement of materials in a steel mill, a district court held under Pennsylvania law that "[i]t is sufficient that (the manufacturer) had carried on an established and well recognized kind of business which has been a regularly maintained activity on his part." *Abdul-Warith v. Arthur G. McKee & Co.*, 488 F. Supp. 306, 311 (E.D. Pa. 1981).

111. Participation in the chain of distribution is determinative. A laundromat operator is a licensor of public use of his machines and is not a seller in the usual sense. Nonetheless, a California court of appeal held that a laundromat operator was subject to strict liability as the supplier of a defective washer that injured a patron because he played "more than a random and accidental role in the overall marketing enterprise" of the product." *Garcia v. Halsett*, 3 Cal. App. 3d 319, 326, 82 Cal. Rptr. 420, 423 (Ct. App. 1970). Bailors and lessors are "sellers" for strict liability purposes. *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970); *W.E. Johnson Equip. Co. v. United Air Lines*, 238 So. 2d 98 (Fla. 1970); *Capital Assocs. v. Hudgens*, 455 So. 2d 651 (Fla. 4th DCA 1984) (holding that UCC implied warranties attend a lease of goods); *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 212 A.2d 769 (1965).

users of their products than do those who mass produce products for sales to individuals. *Use by the masses and sales to the masses* carry the same risk of injury from defects.¹¹² In *Hartman v. Opelika Machine and Welding Co.*,¹¹³ Chief Judge Ervin, writing for the First District Court of Appeal, rejected a stream of commerce "defense" by a custom builder who produced a "spin buggy" used to collect yarn produced in a textile plant. The purchaser designed the device and the purchaser's employees used it. Over the seller's contention that custom building to a purchaser's design meant he was not engaged in the "business of selling such a product," the court held that the product was indeed put into the stream of commerce.¹¹⁴

The appellate court properly rejected Chadbourne's assertion that the paving mix was not put into the stream of commerce.¹¹⁵ Chadbourne was regularly engaged in the business of selling paving mix that he manufactured. That the pavement was not resold to the ultimate user does not make the sale to the DOT disappear. The paving mix was put into the stream of commerce.

C. Causation

Proof of cause in fact or actual cause in a strict product liability action is fact-intensive and requires linking the defect to the proper defendant. Fundamentally, for a court to hold a manufacturer liable, the defect must have existed in the product when the manufacturer passed it on.¹¹⁶ Further, *West* stated as dictum that "ordinary rules of causation" would apply to strict product liability

112. Some courts of other jurisdictions interpret the question narrowly and hold that products which are custom built, or used but not bought by their users, have not been put into the stream. See *supra* note 49. A court may regard the transaction as primarily a service with an incidental transmission of a product. *Fisher v. Morrison Homes, Inc.*, 109 Cal. App. 3d 131, 167 Cal. Rptr. 133 (Ct. App. 1980). There is no basis for such a construction of, or inference from, Section 402A, which, by its own terms, applies to "any product" where the seller "is engaged in the business of selling such a product." RESTATEMENT (SECOND) § 402A(1)(a). The "occasional seller" is the opposite of the seller contemplated by Section 402A. He is one who does not regularly engage in such an activity, like the neighbor who sells you his car. This is the seller who does not put products into the stream of commerce and, consequently, is not subject to strict liability under Section 402A. RESTATEMENT (SECOND) Section 402A comment f.

113. 414 So. 2d 1105 (Fla. 1st DCA 1982).

114. *Id.* at 1106. For a suggestion that the stream of commerce concept should have a life of its own as a second level test after determining that the injury-causing thing was a product, see Comment, *Strict Products Liability for Injuries Prior to Sale or Delivery: A Proposed "Stream of Commerce" Test*, 17 Duq. L. Rev. 799 (1978).

115. *Vaughn*, 462 So. 2d at 515.

116. *Cassisi v. Maytag Co.*, 396 So. 2d 1140 (Fla. 1st DCA 1981).

actions.¹¹⁷ These ordinary rules include the proximate cause rules of negligence.¹¹⁸ Determinations of cause in fact and proximate cause are questions of fact for the jury.¹¹⁹ Florida has a modern proximate cause standard based on foreseeability of manner and result.¹²⁰ The standard jury instruction on intervening cause states:

Negligence may . . . be a legal cause of . . . injury . . . even though it operates in combination with . . . some other cause occurring after the negligence occurs if such other cause was reasonably foreseeable and the negligence contributes substantially to producing such . . . injury . . . or the resulting . . . injury . . . was a reasonably foreseeable consequence of the negligence and the negligence contributes substantially to producing it.¹²¹

Thus, an unforeseeable intervening act may be a superseding, hence *sole*, proximate cause of an injury that was also caused in

117. *West*, 336 So. 2d at 90.

118. Section 402A does not recommend or address the applicability of rules of proximate cause. Compensation policy and the interest in protecting the ultimate user from harm suggest that cause in fact should be enough. See *supra* notes 33-39, 81 and accompanying text. But courts need a way to limit the scope of the risk, to keep the tort from getting out of hand. Proximate cause, the traditional escape route in negligence law, may be used (and misused) by courts trying to tunnel their way out of strict product liability actions. See, e.g., *Watson v. Lucerne Mach. & Equip., Inc.*, 347 So. 2d 458 (Fla. 2d DCA 1977) (holding worker's misuse of product "sole proximate cause" of his injury from defective fruit sampling machine on seller's motion for summary judgment, avoiding the jury's apportionment of fault and determination whether the misuse was unforeseeable). As a policy matter, whatever insurance "crisis" exists or existed in the 1970's is arguably balanced by appending a proximate cause rule to strict product liability. See *supra* note 39.

119. RESTATEMENT (SECOND) § 402A comment q. See *Fenner v. General Motors Corp.*, 657 F.2d 647 (5th Cir. 1981); *Ford v. International Harvester Co.*, 430 So. 2d 912 (Fla. 3d DCA 1983); *Cassai v. Maytag Co.*, 396 So. 2d 1140 (Fla. 1st DCA 1981); *Martinez v. Clark Equip. Co.*, 382 So. 2d 878 (Fla. 3d DCA 1980).

120. Florida's rules of intervening causation apply foreseeability tests to determine if a cause in fact that follows the creation of the original risk is a superseding, hence *sole*, proximate cause of the injury. See, e.g., *Gibson v. Avis Rent-A-Car Sys.*, 386 So. 2d 520 (Fla. 1980) (The intoxicated driver of a rental car stopped in front of the plaintiff, whose car, when he stopped, was rear-ended by a third driver. The court held that a jury might find the intoxicated driver liable if the intervening cause was a reasonably foreseeable result of his negligent act.); *Vining v. Avis Rent-A-Car Sys.*, 354 So. 2d 54 (Fla. 1977) (A driver who left his keys in the ignition was held subject to liability for injuries caused by a thief who stole the car and negligently operated it.); *Padgett v. West Fla. Coop., Inc.*, 417 So. 2d 764 (Fla. 1st DCA 1982) (If the harm that occurred is within the scope of the risk created by the original negligence, the intervening cause is not unforeseeable.). The actor is not shielded from liability by an unforeseeable result or the manner in which it occurs, if his negligence is a substantial factor in bringing about (a cause in fact of) the harm. RESTATEMENT (SECOND) § 435(1). If, by hindsight, the harm seems a highly extraordinary result of the negligent conduct, the conduct may be held not to be a legal cause of the harm. *Id.* at § 435(2).

121. FLA. STD. JURY INSTR. CIV. § 5.1(c) (1974).

fact by a defective product. If both a defect and an intervening negligent act are proximate causes of the injury, Florida's pure comparative fault and contribution rules allow for an apportionment among tortfeasors of damages for which they are jointly and severally liable.¹²² Similarly, a downstream member of the distributive chain who did not create the defect may sue for indemnification for a prior settlement.¹²³

The proof requirement of cause in fact in a strict product liability action is indeed strict. The defect must have been present in the product when the supplier passed it on in addition to the time when it caused injury.¹²⁴ If the product simply wore out¹²⁵ or was negligently maintained,¹²⁶ it was not defective when the supplier passed it on and causation questions do not arise.

If a jury was to find that a defect in Chadbourne's paving mix was a cause in fact of the Vaughns' injuries, it would then decide if the intervening acts or omissions of Walton County's agents were reasonably foreseeable. This process would determine whether the scope of the risk created by the defect included the county's possibly negligent failure to correct the problem. The patency of the drop-off would be an important factor, and, on the facts presented, reasonable jurors could find that Chadbourne's defect, the county's

122. See FLA. STAT. ANN. § 768.28(2)(a), 768.28(2)(b), 768.28(3)(a) (West Supp. 1985) (When tortfeasors are jointly and severally liable, their relative degrees of fault determine their pro rata shares of damages. If one pays more than his pro rata share, he has a right of contribution from the others.); *Persaplastic, C.A. v. Cincinnati Milacron Co.*, 750 F.2d 1516, 1526 (11th Cir. 1985) (Applying Florida law, the jury's stated percentages of fault of each defendant were the proper basis for determining the applicable amount of contribution.).

123. *Houdaille Indus., Inc. v. Edwards*, 374 So. 2d 490 (Fla. 1979).

124. See, e.g., *Cassisi v. Maytag Co.*, 396 So. 2d 1140 (Fla. 1st DCA 1981).

125. A strict liability action was brought against the manufacturer of a lawn mowing tractor based on a nonskid painted surface that had worn off the platform when the user slipped upon dismounting the tractor. The court held that the lack of a nonskid surface was not an "unexpected danger," to which *West* was addressed, because the purchaser had notice when the tractor was purchased that the surface would eventually wear out. *Savage v. Jacobsen Mfg. Co.*, 396 So. 2d 731 (Fla. 2d DCA 1981). Chief Judge Ervin stated in *Cassisi* that a product's age, its expected useful life, its state of repair, the severity of its use, and whether it was abnormally used are factors for the jury to weigh in determining if the product was defective when it was in the supplier's control. *Cassisi*, 396 So. 2d at 1152. A product may be "so old, so frequently repaired, and subjected to such rugged use" that its condition may justify a court finding that it was not defective as a matter of law. *Id.* See *Mitchell v. Ford Motor Co.*, 533 F.2d 19 (1st Cir. 1976) (A dump truck's parking brake had not been properly maintained by periodic adjustments for wear in 25,000 miles use. It failed to hold the truck, which rolled over the driver, after he put on the brake and got out.); *Barich v. Ottenstror*, 550 P.2d 395 (Mont. 1976) (user fell backward when handle pulled out of cardboard wardrobe moving-box used after two years' storage in unheated garage).

126. Algie Vaughn, for instance, could bring an action for negligent maintenance against Walton County.

inaction, both, or neither, were proximate causes of the Vaughns' crash.

The necessity for what is often highly technical proof that the defect in question was the cause in fact of injury combined with a proximate cause requirement, a policy tradeoff already made,¹²⁷ makes the proximate cause fiction of *Slavin v. Kay*¹²⁸ patently inapposite to the instant case.

D. *The Slavin Doctrine*

Developed in a negligence action by a motel guest against the motel owner and a contractor, *Slavin* is Florida's version of the accepted-work doctrine. The guest was injured when a sink in his room came loose from the wall and fell on him. The supreme court held that a dangerous condition that caused a third party's injury, and was negligently created by a building contractor, is the proximate cause of the injury if the defect was not discoverable by the owner upon a reasonable inspection. The owner, however, has sole responsibility for patent defects after he accepts the work.¹²⁹ The contractor is subject to ongoing liability for hidden (latent) defects. Discovery of latent defects is not reasonably expected of the owner, while the contractor is "treated like any other tortfeasor" who creates dangers of which he should have known.¹³⁰

What the *Slavin* court really did was carve out a piece of the privity rule, as did other courts in other areas of negligence law, by applying the latent danger exception to a dangerous condition on land. The injured visitor was thus able to hold liable the building contractor who created a latent risk, with whom he was not in privity.

Although it might be indexed as a rule of intervening causation in the loosest sense, *Slavin* is really a privity rule disguised as a proximate cause fiction that works like an on-off switch.¹³¹ It can select one defendant for liability and insulate another in a multi-party construction negligence action.¹³² The *Slavin* court used

127. See *supra* note 118.

128. 108 So. 2d 462 (Fla. 1958).

129. *Id.* at 466.

130. *Id.* at 467.

131. An example of *Slavin's* authentic legal gibberish is the passage wherein the court states that if "the owner cannot be held to have assumed the risk of a particular defect or danger, then there is no intervening fault to sever the causal relation." *Id.* (emphasis added).

132. When the defect is patent, the action may be viewed as one against the owner for negligent maintenance in not discovering and correcting the defect. See *id.* at 466 (citing

proximate cause as a vehicle for expanding the scope of the contractor's duty. Almost thirty years later, however, its patent danger limitation is inconsistent with Florida's approaches to both fault and proximate cause. The courts have repeatedly questioned the correctness of the rule in the last decade, in view of Florida's move to pure comparative fault and contribution,¹³³ which represents a judicial policy of striving to "equate liability with fault in negligence actions"¹³⁴ and a rejection of common law fictions of "proximate fault."¹³⁵

E. *What is Slavin Doing Here?*

At first blush, *Slavin* and its proximate cause fiction seem wholly out of place in a strict product liability action. Nonetheless, the First District Court of Appeal assumed that because the road drop-off was patent and observable (and had in fact been observed by an employee of Walton County), Chadbourne, as the paver of the road, would not be liable were he not also the manufacturer of the paving mix.¹³⁶

The trial court did not make clear the basis upon which it granted Chadbourne's motion for summary judgment. Under *Slavin*, however, the patency of the defect would ordinarily preclude holding Chadbourne liable for creating it. The appellate court had to distinguish *Slavin* before it could reach the definitional issue under Section 402A and reverse on Vaughn's strict liability claim.¹³⁷

The First District found an issue that previous courts may have ignored. Emphasizing that Chadbourne was a manufacturer as well as a contractor, and that the *Slavin* rule applies only to contractors, the court was able to decide that Chadbourne was sub-

Casey v. Wrought Iron Bridge Co., 114 Mo. App. 74, 89 S.W. 330 (1905)). The *Slavin* court did not care if this theory, or that of imputing the contractor's fault to the owner, was the theoretical basis for its rule. *Id.*

133. See *Hoffman v. Jones*, 287 So. 2d 431 (Fla. 1973); *supra* note 122.

134. *Florida Freight Terminals, Inc. v. Cabanas*, 354 So. 2d 1222, 1225 (Fla. 3d DCA 1978). See *El Shorafa v. Ruprecht*, 345 So. 2d 763 (Fla. 4th DCA 1977). *But see* *Lubell v. Roman Spa, Inc.*, 362 So. 2d 922 (Fla. 1978).

135. See *Vinson, Proximate Cause Should Be Barred From Wandering Outside Negligence Law*, 13 FLA. ST. U.L. REV. 215, 252-53 (1985).

136. *Vaughn v. Edward M. Chadbourne, Inc.*, 462 So. 2d 512, 514-15 (Fla. 1st DCA 1985).

137. *Id.* at 514. The trial court and the court of appeal both assumed that *Slavin* applied to a strict product liability action. The only way the trial judge could have granted Chadbourne's motion for summary judgment on all three theories (negligence, breach of implied warranty, and strict liability) was to rely on the *Slavin* argument.

ject to strict product liability for defects in its paving mix. The First District used this narrow, novel reading of *Slavin* to limit it, sidestep it, and avoid either applying it or questioning its underlying validity.¹³⁸

F. *Slavin Is Misapplied to a Product Liability Action*

Strict product liability actions are founded upon the policy of holding sellers liable for injury-causing defects in their products. The manufacturer of a defective product is the ultimate defendant. Whether its defective product was a proximate cause of the injury is a factual question that the jury answers by assessing the scope of the risk created by the defect. It is not very likely that the *West* court had *Slavin's* proximate cause fiction in mind when it spoke of "ordinary rules of causation," and even if it did, the ordinary rules of causation are not frozen in time.

However patent the drop-off might have been to the county commissioner who inspected the eroding pavement in the daylight, it was far from patent to the Vaughns as they drove over it in the dark.¹³⁹ The recent case of *Pando v. Lloyd Citrus Trucking, Inc.*¹⁴⁰ well illustrates how a defect that is patent to the DOT upon a daytime inspection becomes a nighttime trap for motorists.

In *Pando*, a state road had an unmarked turn lane at an intersection, and a trucker, keeping to the right as he crossed the intersection, dropped down to the shoulder when his lane disappeared. In a resultant negligence action, the jury rejected the argument that the defect was patent and that the DOT should be solely responsible for the dangerous intersection. The danger encountered

138. Chief Judge Ervin's manufacturer/contractor distinction would cause problems in later cases. Contractors (assemblers of the larger product and sellers of supplies) and owners (suppliers of the larger product) could argue that *Slavin* insulates them from strict liability because they are not manufacturers. See *Vaughn*, 462 So. 2d at 515. This would restrict the injured party's access to members of the chain of distribution, undercutting strict liability policies. Judge Ervin offered no reason why a manufacturer/seller should be subject to strict liability, but a mere seller should not be. A good reason would not be easy to find.

139. *Vaughn*, 462 So. 2d at 513.

140. 83-7085 CA(L) (Fla. 17th Cir. Ct. June 25, 1985), summarized in 28 ATLA L. REP. 360 (1985). *Pando* involved a section of southbound State Road 7 in West Palm Beach, where a tractor-trailer driver, keeping to the right as he went through an intersection, found that he had run out of road, and hit a four inch drop-off to the shoulder. He was in an unmarked turn lane which had, until then, been an unmarked through-lane. The driver steered left to climb back up to the road. When the tires regained the pavement, the truck shot across the road and smashed head on into a compact car in the northbound lane. Some occupants of the car and the survivors of the others sued the truck driver's employer, who counterclaimed against the developer who designed and built the intersection. *Id.*

was the invisibility of the drop-off in the dark.¹⁴¹ The factual question raised goes to the heart of both the *Vaughn* case and the *Slavin* doctrine: whether the risk posed by the patent defect discovered by the owner is the same risk as the one posed by the latent defect that caused the harm. This question should have prevented the trial court from granting Chadbourne's motion for summary judgment in the first place.¹⁴²

The undesirable consequences of applying the *Slavin* doctrine to strict product liability actions begin with the instant case. Here, the fortuity of a manufacturer's *installing* a defective product *himself* and the defect becoming *obvious* would absolve him of liability. Such a result would subvert the strict product liability cause of action, which is designed to protect the ultimate user from injury-causing defects by assigning the loss to those who create the risks.¹⁴³

The First District examined the "patent danger" rule for guidance in dealing with *Slavin* and the effect of patent defects in a strict product liability action. In *Auburn Machine Works v. Jones*,¹⁴⁴ the Supreme Court of Florida had previously rejected the argument that an open and obvious hazard in the product absolves the manufacturer of responsibility for the user's injury. The *Auburn* court recognized that "the patent danger doctrine encourages manufacturers to be outrageous in their design, to eliminate safety devices and to make hazards obvious."¹⁴⁵ The rule suffered from rigidity and produced harsh results because it prevented the plaintiff from establishing his case altogether. The better view is to make the obviousness of the danger available to the defendant on

141. *Id.*, summarized in ATLA L. REP., *supra* note 140, at 361.

142. *Vaughn*, 462 So. 2d at 514-15. Even if the "uncontroverted evidence" reveals that the defect was patent and observable to agents of Walton County upon a daytime inspection, a material factual question has *not* been negated, that is, whether the invisible danger encountered by the Vaughns on the night of the crash was a danger different from the one posed by the defect observed. If reasonable jurors could differ, Chadbourne did not carry his burden. The movant must negate all material questions of fact to prevail on a motion for summary judgment in Florida. *Holl v. Talcott*, 171 So. 2d 412 (Fla. 3d DCA 1965), *conformed to*, 192 So. 2d 76 (Fla. 3d DCA 1966), *appeal after remand*, 224 So. 2d 420 (Fla. 3d DCA 1969).

143. See *supra* notes 33-39 and accompanying text.

144. 366 So. 2d 1167 (Fla. 1979). See *Watson v. Lucerne Mach. & Equip., Inc.*, 347 So. 2d 459 (Fla. 2d DCA 1977). Compare *id.* with *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950) (holding the duty owed to users is merely to make an inherently dangerous machine free from latent defects). This theory, a variant of the *volenti non fit injuria* approach to assumption of risk, was overruled in *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

145. *Auburn*, 366 So. 2d at 1170.

the issues of whether the defect is unreasonably dangerous and whether the plaintiff acted reasonably in the circumstances.¹⁴⁶ This approach advances Florida's policy of correlating liability with fault.¹⁴⁷

Auburn expressly rejected the existence of a patent danger as a bar to the plaintiff's recovery in a strict product liability action and subsumed it in the assessment of the plaintiff's comparative fault.¹⁴⁸ *West* had previously stated that a plaintiff's failure to discover a defect was not a defense to a strict liability action.¹⁴⁹ The inescapable conclusion is that a manufacturer remains subject to liability when a defect is patent to a third party, if the *victim's own discovery* of the defect would not bar his recovery.¹⁵⁰

Policy has aimed the strict product liability action at the manufacturer by definition. By the terms of *West* and its progeny, patency is not determinative, but merely a factor relevant to the issues of defectiveness and comparative fault. Who created the defect, and whether an intervening act was outside its scope, are factors relevant to the issues of cause in fact and proximate cause. These are questions for the trier of fact. They are to be answered separately. As a negligence rule, *Slavin* is obsolete. To apply it now to a strict product liability action is mischief.

146. *Id.* at 1169.

147. *Id.* at 1171 (citing *Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973)).

148. *Auburn*, 366 So. 2d at 1167, 1169.

149. *West*, 336 So. 2d at 90. See *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977) (holding implied assumption of risk is no bar to recovery and the reasonableness of plaintiff's conduct is considered under comparative negligence principles).

150. See Amicus Curiae Brief of Academy of Florida Trial Lawyers (for respondent Vaughn) at 15-16 *Chadbourne v. Vaughn*, No. 66,413 (Fla. Oct. 11, 1985). In the appellate court, Chief Judge Ervin relied upon *Auburn* on the issue of patency of defect. *Vaughn*, 462 So. 2d at 515. His own opinion in *Hardin* is also instructive. *Hardin v. Montgomery Elevator Co.*, 435 So. 2d 331 (Fla. 1st DCA 1983). There, an elevator manufacturer argued that his knowledge when he passed on his product that it was to be inspected for defects put him beyond the reach of strict product liability. The court held that this knowledge was merely a factor for the jury to consider on the question whether the product was defective when it was in the manufacturer's hands. *Id.* at 336-37. See *supra* note 125. Like the actual age of the product, its expected sales life, the severity of its use, and the state of its repair, the facts relating to its inspection are part of the history of the product. If the manufacturer is not immunized by knowledge that inspection is a part of the useful life of its product, it cannot be immunized by the facts surrounding actual inspection. Roads, like elevators, are regularly inspected. Roads require maintenance, and may frequently require early repaving when paving mixes are not defective. In possession of all the relevant evidence, a jury might decide that *Chadbourne's* paving mix was not defective when it was made, despite the patency of the drop-off that appeared later. Mere patency proves too much (and the wrong element) if *Slavin* is applied.

G. *Slavin Must Go*

The accepted-work doctrine of *Slavin* mucks up the works of Florida's negligence law. Perhaps it was useful as a privity exception, but subsequent case law has evolved well past this point.¹⁵¹ The trial court relied on *Slavin* to grant Chadbourne summary judgment on all three theories, and the First District had to get around *Slavin* to reverse.¹⁵² The supreme court now must face the rule, and it can do Florida tort law a favor by overruling *Slavin* outright instead of affirming Judge Ervin's unrealistic manufacturer/contractor distinction.¹⁵³

The supreme court might take its cue, as did the *Auburn* court, from *Micallef v. Miehle*,¹⁵⁴ which overruled the patent danger rule in New York. Following *Micallef*, the New York courts recognized that the same principles compelled rejecting their version of the *Slavin* patent/latent test. In *Cubito v. Kriegsberg*,¹⁵⁵ the court stated:

[A] manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger . . . in considering the extent of the liability of an architect, by parity of reasoning the liability of an architect must now be treated under the same tests currently applied toward an industrial manufacturer. That is to say, *the test of patent or latent defect is not to be applied*, and the question of liability depends rather on whether the architect exercised due care in preparing his plans.¹⁵⁶

The question, as it was in *Slavin*, is whether the contractor or designer should not be treated like any other tortfeasor.¹⁵⁷ What was the exception is now the rule. A foreseeable plaintiff has a cause of

151. The availability of negligence actions against building contractors, engineers, and architects by those out of privity is well settled. Winning such actions is another matter. See *supra* note 74 and accompanying text.

152. It is not at all clear that Chadbourne was entitled to summary judgment even if the supreme court neither overrules *Slavin* nor holds it inapplicable to a strict product liability action. See *supra* note 142 and accompanying text.

153. See *supra* note 138.

154. 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

155. 69 A.D.2d 738, 419 N.Y.S.2d 578 (1979).

156. *Id.* at 744-45, 419 N.Y.S.2d at 582 (emphasis added). The Illinois supreme court discarded the accepted-work in *Hunt v. Blasius*, 74 Ill. 2d 203, 384 N.E.2d 368 (1978). See *Fournier v. 3113 W. Jefferson Partnership*, 100 Ill. App. 3d 820, 427 N.E.2d 408 (App. Ct. 1981).

157. *Slavin*, 108 So.2d at 467.

action against a negligent contractor in Florida.¹⁵⁸ The privity rule, which was the reason for the *Slavin* exception, no longer exists.

In a multiparty action, where the owner and the contractor are defendants, the owner is likely to be held partly at fault for negligent maintenance anyway, *even where the contractor is liable for a latent construction defect*. A good illustration is *Echols v. Hammett Co.*,¹⁵⁹ where the jury found the DOT and the contractor 6.7% and 8.3% at fault, respectively, on that basis.¹⁶⁰ The DOT and the road builder could not both have been liable unless the jury found that *each one's* negligence was a proximate cause of the injury. This approach drains the content from the *Slavin* rule, which purports to insulate the owner when a defect is latent.

It is a bastard rule of "proximate fault," fundamentally unsound, and subversive to a pure comparative fault and contribution scheme. This is an appropriate time for the supreme court to throw the baggage overboard.

H. Policy Reasons and Results

Each year our nation's losses on the highways equal our losses in Vietnam. No small portion of these losses is the result of dangerous roads.¹⁶¹ Ultimate users need protection from equipment failure, costing lives, caused by defects in manufacture. Modern roads are part of the driver's equipment. The county road capable of handling modern vehicles in modern numbers is no pathway dug out of dirt. Its design and construction are highly technical.¹⁶² It has the qualities of a product, and the carnage it engenders if it is defective invokes strict liability's basic policies of compensation, protection, and safety.

The argument that the risk of injury-causing defects could be spread, through insurance and a pass-along of settlement costs, originally helped persuade courts to adopt strict product liability. Of late, it is a flipped argument, used to justify checking the growth of the doctrine where risk spreading may be undesirable.

158. See *supra* notes 74-75.

159. 423 So. 2d 923 (Fla. 4th DCA 1982).

160. The trial judge directed a verdict for the road builder, a residential developer, applying *Slavin* incorrectly, where the evidence raised a question of fact as to latency of the defect. *Echols*, 423 So. 2d at 925. The Fourth District Court of Appeal stated that it would have reinstated the jury verdict were it not for the trial judge's refusal to allow the builder's final argument that the DOT's negligent maintenance was the sole cause of the accident that occurred when a car left the roadway and encountered a drop-off to the shoulder. *Id.*

161. See *supra* note 107.

162. *Id.*

Highway construction is costly, it is not unlike medical care insofar as highways are essential products,¹⁶³ and this is one situation where potential plaintiffs spread the risk by self-insurance.

In their bids on public projects, pavers required to increase their insurance coverage will attempt to pass on these and other settlement costs that may result from strict liability. The state might raise license and registration fees or reinstate an auto inspection program to pass along the costs to the public. If such efforts turn out to be insufficient, and if the paver must pay higher settlement costs at a fixed fee level for his highway work because he is subject to strict liability, then it must be remembered that paving contractors pave commercial projects, too.

The shopping mall parking lot is not a public work, it is fueled by private commerce, and the mall is the focal point of the consumer's contact with the "overall marketing enterprise." Higher settlement costs for highway construction that a contractor cannot directly pass on can be balanced or defrayed by commercial work, where the contractor can make such pass-alongs.

If this is how the cost is to be spread among motorists, so be it. The paver's public trust when he paves a public road cannot be diminished. *This* pavement must work safely in all weather conditions under cars travelling at three times the speed of cars in the driveways and parking lots that the paver paves in the private sector.

Notwithstanding the pass-along question, knock out *Slavin* and let in the strict liability action and roads will be built better. Although the cost of road construction and lack of public funds are part of the problem of defective roads, the state is not helped in any way by defective dedicated roads such as those in *Echols* or *Pando*, or defective county roads, as in *Vaughn*. It is likely to be a defendant when shoddy design and workmanship cause accidents that result in lawsuits. As *Echols* shows, the state cannot easily shift all the loss from latent defects anyway,¹⁶⁴ which is the only possible benefit to it of the *Slavin* rule in a defective highway case. The *Echols* court did not question the jury's ability to find that the owner's negligent maintenance and the contractor's latent defect were *both* proximate causes of the injury. This indicates that *Slavin* is already overruled in practice, if not in principle.

A narrow reading of the cases is the path to Judge Ervin's re-

163. See *supra* note 51 and accompanying text.

164. See *supra* note 159 and accompanying text.

sult.¹⁶⁵ It is good jurisprudence for the supreme court to read *Slavin* narrowly if it does not have the consensus to reverse it, and to use the building supply cases to affirm that strict liability is appropriate, because the question whether the road is itself a product is not before it. Courts that purport to use pure policy reasons for justifying application or withholding application of strict liability seldom do so consistently,¹⁶⁶ and importing inconsistency into the law is *not* good jurisprudence. Finally, as the *Schipper* court stated, "[a]ncient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected."¹⁶⁷

IV. CONCLUSION

The First District Court of Appeal properly applied Florida case law and the policies that undergird the doctrine of strict product liability to the paving mix and its manufacturer. The Florida building supply cases¹⁶⁸ require affirming the First District, which did not hold that improvements are products under Section 402A, merely that products incorporated into improvements remain products. This does no violence to Florida law.¹⁶⁹ Neither does a decision that the paving mix was put into the stream of commerce.¹⁷⁰

The First District read the *Slavin* doctrine narrowly and properly distinguished it. The manufacturer of a defective product is not immunized because someone will inspect it, and remains subject to strict liability irrespective of how obvious is the defect and to whom.¹⁷¹ Applying *Slavin* would let in the back door a rule that

165. Except for his distinction between manufacturers and sellers with respect to strict liability. But this distinction is not necessary to his result. See *supra* note 82.

166. See *supra* note 53.

167. *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 90, 207 A.2d 314, 325 (1965).

168. See *supra* notes 85-89 and accompanying text.

169. Because the courts do not reach the question whether improvements are "larger" products, neither the state, as the designer and supplier of roads, nor designers and developers of other improvements to real property are subject to a strict liability action for defects which cause injury to the person or property. See *supra* note 106; *Fisher v. Morrison Homes, Inc.*, 109 Cal. App. 3d 131, 167 Cal. Rptr. 133 (Ct. App. 1980); *Milam v. Midland Corp.*, 282 Ark. 15, 665 S.W.2d 284 (1984).

170. *Hartman v. Opelika Mach. & Welding Co.*, 414 So. 2d 1167 (Fla. 1st DCA 1982).

171. *Auburn Mach. Works v. Jones*, 366 So. 2d 331 (Fla. 1979). Despite the supreme court's reaffirmance of *Slavin* seven years ago in *Lubell*, the question of its validity will not go away. *Lubell v. Roman Spa, Inc.*, 362 So. 2d 922 (Fla. 1978). *Slavin* persists as an anomaly which perverts the jury's fact-finding role in a pure comparative fault scheme. Fault and causation are separate inquiries. They should not and need not be bootstrapped and confused. Proximate cause fictions such as *Slavin*, last clear chance, or the patent danger doctrine are really breach of duty or fault questions, anyway. *Slavin* further confuses the mat-

has been barred at the gate.

Proof of cause in fact requires that the plaintiff link the manufacturer to the injury by a defect for which the manufacturer is responsible, that is, a defect that inhered in the product when he passed it on. This is no small burden of proof, and it is made more because the plaintiff also must prove that the defect proximately caused his injury. An obvious defect under *Slavin* may prevent the plaintiff from presenting his case at all. Giving this advantage to the manufacturer is not justifiable in view of the injured plaintiff's heavy burden of causal proof.¹⁷² Neither is it justifiable that a manufacturer has a patent danger defense when his defective products are incorporated into improvements, but not when they are incorporated into movable goods.

Florida's implied warranty remedy to first purchasers of residences does some jobs that strict liability does elsewhere, notably California. The extension of a strict liability remedy will eventually subsume Florida's new privity rule, and fill in its patchwork of implied warranty law for improvements.¹⁷³ The same evolution from sales warranty to strict liability that took place with chattels will take place with improvements. With time, the consumer becomes ever more vulnerable and exposed, while his ability to prove negligence against remote defendants becomes ever less. Meanwhile, the supply of improvements takes on the character of an "overall marketing enterprise." It is pure foolishness that victims of defective products in the home have no strict liability remedy, but their neighbors who live on a boat or travel in a motor home do.

There may be problems with the required result. Courts have not satisfactorily addressed the big product/little product question. Why is the paving mix a product but not the road it becomes?¹⁷⁴

ter by assigning duty, breach, and causation as a matter of law by way of the patency of the defect. The rule should be replaced with the well developed principles of comparative fault and intervening causation based on foreseeability before it can foul up and confound those trying to fathom and apply Florida product liability law. Note that the First District holding makes *Slavin* applicable to a strict liability action that does not involve a manufacturer. If the contractor/assembler and owner/seller analogies are to be recognized they will be born into strict liability with prenatal injuries caused by *Slavin*.

172. If *Slavin* does control all theories in this case, the manufacturer/contractor could concede that he was negligent in creating a patent defect. Because the patency of the defect shifts responsibility to the owner for the injuries caused by the defect, Chadbourne, as a contractor, has a defense of negligence to a strict liability action against him as a manufacturer.

173. This is so bad? See *supra* notes 64-75 and accompanying text.

174. Similarly, the elevator is a product, but the building may not be, in *Hardin v. Montgomery Elevator Co.*, 435 So. 2d 331 (Fla. 1st DCA 1983); the roof tiles or trusses are

Likewise, it seems unfair to hold a materialman or manufacturer of building supplies subject to strict liability for defects without casting a similar responsibility upon the seller or supplier of the improvement, the larger product, for defective manufacture or defective design.¹⁷⁶

Finally, road maintenance and construction are costly. The nation's roads include many miles needing immediate attention, while public funds for this purpose are already in short supply; this is part of the problem.¹⁷⁶ The natural impulse is to fear a rash of strict liability suits for defective pavement following affirmance of the First District in *Vaughn*. States, however, are well protected by immunities and the designer doctrine.¹⁷⁷ As for private party defendants such as Chadbourne, it must be remembered that this case is unusual. The road deteriorated in two years.¹⁷⁸ Most of the documented dangerous roads have not been properly maintained since they were paved and/or built many years ago. Consequently, statutes of repose will moderate the volume of actions brought, and the simple defense of the pavement having *worn out* will be effective in the greater number of cases.¹⁷⁹

Ultimately, the strong public policy of protecting the public from unexpected dangers in products of all sorts must link up with a no less strong public policy favoring highway safety to insure that Algie Vaughn and others similarly situated have the remedy guaranteed to them by the Florida Constitution.¹⁸⁰ The motorist needs adequate protection against unexpected dangers resulting

products but perhaps not the rooves in *Gory Assoc. Indus. v. Jupiter Roofing & Sheet Metal*, 358 So. 2d 93 (Fla. 4th DCA 1978) & *Tri-County Truss v. Leonard*, 467 So. 2d 370 (Fla. 4th DCA 1985). What test will work if not all improvements are products under Section 402A? The separate identity test of the Illinois courts? Will they apply it consistently? See *Boddie v. Litton Unit Handling Sys.*, 118 Ill. App. 3d 520, 455 N.E.2d 142 (App. Ct. 1983).

175. Developers may have deeper pockets and may be more insurable than paving contractors. They probably are in a better position than contractors to pass along settlement costs.

176. See *supra* note 107.

177. See *supra* note 106.

178. *Vaughn*, 462 So. 2d at 513.

179. See *supra* note 125. In many states, and probably now in Florida, statutes of repose allow an action to be time-barred before it accrues, whether it is based on building defects or product defects. The running of repose periods will limit the ability of injured parties to bring strict liability actions for design/construction/material defects as opposed to actions for negligent maintenance. See *supra* note 95.

180. FLA. CONST. art. I, § 21. If the supreme court adopts the trial court's view of this case, Vaughn has no remedy under any theory of recovery against Chadbourne.

from defective equipment. Sooner or later, courts will recognize that the motorist's equipment includes county road 1087.

ALAN H. ROLNICK*

*For my wife, Mahli, and our family. Thanks to the three o'clock club, and credit to the team. All who touched this piece left it better than they found it.