PRACTICE FOCUS / REAL ESTATE

Going Strong: Slavin Doctrine Continues to Protect Fla.'s Builders, Designers

Commentary by Georg Ketelhohn

In Florida's construction industry, the decision that gave life to the Slavin doctrine, the Florida Supreme Court's ruling in *Slavin v. Kay* in 1958, has withstood the test of time and appears to be as strong as ever. A recent appellate ruling illustrates how the doctrine continues to offer vital protections from liability for the state's contractors, subcontractors and design professionals against future injuries alleged to have been caused by defects in their work.


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The 60 year-old ruling by the state's highest court held that a contractor's liability in negligence, which is the duty of care that it owes to third parties, terminates if the property owner accepts the contractor's work with patent defects. It is used to defend contractors from liability for patently obvious and apparent defects when they cause injuries after the property owner has accepted the improvements together with the responsibility for their ongoing maintenance and repair.

The recent ruling applying the doctrine was issued by the state's Third District Court of Appeal in the case of *Melitina Valiente v. R.J. Behar*. It stems from the tragic death of a motorcyclist who collided with another vehicle at a Hialeah intersection in 2008. The subsequent complaint was filed by the victim's mother against the city of Hialeah, R.J. Behar & Co., Williams Paving and Melrose Nursery, among others.

The suit alleged that R.J. Behar (the designer of the city's road improvement project), Williams Paving and Melrose Nursery were negligent and responsible for a visual obstruction that caused the fatal accident. It posited that the defendants planted Jatropha Hastata shrubs in 2005 in the swale area of the intersection where the accident occurred, and the plants eventually blocked the view of passing motorists and caused the accident more than two years later.

The trial court granted summary judgment to each of these three defendants. It concluded that the Slavin Doctrine relieved them from liability because any obstruction caused by the plants would have been patent when the project was accepted by the city.

In the ensuing appeal, the majority opinion found that while in most cases the patency or latency of a dangerous condition is a question of fact for the jury, thereby precluding summary judgment, there are exceptions for cases in which the undisputed material facts establish that, if there was a defect, it would have been patent. The majority noted that the shrubs were approximately five feet tall and two and a half feet wide when they were planted, which is more than two feet taller than the maximum height set forth in the Miami-Dade County Public Works manual. For purposes of patency under the Slavin Doctrine, it ruled that the relevant question is whether the plantings created a visual obstruction and, if so, was the condition latent or patent? It also noted that the test for patency is not what the city knew, but rather what the city could have discovered if it had performed a reasonably careful inspection.

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In such a roadway construction project, the majority found that any reasonably careful inspection of 5-foot-tall shrubs in the swale near an intersection must include determinations of whether they constitute a visual obstruction to passing motorists.

"By definition, the presence of a visual obstruction is readily ascertainable—either it obstructs your view or it does not," reads the ruling. "Indeed, the plaintiff's own expert contends that the shrubs caused a visual obstruction immediately upon being planted in 2005. On these facts, because any visual obstruction these shrubs might have posed could have been discovered by the city upon a reasonable inspection, the alleged visual obstruction would have been patent, and therefore, R.J. Behar, Williams Paving, and Melrose Nursery are protected by the Slavin Doctrine because the city accepted their completed work."

The dissenting opinion accuses the majority of conflating the patency of the condition with the patency of the alleged dangerousness of the condition. The majority disagrees, noting that because the shrubs themselves were open and obvious, any visual obstruction they might have caused when they were planted and accepted by the city could have been discovered through reasonable care. It notes there is no evidence to suggest that if the plantings posed a dangerous obstruction for motorists, the city could not have discovered the danger prior to accepting the work. Whether the growth of the plants over time is what constituted a dangerous condition two years later is a separate question, as the issue on appeal is whether the plantings, as they were when the city approved and accepted them, created a dangerous visual obstruction that could have been discovered with reasonable care.

The majority concludes that the dissent's discussion regarding summary judgment and prior rulings as to its inappropriateness on the issue of whether a party exercised reasonable care is misplaced. The majority found that the question on appeal is not whether any of these three defendants owed the victim a duty of care or breached that duty, resulting in the fatal accident, but rather the sole issue is whether the Slavin Doctrine protects them after their work had been approved and accepted.

"It is undisputed that the city could have discovered a visual obstruction, if one did exist, by simply looking," the majority concludes.

The dissent also suggests the defendants had some duty to inspect and perform visibility studies of the plantings in question, and because all of the defense witnesses testified that there were no visual obstructions at the subject intersection, this testimony created a material issue in dispute precluding summary judgment. But the majority countered that the issue of duty has no relevance to the appeal, which is solely to determine whether the city relieved each defendant from future liability arising from any alleged defect that was patent when it accepted the work.

As this ruling demonstrates, the Slavin doctrine continues to serve as a vital defense for Florida contractors, subcontractors, architects and engineers facing claims for injuries to third parties. A majority of other states have adopted the "modern rule" or the "foreseeability doctrine," which provides that a contractor is liable for third-party injuries as a result of the condition of the work, even after completion of the work and acceptance by the owner, where it was reasonably foreseeable that an injury would occur due to the contractor's negligence or failure to disclose a dangerous condition. With this recent ruling by the Third DCA, it is apparent that this competing doctrine has not yet gained a foothold in Florida's courts.

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