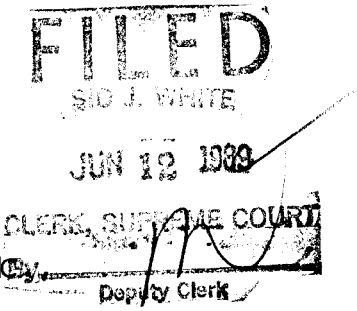
IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,190



MARY SHARON SULLIVAN,

Petitioner,

vs.

SILVER PALM PROPERTIES, INC.,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Mary Sharon Sullivan sued respondent and others for injuries received in a collision of the vehicle in which she was a passenger with a tree. The collision occurred when the driver lost control after hitting a series of bumps in the road caused by tree roots emanating from respondent's property. After several days of trial, the jury returned a verdict finding in favor of the petitioner, assessing her damages at $250,000 and finding respondent, Silver Palm Properties, Inc. (adjoining property owner), 22.5% negligent; Dade County, 15% negligent; and Robert Stevens (the driver), 62.5% negligent. Final judgment entered against Silver Palm and its insurer reflecting a set-off of the $50,000 settlement by Dade County. (R.611; Tr.740)

Silver Palm, appealed to the Third District Court of Appeal. In a 2-1 decision, the judgment for petitioner was reversed based on the conclusion that a landowner (Silver Palm) does not have a duty to retard subterranean root growth which protrudes into an adjoining highway causing disruptions in the surface of the road. The dissenting judge stated that a long line of Florida precedent was controlling and required affirmance of petitioner's judgment.

Rehearing en banc was granted. Five judges voted to adhere to the panel opinion and certified the following question to this Court as one involving great public

importance:

> DOES A LANDOWNER HAVE A DUTY TO RETARD THE SUBTERRANEAN ROOT GROWTH OF ITS TREES WHICH ARE LOCATED ADJACENT TO A PUBLIC RIGHT OF WAY?

Four judges dissented from the en banc decision, but concurred with certifying the question. The dissent again states that the law of Florida is clear that adjoining property owner may incur liability for damages caused by subterranean roots emanating from private property which protrude into a public right of way and cause it to be obstructed:

> "The majority holds that we should disregard this long line of precedent because here we are dealing with road obstruction caused by underground growth while the cited cases apply only to injury caused by above ground growth and other obstructions. I believe the law to be clear and unambiguous, to be broad enough to apply to the facts before us, and to be controlling of the disposition of this case." Silver Palm Properties, Inc. v. Sullivan, 541 So.2d 624 (Fla. 3d DCA 1989).

The facts presented to the jury are summarized in the District Court decision. On a wet, rainy day, Mary Sullivan was a passenger in a vehicle driven by her friend, Robert Stevens. While traveling along Southwest 232nd Street in South Dade County (in a lane which a surveyor estimated to be approximately seven feet wide), Stevens hit a series of bumps in the road, obscured by rainwater, causing him to lose control of his car and crash into a tree, causing

serious injury to both himself and Mary Sullivan.

Silver Palm Properties was the adjacent landowner which owned Australian pine trees planted immediately adjacent to the road. It was the growth of roots from these trees which caused the road pavement to buckle. As acknowledged by Silver Palm, these trees helped prevent wind damage to the avocado fruit growing in the groves belonging to Silver Palm.

While 232nd Street is located in an agricultural area, there was testimony that the street is "pretty busy," "it is one of the main drags between Krome Avenue and U.S. 1." (Tr.72) There was also evidence that the trees roots which caused gross distortions in the driving surface of 232nd Street protruded so far into the roadway that there was no room for cars to get by the bumps without leaving the lane of travel. (Tr.90)

Petitioner's witness, Burton Morrow, a mechanical engineer (Tr.113), testified that approximately three and a half to four feet of pavement was uprooted to a height of five or six inches of broken, irregular pavement caused by the roots from the Australian pine trees. (Tr.125, 125) He testified that if a vehicle were traveling down the road in its proper lane of travel there would only be seven to seven and a half feet from the center of the roadway before the right tire would hit the bumps. (Tr.127) It was the opinion of this expert that the bumps, broken pavement,

puddles, and the wet roadway were the primary cause of the accident. (Tr.143)

Silver Palm Properties is in the business of growing fruit. (Tr.271) It has owned the property abutting Southwest 232nd Avenue for "10 or 15 years." (Tr.272) The function of the Australian pines planted immediately adjacent to the roadway is to serve as a windbreak to protect the fruit from damage caused by wind. (Tr.274) During the years that Silver Palm owned the property, the roots of the trees had never been cut or pruned, nor had Silver Palm done any trimming of the trees. (Tr.276)

In 1974, Dade County expanded and resurfaced 232nd Street adjacent to the property owned by Silver Palm. (Tr.281) At that time, the roots which extended into the roadway and obstructed the road surface were scraped away with a scraping machine and the surface of the roadway was smoothed. (Tr.332) These same roots again protruded into the roadway between 1974 and the time of the accident in 1981.

Respondent's expert, James K. Dunaway, a botanist and horticulturist (Tr.283), testified that there were six hundred feet of 232nd Street in which there was some upheaval of the asphalt from four to six feet into the pavement caused by the roots from the Australian pine trees. (Tr.290)

He testified that there were two methods known to

horticulturists for maintaining a tree so that roots remain smaller and would not impinge upon the adjacent roadway. This would be by root-pruning (cutting the roots) or trimming the limbs of the tree. Controlling the size of the tree also controls the size of the roots necessary to support the tree. (Tr.294-295, 297-298)

The "topping" of the trees suggested to control the root size would have cost approximately $20.00 a tree for the first trimming and approximately $1.00 or $2.00 per tree per year thereafter. (Tr.300) This expert testified that if the trees had been root-pruned in 1974 when the roadway was widened, it would not have been necessary to root prune again until 1984. (Tr.328)

CERTIFIED QUESTION

DOES A LANDOWNER HAVE A DUTY TO RETARD THE SUBTERRANEAN ROOT GROWTH OF ITS TREES WHICH ARE LOCATED ADJACENT TO A PUBLIC RIGHT OF WAY?

SUMMARY OF ARGUMENT

It has been the law of Florida for at least fifty years that a landowner may incur liability for damages caused by an obstruction of a public right of way. This rule of liability has been applied to artificial conditions, as well as vegetation emanating from private property. Gulf Refining Co. v. Gilmore, 112 Fla. 366, 152 So. 621 (1933); Price v. Parks, 127 Fla. 744, 173 So. 903 (1937); Morales v. Costa, 427 So.2d 297 (Fla. 3d DCA 1983), cert. den., 434 So.2d 886 (Fla. 1983); Armas v. Metropolitan Dade County,

429 So.2d 59 (Fla. 3d DCA 1983).

The Third District Court of Appeal has determined that subterranean tree roots growing under and causing bumps in a public bicycle path can constitute actionable negligence. See, Stahl v. Metropolitan Dade County, 438 So.2d 14 (Fla. 3d DCA 1983). There is no basis in common law nor common sense to impose a duty where protruding vegetation is above ground but to refuse to impose liability where an obstruction is caused by subterranean roots.

ARGUMENT

Petitioner respectfully suggests that the question certified is incomplete and should be:

> DOES A LANDOWNER HAVE A DUTY TO RETARD THE SUBTERRANEAN ROOT GROWTH OF ITS TREES WHICH ARE LOCATED ADJACENT TO A PUBLIC RIGHT OF WAY WHERE THE ROOTS CAUSE A MAJOR DISRUPTION OF THE ROAD SURFACE WHICH IS A HAZARD TO MOTORISTS?

On a wet, rainy day Mary Sullivan was a passenger in a vehicle driven by Robert Stevens. While traveling along Southwest 232nd Street in south Dade County, the vehicle hit a series of bumps in the road, obscured by rainwater, causing the driver to lose control of the car and crash into a tree. Respondent, Silver Palm Properties, was the adjacent landowner which owned Australian pine trees planted immediately adjacent to the road. It was the growth of roots from these trees which caused the road pavement to buckle. It was stipulated at trial that Dade County owned

and maintained the subject road surface, while Silver Palm Properties admitted to ownership of the adjacent property and trees.

In the majority opinion reversing the final judgment for Mary Sharon Sullivan, the Court defines the issue on appeal to be whether a landowner has a duty to regulate the growth of roots from trees growing on his land where these roots extend beneath the adjacent publ c right of way. The majority finds that ". . .a landowner does not have a duty to retard the subterranean root growth of his trees."

The crux of the majority holding is in the concluding sentence of the opinion: "To impose upon a landowner a duty to undertake root trenching or tree topping purely in anticipation that subterranean growth may alter the surface of a public right-of-way at some indeterminate time in the future is both burdensome and unreasonable."

One judge dissented based upon the "well settled" rule that a private person may incur liability for damages caused by an obstruction of a public right of way. This rule was set forth in Florida in Gulf Refining Co. v. Gilmore, 112 Fla. 366, 152 So. 621 (1933) and affirmed in Price v. Parks, 127 Fla. 744, 173 So. 903 (1937).

The dissent points out that later decisions of the Third District have held that the obstruction of a public right of way by an adjacent landowner, even by vegetation which grows on private property, may subject the landowner

to liability. These case are Morales v. Costa, 427 So.2d 297 (Fla. 3d DCA 1983), rev. den., 434 So.2d 886 (Fla. 1983) and Armas v. Metropolitan Dade County, 429 So.2d 59 (Fla. 3d DCA 1983). The dissent states the law of Morales and Armas to be clear, unambiguous, and broad enough to control disposition of the instant case.

It is an inescapable conclusion from reading Morales and Armas that the duty of an adjoining property owner to protect users of an adjacent right of way from an unreasonable risk of harm does not logically depend upon whether the vegetation growing from the private property is above ground or subterranean. Furthermore, the difficulty of correcting or preventing an obstruction does not eliminate the duty to do so, but is one factor which the trier of fact considers in determining whether a plaintiff can recover from a defendant.

The statement in the majority opinion that the offending vegetation ". . .was anything but obvious" ignores the evidence presented to the jury that the adjoining property owner had known, at least since 1974 when the road was resurfaced by the County, that roots emanating from trees planted on its property had intruded into the roadway and caused it to buckle. As pointed out in the majority opinion, at the time the road was resurfaced in 1974 (seven years before petitioner's injury), the County merely scraped over the tops of the existing roots. If the trees had been

"root trenched," the trenching would have retarded root growth for approximately ten years, ". . .well beyond the date of the accident."

As established by the trial testimony, there was an "upheaval of asphalt" caused by the encroaching roots which ran four to six feet into the pavement for approximately six hundred feet of the adjoining roadway. (Tr.290) The owner of the property was well aware of the condition of the road and what caused it. (Tr.343) The property owner admitted that roots from trees growing on his property caused the surface of the road to be disrupted. He testified that that condition had existed prior to the resurfacing in 1974, was eliminated by cutting the tops off the roots by the County, and the same condition occurred after the roadway had been resurfaced. (Tr.346-347)

Both Morales and Armas applied the rule announced by this Court in Gulf Refining Company V. Gilmore, supra, fifty years previously: A landowner might be liable for obstructions to the public right of way based upon a duty owed to a user of that right of way not to obstruct it. See also, Price V. Parks, supra.

In Morales V. Costa, supra, the Third District determined that where the owner of adjacent property permits natural growth which emanates on private property to protrude into the public way, the owner of the adjacent property ". . .may incur liability for damages caused by an

obstruction upon a public way." This determination is based upon the reasoning that the users of the public right of way have a right to expect that it will not be unreasonably obstructed. "Unreasonably obstructed" clearly applies to above and below ground obstructions.

The Morales decision was followed in Armas v. Metropolitan Dade County, 429 So.2d 59 (Fla. 3d DCA 1983). The plaintiff there was injured in an intersectional collision which plaintiff claimed had occurred because the view of a stop sign controlling the intersection was obstructed by foliage which had grown from the adjacent private property onto the right of way where the sign was located. The plaintiff sued not only the driver of the other vehicle, but the owner of the neighboring lot, the City of Miami, which controlled the swale and streets in question, and the County which had erected the stop sign. The trial court determined that there was no actionable breach of duty by any defendant and summary judgment was entered in their favor. These determinations were reversed.

As to the property owner, the court cites the "almost identical case" of Morales v. Costa for the proposition that a landowner may be liable for the maintenance of vegetation which grows and exists on private property but which protrudes into the public way. Based on Morales and the cases which it cites, the judgment in favor of the adjoining property owner was reversed. Once again it was determined

that there could be an actionable breach of duty by an adjoining property owner.

The dissenting opinion to the order on rehearing en banc succinctly states Petitioner's argument:

> "The majority holds that we should disregard this long line of precedent because here we are dealing with road obstruction caused by underground growth while the cited cases apply only to injury caused by above ground growth and other obstructions. I believe the law to be clear and unambiguous, to be broad enough to apply to the facts before us, and to be controlling of the disposition of this case.
>
> It is elementary knowledge that a tree not only grows branches above ground, but also extends roots below ground. Consequently, just as a landowner has a duty to control his plants so that their above ground growth does not extend into a public right of way, so a duty must exist to control the plants' root growth."

Oddly enough, the same district court which would find no duty to retard subterranean growth on the part of the adjoining property owner found such a duty could exist on the part of a county which permitted subterranean roots to cause a bicycle path to buckle. Stahl v. Metropolitan Dade County, 438 So.2d 14 (Fla. 3d DCA 1983).

Monick v. Town of Greenwich, 144 Conn. 608, 136 A.2d 501 (1957) was an action for injuries sustained by a plaintiff who tripped over the roots of a tree which had grown into a public highway. On appeal, judgment for the plaintiff was affirmed based on a determination the city was

liable for the injuries proximately resulting from the nuisance which the city permitted to remain. Whether, as the opinion suggests, the roots were partially above and partially below ground made no difference in the Monick case and should make no difference here.

Over one hundred years ago, the rule of law which should logically govern the answer by this Court of the certified question in the affirmative was stated in Weller v. McCormick, 47 N.J.L. 397, 398, 1 A. 516 (1885), app. after remand, 52 N.J.L. 470, 19 A. 1101 (1890):

> "It must be conceded that ordinarily when a person for his private ends, places or maintains in or near a highway, anything which if neglected will render the way unsafe for travel, he is bound to exercise due care to prevent its becoming dangerous."

The "anything" to which the New Jersey court alludes clearly includes tree roots as well as tree branches. Florida decisions, prior to the instant case, would undoubtedly have agreed.

CONCLUSION

Implicit in the question certified is the recognition that Silver Palm, as the adjoining property owner, did have a duty to retard the above ground growth of its trees to prevent incursion into the public right of way. Where an open and obvious obstruction is caused by subterranean root growth, there is no logical reason to find no duty exists to prevent the obstruction from occurring. The property owner

knew the roots from its trees were causing the adjacent roadway to buckle. Two methods existed to prevent further root incursion after the road was smoothed and repaired previously. An obvious hazard was detected and ignored. The questions of duty, failure to perform that duty and injury caused by that failure were properly submitted to the jury. The certified question should be answered in the affirmative in accordance with long established Florida precedent.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Michael J. Murphy, Esquire, Gaebe, Murphy & Mullen, 4601 Ponce de Leon Boulevard, Suite 100, Coral Gables, Florida 33146, this 9th day of June, 1988.