IN THE SUPREME COURT OF FLORIDA

CASE NO: 74,190

MARY SHARON SULLIVAN,

Petitioner,

vs.

SILVER PALM PROPERTIES, INC.,

Respondent.

BRIEF OF THE RESPONDENT ON THE MERITS

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INTRODUCTION

The Respondent/Appellant/Defendant below, SILVER PALM PROPERTIES, will be referred to as the **"LANDOWNER".** The Petitioner/Appellee/Plaintiff below, MARY SHARON SULLIVAN, will be referred to as **"SULLIVAN".** Metropolitan Dade County, a Defendant below and not a party to this appeal, will be referred to as the "COUNTY". Robert Stevens, Jr., a Defendant below and not a party to this appeal, will be referred to as the "DRIVER". The symbol **"R"** refers to the record on appeal. The symbol **"T"** refers to the transcript of the trial of August 20 through **24, 1986.** The **symbol "A"** will refer to the attached Appendix. All emphasis is added unless otherwise indicated.

STATEMENT OF THE CASE

This personal injury negligence action arises out of a one vehicle accident. SULLIVAN sued the LANDOWNER, the COUNTY, and the DRIVER in **1983.** The initial trial in January of **1985** ended in a mistrial. (T. 5) A second trial resulted and an assessment of liability against all Defendants in percentages and an appeal to the Third District Court of Appeals resulted in a reversal as to the LANDOWNER. On Rehearing En Banc, the Third District Court of Appeals adhered to the initial panel decision but certified the following question to this Court as one of 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?"

STATEMENT OF THE FACTS

The LANDOWNER relies upon the recitation of facts contained within the District Court's majority Opinion. **(A.** 1-6)

The LANDOWNER also sets forth the following corrections and additions to **SULLIVAN'S** Brief:

On Page **4** of **SULLIVAN'S** Brief, she refers to James K. Dunaway as the "Respondent's botanist and horticulturist expert". However, Mr. Dunaway was, in fact, **SULLIVAN'S** expert, and it is believed that this is simply an inadvertent misstatement by **SULLIVAN.**

It should be pointed out that of the four methods put forth to retard subterranean root growth, two methods would have killed the trees outright, and the third would have effectively destroyed the trees' usefulness as windbreaks for the fruit crop. The fourth method, root trenching, **would not have eliminated** the subterranean root growth; it would have only delayed the necessity for further root trenching for approximately ten years according to **SULLIVAN'S** expert. Stevens, the driver of the vehicle, was **very familiar** with this particular two-lane paved rural roadway, as he used it daily to go to and from work. (T. **51,** 73, **82)** Stevens lived only seven blocks away on the same street. (T. 51) He did not or could not see the bumps at the time of the accident because of the hard rain, but he **knew from prior experience that they were there.** (T. 56, **59, 65** and **89)**

The Redlands where this accident occurred is a rural,

agricultural, and heavily wooded area. (T. 74, 122) Avocado groves abound, and the land abutting 232 Street, where the accident occurred, was used for growing avocados. (T. 273, 343) The LANDOWNER **did not plant the trees in question.** (T. 318, 654) There were **no prior accidents** in the area that were attributable to the bumpy surface of the roadway. (T. 534,535)

SUMMARY OF *ARGUMENT*

The LANDOWNER has no duty to remedy conditions of a purely natural origin upon its land. The LANDOWNER has no duty nor right to maintain or disturb an abutting County road. The only cases which create an exception to the general law stated above specifically address a land owner's duty as it affects vegetation which obstruct traffic control devices on abutting roadways. This is not the case before the Court. No exception should be made to the general rule of no duty.

ARGUMENT

"A LANDOWNER HAS NO DUTY TO RETARD THE SUBTERRANEAN ROOT GROWTH OF ITS TREES WHICH ARE LOCATED ADJACENT TO A PUBLIC RIGHT-OF-WAY."

The law is well-settled in Florida that a land owner has no affirmative duty to remedy conditions of a purely natural origin upon its land. Evans vs. Southern Holding Corporation, 391 So.2d 231 (Fla. 3d DCA 1980); rev. den. 399 So.2d 1142 (Fla. 1981); Bever vs. Nelson, 493 So.2d 1124 Fla. 3d DCA 1986; Cushin vs. Grossman Holdins, Inc., 242 So.2d 79 (Fla. 3d DCA 1982); Stevens vs. Liberty Mutual Insurance Company, 415 So.2d 51 (Fla. 3d DCA 1982); Pediso vs. Smith, 395 So.2d 615 (Fla. 5th DCA 1981);

Bassett vs. Edwards, 158 Fla. 848, 30 So.2d 374 (1947).

The LANDOWNER and the Court below have acknowledged a very narrow exception to this generally accepted rule of no liability of a land owner for injuries caused by natural conditions on his land. That exception is not applicable in this case and is not universally accepted in all the District Courts. This narrow exception applies if a land owner plants and maintains trees or vegetation which obstruct a public traffic control device. Then and only then may a land owner be liable for traffic accidents caused by the obstructed device. Morales vs. Costa, 427 So.2d 297 (Fla. 3d DCA), rev. den. 434 So.2d 886 (Fla. 1983) (land owner plans and assumes duty of maintaining trees in swale area which obstruct stop sign; plaintiff injured in intersectional collision; summary judgment for land owner reversed); Armas vs. Metropolitan Dade County, 429 So.2d 59 (Fla. 3d DCA 1983) (plaintiff injured in intersectional collision alleging land owner failed to prune branches which obstructed traffic control device; summary judgment for land owner reversed); contra, Pedigo vs. Smith, 395 So.2d 615 (Fla. 5th DCA 1981) (land owner alleged to be negligent for permitting tree to grow to obstruct stop sign; dismissal with prejudice in favor of land owner affirmed). None of the instant facts fit within the narrow exception recognized by the Third District and distinguished in the majority opinion. This case involves bumps on the surface of a public roadway which the COUNTY stipulated it owned and had the responsibility to maintain and repair it, and in addition, the

COUNTY stipulated that they knew it was in a defective condition. (T. 423, 429, and 465)

This Court, in the case of Bailey Drainage District vs. Stark, 526 So.2d 675 (Fla. 1988) recently stated:

> "[A]lthough brush and weeds may be a naturally occurring condition not specifically created by a governmental entity, an entity responsible for maintaining an intersection has a duty to warn of or to make safe naturally occurring conditions which render an intersection dangerous when the conditions create a danger which is not readily apparent to motorists.
>
> We also conclude that it is irrelevant whether the brush and weeds are actually located on the governmental entity's right-of-way or on privately owned property adjacent to the right-of-way. The relevant inquiry is whether the brush and weeds, wherever located, obstruct the view of motorists, creating a danger which is not readily apparent. If the brush and weeds are located on the entity's right-of-way, the entity may either warn of the danger or remove the obstruction. If the brush and weeds are located on privately owned property so that removal is not an option, the entity still has a duty to warn of the danger."

As stated in Bailey, and as stipulated by the COUNTY below, it is the governmental entity that has the right, the duty, and the obligation to maintain, repair, remedy, and warn of any condition on the public right-of-way. It is their's and their's alone.

The LANDOWNER had no duty nor right and was prohibited from remedying any situation on a public road pursuant to Metropolitan Dade County Ordinance No. 21-30, which expressly prohibits any individual from "moving, disturbing, or taking any earth, stone, or other material from any public street, alley, park or other

public grounds."

Prior to this case, the issue of an adjoining land owner's liability to persons on a public right-of-way for subterranean tree growth has never been addressed. In Stahl vs. Metropolitan Dade County, 438 So.2d 14 (Fla. 3d DCA 1983) the Third District addressed the issue of the County's liability for subterranean root growth which caused a disruption on a bicycle path allegedly causing a bicyclist to swerve from the bicycle path into the roadway where he was struck by a car. The County owned the bicycle path and the Court ruled on those facts that a cause of action was stated against the County. In Stahl the land owner was not sued. SULLIVAN'S reliance on Stahl is misplaced. It has nothing to do with a land owner's liability, but instead has to do with the County's duty which was stipulated, litigated, and decided by a jury in this case.

Florida cases involving a defective sidewalk have consistently ruled in favor of abutting land owners. In Beattie vs. City of Coral Gables, 458 So. 2d 131 (Fla. 3d DCA 1978), the Plaintiff tripped and fell on a cracked public sidewalk. The Court affirmed a Summary Judgment in favor of a business whose premises abutted the sidewalk. In Cantens vs. Jeff-Son, Inc., 381 So.2d 307 (Fla. 3d DCA 1980), the Plaintiff tripped and fell on a defective public sidewalk. The Court affirmed a Summary Judgment in favor of the hotel which abutted the sidewalk, holding that the hotel had no duty to maintain the sidewalk, which was the responsibility of the City of Miami Beach.

In other jurisdictions that have decided this issue, the land owner was held not liable for injuries resulting from an accident caused by roots growing under the surface of a public right-of-way. Wall vs. Village of Tullalah, 385 So.2d 905 (La. App. 1980); cert. den. 393 So.2d 737 (La. 1980); Rose vs. Sloush, 104 A. 194 (Ct. App. J.J. 1918); Bennett vs. Gordon, 244 A.2d 135 (N.J. App. 1968); Hayden vs. Curley, 169 A.2d 809 (N.J. 1961); City of Birmingham vs. Wood, 197 So. 885 (Ala. 1940). These cases state that it would be obviously inequitable to subject a property owner to liability where he had no duty or right to maintain the public right of way affected by tree roots and no legal authority to remedy any situation which the naturally growing roots might have created.

In Wall, a Plaintiff tripped and fell over a raised portion of the sidewalk which was caused by root growth. It was alleged the abutting land owner was negligent for failing to maintain his trees so that roots would not push up the sidewalk. The trees had been in existence for a number of years. The Court held in favor of the landlord reasoning:

> "Tort liability against the adjoining property owner results only when the adjoining property actually created or caused the defect involved."

The Court concluded:

> "It was undisputed in this case that the defective sidewalk was caused by pressure from tree roots. It is the responsibility of the municipality and not that of [the abutting property owner] to maintain the sidewalk and correct the defect. Because of the remoteness of the relationship between the tree owner, the growth of the tree roots and the resulting defect in the

> sidewalk, it cannot logically be held that [the abutting property owner] actually created or caused the defect involved."

In City of Birmingham, the Alabama Supreme Court confronted the situation where a Plaintiff had sustained injuries in a fall caused by a raised sidewalk pushed up by tree roots. In holding for the land owner, the Court stated:

> "In the present case the growing and spreading of the roots, which caused the sidewalk to become uneven, were nature's work, over which [the land owner] had no control and concerning which she owed no duty."

The County stipulated it owned and maintained the subject street and shoulder. The County widened and resurfaced the road in 1974. As pointed out in the majority opinion "the trees were not originally located immediately adjacent to the road but became proximate when Dade County widened and resurfaced the road in 1974."

Common sense dictates that an overwhelming burden would be placed upon private property owners if they were held liable for injuries resulting from damage caused by roots of naturally growing vegetation which protrude under the surface of either a sidewalk or highway. If abutting land owners were liable for such acts of nature, it would necessarily follow that a land owner would have to maintain (including resurfacing when necessary) portions of the public rights-of-ways bordering their property. Property such as public rights-of-way and easements are within the exclusive jurisdiction, for maintenance and repair, of the municipality, and in this case the County. As

pointed out in the case of Gallo vs. Heller, 512 So.2d 215 (Fla. 3rd DCA 1987).

> "The rule at common law and the majority rule in this Country, which is followed in Florida, is that a possessor of land is not liable to persons outside of the land for a nuisance resulting from trees and natural vegetation growing on the land. The adjoining property owner to such a nuisance, however, is privileged to trim back at [his] own expense any encroaching tree roots or branches or other vegetation which has grown on to his property. (citations omitted)"

SULLIVAN'S reliance upon Gulf Refining Company vs. Gilmore, 112 Fla. 366, 152 So.621 (1933) and Price vs. Parks, 127 Fla. 744, 177 So.903 (1937) is misplaced. Both Gulf and Price involved artificial conditions created by others on public right-of-ways. In Gulf the Plaintiff tripped over a cord at night as she stepped across a grass plot located between a paved sidewalk and a curb. A gas station owner had planted grass in the swale area between the curb and the sidewalk and had cordoned off the area to discourage walking across the planted space by pedestrians. The cord was dark in color, not readily observable at night, on stakes, and the Court simply ruled that this artificial condition created by the station could give rise to liability. The case had nothing to do with naturally growing vegetation on land abutting a public right-of-way. In Price, a contractor spilled slippery materials and substances on a public bridge. This was an artificial condition directly created on the public right-of-way, not naturally occurring.

CONCLUSION

Based upon these facts and the law cited in this brief and the majority opinion, this Court should answer the certified question: no.

CERTIFICATION

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 21st day of July, 1989, to: JOE UNGER, ESQUIRE, 66 West Flagler Street, Suite 606, Miami, Florida 33130; and ROBERT E. SHACK, ESQUIRE, 1320 South Dixie Highway, Suite 801, Coral Gables, Florida 33146.

Respectfully submitted,

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