IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,190

MARY SHARON SULLIVAN,

Petitioner,

vs.

SILVER PALM PROPERTIES, INC.,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS

LAW OFFICES OF JOE N. UNGER, P.A.
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and

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ARGUMENT

Respondent argues that Silver Palm had no duty to remedy the condition of underground roots caused by trees naturally growing on its land because "the law is well settled in Florida that a landowner has no affirmative duty to remedy conditions of a purely natural origin upon its land." (Brief of Respondent on the Merits, p.3). This legal premise relied on by respondent is not the law of Florida where an obstruction emanating from private property protrudes onto an adjacent right-of-way and the obstruction subsequently causes damages to a user of the right-of-way.

Cited in support of the "well settled law" is the decision in Evans v. Southern Holding Corp., 391 So.2d 321 (Fla. 3d DCA 1981), cert. den., 399 So.2d 1142 (Fla. 1981). In Evans, the owner of four corners of land adjacent to an intersection where an accident occurred allowed high weeds and heavy equipment to obscure the view of approaching traffic. The court stated the "simple question presented" to be whether there is a duty on a landowner to maintain his property in a condition so that a motorist approaching a public highway intersection can see other approaching motorists. Evans v. Southern Holding Corp., supra. The inapplicability of the decision in Evans to the instant case is set forth in the statement of the court that "the question. . .excludes situations where the obstruction

protrudes onto public property." Evans v. Southern Holding Corp., supra at page 232.

The second case cited by respondent is a per curiam affirmance, citing the Evans case, and presumably based upon the same different factual context. Beyer v. Nelson, 493 So.2d 1124 (Fla. 3d DCA 1986). The next case cited by respondent, Cushen v. Grossman Hope Holdings Limited, 424 So.2d 79 (Fla. 3d DCA 1982) involves an issue "identical to the one involved in Evans. . . .". To the same effect is Stevens v. Liberty Mutual Insurance Company, 415 So.2d 51 (Fla. 3d DCA 1982). By specific statement of the decision in Evans, none of these cases apply to the factual situation here.

Respondent also cites in support of the "well settled proposition" upon which it relies Pedigo v. Smith, 395 So.2d 615 (Fla. 5th DCA 1981). The Pedigo decision in turn relies upon Evans and presumably involved a situation where a tree located entirely on private property obstructs the view of a stop sign and obscures its view from approaching motorists.

The last case cited, Bassett v. Edwards, 158 Fla. 848, 30 So.2d 374 (1947), was not an action against a landowner but against the colliding motorist.

Thus, no case cited by respondent involves the obstruction of a public right-of-way by natural growth emanating from the property of an adjacent property owner which protrudes into and obstructs a public right-of-way.

The situation with which the cases cited by respondent do not deal is the situation which exists in the instant case.

The situation now before this Court was the subject of Morales v. Costa, 427 So.2d 297 (Fla. 3d DCA 1983), pet. rev. den., 434 So.2d 886 (Fla. 1983), relied on by petitioner. Morales distinguishes the decisions in both Evans and Pedigo since neither involved obstruction of a public right-of-way by an adjacent landowner, where the obstruction is caused by something which grows and exists upon the private property but protrudes into and obstructs the public way. Morales was followed by Armas v. Metropolitan Dade County, 429 So.2d 59 (Fla. 3d DCA 1983).

Respondent acknowledges the existence of the Morales and Armas decisions but argues that they encompass "a very narrow exception" to the general rule of no liability, which does not apply to this case. The "very narrow exception" acknowledged by respondent is where a landowner plants and maintains trees or vegetation which obstruct a traffic signal, a factual situation not involved in the instant case.

Any fair reading of Morales and Armas discloses that the reasoning belies limiting their application to vegetation which obstructs the view of a traffic control device. When the Morales decision stated ". . .a private person may incur liability for damages caused by an obstruction upon a public way" (Moxales v. Costa, supra at

page 298), the determination was infinitely broader than the "narrow exception'' which respondent argues would not apply to the instant case.

What respondent has done is to apply the "Tuesday Rule" in an attempt to distinguish the indistinguishable. Where a party is faced with a prior determination which undoubtedly supports an adverse legal position, that party seeks to distinguish the controlling case by saying that the factual situation involved in the case under consideration occurred on a Monday, while the factual situation in the cited case occurred on a Tuesday, thus making it inapplicable.

Only an advocate faced with incontrovertible contrary authority could read the Morales and Armas decision with blinders to make the pronouncement of law there contained applicable only to those situations where vegetation growing on private property protrudes onto the public way and blocks the view of a stop sign.

Despite clearly stated law pursuant to which an adjacent property owner may incur liability for damages caused by any obstruction upon a public way, respondent argues that the property owner in the instant case could not be liable because all parties agreed and stipulated that it was Dade County which owned and had responsibility to repair the adjacent street. What this argument overlooks and refuses to consider is that the condition which caused the public way to buckle and ultimately caused a driver to lose

control of his vehicle emanated from the trees owned by the adjacent property owner which were located entirely on its property. Furthermore, expert testimony established that the root growth which caused the adjacent street to buckle could have been prevented by either root pruning or trimming the tops of the trees to inhibit root growth. Either of these preventative measures would have to be accomplished by Silver Palm, not the County.

Based on the evidence presented, the jury found that the negligence of the adjacent property owner in failing to take easily accomplished steps contributed to the condition which subsequently caused injury to the plaintiff. The root condition causing buckling of the surface of the roadway had existed for many years and had been superficially corrected by the County when it resurfaced the road in 1974. It was a condition of which Silver Palm was well aware. See, Bolton v. Smythe, 432 So.2d 129 (Fla. 5th DCA 1983), pet. rev. den., 440 So.2d 343 (Fla. 1983).[1]

Respondent argues that notwithstanding the clear duty imposed on an abutting property owner to keep natural vegetation from protruding onto the right-of-way, this case should be controlled by those Florida decisions involving

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1. The quotation from Bailey Drainage District v. Stark, 526 So.2d 678, 681-682 (Fla. 1988), does not apply here. That case was decided on the narrow question of eliminating the bar of sovereign immunity where a known dangerous condition exists.

defective sidewalks which ". . .have consistently ruled in favor of abutting landowners." (Brief of Respondent, page 6). In the cases cited by respondent, the plaintiffs tripped and fell on cracked public sidewalks and the courts held that there was no duty on the adjoining property owner to maintain the sidewalk. Nothing in these decisions indicates the cause of the crack originated from a source emanating from the property f the abutting property owner. These cases are decided on the simple principle that there is no duty to maintain an adjoining sidewalk and are totally inapplicable to the situation where a condition on an abutting property owner's land protrudes into a public way and causes a dangerous condition to exist. See, Beattie v. City of Coral Gables, 358 So.2d 1131 (Fla. 3d DCA 1978); Cantens v. Jeff-Son, Inc., 381 So.2d 307 (Fla. 3d DCA 1980).

It is instructive to examine the cases cited by respondent from other jurisdictions in support of respondent's argument that under the facts of this case, Silver Palm cannot be held liable for the injuries sustained by the plaintiff. In Rose v. Slough, 101 N.J. Super. 252, 104 A. 194 (1918), the court draws a careful distinction between a tree planted on private property for the private benefit of the property owner as opposed to a tree planted

in conformity to a government plan to beautify a public highway.[2]

There was no ordinance or statute introduced in the instant case which imposed on the County an affirmative duty to plant or trim the trees which existed on the property of Silver Palm. More importantly, the sole purpose of these trees was to benefit the property owner since they existed as a windbreak to protect the fruit which grew on the property owner's avocado farm. This situation is discussed in the Rose case which quotes from the earlier decision 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."

There is no question here that the trees which protruded onto the highway were for the "private ends" of the abutting property owner and not for the public good.

In Hayden v. Curley, 169 A.2d 809 (N.J. 1961), a municipality planted a tree in a sidewalk. The municipal ordinance gave the municipality exclusive control of

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2. "The legal effect of the ordinance in the present case is that it is an affirmative act of the municipal authority, by which it has taken under its care and control the regulation and preserving of shade trees for the public benefit." Rose v. Slough, supra, at page 195.

planting and maintaining shade trees. This is not factually akin to the present case in which the County had the right and authority to maintain the public thoroughfare, but neither the right nor authority to alter trees growing on appellant's private property to prevent protrusion onto the right-of-way.

Similarly, in Bennett v. Gordon, 244 A.2d 135 (N.J. App. 1968), the government entity in question had assumed exclusive control of trees planted in the public way and an abutting property owner was held to be exempt from liability for damages to an individual who suffered injury for which the tree was the producing cause.

Here, the distinguishing feature is that the trees ultimately causing injury to the plaintiff were planted on private property for private purposes. A public entity was not charged with the obligation of trimming or maintaining the trees.

Two cases cited by respondent appear to indicate that there would be no liability upon an abutting property owner where tree roots caused a sidewalk to become uneven. The finding of no liability was justified in one case because the growing and spreading of roots was "nature's work." Wall v. Village of Tallulah, 385 So.2d 905 (La. App. 1980); City of Birmingham v. Wood, 197 So.2d 885 (Ala. 1940). In two Florida cases, "nature's work" such as tree limbs or tree roots which grow on private land and protrude into the

public way can be the basis of liability. A duty is owed by an abutting property owner which can be breached causing damages. Armas V. Metropolitan Dade County, supra; Moxales V. Costa, supra. It was this duty which the jury properly determined was breached by Silver Palm.

CONCLUSION

For the reasons set forth in the main brief of petitioner on the merits as well as this reply brief, the certified question should be answered in the affirmative.

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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 11th day of August, 1989.