IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,533

3d DCA Case Nos. 98-00560
97-03525

L.T. Case No. 97-8910

Fla. Bar No. 765960

ILEANA WHITT, etc.,
et al,

Petitioners,

vs.

IGNACIO URBIETA, et al,

Respondents.
_____/

PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF COMPLIANCE

Undersigned counsel certifies that this brief has been typed in 14 point Times Roman and complies with the Administrative Order of this Court entered on July 13, 1998.

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STATEMENT OF THE CASE AND FACTS

Ilia Fotinov was killed, and his wife Yordanka Fotinova seriously injured, when a vehicle exiting an Amoco service station premises in Miami Beach struck the pair as they walked along the sidewalk in front of and adjacent to the premises exit. (R.158-9, 163-4) Ilena Whitt, as Personal Representative of the Estate of Fotinov, and Fotinova, sued the driver and owner of the errant vehicle, as well as the service station owners, Ignacio Urbieta and Ignacio Urbieta, Jr. (R.156-70)[1]

Plaintiffs' operative (second amended) complaint against the station owners alleged that:

> A large and dense stand of foliage existed upon the south side of the SILVERMAN/URBIETA property, adjacent to the sidewalk and the approach used by invitees to the above-described exit. Said foliage was so dense and large as to effectively impair the vision of any motorist exiting the subject service station, including [the subject motorist], from being able to readily observe pedestrians on the sidewalk on or near the SILVERMAN/URBIETA property. Said foliage also precluded pedestrians, such as the Plaintiffs, invitees

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[1] Plaintiffs' claims against the vehicle driver and owner continue below and are not at issue on this appeal. Plaintiffs also sued the lessors of the property, Eli and Irene Silverman, who settled with Plaintiffs during the pendency of the appeal in the district court and are no longer parties to the case.

> and/or licensees upon the sidewalk, from readily observing motorists exiting the SILVERMAN/URBIETA property.
>
> (R.158)

The complaint alleged active negligence/premises liability on the part of the owners in, inter alia:

> creating and/or permitting the existence of a dangerous condition upon [their] premises, to wit: the existence of vision impairing foliage upon [their] premises, precluding motorists exiting Defendants' property and/or pedestrians upon the intersecting sidewalk from observing each other....
>
> (R.163)

The complaint further alleged that Defendants "knew of the existence of the dangerous conditions or should have known since they had existed for a sufficient length of time." (Id.)

The owners moved to dismiss Plaintiffs' operative complaint for failure to state a cause of action. (R.171-6) Relying upon the Third District's decision in EVANS v. SOUTHERN HOLDING CORP., 391 So.2d 231 (Fla. 3d DCA 1980), rev. den., 399 So.2d 1142 (Fla. 1981), and the Fifth District's decision in PEDIGO v. SMITH, 395 So.2d 615 (Fla. 5th DCA 1981), Defendants contended that there is no common law duty in Florida owed to persons outside a premises in respect to a hazardous 'natural' condition existing entirely upon the premises, regardless

of the premises owner's creation, or actual or constructive knowledge, of the hazard or the foreseeability of the harm the hazard presents to such persons. (Id.)

Plaintiffs countered that since the time those cases were decided, this Court had reaffirmed that a foreseeability test applies to all questions of duty in tort, and those district courts which have thereafter had occasion to consider the duty owed in foliage and other obstruction cases have held that a legal duty exists in favor of all persons who might foreseeably be injured by on-premises hazards, including proximate pedestrians and passing motorists. (R.293-303)

The trial court afforded Plaintiffs an opportunity to be heard, but adhered to the traditional agrarian precept that possessors of land have the absolute right to do what they wish with their property and owe no duty to persons outside the premises for injuries caused by 'purely natural' conditions created and existing wholly upon the premises, irrespective of the foreseeability of harm to such persons. (R.306-7) The trial court followed EVANS and PEDIGO, granted the property owners' motions to dismiss, and dismissed Plaintiffs' common law negligence claims against those Defendants. (R.283-284B)[2]

[2] The trial court allowed Plaintiffs twenty days within which to determine whether any statute or ordinance violation could be found before

The Third District reversed the dismissal of Plaintiffs' ordinance-based negligence claim but affirmed the dismissal of Plaintiffs' common law negligence claim upon a line of prior decisions:

> declin[ing] to impose liability for a visual obstruction created by foliage growing on a landowner's property, so long as the foliage does not protrude into the public way. See *Morales v. Costa*, 427 So.2d 297 (Fla. 3d DCA 1983); *Stevens v. Liberty Mutual Ins. Co.*, 415 So.2d 51 (Fla. 3d DCA 1982); *Evans v. Southern Holding Corp.*, 391 So.2d 231 (Fla. 3d DCA 1980); *see also Dawson v. Ridgley*, 554 So.2d 623 (Fla. 3d DCA 1989); *Armas v. Metropolitan Dade County*, 429 So.2d 59 (Fla. 3d DCA 1983). So long as the foliage remains within the landowner's property, the "landowner has a right to use and enjoy his property in any manner he sees fit," *Morales*, 427 So.2d at 298, and it is the responsibility of the motorist to maintain a proper lookout when visibility is restricted. *See Bassett v. Edwards*, 158 Fla. 848, 852, 30 So.2d 374, 376 (1947); *Evans*, 391 So.2d at 232. The logic of the cited cases applies equally to the present case.

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dismissing their pleadings with prejudice. (R.307-09) Plaintiffs found such a provision in the Code of Metropolitan Dade County and amended their complaint accordingly.(R.203-13) At a subsequent hearing, the trial court nevertheless found the provision inapplicable and dismissed Plaintiffs' last complaint with prejudice. (R.338-52, 284A-B)

> WHITT v. SILVERMAN, 732 So.2d 1106, 1108 (Fla. 3d DCA 1999).

The Third District went on to hold:

> The plaintiffs acknowledge the cited line of cases, but contend that they have been overruled sub silentio by the Florida Supreme Court's decision in *McCain v. Florida Power Corporation*, 593 So.2d 500 (Fla. 1992). We disagree. The *McCain* decision clarified how foreseeability can be relevant both to the element of duty and the element of proximate cause for purposes of tort law. *See id.* at 502. The actual claim at issue in *McCain* was for injuries suffered when plaintiff's mechanical trencher struck an underground cable in an area Florida Power had designated as safe for trenching. *See id.* at 501. We do not think that *McCain* addressed the question now before us, nor do we believe that *McCain* has overruled our earlier cases involving landowner liability for foliage growing on the landowner's property. We therefore affirm dismissal of the negligence claim.
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> Id.

Plaintiffs filed a timely notice to invoke the discretionary jurisdiction of this Court under Fla.Const.Art.V., §3(b)(3). This Court accepted jurisdiction by Order dated Sept. 23, 1999.

SUMMARY OF THE ARGUMENT

Plaintiffs' operative complaint alleged that the Defendant property owners created or allowed to flourish a large, dense stand of foliage upon and near the exit to their busy service station premises which they knew or should have known prevented motorists egressing the premises and pedestrians upon the adjacent sidewalk from observing one another. These allegations, taken as true, established a foreseeable zone of risk created by Defendants, and Plaintiff Whitt's decedent and Plaintiff Fotinova were clearly persons foreseeably within that zone of risk. Pursuant to this Court's decision in McCAIN v. FLORIDA POWER CORP., 593 So.2d 500 (Fla. 1992), and its progeny, the Third District erred in its affirmance of the 'no duty' dismissal of Plaintiffs' common law negligence claim.

The traditional agrarian rule, that an owner of land is under no affirmative duty to remedy conditions thereon of "purely natural origin" has no place in a modern, urban commercial environment (a busy service station premises) where nothing exists of truly natural origin and where the owner expects and expressly invites the public to be. The law must favor public safety over a business owner's desire for aesthetics, especially where the owner creates, or otherwise allows to subsist, a dangerous, visually obstructive condition near the egressway of its premises, albeit one botanic in nature.

In the instant case, one pedestrian was killed, and another seriously injured, allegedly because of Defendants' improvident placement or condonation of a large, dense stand of foliage near their service station exit and despite their prior knowledge of the precise visual hazard the foliage presented to such persons. The question of duty here - - as in all cases sounding in tort - - should be viewed through the lenses of foreseeability and not mechanically decided upon an arbitrary and vestigial rule informed by conditions in an overwhelmingly agricultural society. Such is the trend in other jurisdictions. It should be the law in Florida too, if it is not already.

ARGUMENT

THE DISTRICT COURT ERRED IN APPLYING THE TRADITIONAL AGRARIAN RULE, RATHER THAN FORESEEABILITY ANALYSIS, IN DETERMINING THE QUESTION OF DUTY IN THIS CASE, AND IN AFFIRMING THE DISMISSAL OF PLAINTIFFS' COMMON LAW NEGLIGENCE CLAIM AGAINST THE DEFENDANT SERVICE STATION OWNERS.

In 1937, this Court in HARDIN v. JACKSONVILLE TERMINAL CO., 128 Fla. 631, 175 So.226, 228 (Fla. 1937), stated, albeit in the negative:

> there is no liability on the part of the landowner to persons injured outside his lands (which includes persons on adjacent highways), unless the owner has done or permitted something to occur in his lands which he realizes or should realize involves an unreasonable risk of harm to others outside his land, and therefore imposes on him, as an owner or possessor of the land the duty of abating or obviating the use or condition from which the risk is encountered.

Forty-three years later, however, the Third District in EVANS v. SOUTHERN HOLDING CORP., 391 So.2d 231, 232 (Fla. 3d DCA 1980), rev. den., 399 So.2d 1142 (Fla. 1981), adhering to "the traditional rule that the owner of land is under no affirmative duty to remedy conditions of purely natural origin upon his land," refused to recognize a duty in favor of passing motorists whose views were obstructed by a "large, dense, and high growth of weeds" as well as

large trailers, equipment, and other items extant upon, but not protruding over, the defendant owner's undeveloped property proximate to the intersection where the collision in suit occurred. Citing this Court's decisions in HARDIN, supra, and BASSETT v. EDWARDS, 158 Fla. 848, 852, 30 So.2d 374, 376 (Fla. 1947), the Third District reasoned: "We find that no such duty has been established in Florida." Id.[3]

One year later, the Fifth District in PEDIGO v. SMITH, 395 So.2d 615 (Fla. 5th DCA 1981), followed EVANS and affirmed the dismissal of an intersection collision defendant motorist's third party complaint against a homeowner whose tree, the defendant-third party plaintiff alleged, obscured his view of a stop sign at the intersection and contributed to the ensuing accident. As in EVANS, the

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[3] The above quoted language from HARDIN would seem to support a contrary conclusion. And, as Judge Schwartz pointed out in his dissent in EVANS, BASSETT was not an action against a landowner at all and "embodie[d] concepts of proximate causation, intervening cause, and contributory negligence which no longer obtain in our state." 391 So.2d at 234. At this juncture, non-apportionment of the fault of third parties might also be added to Judge Schwartz's distinguishment list.

obstructing tree in PEDIGO was physically contained entirely upon and within the homeowner's property.

Florida courts have struggled with the rigid and arbitrary "traditional rule" and have recognized exceptions thereto in cases where the offending vegetation or other obstructive condition protruded over the owner's property into the public right-of-way, or where a statute or ordinance violation could be found. See e.g. MORALES v. COSTA, 427 So.2d 297 (Fla. 3d DCA)(reversing summary judgment entered in favor of property owner whose black olive tree situated on public swale area allegedly obstructed plaintiff motorist's view of stop sign at intersection contributing to collision), rev. den., 434 So.2d 886 (Fla. 1983); ARMAS vs. METROPOLITAN DADE COUNTY, 429 So.2d 59 (Fla. 3d DCA 1983)(reversing summary judgments entered in favor of property owner and city where owner's tree grew over owner's property and obstructed stop sign located on city's property allegedly contributing to subject collision).

Other courts and commentators have attempted to restrict the application of the "traditional rule" by drawing a distinction between rural and urban property. The Restatement (Second) of Torts §363(2) provides that "[a] possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an

unreasonable risk of harm arising from the condition of trees on the land near the highway." Another exception has been recognized for artificial as opposed to purely natural conditions upon the land. See Restatement (Second) of Torts §364; KOLBA v. KUSZNIER, 599 A.2d 194, 199 (N.J. Super. Ct.1991)(holding that shrubbery was artificial condition upon land not natural one since it was planted by defendant owners or their predecessors in title). Still another exception has been recognized in cases involving owners of land near a public highway who know or have reason to know that "a public nuisance caused by natural conditions" exists upon their land but fail to exercise reasonable care to remedy such conditions and prevent an unreasonable risk of harm to persons using the highway. See Restatement (Second) of Torts §840(2).

Some courts have disregarded the "traditional rule" and all of its sundry exceptions (i.e. rural/urban, natural/artificial, etc.) altogether in favor of a less arbitrary standard of reasonable care premised upon foreseeability. See e.g., SPRECHER v. ADAMSON COMPANIES, 178 Cal. Rptr. 783, 636 P.2d 1121 (Cal. 1981)(en banc); GUY v. STATE, 438 A.2d 1250 (Del. Super. Ct.1981); LANGEN v. RUSHTON, 360 N.W.2d 270 (Mich. Ct. App. 1984); HARVEY v. HANSEN, 445 A.2d 1228 (Pa. Ct. App. 1982); HAMRIC v. KANSAS CITY S.R. CO., 718 S.W.2d 916 (Tex. Ct. App. 1986); ANNOT., LIABILITY OF PRIVATE

LANDOWNER FOR VEGETATION OBSCURING VIEW AT HIGHWAY OR STREET INTERSECTION, 69 A.L.R. 4th 1092 (1989).

This Court, in several recent decisions, has reaffirmed that foreseeability determines the question of legal duty in Florida in all cases sounding in tort. In McCAIN v. FLORIDA POWER CORP., 593 So.2d 500, 503 (Fla. 1992), this Court restated and held:

> Florida, like other jurisdictions, recognizes that a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others. As we have stated:
>
> > Where a defendant's conduct creates a *foreseeable zone of risk,* the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.
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> *Kaisner*, 543 So.2d at 735 (citing *Stevens v. Jefferson,* 436 So.2d 33, 35 (Fla. 1983)) (emphasis added); *see Webb v. Glades Elec. Coop., Inc.,* 521 So.2d 258 (Fla. 2d DCA 1988). Thus, as the risk grows greater, so does the duty, because the risk to be perceived defines the duty that must be undertaken. *J.G. Christopher Co. v. Russell,* 63 Fla. 191, 58 So. 45 (1912).
>
> The statute books and case law, in other words, are not required to catalog and expressly proscribe every conceivable risk in order for it to give rise to a duty of care. Rather, each defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result. This requirement of reasonable, general foresight is the core of the duty

> element. For these same reasons, duty exists as a matter of law and is not a factual question for the jury to decide: Duty is the standard of conduct given to the jury for gauging the defendant's factual conduct. As a corollary, the trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant.
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> 593 So.2d at 503 [emphasis the Court's except as underscored; the Court's footnote omitted].

In SPRINGTREE PROPERTIES, INC. v. HAMMOND, 692 So.2d 164 (Fla. 1997), this Court applied foreseeability analysis and confirmed the existence of a tort duty on the part of a defendant restaurant owner following a patron motorist's inadvertent ascension of a curb in front of the owner's parking lot resulting in injury to another prospective patron. Florida courts had previously refused to recognize a duty on such facts. See e.g. MOLINARES vs. EL CENTRO GALLEGO, INC. 545 So.2d 387 (Fla. 3d DCA), rev. den., 557 So.2d 866 (Fla. 1989). In SPRINGTREE, however, this Court overruled those precedents and held that the defendant restaurant owner "could foresee the zone of risk created by this particular situation and thus owed a duty to Hammond." 692 So.2d at 166.

District courts which have had occasion to decide foliage and other obstruction cases post-McCAIN have utilized foreseeability analysis to determine whether and to whom a duty is owed. In DYKES v. CITY OF APALACHICOLA,

645 So.2d 50 (Fla. 1st DCA 1994), rev. dism., 651 So.2d 1193 (Fla. 1995), for example, the twelve year old plaintiff was mowing a lawn on the adjacent right-of-way in front of a home when he stepped into the roadway and was struck by a passing vehicle. The vehicle's driver contended that trees or bushes which grew on the right-of-way prevented her view of the plaintiff who stepped into the street from behind the bushes before she could take evasive action. Plaintiff sued the City of Apalachicola which controlled the right-of-way and the vegetation thereon. The trial court entered final summary judgment in favor of the City. The First District reversed. The district court explained and held:

> The general test for determining whether a duty exists to support a negligence action is whether a defendant's conduct creates a *foreseeable zone of risk*. *McCain v. Florida Power & Light Corp.*, 593 So.2d 500 (Fla. 1992).
>
> The law will recognize a duty placed upon a defendant either to lessen the risk or to see that sufficient precautions are taken to protect others from the harm the risk poses. *Id.*
>
> In *McCain*, the supreme court reiterated that the existence of a duty of care in a negligence action is a question of law which is determined by finding whether or not the defendant created a generalized and foreseeable risk of harming others. In *Foley*, *supra*, and *Bailey*, *supra*, it was held that such zone of risk was created by the failure to maintain foliage in a right-of-way.
>
> Appellee argues that the duty to maintain a right-of-way only extends to motorists and not to people who

> step out from behind the uncut foliage. In *McCain*, the supreme court rejected the idea that a duty only arises when a tort-feasor is able to see the exact nature of the injury or precise manner in which the injury occurs. *See also Stazenski v. Tennant Co.*, 617 So.2d 344 (Fla. 1st DCA 1993). The duty extends to all parties within the zone of risk created by the tort-feasor. In the instant case, the zone of risk clearly extended to any party who may be injured as a result of the obstructed view of the motorists, including pedestrians emerging from behind the foliage.
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> 645 So.2d at 52 [emphasis the court's].

Similarly, in NAPOLI v. BUCHBINDER, 685 So.2d 46 (Fla. 4th DCA 1996), plaintiff, a passing motorist, alleged that the design of defendants' shopping center parking lot and placement of a stop sign thereon contributed to causing an accident on the adjacent roadway. The trial court entered final summary judgment in favor of defendants. The Fourth District reversed. The district court found error in the trial court's failure to apply a McCAIN foreseeability test to the facts at bar, the court recognized a duty, and reversed and remanded the cause for a trial on the issues of defendants' alleged negligence and proximate cause. 685 So.2d at 47-8.

In the instant case, Plaintiffs' operative complaint alleged that the Defendant property owners caused or allowed a large, dense stand of foliage to exist upon and near the exit to their service station premises which they knew or should have known prevented motorists egressing the premises and pedestrians upon the

adjacent sidewalk from observing one another. These allegations, taken as true, established a foreseeable zone of risk created by Defendants, and Plaintiff Whitt's decedent and Plaintiff Fotinova were clearly persons within the zone of risk from which the harm was encountered. In accord with McCAIN and its progeny, this Court should confirm the existence of a legal duty and order the reinstatement of Plaintiffs' common law negligence claim.

The traditional agrarian rule, that an owner of land is under no affirmative duty to remedy conditions thereon which are of 'natural' origin, simply has no place in a bustling urban commercial environment (a busy service station premises) where nothing exists of truly natural origin and where the owner expects and expressly invites the public to be. The law must favor public safety over a business owner's desire for aesthetics, especially where the owner creates, or allows to subsist, a dangerous, visually obstructive condition near the egressway of its premises, albeit one botanic in nature. In this case, one pedestrian was killed, and another seriously injured, allegedly because of Defendants' improvident placement or condonation of a dense stand of foliage near their service station exit and despite their prior knowledge of the precise hazard the foliage presented to such persons. The question of duty here - - as in all cases sounding in tort - - should be viewed through the lenses of foreseeability and not mechanically decided upon an

arbitrary and archaic rule informed by conditions in an overwhelmingly agricultural society.

CONCLUSION

For the foregoing reasons and upon the authorities cited, Plaintiffs respectfully suggest that the district court erred in affirming the trial court's 'no duty' dismissal of Plaintiffs' common law negligence claim premised upon the traditional agrarian rule rather than applicable foreseeability analysis. The decision of the Third District Court of Appeal should be quashed with directions that this cause be remanded to the trial court for reinstatement of all of Plaintiffs' claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Plaintiffs' Brief on the Merits was mailed to the following counsel of record this _____ day of October, 1999.

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