ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,533

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

L.T. Case No. 97-89 10

Fla. Bar No. 765960

ILEANA WHITT, etc.,
et al,

Petitioners,

vs.

IGNACIO URBIETA, et al,

Respondents.

PETITIONERS' BRIEF AND APPENDIX ON JURISDICTION

GINSBERG & SCHWARTZ
and
RATINER, REYES & O'SHEA, P.A.
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STATEMENT OF COMPLIANCE

This 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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LIST OF CITATIONS AND AUTHORITIES

CITATIONS

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS[1]

This was an appeal from the final dismissal of a complaint against the owners of an urban service station alleging that a dense stand of foliage which the owners allowed to flourish upon the premises prevented customer- motorists exiting therefrom and pedestrians upon the adjacent sidewalk from observing one another, as a result of which one such motorist struck two pedestrians, killing one and seriously injuring the other. (A.1) Petitioners' operative complaint alleged that the Respondent service station owners themselves created and were cognizant of the subject dangerous condition but did nothing to abate same.

The District Court of Appeal, Third District, affirmed the dismissal of Petitioners' common law negligence claim based upon a line of prior decisions of the same court:

> 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 23 1 (Fla. 3d DCA 1980); ***see also Dawson v. Ridgley, 554*** So.2d 623 (Fla. 3d DCA ***1989);*** *Armas* ***v. Metropolitan Dade County, 429***

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[1] The district court's opinion from which review is sought can be found at 24 Fla.L.Weekly D453, 1999 WL 72415 (Fla. 3d DCA Feb. 17, 1999). A copy is also appended hereto("A").

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.

(A. 1-2)

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 plaintiffs 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.

(A.2) [emphasis supplied]

Petitioners filed a timely notice to invoke the discretionary jurisdiction of this Court under Fla.Const.Art.V., §3(b)(3).

SUMMARY OF THE ARGUMENT

The Third District's decision in this case conflicts squarely with McCAIN and the decisions of two other district courts of appeal which have had occasion to decide foliage and other obstruction cases after McCAIN, and which have in fact applied a McCAIN foreseeability analysis to determine the question of duty. This Court has jurisdiction.

It is important that this Court exercise its jurisdiction to review this case because 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 an 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, and allows to subsist, a dangerous, visually obstructive condition albeit botanical in nature. In the instant case, one person was killed, and another seriously injured, allegedly because of the Respondents' improvident placement of a dense stand of foliage and 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 lense of foreseeability and not mechanically decided upon

a notion founded upon conditions in an overwhelmingly agricultural society from an era gone by. Such is the trend in other jurisdictions. It should be the law in Florida too, if it is not already.

ARGUMENT

I.

THIS COURT HAS JURISDICTION TO REVIEW THIS CASE.

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.
>
> *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.
>
> 593 So.2d at 503 [emphasis the Court's except as underscored; the Court's footnote omitted].

In the instant case, the Third District adhered to its pre-McCAIN precedents and held that foreseeability analysis does not apply to the question of duty in "cases involving landowner liability for foliage growing on the landowners' property."(A.2) Most respectfully, McCAIN contains no such exemption. Post McCAIN, other districts which have had occasion to decide foliage and other obstruction cases have in fact applied a McCAIN foreseeability analysis to determine the question of duty. See e.g. DYKES v. CITY OF APALACHICOLA, 654 So.2d 50 (Fla. 1st DCA 1994), rev. dism., 65 1 So.2d 1193 (Fla. 1995); NAPOLI v. BUCHBINDER, 685 So.2d 46 (Fla. 4th DCA 1996); cf. SPRINGTREE PROPERTIES, INC. v. HAMMOND, 692 So.2d 164 (Fla. 1997)(applying McCAIN foreseeability analysis and confirming existence of tort duty on part of landowner following patron motorist's inadvertent ascension of curb in front of owner's parking lot resulting in injury to pedestrian).

Duty analysis rooted in foreseeability is, of course, nothing new in the context of premises liability. More than sixty years ago, this Court in HARDIN v. JACKSONVILLE TERMINAL CO., 128 Fla. 63 1, 175 So. 226,228 (1937), explained:

> there is no liability on the part of a landowner to persons injured outside his lands (which includes persons on adjacent highways), unless the owner has done or permitted something to occur on 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.
>
> [emphasis supplied]

The Third District's opinion here, refusing to apply a foreseeability analysis to the question of duty, is in conflict with the above decisions of this Court and two other district courts on the same question of law. This Court has jurisdiction. Fla.Const.Art.V, §3(b)3; E.R. SQUIBB & SONS, INC. v. FARNES, 627 So.2d 825, 826 (Fla. 1997)(district court's failure to apply correct legal standard invokes this Court's conflict jurisdiction);FORD MOTOR CO. v. KIKIS, 40 1 So.2d 134 1, 1342 (Fla. 198 l)(discussion in district court's opinion of basis upon which it reached decision and of legal principles it applied, if in

conflict with decision of Supreme Court or another district court, supplies sufficient basis for conflict review).

II.

THIS COURT SHOULD ACCEPT JURISDICTION.

It is important that this Court exercise its jurisdiction to review this case because the traditional agrarian rule, that an owner of land is under no affirmative duty to remedy conditions thereon which are of 'purely natural origin', has no place in an 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, and allows to subsist, a dangerous, visually obstructive condition albeit botanical in nature. In the instant case, one person was killed, and another seriously injured, allegedly because of the Respondents' improvident placement of a dense stand of foliage and 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 lense of foreseeability and not mechanically decided upon a notion founded upon conditions in an overwhelmingly agricultural society from an era gone by.

The trend in other jurisdictions has been to find exceptions to the application of the traditional agrarian rule or to abolish it entirely. 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 distinction has been drawn for artificial as opposed to purely natural conditions upon the land. See Restatement (Second) of Torts §654; COLBA v. KUSZNIER, 599 A.2d 194 (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 discarded the "traditional rule" altogether in favor of a more flexible duty of reasonable care premised upon foreseeability. See e.g. SPRECHER v. ADAMSON COMPANIES, 178 Cal. Rptr. 783,636 P.2d 1121

(Cal. 198 1)(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 should be the law in Florida too, if it is not already.

Petitioners respectfully urge this Court to accept jurisdiction over this case and resolve a conflict on an important question of Florida law.

CONCLUSION

For the foregoing reasons and upon the authorities cited, Petitioners respectfully request this Court to exercise its jurisdiction and resolve the conflict presented by the Third District's decision in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing brief on jurisdiction was mailed to the following counsel of record this 13th day of May, 1999.

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APPENDIX

Exist with Population Density, 3 17 BRIT. MED. J. 895 (1998).

[4]We find no error in the trial court's admission of this exhibit. Plaintiffs sought to introduce a 2-hour "a-day-in-the-life video" which the judge limited to the 19-minute version presented at trial. The redaction allowed the jury to view the most relevant aspects of the tape while minimizing any potentially inflammatory effect. Mrs. Castillo's exposure to the "mist" coming from the "U-pick" field was the subject of extensive debate below. During her initial deposition on October 21, 1995, Mrs. Castillo was asked whether the alleged mist coming from the Pine Island tractor got on her skin, she stated: "I don't know. I can't say for sure. I don't know." When asked whether she remembered being sprayed so that she actually felt it on her skin she responded: "No, I don't remember that." During her final deposition on April 24, 1996, three weeks before trial and after her expert had changed his theory of exposure from inhalational to derrnal, she testified that, in fact, she had been drenched in a shower of the spray as she stood in its path for several minutes.

[5]Daniels elaborated and stated that this was "everybody['s]" practice. He testified that in June of 1989, Pine Island returned unused Potassium Nitrate, Bucktril, Agri-Dex, and Dual. There was no return of any unused Benlate.

[6]There was also a considerable amount of evidence that tomato plants are not sprayed until the first bloom-four to six weeks after planting.

[7]*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[8]Although the case against DuPont is resolved by our holding on the sufficiency issue discussed in section II above, because this defendant took the lead in the litigation of the *Frye* issue below, it will be referred to during our discussion of the scientific evidence.

[9]The trial court did determine that the expert testimony would assist the jury and that the plaintiffs' experts were qualified to *testify* in this area. The court's statement concerning "probable cause" is confusing but appears co be nothing more than an unfortunate analogy. Contrary to DuPont's suggestion, we do not believe that the court misapplied that concept to these facts.

[10]In *Wade-Greaux v. Whitehall Labs., Inc.*, 874 F. Eupp. 1441, 1450. (D.V.I.), *affirmed*, 46 F.3d 1120 (3d Cir. 1994), the court noted preliminarily: "Persons who study teratology come from different medical or scientific disciplines, including pediatrics, obstetrics, embryology, epidemiology and genetics. . Nevertheless, physicians and scientists who study the causes of birth defects, regardless of their specific training and experience, comprise a single medical/scientific community and are known as teratologists."

@'Toxicology is defined as 'the study of adverse effects of chemical agents on biological systems.' , . . One of the central tenets of toxicology is that 'the dose makes the poison' implying that all chemical agents are harmful-it is only a question of dose." Berry. 709 So. 2d 552, 559 (Fla. 1st DCA 1998) (quoting *Reference Manual on Scientific Evidence.* 185 (Federal Judicial Center, 1994)) (citation omitted).

"Many of the "*toxic* tort" cases either require epidemiologic proof *or* reject in vitro and *in* vivo test results that conflict with epidemiologic data. However, these cases primarily concerned birth defects which arose following the ingestion of the pharmaceutical Bendectin by pregnant women (see cases cited at p. 21). and a "wealth" of epidemiological data was available.

[12]Rats, the *least* appropriate mammalian test species, are used in 90% of long-term animal bioessays due to pragmatic concerns such as availability, size, cost ($3.50-30 as compared to up to $10,000 for a pregnant primate), short life span and lack of a vomiting-reflex. See Jack L. Landau & W. Hugh O'Riordan, *Of Mice and Men: The Admissibility of Animal Studies to Prove Causation in Toxic Torts Litigation*, 25 Idaho L. Rev. 521. 532-49 (1988); Michael D. Green, *Expert Witnesses and Sufficiency of Evidence* in Toxic *Substance Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 N . U. L. Rev. 643, 654-57 (1992).

[13]*See Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307, 313 (5th Cir. 1989) ("This circuit has previously realized the very limited usefulness of animal studies whenconfronted with questions of toxicity. . . The court noted several methodological flaws which rendered the rat study inconclusive; specifically, the court focused on the small number of rats used in the study, the high (sometimes *near*-lethal) doses given, and the difficulty of extrapolating those results to humans."); *Merrell Dow Pharms.. Inc. v. Havner, 953* S.W.2d 706, 729 (Tex. 1997), *cert. denied,* U.S. , 118 S.Ct. 1799 (1998).

A highly regarded text on scientific evidence cites an example:

> Sometimes understanding the mechanism underlying the species difference can allow prediction of whether the effect will occur in humans. Thus, carbaryl, an insecticide commonly used, among other things, for gypsy moth control, produces fetal abnormalities in dogs but not in hamsters, mice, rats, and monkeys. Dogs lack the specific enzyme involved to metabolize carbaryl; the other species tested all have this enzyme, as do humans. On this basis, it has been reasoned that humans are not at risk for fetal malformations produce by carbaryl.

Reference Manual On Scientific Evidence, 202 (Federal Judicial Center, 1994).

[14]*See* Bernard D. Goldstein & Mary Sue Henifin, ***Reference Guide on*** *Toxicology*, *in Reference Manual on Scientific Evidence* 181, 203 (Federal Judicial center. 1994).

[15]*See Havner, 953* S.W.2d at 730.

[16]*See Brock*, S74 F. 2d at 313 ("While we do not hold that [the failure to publish a study or conclusions for the purposes of peer review]. in and of itself, renders his conclusions inadmissible, courts must nonetheless be especially skeptical of medical and other scientific evidence that has not been subjected to thorough *peer review.*"); *Lynch. 830* F. 2d at 1195; *Havner,* 953 S.W.2d at 726-1-].

[17]*See Lust v. Merrell Dow Pharms.. Inc.*, 89 F.3d 594, 597 (9th Cir. 1996); *Berry*, 709 So. 2d at 561 n.8 (quoting *Daubert v. Merrell Dow Pharms., Inc., 43* F.3d 1311, 1317 (9th Cir. 1995)) ("One very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for the purpose of testifying."); *Havner*, 953 S.W.2d at 726.

We note that the tests conducted by Drs. Howard and van Veltzen in this case were commissioned and paid for by plaintiffs.

[18]*See Brock* 874 F.2d at 310 ("[C]ourts must critically evaluate the reasoning process by which the experts connect data to their conclusions in order for courts to consistently and rationally resolve the disputes before them.").

[19]"There are approximately 2,000 agents that have been shown to be teratogenic in some animal species, but only about 25-30 of those are considered to be human teratogens." *Wade-Greaux*, 874 F. Supp. at 1480.

[20]DuPont's argument is analogous to recent analyses regarding the admissibility of DNA evidence, In the DNA context, the courts have emphasized that the *Frye* test must be applied, not only to the matching procedure, but also to the testing protocolused in the analysis. See Brim, 695 So. 2d at 271 ("The fact that a match is found in the first step of the DNA testing process may be 'meaningless' without qualitative or quantitative estimates demonstrating the significance of the match."); *Hayes*, 660 So. 2d at 263 (emphasizing the application of *the Frye* test to *the resting procedures* used in the analysis).

[21]As concerns Drs. Howard and van Veltzen's reliance on the rat gavage studies performed by DuPont in order to secure federal certification for Benlate, we note that contrary to the negative conclusions drawn by Howard and van Veltzen from these in vivo studies. the Environmental Protection Agency, which regulates all pesticides distributed or sold in the United States, see 7 U.S.C. section 136a(a), nevertheless approved the product determining that it did nor present a danger to *pregnant women* either through inhalational *or* dermal exposure.

* * *

Wrongful death-Automobile accident-Action against landowner, alleging that foliage growing on landowner's property obstructed motorist's vision of sidewalk, as result of which motorist's vehicle struck pedestrians-Trial court properly dismissed common law tort count-Landowner has no liability for visual obstruction created by foliage growing on landowner's property so long as foliage does not protrude into public way—Error to dismiss claim based on landowner's violation of county ordinance governing height of hedges on edge of driveways leading to public right-of-way

ILEANA WHITT, as Personal Representative of the Estate of ILL4 FOTINOV, deceased, and on behalf of the surviving Statutory Beneficiaries of ILIA FOTINOV, and YORDANKA FOTINOVA, Appellants, vs. ELI SILVERMAN, IRENE SILVERMAN, IGNACIO URBIETA and IGNACIO URBIETA, JR., d/b/a OCEAN AMOCO, Appellees. 3rd District. Case Nos. 98-560 & 97-3525. L.T. Case No, 97-8910. Opinion filed February 17, 1999. An appeal from the Circuit Court for Dade County, Celeste H. Muir, Judge. Counsel: Ginsberg & Schwartz and Todd R. Schwartz and Ratiner, Reyes & O'Shea, for appellants. Josephs, Jack & Gaebe and Helen Leen Miranda, for appellees.

(Before COPE, LEVY, and SHEVIN, JJ.)

(PER CURIAM.) This is an appeal from dismissal of claims against landowners, alleging that foliage growing on the landowners' property obstructed a motorist's vision as a result of which a motorist's car struck two pedestrians. We affirm dismissal of the common law tort claim, but reverse in part the dismissal of the claim for violation of a Miami-Dade County ordinance.

Defendant-appellees' ("landowners") operate an Amoco service station on Collins Avenue on Miami Beach. While leaving the service station premises in her car, service station customer Jean Simoneau struck two pedestrians, killing one and injuring the other.

Plaintiffs[2] filed this personal injury action against rhe landowners, among others.[3] Plaintiffs allege that the landowners had a dense stand of foliage between their service station and the adjacent property. Plaintiffs say that the foliage impaired the driver's view of the sidewalk, thus causing or contributing to the accident. However, the foliage was entirely on the landowner's property, and did not protrude into the public way. The trial court dismissed plaintiffs' claims for negligence and violation of a Miami-Dade County ordinance. This appeal follows.

In the context of automobile collision cases, this court has declined to impose liability for a visual obstruction created by foliate 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. Evans*, 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

A. 1

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.

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 50 1. We do not think that *McCain* addressed the question now beforeus, 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.

Liability can be imposed, however, "where obstructions on private property are in violation of some statute or ordinance." *Evans*, 391 So. 2d at 232 (citations omitted). Plaintiffs allege alternatively that the foliage in this case was located so that it violated section 33-1 1(c) of the Miami-Dade County Code.

Section 33-11(c) states, in part, "The height of fences, walls, bus shelters and hedges shall not exceed two and one-half feet in height within *ten* (IO) feet of the edge ofdriveway leading to a public right-of-way." Plaintiffs have specifically alleged a violation of this portion of the ordinance. The ordinance does not define what constitutes a "hedge," and the complaint uses rhe generic term "foliage"-which could include a hedge. That being so, this claim should not have been dismissed.

Plaintiffs also allege aviolation of another portion of section 33-1 l(c) which prohibits "obstructions to cross-visibility at a height of two and one-half (2.5) feet or more above pavement . . . ." The remainder of section 33-1 l(c) makes clear, however, that the safe sight distance triangle applies only at what the ordinance describes as through streets and minor streets. Here we deal wirh the intersection of a driveway with a through street, so the safe sight distance triangle portionof section 33-1 l(c) does not apply. That being so, the claim for violation of the safe sight distance triangle was properly dismissed.

Affirmed in part, reversed in part, and remanded for further proceedings consistent herewith.

'Eli Silverman, Irene Silverman, Ignacio Urbieta, and Ignacio Urbieta, Jr.

[2]Ileana Whitt, as personal representative of decedent Ilia Fotinov, and the injured pedestrian, Yordanka Fotinova.

'The plaintiffs' claims against the driver and the car owner are not at issue in this appeal.

* * *

Contracts-Attorneys-Where attorney who represented client in personal injury action signed agreement providing that attorney would withhold necessary sums from any settlement, judgment or verdict as might be necessary to adequately protect physical therapist who treated client, attorney was obligated to pay physical therapist's bill for services from settlement of client's lawsuit although amount remaining from settlement was insufficient to pay attorney's fees and costs

STUART M. BERGER. RPT, P.A., d/b/a CONCORDE PHYSIOTHERAPY. Appellant/Cross-Appellee, vs. SILVERSTEIN, SILVERSTEIN & SILVERSTEIN, P.A., Appellee/Cross-Appellant. 3rd District. Case No. 98-453. L.T. Case No. 96-18935. Opinion filed February 17, 1999. An Appeal from the Circuit Counfor Dade County, Gisela Cardonne, Judge. Counsel: Mark S. Sussman, for appellant. Hersch & Talisman, and Patrice A. Talisman, for appellees.

(Before NESBITT, JORGENSON and SORONDO, JJ.)

(PER CURXAM.) Stuart M. Berger, RPT, P.A., d/b/a Concorde Physiotherapy (Berger) appeals, and Silverstein, Silverstein & Silverstein, P.A. (Silverstein) cross appeals the lower court's order granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment.

Ida Small was injured in an elevator accident. On October 29, 1991, she retained Silverstein to represent her in claims arisi the accident and entered into a contingect fee agreement e Silverstein to recover costs incurred and providing it with a any recovery obtained.

Berger treated Small with physical therapy. On May 6 Small signed a contract/lien authorizing her attorney to direc Berger the sums owed him for services rendered to her fr settlement, judgment or verdict. On June 17, 1993, Silverst signed the document, agreeing to observe all its terms and w such sums from any settlement, judgment or verdict as necessary to protect Berger. Berger treated Small for approxi three years, and his total bill for services rendered to $16,686.31. Silverstein ultimately settled Small's lawsuit fo of $27,500. Silverstein then took $11,000 for attorney's f $14,691.82 in costs, leaving only $1,808.18 for Small and I

On September 18, 1996, Berger filed an action against containing a count against Small, Silverstein and one of its att forbreachofcontract. Berger later voluntarily dismissed cl; to Small and the individual attorney. Silverstein raised affir defenses, primarily asserting that it had a priority interest and recover attorney's fees and costs, higher than that of any med provider or lien holder, for monies recovered in the settlemen parties moved for summary judgment. On February 10, 1998, trial court denied Berger's motion and granted Silverstein's mot finding that Silversrein had a higher priority interest and lie Berger. The court disallowed Silverstein's claimed co: telephone, fax, postage and express delivery totaling $1069.60 determined that Berger's lien totaled $2,877.68. Silverstein mo for rehearing, which was denied, and the court amended its orde provide that Berger was entitled to recover $2,877.78.

Contrary to Silverstein'sposition, we do not resolve this case the basis of the law of competing liens. Rather, we find that execution of the document in question created a bindir ig a enforceable contract among the parties. See *Heffelfinger v. Gibs* 290 A.2d 390 (D.C. 1972). This contract clearly provide :d th Silverstein would "withhold [the necessary] sums from a settlement, judgment or verdict as [might] be necessary to ac quately protect" Berger. Nothing in this agreement suggested th Berger would have to stand in line behind the attorneys' financi interest in the case. The fact that the case was settled for les Silverstein anticipated does not alter the rights of Berger wh fulfilled his part of the bargain by treating Ms. Small for a t otal ***three years. See Marshall Construction, Ltd. v. Coastal Sheet Met & Roofing***, Inc., 569 So. 2d 845 (Fla. 1st DCA 1990) ("It is a wel settled contract principle that unexpected difficulty, expense, hardship does not excuse a party from performance of its oblig atio under a contract."); *Bumby & Stimpson*, Inc. *v. Peninsula Util Corp.*, 169 So. 2d 499 (Fla. 3d DCA 1964).

We reverse the lower court's order granting Silverstein's motio for summary judgment and denying Berger's motion for SUMmar judgment and remand with instructions to enter final summar judgment in favor of Berger. Based on our holding on this issue, th cross-appeal is moot. (JORGENSON and SORONDO, JJ., concur

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(NESBITT, J., concurring.) I fully agree with the judgment an result rendered in this case. The attorney had some two (2) year invested in the matter prior to his agreement directly with th therapist. Unquestionably, the attorney had a charging lien again the first proceeds recovered on behalf of his client, however th effect of his agreement with the therapist was to partially or w divest himself from enforcing that lien.

* * *

Paternity-Blood test-Where mother alleged that petitioner wa child's biological father! but mother was married to another ma at time of child's birth, trial court departed from essential require ments of law in ordering petitioner to undergo blood testing t determine paternity, in the best interest of the child, contrary t recommendation of guardian ad litem and without notifying lega father of proceedings-Legal father required to be notified an given opportunity to be heard

SALVADOR E. PAREJA, Petitioner, vs. STATE OF FLORIDA, DEPARTMENT OF REVENUE, ex rel IRIS B. AYALA, Respondent. 3rd District. Case

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