ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 95,533

DCA Case Nos. 98-0560 & 97-03525

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By

ILEANA WHITT,
et al,

Appellants,

vs.

TGNACIO URBIETA, et al.,

Appellees.

RESPONDENTS
IGNACIO URBIETA, and IGNACIO URBIETA, JR.
ANSWER BRIEF ON JURISICTION

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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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STATEMENT OF THE FACTS AND CASE

Respondents operate an Amoco service station on Collins Avenue in Miami Beach (A 1). While leaving the service station in her car, Jean Simoneau struck two pedestrians (A 1). The Petitioners filed a personal injury action against the landowners, the driver of the vehicle, and the owner of the vehicle (A 1).

The Petitioners alleged that the Respondents, as landowners, had a dense strand of foliage between their service station and the adjacent property (A 1). They claimed that the foliage impaired the driver's view of the sidewalk, thus causing or contributing to the accident (A 1). The foliage was contained within Respondent's property and did not protrude onto a public right-of way (A 1). The trial court dismissed the Petitioner's claims for negligence and violation of a Miami-Dade ordinance (A 1).

The Petitioners appealed to the Third District Court of Appeal (A 1). The appellate court affirmed dismissal of the common law negligence, citing the long line of cases which hold that there is no liability on the part of a landowner for foliage growing on its property which does not protrude onto a public right-of way (A 1), citing Morales v. Costa, 427 So.2d 297 (Fla. 3d DCA 1983); Stevens v. Libertv Mutual Ins. Co., 415 So.2d 5 1 (Fla. 3d DCA 1982); Evans v. Southern Holding. Corp., 391 So.2d 23 1 (Fla. 3d DCA 1980); Dawson v. Ridgely, 554 So.2d

623 (Fla. 3d DCA 1989); Armas v. Metropolitan Dade County, 429 So.2d 59 (Fla.. 3d DCA 1983); and Bassett v. Edwards, 158 Fla. 848, 30 So.2d 374, 376 (1947).

The Appellate Court rejected Petitioner's contention that this Court's decision in McCain v. Florida Power & Light Corporation ,593 So.2d 5000 (Fla. 1992) overruled these cases sub silentio. The Third District reversed that portion of the lower court's order dismissing the claim that a Miami-Dade ordinance was violated (A 2). The Petitioner's then sought to invoke the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

There is no express conflict between the decision of the Third District Court of Appeal and the cases relied upon by the Petitioners. The Petitioners' contention that the McCain Court re-wrote tort law and now allows for common law actions against landowner's for foliage within its property is erroneous. As noted by the Third District Court of Appeal, McCain did not address the issues before the trial court or the Third District Court of Appeal: Whether there is liability on the part of a landowner for foliage conditions which are contained on its property.

Rule 9.030(a)(2)(A) of the Florida Rules of Appellate Procedure provide that the discretionary jurisdiction of this Court may be sought to review decisions of the district courts of appeal that expressly and directly conflict with the decision

of another district court of appeal or with the Supreme Court on the same issue of law. There is no such conflict in the case at bar: All of the courts agree that, so long as the alleged condition is contained within the landowner's property, and there is no violation of a statute, regulation, or ordinance, there is no liability on the part of the landowner as there is no duty. McCain did not address this issue of law, nor did it overrule the established line of cases cited by the Third District Court of Appeal in reaching its decision.

There is no conflict and therefore no basis to invoke the discretionary jurisdiction of this Court. The decision of the Third District Court of Appeal must stand.

ARGUMENT

I.

THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL

The Petitioners asked the Third District Court of Appeal to r-e-write black-letter law and allow them to sue a landowner for foliage which exists solely on the landowner's property, does not intrude over a public right-of-way and which, if held to be actionable, would essentially render a landowner liable for all incidents which occur on, or related to, their property, regardless of fault or their right to use

their property as they see fit. The Third District Court of Appeal rejected this argument.

Florida courts are clear that a landowner owes no duty to maintain its property so that a motorist approaching a public intersection or street can see approaching vehicles or pedestrians. Stevens v. Liberty Mutual Insurance Company, 415 So. 2d 51 (Fla. 3d DCA 1982); Evans v. Southern Holding Corp., 391 So. 2d 231 (Fla. 3d DCA 1981). On the contrary, the duty is on the motorist/ pedestrian to exercise reasonable care for their own safety, to observe alleged obstructions of their view, and to control their actions as the situation requires. Evans, supra.

In Evans, an action was brought by a passenger in a vehicle to recover damages for injuries sustained in an automobile accident from the owner of land at an adjacent intersection. The court adhered to the traditional rule that the owner of adjacent property is under no affirmative duty to remedy conditions on the property so that a motorist's view of intersecting traffic is not obstructed. The court held that the landowner who allowed the obstructions consisting of high weeds and stored heavy equipment which impaired the view of other drivers (or in this case a motorist and pedestrian) was not liable to the plaintiff. The court ruled that obstructions of views by passing motorists must be observed by all motorists

and it is the duty of the drivers, or in this case the pedestrian, to observe obstructions and to bring their vehicles under such control as the situation requires or demands. Evans. supra.

A private landowner has no duty to motorists (or pedestrians) to maintain its property in such a way that a driver who is exiting the property has a completely unobstructed view of intersecting traffic. Dawson v. Ridgely, 554 So. 2d 623 (Fla. 3d DCA 1989). Likewise, no such duty should extend to pedestrians such as the Petitioners.

This rule of non-liability arises from the Court's recognition that the landowner has the exclusive right to use and enjoy his property as he sees fit. The duty of care is therefore shifted to vehicle operators who must share the roads with others. The proper rule is that the negligence of those who collide on public streets intervenes and supersedes any alleged negligence of the private landowner. Pedigo v. Smith, 395 So. 2d 6 15,617 (Fla. 5th DCA 198 1).

The Petitioners' reliance upon McCain was misplaced. It is factually and legally distinguishable. As noted by the appellate court, McCain was not a landowner case, it was a situation where the plaintiff, a trench digger, hit a power cable with his trencher and was injured. McCain v. Florida Power Corporation, 593 So. 2d 500 (Fla. 1992). The McCain Court clarified the relationship of

foreseeability to the issues of duty and proximate cause. This Court did not overrule or reverse the well-established rule of law that a landowner is not liable to passing motorists for obstructions on the landowner's property. There is no conflict with the McCain decision because McCain did not address the same issues of law which were before the Third District Court of Appeal.

A crucial issue in this case was the fact that the foliage in question did not protrude onto a public right-of-way. The cases relied upon by Petitioner all deal with vegetation which grew over the pronerty line onto a right of way.

In Dykes v. City of Apalachicola, 645 So. 2d 50 (Fla. 1 st DCA 1994), the plaintiff was mowing the lawn on the right-of-way in front of a home. He stepped out into the roadway and was hit by a vehicle. The driver claimed that overgrown shrubs obscured her view of the boy. The trees grew on the right of way and hung over the road way. Dykes, 5 1. Applying McCain, the court held that a landowner's duty extended to any party who may be injured as a result of the obstructed view of the motorists, be they a motorist or pedestrian. Dykes is a protrusion case as well. The holding is consistent with the Evans distinction between foliage which is within the property and that which protrudes out. It has no bearing on the issues in this case.

Likewise, Napoli v. Buchbinder, 685 So. 2d (Fla. 4th DCA 1997) has no

bearing on the case at hand. In Napoli, the appellant filed a wrongful death action and alleged that the design of appellee's parking lot and the placement of a stop sign contributed to the accident. The trial court granted summary judgment on the basis of Dawson, supra. While the court does not state why the trial court's reliance upon Dawson was misplaced, one might infer that it was because Dawson was an obstruction case and Napoli was a negligent placement of street signage case and there is no corollary between the two cases. The court did apply McCain and found a material fact as to whether landowner's placement of sign placed plaintiff within a foreseeable zone of risk. At no point did the Court state that Dawson was no longer good law or that McCain had overruled or modified the controlling rule of law that a landowner does not have a legal duty to maintain foliage so as to provide motorists (and pedestrians) with an unobstructed view of traffic. Evans; Stevens; Dawson; and Pedigo.

Springtree Properties. Inc v. Hammond, 692 So. 2d 164 (Fla. 1997) is also distinguishable. First, Springtree did not overrule a long line of cases due to the McCain decision. Rather, it held that in case where a car jumps a curb and injures someone, the mere fact that there had been no prior similar instances and that a protective sidewalk had been installed were not enough to vitiate liability for such an incident. To the extent that Molinares v. El Centro Gallego, Inc., 545 So. 2d

387 (Fla. 3d DCA 1989) and other cases held that it did the Court disapproved it.

As a matter of completely established law, there is no common law duty, nor any possible breach of that duty, under the circumstances of the present case. There is no basis to invoke the discretionary jurisdiction of this Court as there is no conflict with McCain or the decisions of the other district courts of appeal.

II.

THIS COURT SHOULD NOT ACCEPT JURISDICTION

The Petitioners' contend that this Court should exercise jurisdiction over this matter as "the traditional agrarian rule , . . has no place in an urban commercial environment ." See Petitioners' Brief on Jurisdiction, at 7. The Petitioners originally sought to invoke the discretionary jurisdiction of this Court on the basis that the Third District Court of Appeal's decision was in conflict with the decisions of this Court and other appellate courts. There is no provision in Florida Rule of Appellate Procedure 9.030(a)(2)(A) which vests jurisdiction in this Court to review matters on the basis of public policy reasons alone. Rather, the decision must "expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law." Fla. R. App. P. 9.030(a)(2)(A)(iv).

Cases from other jurisdictions in other states have no bearing on the issue

before this Court. First, such decisions are not binding upon this Court or the other courts of this state. Further, the notion that the rule is archaic and should therefore be abolished is inaccurate. To impose a duty under the circumstances of the present case would make every landowner and homeowner an insurer for those who use the sidewalks in Florida. In other words, someone exiting a gas station and someone walking on a sidewalk would have to be warned of the presence of pedestrian traffic and vehicular traffic so that they must stop and look. Liability would be virtually limitless if such a duty of care was imposed. Petitioners are asking this Court to disregard an established rule of law and to hold that such actions can be brought. Aside from the fact that such an action would open the flood gates of litigation and infringe upon an owner's right to use and enjoy his property, the Petitioners' argument fails simply because the case law is strictly against such a suit. This rule of non-liability arises from the recognition that the landowner has the exclusive right to use and enjoy his property as he sees fit. The duty of care is therefore shifted to vehicle operators who must share the roads with others. This Court discussed the motorists duty when confronted with a natural obstruction in Basset v. Edwards, 30 So. 2d 374 (Fla. 1947):

> Obstruction of view when motoring on a highway must be observed by all motorists. Every user of the highway is required to exercise reasonable care for his own safety and protection. It was the truck

> driver's duty and also the driver of the automobile to observe the oleander bush at this intersection and to bring their vehicles under such control as the situation required and demanded.
>
> Basset, 376.

The policy behind Basset is applicable in this case. The duty is upon the driver of the vehicle to observe any alleged obstruction and to control his or her vehicle accordingly. The cases asserted by the Petitioners are not grounds for the invocation of this Court's discretionary jurisdiction. They are not precedent, nor are they germaine to the issue before this Court: Whether the decision of the Third District Court of Appeal is in conflict with a decision of this Court or another district court of appeal.

CONCLUSION

For the foregoing reasons and the authorities cited, this Court lacks discretionary jurisdiction to review this matter.

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