IN THE SUPREME COURT OF FLORIDA

CASE NO.: 95,533

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

ILEANA WHITT, etc., et al,

Petitioners,

vs.

IGNACIO URBIETA, et al.,

Respondents.
_____/

RESPONDENTS' IGNACIO URBIETA AND IGNACIO URBIETA, JR.'S ANSWER BRIEF

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STATEMENT OF COMPLIANCE

Counsel for the Respondents certify that this brief was typed in 14 point arial and complies with the Administrative Order of this Court dated July 13, 1998.

INTRODUCTION

The Appellants, Ileana Whitt, as Personal Representative of Ilia Fotinov, deceased, and on behalf of the surviving Statutory Beneficiaries of Ilia Fotinov and Yordanka Fotinova, individually, will be referred to as "Appellants" or "Whitt".

The Appellees, Ignacio Urbieta and Ignacio Urbieta, Jr., will be referred to as "Appellees" or "Urbieta".

The Record on Appeal will be designated by the letter "R."

All emphasis in the Brief is that of the writer unless otherwise indicated.

STATEMENT OF THE FACTS AND CASE

The Appellants filed suit against Eli Silverman, Irene Silverman, Ignacio Urbieta and Ignacio Urbieta, Jr. d/b/a Ocean Amoco, Jean C. Simoneau, and Avis Rent-A-Car, Inc. claiming that Defendant, Simoneau was an invitee of the premises of the Urbietas' and the Silvermans' (an Amoco gas station) (R. 19-21). They further alleged that a large and dense strand of "foliage" existed between the gas station and property owned by Avis (R. 21) The Appellants claimed that Defendant, Simoneau, driving a Lexus vehicle, struck them as he was exiting the gas station and as they were pedestrians on an adjacent sidewalk (R. 21).

The Appellants claimed that the Urbietas owed a duty to them, pedestrians on an adjacent sidewalk, to maintain their property in a reasonably safe condition (R. 23). The Appellants claimed that foliage on the premises impaired Defendant, Simoneau's vision and caused the accident (R. 23). The Appellants did not claim that the foliage had overgrown the sidewalk or was protruding onto a public right-of-way (R. 23). Rather, they claimed that the Urbietas owed a duty to provide warning signs

for motorists, warning signs for pedestrians, speed retarding devices, and "supplemental vision enhancing" devices (R. 24).

The Urbietas moved to dismiss the First Amended Complaint as Florida Law clearly provides that there is no such cause of action for foliage between two Defendants' properties (R. 107). The Court granted the Motion to Dismiss (R. 138).

The Appellants then filed a Second Amended Complaint, alleging that the Urbietas owned the sidewalk and that the foliage existed upon their property (R. 158). They once again did not contend that it protruded over the property line. The Appellants claimed that the foliage was dense and large and impaired their vision and Defendant Simoneau's vision (R. 158). They also claimed that the Urbietas should have provided "vision enhancing devices" (R. 161).

Again, the Urbietas moved to dismiss as the established law holds a landowner owes no duty to a pedestrian walking past their property to maintain foliage on the property in such a manner to provide exiting motorists with an unobstructed view of traffic (pedestrian or otherwise) (R.

172). The Silvermans moved to dismiss on the same basis.

At the hearing on the Silvermans' Motion to Dismiss, the Silvermans argued the established line of cases which hold that a landowner cannot be held liable in these circumstances; Evans, infra; Pedigo, infra; Morales, infra. The Appellants contended that these established line of cases were overruled by McCain, infra, a case which clarifies the issues of foreseeability as it pertains to duty and proximate cause. The trial court asked the parties "[w]ell, isn't the growth or underbrush or brushes an act of God? I mean, isn't this expanding the tort law quite a bit?" (R. 295).

The trial court noted that a landowner normally is free to use his [or her] property to the full extent of the law and that it had a problem ignoring the law to that effect (R. 306). The trial court dismissed the Second Amended Complaint against the Silvermans (R. 192-193). Before the hearing could be held on the Urbietas' identical motion, the Appellants amended their Complaint for a third time (R. 203).

In their Third Amended Complaint, the Appellants reiterated their contentions outlined above and further added an allegation that the foliage

violated a Miami-Dade County zoning ordinance (R. 208). The Urbietas moved to dismiss as the Appellants had still not pled a cause of action against them (R. 326).

At the hearing on the Motion to Dismiss, the Appellants claimed that the dangerous condition complained of was not the foliage, but use of the property as a gas station where cars would go in and out (R. 348-349). The trial court reviewed the ordinance which Appellants claimed was violated (R. 349). The trial court noted that it did not appear to apply to the foliage (R. 349). The Urbietas argued that the ordinance did not apply, that it was a beautification and permitting ordinance and had nothing to do with protecting pedestrians (R. 350). The trial court took the matter under advisement and reviewed the ordinance to determine its sufficiency (R. 350-351). The trial court subsequently granted the Motion to Dismiss on all grounds and the Appellants appealed to the Third District Court of Appeal. (R 334-337).

On appeal, The Third District reversed the dismissal of the ordinance claim but affirmed the dismissal of the negligence claim. Whitt v. Silverman,

732 So.2d 1106, 1108 (Fla. 3d DCA 1999). The Third District held as follows:

> The Plaintiffs acknowledge the cited line of cases, but contend 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 has overruled our earlier cases involving landowner liability for foliage growing on the landowner's property. Id.

The Third District reversed the trial court's Order Granting the Motion to Dismiss on the ordinance issue. The Appellants filed a notice to invoke discretionary jurisdiction of this Court on the negligence issue and this Court accepted jurisdiction on September 23, 1999.

SUMMARY OF THE ARGUMENT

The Appellants were struck by a vehicle driven by Defendant, Simoneau while walking on a sidewalk. Simoneau was exiting a gas station at the time. They sued Simoneau for his negligence and also sued the

Urbietas, alleging that they owned and maintained the gas station. They claimed that foliage which existed on the Urbietas' property and which did not extend off the property caused the incident. The trial court properly dismissed the Third Amended Complaint as there is no such cause of action against the landowners under Florida law.

To impose a duty on a landowner to trim foliage for the benefit of a passing pedestrian would make every landowner an insurer for those who use the sidewalks in Florida. Thus, someone exiting a property 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. This is already required in Florida. Liability would be virtually limitless if such a duty on a landowner was imposed.

Florida court's have consistently held that a landowner owes no duty to maintain its property in such a way so that a motorist approaching a public intersection of 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 Corporation, 391 So. 2d 231 (Fla. 3d

DCA) rev. den. 399 So.2d 1142 (Fla. 1981). The Appellants are asking this Court to disregard that established rule of law and hold that such actions can be brought. This would open the flood gates of litigation and infringe upon an owner's right to use and enjoy his or her property as he or she sees fit. The Appellants' argument fails simply because the case law is strictly against such a suit.

The Appellants contention that this Court re-wrote tort law and now allows for such an action in McCain v. Florida Power Corporation, 593 So.2d 500 (Fla. 1992) is erroneous. McCain addressed the proximate cause issues which arise in litigation and defined them. McCain did not reverse prior cases which deal with the duty of a landowner. Appellants arguments regarding proximate cause have nothing to do with the issues in this case. As stated in McCain, the presence of a duty on the part of the alleged tortfeasor opens the court house doors. If there is no duty, there is no cause of action. In this case, there is neither. As a result, the dismissal should be affirmed in accordance with long established Florida law.

ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED THE APPELLANTS' NEGLIGENCE CLAIM AND FOUND THAT FLORIDA LAW DOES NOT CREATE A CAUSE OF ACTION AGAINST A LANDOWNER FOR A PEDESTRIAN INJURED BY THE ACTIONS OF A MOTORIST EXITING THE LANDOWNER'S PROPERTY BECAUSE FOLIAGE SOLELY ON THE LANDOWNER'S PROPERTY ALLEGEDLY BLOCKED THE MOTORIST'S VIEW OF THE PEDESTRIAN

The District Court correctly held that the Appellants did not possess a cause of action against the Urbietas for negligence for allowing foliage to exist solely on their property which allegedly blocked the view of a motorist exiting their property, thereby injuring the Appellants. The District Court correctly declined to abandon established law and allow Appellants to sue a landowner for an incident allegedly caused by foliage which exists solely on his or her property. The District Court's ruling maintains established principles of law. Had the District Court reversed as Appellant requested, a landowner would be 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. Such a vast expansion has not been accepted in Florida and should not be allowed.

In order for the Urbietas to be held liable for the incident, the following must be established: (1) the Urbietas owed a duty to Appellants; (2) they breached that duty; and (3) there were injuries or damages proximately caused by the breach. Tieder v. Little, 502 So. 2d 923 (Fla. 3d DCA 1987). Florida courts are clear that a landowner owes no duty to a pedestrian to maintain its property so that a motorist approaching a public intersection or street can see them approaching. 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) rev. den. 399 So.2d 1142 (Fla. 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. Id. In 7A Am.Jur. 2d, Automobiles 818, the author states:

> Where there are obstructions to the view of a motorist at an intersection, and the presence of others using the intersection may reasonably be anticipated, extra vigilance and caution are required of the motorist in order to prevent injury to such persons, and the failure of a motorist to note the dangers at a blind intersection which may result in an accident may properly be the basis for a finding of negligence.

Florida follows this view, imposing the duty of care on the operator of the vehicle instead of the landowner. Section 316.125, Fla.Stat. (1999), states, in part, as follows:

> **Section 316.125, Fla.Stat. (1999) Vehicle entering highway from private road or driveway or emerging from alley, driveway or building.-**
>
> > (2) The driver of a vehicle about to enter or cross a highway from an alley, building, private road or driveway within a business or residence district shall stop the vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across the alley, building entrance, road or driveway, or in the event there is no sidewalk area, shall stop at the point nearest the street to be entered where the driver has a view of approaching traffic thereon and shall yield to all vehicles and pedestrians which are so close thereto as to constitute an immediate hazard.

The traditional rule in Florida is that a landowner is under no affirmative duty to warn or even remedy conditions of natural origin on its land in order to provide an unobstructed view the motorist. Evans v. Southern Holding Corp., 391 So. 2d 231 (Fla. 3d DCA) rev. den. 399 So.2d 1142 (Fla. 1981). Florida courts have rejected challenges to this rule.

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. Id.

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 Appellants. In Dawson, a driver pulled out of the defendant's shopping mall and struck the plaintiff who was a passenger on a motorcycle. Id at 624. The plaintiff sued the driver and the shopping mall. Id. The claim against the shopping mall was based upon the fact that a concrete telephone pole partially obstructed the view of the defendant driver as he was exiting the parking lot and pulling out onto the street. Id. The trial court found that there was no duty to the passing motorist. Id.

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. This Court discussed the motorists duty when confronted with a natural obstruction in Basset v. Edwards, 30 So. 2d 374, 376 (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.

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 615, 617 (Fla. 5th DCA 1981).

In Pedigo were that the defendant/landowner allowed tree on his property to grow out and obscure the motorist's view of a stop sign at an intersection, resulting in the plaintiff's injuries. The plaintiff sued the landowner for the obstruction. The court found no liability on the part of the landowner. Id.

Florida courts have held that a motorist traveling upon a public highway was not within the class of persons protected by an ordinance regulating removal of trees and vegetation. Stevens v. Liberty Mutual Ins. Co., 415 So. 2d 51 (Fla. 3d DCA 1982). In the absence of the violation of a statute, the Court adhered to the rule that there is no common law duty of a landowner to maintain his property in a condition so that a motorist approaching a public highway can see other approaching motorists. Id.

The Third District correctly found that Appellants' reliance upon

McCain v. Florida Power Corporation, 593 So.2d 500 (Fla. 1992) is misplaced. First, 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. This Court analyzed the relationship of foreseeability to the issues of duty and proximate cause. This Court did state that a duty arises when a defendant's conduct creates a foreseeable zone of risk which poses a general threat of harm to others, but it certainly did not re-write the volumes of law which hold that the court determines the issue of duty as a matter of law. Indeed, this Court reiterated that duty is a "minimal threshold legal requirement for opening the courthouse doors." Id at 502. 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. Id.

To interpret McCain in such fashion would open the flood gates of litigation in areas of law where it is firmly established that no such liability exists, and supersede Florida law which clearly places the duty of care on a driver exiting a private road from a business onto a sidewalk or street.

A crucial issue in this case is the fact that the foliage in question did not protrude onto a public right-of-way. This distinction was brought to the trial court's attention that the hearing on Silvermans' Motion to Dismiss. The Florida cases relied upon by Appellants all deal with vegetation which grew over the property line onto a right of way. Morales v. Costa, 427 So. 2d 297 (Fla. 3d DCA 1983); Armas v. Metropolitan Dade County, 429 So. 2d 59 (Fla. 3d DCA 1983); Dykes v. City of Apalachicola, 645 So. 2d 50 (Fla. 1st DCA 1994).

In Morales, the plaintiff claimed that defendant landowner obstructed the plaintiff's view of a stop sign by planting an olive tree in a swale area and by voluntarily assuming the duty of the maintenance of that area and negligently failed to fulfill that obligation. Id. at 297. The trial court entered judgment in favor of the landowners and defendant attempted to uphold the judgment based upon Evans, supra. However, the Court could not apply Evans because, as specifically stated, when the vegetation protruded into and obstructed a public right-of-way the landowner incurs liability for the protrusion. Id. at 298.

In the instant action, there is no claim that the foliage protruded onto a public right-of-way. Indeed, the Third Amended Complaint specifically states that the subject foliage was on the property (R. 205). If the Appellants were claiming that the growth protruded over the sidewalk and obstructed their vision along the right-of-way, this Court would have to examine and perhaps apply Morales. In the absence of such a protrusion, Morales does not control.

Likewise, Armas does not mandate reversal. In Armas, the plaintiff was involved in an intersection collision. He claimed that it had occurred partially because his view of a controlling stop sign was obstructed by foliage which had grown from the adjacent property onto the dedicated right of way. In the present case, there is no allegation that the foliage grew out of the property and obscured the Appellants' vision. Applying the Morales exception to the rule of no-liability, the court reversed a summary judgment in favor of the landowner. Armas, 429 So.2d at 60-61.

In Dykes, 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, 645 So.2d at 51. 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/Morales distinction between foliage which is within the property and that which protrudes out. It has no bearing on the issues in this case. Applying the controlling law, Evans, Stevens, and Pedigo, this Court should affirm.

Napoli v. Buchbinder, 685 So. 2d 46 (Fla. 4th DCA 1997) also 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 causing 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.

The Appellants' reliance upon Springtree Properties, Inc. v. Hammond, 692 So. 2d 164 (Fla. 1997) is also misplaced. 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. At no point did the Springtree court do what the Appellants in this case urge this Court to do: abandon existing tort law to allow for

causes of action which Florida law holds does not exist.

There is no legal or public policy reason to impose the limitless liability which the Appellants want this Court to adopt by reversing the dismissal below. 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 and the dismissal should be affirmed.

CONCLUSION

For the foregoing reasons and the authorities cited, the decisions of the Third District Court of Appeal and trial court should be affirmed.

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