IN THE SUPREME COURT OF FLORIDA

BEVERLY WILLIAMS,

Petitioner,

v. **CASE NO.: SC05-1817**

CECELIA DAVIS, as Personal Representative of the Estate of Twanda Green, deceased,

Respondent.

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INITIAL BRIEF OF PETITONER BEVERLY WILLIAMS

On Discretionary Review of the
District Court of Appeal, Fifth District

Jack W. Shaw, Jr.
Florida Bar # 124802
220 N. Palmetto Ave.
Orlando, Florida 32801
P. O. Box 2266
Orlando, Florida 32802-2266
(407) 650-9008
Fax: (407) 650-9070
E-mail: jshaw@ewheelerpa.com
Attorneys for Petitioner

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PRELIMINARY STATEMENT

In this brief, the parties and witnesses will generally be referred to either by name or as they stood in the trial court, Respondent Cecilia Davis as Personal Administrator, Plaintiff in the trial court, as "Ms. Davis" or "Plaintiff"; Plaintiff's decedent, Twanda Green, as "Ms. Green"; Petitioner Beverly Williams, a Defendant in the trial court, as "Ms. Williams"; and Shafter Williams, her deceased husband, as "Shafter Williams". References to the Record on Appeal will be by the symbol "R: ", followed by the Record page involved. References to the Supplemental Record(s) on Appeal will be by the symbol "A: ", followed by the Respondent's District Court Appendix page number, since that appendix contains all of the items in the Supplemental Record(s).

All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This is an appeal in a personal injury case arising out of an August, 1997, intersection collision in which plaintiff's decedent, Ms. Green, was killed when the vehicle she was driving, as part of a procession that was shuttling rental cars from one place to another in the course of her employment, was hit broadside by a dump truck. (R5:1041; SR:4; A:1-19).

Ms. Green was traveling southbound on Sidney Hayes Road, while the dump truck was traveling west on Pine Street. (R5:1041; A:4). There had been no prior accidents at this intersection. (R3:446-452; A:73, 74). The intersection was controlled by a Yield sign in Ms. Green's direction. (A:4). As Ms. Green, driving the 5th of 6 cars in the procession, approached the intersection, she slowed down and pulled into the intersection to make a left turn. (A:4). She was hit broadside by the dump truck, sustaining injuries which proved fatal. (R5:1041; SR:11-13). As a result of the accident, plaintiff brought suit against a number of parties, including Mr. and Mrs. Williams. (R1:1-16; A:1-19).

Beverly Williams, together with her late husband, Shafter Williams, owned some land at the corner of this intersection. (A:17). Plaintiff asserted that this property was overgrown with bushes and trees so as to obscure the view of traffic proceeding west on Pine Street (i.e., her view of the oncoming dump truck). (A:17). It was plaintiff's theory that Mr. and Mrs. Williams owed a common law duty to clear this property of obstructions to the line of sight at the intersection, and that an obstruction to the decedent's line of sight (a tree on the property) contributed to causing the accident in question. (A:17). Alternatively, plaintiff asserted, Mr. and Ms. Williams had

assumed a duty to clear the property of obstructions to the line of sight by contracting with the County to have the County clear the property and bill Mr. and Ms. Williams for doing so. (A:17-18).

Ms. Williams' deceased husband, Shafter Williams, was eventually dismissed from the suit with prejudice (since he was dead when the suit was filed and no substitution of parties was ever effectuated, notwithstanding the filing of a suggestion of death). (R4:706-707).

There is no evidence anywhere in the Record of any statute or ordinance requiring the maintenance that Plaintiff claims should have been done.

Plaintiff claim of an assumed duty (based on an asserted contract with the County to clear the property and send bills to Mr. Williams), is based solely on Ms. Williams' deposition testimony and on the deposition testimony of Linda Norris, a former paralegal with the law firm representing plaintiff.

Ms. Williams testified that her husband would occasionally get "little yellow slips" from the County regarding the property, and that he had stated that he was not going to do anything in response, the city would have to do it. (R5:890). She testified that she never really looked at these slips, and

never discussed them with her husband. (R5:890). She stated that the slips said that if they did not maintain the property, the county would do so and bill them, but that she didn't know anything else about them. (R5:891). She testified that they never hired a tree service or the like to go to the property and do any trimming. (R5:897). Finally, she testified that in the five years or so they had owned the property, she had no knowledge as to whether or not any maintenance was done on the property by anyone. (R5:898). In short, her testimony, construed most favorably to plaintiff, is that the county unilaterally told her (now-deceased) husband to clear the property or the County would do so and send him a bill, and that he never cleared the property in response. There is no evidence that the County ever cleared the property, that the County ever sent them any bills for doing so, or that any bills the County might have sent were ever paid.

Ms. Norris (the paralegal from plaintiff's law firm) testified in deposition that she had had a single telephone conversation with Mr. Williams, and that in that conversation he had stated that he had paid the County a lot of money to clear that land, that the County had always cleared the land for him, and that his files would document that fact. (R5:849, 853). Initially, she testified that this conversation occurred after the suit had been

filed (R5:830) (as noted above, Mr. Williams died before suit was filed); subsequently, she testified that it happened before suit had been filed, after she sent him a letter requesting insurance information. (R5:837). Ms. Norris identified a memorandum to the file that she had prepared at the time of this alleged conversation, but had no recall of the events other than what was reflected in that memorandum. (R5:831).

The trial court, after hearing argument of counsel, entered Summary Final Judgment in favor of Ms. Williams. (R6:1194-1195).

Proceedings on Appeal

This appeal was timely instituted. (R6:1200-1205). Petitioner moved for appellate attorneys' fees, based on a Proposal for Settlement which had not been accepted. That motion was later denied by Order dated November 18, 2004.

A divided District Court reversed the trial judge. Davis v Dollar Rent A Car Systems, Inc., 909 So.2d 297 (Fla. 5th DCA 2004). The District Court majority held that the traditional rule of landowner nonliability to passing motorists for natural conditions on the premises were no longer viable in light of the decision in McCain v Florida Power Corp., 593 So.2d 500 (Fla. 1992), and that the decision in Whitt v Silverman, 788 So.2d 210 (Fla.

2001), although factually distinguishable, rejected the traditional distinction between natural and artificial conditions for purposes of determining liability (although also stating that there was nothing in the record to establish whether the foliage was natural as opposed to having been planted by Williams). Under that analysis, the panel majority concluded that the existence of the foliage created a foreseeable zone of risk, and hence that a common law duty existed.

Turning to the alternative theory of a contractually assumed duty, the panel majority, relying in part on its opinion in the companion case of Davis v Orange County Board of County Commissioners, 852 So.2d 370 (Fla. 5th DCA 2003), held that there were factual questions as to the existence of a contract between Orange County and Williams to clear the foliage on the property adjacent to the intersection.

Judge Griffin, dissenting, pointed out that Florida traditionally had not recognized the common law duty found by the majority. Judge Griffin, moreover, further noted that the Court in Whitt v Silverman, 788 So.2d 210 (Fla. 2001), had taken pains to limit its holding to a commercial property in an urban setting and that the reasoning in that case was tied to the fact that the driver was invited to come onto the property by the landowner, who

controlled ingress and egress. Failing to limit Whitt to a commercial context, she reasoned, would raise "unsettling concepts" in the law of negligence, such as requiring a landowner to anticipate the negligence of third parties and take affirmative steps to eliminate an environment in which the third party might act negligently. Judge Griffin questioned whether it was fair or desirable to leave entirely to a post hoc decision by a jury the question of whether a landowner had sufficiently protected those beyond the property who might benefit from having a clear view, noting that landowners had a right to know what is expected of them. Under the facts of this case, Judge Griffin concluded, there was no common law duty on the part of Williams.

The District Court unanimously certified that its decision passed on a question of great public importance, which it framed as follows: "Does the foreseeable zone of risk analysis established in McCain apply to private owners of non-commercial property containing foliage that blocks motorists' view of an adjacent intersection and causes an accident with resulting injuries?"

Petitioner timely moved for rehearing and for rehearing en banc. In response, the District Court issued a further split decision, again reaching the same result, on Sept. 1, 2005. The panel majority adhered to its decision that

McCain and Whitt compelled them to conclude that a foreseeable zone of risk analysis resulted in a conclusion that there was a common law duty sufficient to preclude summary judgment. The majority opinion further stated that residential landowners could be liable to passing motorists where protruding foliage obscured a roadway sign, and hence that such landowners should likewise be liable where such foliage obstructed the view of an intersection. The majority also stated that summary judgment was inappropriate because the Record did not disclose whether it was "natural" or "artificial" (i.e., whether Williams, or even a prior owner, had planted or fertilized the foliage)—an issue which had never been addressed in the trial court or in the briefs or arguments of the parties on appeal. The majority dismissed policy arguments as to the effect of imposing such liability, on the basis that they were unsupported by record evidence.

Judge Griffin, dissenting, referred extensively to the Proposed Final Draft No. 1 of the Third Restatement of the Law of Torts. Applying that analysis, she reasoned that "foreseeable zone of risk" was only part of a proper analysis as to whether a common law duty existed in any particular set of facts. Judge Griffin then pointed out that the only conduct on the part of Williams in this case was ownership of the property and the nonfeasance

of not cutting down existing foliage. Under Section 37 of the Draft, and comment F to that section, Judge Griffin reasoned, Williams had not created a risk, and hence no duty existed, absent policy reasons to create a duty, even if harm to another was foreseeable from the condition of the foliage. Concluding that no policy reason existed to support the creation of such a duty, Judge Griffin would have affirmed the trial court's summary judgment as to any common law duty claim.

There was no express ruling on the request for an en banc rehearing. Petitioner timely filed a Notice to Invoke Discretionary Jurisdiction, and on October 14, 2005, this Court entered its order postponing the issue of jurisdiction and establishing a briefing schedule.

SUMMARY OF ARGUMENT

This Court should accept jurisdiction in this case and should answer the certified question in the negative. The District Court was correct in its assessment that the issue involved here is of great public importance, since it contradicts prior case law and establishes a duty and a potential basis of liability that would apply to every landowner in Florida.

The trial court properly granted summary judgment in this case. As to a common law duty, Florida law has long held that a landowner is not under

a duty to maintain his or her premises so as to provide clear lines of sight for motorists on adjoining roads. Although this Court has retreated from that rule in the case of urban commercial establishments vis-à-vis their patrons, no previous Florida appellate decision has held that a residential landowner has such a duty to a passing motorist with whom there is no connection whatsoever. Creation of such a duty could not be confined to those whose property abutted an intersection. It would lead to unfortunate and unjustifiable discrepancies in a landowner's duties to those on the premises and those who are merely passing by.

There are significant problems with an approach that distinguishes between "natural" and "artificial" conditions, but which confines "natural" conditions to those which are, in essence, untouched by human hand. A more reasoned approach would be to posit the existence or nonexistence of duty, as a matter of law, on the location and use of the property. Applying that approach in the instant case, no common law duty exists, and the trial court properly granted summary judgment in this case.

An important function of tort law is to establish predictable rules by which one can govern conduct to avoid liability—and to avoid the considerable costs and uncertainties of litigation (including the burden on

the court system of that increased litigation). The traditional rule clearly accomplishes those goals, but the rule espoused by the District Court can only lead to increased litigation against landowners.

The record in the instant case demonstrates that the trial court properly entered summary judgment on plaintiff's alternative theory of an assumed duty. The only evidence to which plaintiff can point as showing a contractual duty to clear the property is the deposition testimony of Ms. Williams, which establishes only that the County sent her husband little slips of paper telling him to clean the property or they would do so and bill him for it, and the deposition testimony of a former paralegal in plaintiff's law firm, who claimed that the now-deceased Mr. Williams had told her that the County was clearing the property. The latter testimony is inadmissible hearsay, and cannot be relied on in connection with a summary judgment motion. Ms. Williams' testimony falls far short of establishing the contractual relationship plaintiff contends existed, and requires, in order to support plaintiff's position, the use of speculation, conjecture, and the impermissible piling of inference on inference.

The trial court was correct in granting Ms. Williams a summary judgment in this case, and the District Court erred in reversing that decision.

The District Court's decision should be quashed, the certified question answered in the negative, and the case remanded with directions to affirm the trial court.

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS DISCRETION IN FAVOR OF ACCEPTING JURISDICTION IN THIS CASE.

This Court has discretionary jurisdiction pursuant to Article V, Section 3(b)(4), Florida Constitution, the District Court having certified that its decision passed on a question of great public importance, which it framed as follows: "Does the foreseeable zone of risk analysis established in McCain apply to private owners of non-commercial property containing foliage that blocks motorists' view of an adjacent intersection and causes an accident with resulting injuries?".

This Court should exercise that discretion in favor of accepting jurisdiction, since the District Court was correct in its assessment that the decision is of great public importance. The District Court's decision overturns a long line of cases in which private landowners were held to have no common law duty to passing motorists. See, for instance, Pedigo v Smith, 395 So.2d 615 (Fla. 5th DCA 1981)(allowing tree on property to obscure

passing motorist's vision of stop sign not actionable); Evans v Silverman, 391 So.2d 231 (Fla. 3rd DCA 1980) (same); Dawson v Ridgley, 554 So.2d 623 (Fla. 3rd DCA 1989) (same as to telephone pole near exit from premises).

If, as the District Court held, such a common law duty now exists, it will potentially affect every owner of private property in this State. From the canopy roads of Tallahassee and the greenery of Winter Park, to the smaller towns of the Panhandle and the southwest of the State, to rural landowners outside any municipal boundary, any landowner whose property abuts a road will face potential liability to passing motorists for trees or privacy fences on his property that might obstruct a motorist's view of some transitory danger. Whether to impose such a wide-ranging duty is indeed a question of great public importance.

II. THIS COURT SHOULD HOLD THAT A RESIDENTIAL LANDOWNER HAS NO COMMON LAW DUTY TO PASSING MOTORISTS TO SO MAINTAIN HIS OR HER PROPERTY AS TO ENSURE LINES OF SIGHT.

The standard of review as to the existence of a duty is de novo, since it involves a pure question of law. The standard of review as to whether the record discloses the existence of a genuine factual dispute sufficient to

preclude summary judgment is that all disputed issues of material fact, and all reasonable inferences, must be construed in favor of the plaintiff, as the non-prevailing party. See Anderson v Morgan, 172 So.2d 845 (Fla. 3rd DCA 1965); Crepaldi v Wagner, 132 So.2d 222 (Fla. 1st DCA 1961). The issue in this case is whether there was a common law duty (the duty element of negligence, as opposed to the duty element of proximate cause); if there was such a duty, plaintiff has presented triable issues of fact. For the reasons stated below, however, there is and should be no such common law duty; the certified question should be answered in the negative.

The existence of a duty is a question of law for the court to decide. See McCain v Florida Power Corp., 593 So.2d 500 (Fla. 1992). If no reasonable duty has been abrogated, no negligence can be found, and summary judgment should be granted. See Cassel v Price, 396 So.2d 258 (Fla. 1st DCA 1981). The facts in this case demonstrate that Ms. Williams had no common law duty to plaintiff's decedent to trim the trees on this property so that motorists on the adjacent road would have a clear line of sight of approaching traffic. Accordingly, the certified question should be answered in the negative.

There is a long line of Florida cases applying the traditional rule

(which the District Court deprecatingly referred to as the "agrarian rule") that a landowner does not owe a common law duty to passing motorists to so maintain his or her property as not to obscure the motorist's vision of traffic conditions. See, for instance, Pedigo v Smith, 395 So.2d 615 (Fla. 5th DCA 1981)(allowing tree on property to obscure passing motorist's vision of stop sign not actionable); Evans v Silverman, 391 So.2d 231 (Fla. 3rd DCA 1980) (same); Dawson v Ridgley, 554 So.2d 623 (Fla. 3rd DCA 1989) (same as to telephone pole near exit from premises).

This Court held, nearly 4 months before the summary judgment hearing in this case, that this rule would not apply absolutely to a commercial venture (a gas station on a major road in Miami Beach) that, by its very nature, involves a continuous flow of traffic entering and exiting its premises for the commercial benefit of the landowner, when the landowner's customer, while leaving the gas station on the premises, struck two pedestrians. See Whitt v Silverman, 788 So.2d 210 (Fla. 2001).[1] We do not quarrel with the result reached on the facts in Whitt, but that is not the

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[1] Interestingly, plaintiff never cited Whitt to the lower court at the time of the 2001 summary judgment hearing. Indeed, the first time that plaintiff mentioned Whitt was in an amendment to motion for rehearing (A:39) and a memorandum of law (A:43), both served some 6 weeks after the motion for rehearing had been served.

present case. Here, the facts are vastly different than those that led to the holding that the commercial venture in Whitt had a common law duty.

Indeed, this Court in Whitt was painstaking in setting forth that its decision was the result of the factual situation before it. This Court stated (788 So.2d at 222, emphasis supplied): "We conclude that an inquiry as to the liability of a landowner under the circumstances presented here of a commercial business in an urban area specifically relying on the frequent coming and going of motor vehicles should be guided by a foreseeability analysis, which, as we have frequently stated, is governed by our pronouncements in McCain. In the instant case, the landowners were the owners of a commercial establishment, a service station, which by its very nature involves a continuous flow of traffic entering and exiting the premises for the commercial benefit of the landowners."

The property in the present case is not a commercial establishment, but a residential property. It is not in an urban area, but in a rural one. None of the vehicles involved (or any of their occupants) had ever been on the property. Ms. Williams' interests do not involve a flow, frequent or otherwise, of vehicular traffic onto and off of the property, and this case does not involve anyone either entering or exiting the property for

commercial benefit or any other reason. The tortfeasor driver in this case was not a patron of any business of Ms. Williams'. Neither, for that matter, was plaintiff's decedent. Both plaintiff's decedent and the tortfeasor driver were entirely unconnected with defendant's property; both were simply motorists who happened to be using the roads that border Ms. Williams' property at the time they collided. This case is totally different from Whitt.

A holding that residential landowners in such cases owed a common law duty to passing motorists could not be confined to those whose property abutted an intersection. It could easily be applied to a landowner whose foliage somehow obstructed the view of his or her neighbor's driveway, or of a child who suddenly darted into the street from behind a tree. Nor could it be restricted to foliage; liability would likewise flow from having a privacy fence which, although perfectly in compliance with all applicable ordinances, obscured the view of an intersection or a neighbor's driveway, or even from the failure to tell a guest that his car, parked in front of the premises, was obstructing the line of sight of passing motorists and had to be moved to protect children who might dart into traffic or cars pulling out of neighbors' driveways. The rule espoused by the District Court majority imposes a "duty in the air" of indefinable and unbounded proportions.

Imposition of such a common law duty likewise leads to unfortunate and unjustifiable discrepancies in a landowner's duties to those on the premises and those who are merely passing by. The duty a landowner owes to one on his or her premises depends on the person's status as an invitee, licensee, or trespasser. A person who enters the property of another falls into one of three classifications: invitee, licensee, or trespasser. See Barrio v City of Miami Beach, 698 So. 2d 1241 (Fla. 3rd DCA 1997), rev. den., 705 So. 2d 569 (Fla. 1998). The duty a possessor of land owes to the person on its premises depends on which category the visitor occupies. See Barrio v City of Miami Beach, 698 So. 2d 1241 (Fla. 3rd DCA 1997), rev. den., 705 So. 2d 569 (Fla. 1998).

In the case of a trespasser, the duty owed is simply to avoid willful and wanton injury and, if the trespasser is discovered, to warn of known dangerous conditions not readily apparent to ordinary observation. See Wood v Camp, 284 So.2d 691 (Fla. 1973); Post v Lunney, 261 So.2d 146 (Fla. 1972). Under that standard, no liability would exist here, since there was neither willful and wanton injury nor any dangerous condition not readily apparent to ordinary observation. However, under the rule espoused by the District Court, the same landowner is liable to a passing motorist; the

landowner would owe a higher duty to a passing motorist who never sets foot on the land than the landowner would owe to one who actually comes onto the property.

There is, of course, case law holding a landowner liable to a passing motorist where trees and the like on the land obscure the motorist's vision of a traffic control signal. Initially, we note that there is no claim that the foliage on the Williams land obscured Ms. Green's view of the Yield sign at the intersection. More fundamentally, the crucial distinction is between a condition <u>on</u> the landowner's property and a condition <u>outside</u> the property lines. Thus, in Armas <u>v Metropolitan Dade County</u>, 429 So.2d 59 (Fla. 3rd DCA 1983), the stop sign was "obstructed by foliage which had grown from the adjacent privately-owned property onto the dedicated right-of-way where the sign was located." (429 So.2d at 60); "the vegetation grew onto and over the city's property" (429 So.2d at 61). In <u>Morales v Costa</u>, 427 So.2d 297 (Fla. 3rd DCA 1983), the adjacent landowner had planted a black olive tree in the swale area. In <u>Morales</u>, the court carefully distinguished <u>Pedigo v Smith</u>, 395 So.2d 615 (Fla. 5th DCA 1981), and <u>Evans v Silverman</u>, 391 So.2d 231 (Fla. 3rd DCA 1980), <u>rev. den.</u>, 399 So.2d 1142 (Fla. 1981), which applied the traditional rule, stating (at 298):

> On the other hand, an obstruction of a public right-of-way by an adjacent landowner, even by something which grows and exists upon a private property, but which protrudes into and obstructs the public right-of-way, is an entirely different matter. The court, in Evans, specifically excluded the situation where an obstruction protruded onto public property. The users of a public right-of-way have a right to expect that it will not be unreasonably obstructed. In contrast, they have no such expectations with respect to lands that are entirely within the purview of private ownership.

The Third Amended Complaint, it should be noted, made no claim that the vegetation on the property crossed the property line, only that it obstructed the vision of drivers at or near the intersection.

In Sullivan v Silver Palm Properties, Inc., 558 So.2d 409 (Fla. 1990), this Court considered the case of a plaintiff injured in an auto accident caused in part by bumps in the road which in turn resulted from the subterranean growth of roots from the adjacent private property past the property line and under the road. The trees had been planted by a prior owner of the property some 50 to 70 years earlier. The jury found liability on the part of the landowner for not correcting the condition, but the District Court reversed, finding no duty to retard the subterranean root growth. This Court approved that decision. The Court rejected plaintiff's reliance on Price v Parks, 173 So. 903 (Fla. 1937), and Gulf Refining Co. v Gilmore, 152 So. 621 (Fla. 1933), on the basis that those cases involved artificial, rather than

natural, conditions. The Court further held that Armas v Metropolitan Dade County, 429 So.2d 59 (Fla. 3rd DCA 1983), and Morales v Costa, 427 So.2d 297 (Fla. 3rd DCA 1983), were distinguishable in that the off-premises obstructions of traffic signals in those cases presented an obvious hazard which was easily remedied, whereas the subterranean root growth in the case before it was slow, not easily detectable, and burdensome to remedy. Because of the remoteness of the relationship of the tree owner, the growth of the tree roots, and the resulting defect, the Court said, it cannot logically be held that the property owner created or caused the defect involved.

Similarly in the present case, although the condition is detectable and can be remedied, it involves a natural condition on the land, not an artificial one, and there is no allegation that the condition extended beyond the property line.

The District Court’s facile assumption that the rule it announced would have no major impact since it was merely imposing a duty of reasonable care will not withstand scrutiny. An important function of tort law is to establish predictable rules by which one can govern conduct to avoid liability—and to avoid the considerable costs and uncertainties of litigation (including the burden on the court system of that increased

litigation). The traditional rule clearly accomplishes those goals, but the rule espoused by the District Court can only lead to increased litigation against landowners (either as the sole defendant or as yet another party to be added to litigation against others). Not only will this lead to increased litigation costs, but it will add the uncertainty of speculating what a jury, with the benefit of hindsight, will determine to have been a reasonable course of action for a landowner to have taken to benefit those who pass by his or her property.

As the District Court noted, there are significant problems with an approach that distinguishes between "natural" and "artificial" conditions, but which confines "natural" conditions to those which are, in essence, untouched by human hand (an issue, we note, that had never been raised by the parties in this case). Under this strict construction of "natural", a condition would not be deemed "natural" if, for instance, a prior owner of the property had planted the tree, or the current owner had, at some time, fertilized the tree. The problems of proof inherent in such an approach seem obvious; for instance, a defendant landowner, for instance, would be faced with the task of locating and deposing all former owners of the property (some of whom could well be deceased or beyond the service of process) to

try to determine if they remembered planting or fertilizing the tree some unknown number of years before.

As Judge Griffin suggested, a distinction could easily be made between active conduct and passive failure to act. Under such a rule, for instance, a landowner might be liable if he or she planted or fertilized the tree in question, but not if a prior owner had planted the tree and the defendant landowner had entirely ignored the tree. Such a rule would not remove the burden of having to litigate such issues, but it would at least have the benefit of providing a rule of conduct and limiting the issues, and the needed discovery, in any such litigation. At the same time, that distinction, unless coupled with a broad interpretation of "natural" conditions, would lead to results that seem arbitrary: one landowner would be held liable for an accident caused in part by trees growing on his or her property (because he or she planted them), while his or her neighbor would be free of liability for precisely the same condition (because a prior owner had planted the trees and the subsequent owner had totally ignored them).

A more reasoned approach, we submit, would be to posit the existence or nonexistence of duty, as a matter of law, on the location and use of the property. While it is reasonable to expect the owner of a commercial

property on a main thoroughfare in Miami Beach, whose business depends on a constant stream of customers in vehicles, to exercise care not to obstruct the view of those customers as they leave the property (the situation in Whitt), it is wholly different to expect the owner of a noncommercial property abutting a road in a rural or suburban setting, who has no interest in motorists entering or leaving the property (the facts of the present case), to take action (for instance, by trimming trees that the owner may find aesthetically pleasing or a buffer against noise) at his or her own time and expense solely to benefit total strangers who happen to use the adjoining road, and with whom the landowner would otherwise never have had any contact.

For all of these reasons, we submit, this Court should answer the certified question in the negative, and hold that no common law duty exists in the circumstances of the present case. The decision below should be reversed, and the cause remanded with instructions to affirm the trial court.

III. THE TRIAL COURT CORRECTLY ENTERED SUMMARY JUDGMENT ON PLAINTIFF'S ALTERNATIVE THEORY OF A CONTRACTUAL DUTY TO CLEAR THE PROPERTY.

We recognize that the applicable standard of review requires that all disputed issues of material fact, and all reasonable inferences, must be construed in favor of the plaintiff, as the non-prevailing party. See Anderson v Morgan, 172 So.2d 845 (Fla. 3rd DCA 1965); Crepaldi v Wagner, 132 So.2d 222 (Fla. 1st DCA 1961). Even under that exacting standard of review, the summary judgment in this particular case should be reinstated as to the contractual duty claim. There is no basis for reversing the summary judgment, since the record facts in this case disclose that there is no factual basis for imposing liability under plaintiff's theory of an assumed duty to clear the property.

Once the Court has obtained jurisdiction over a case, it has the discretion to review the entirety of the case, not merely the portion which forms the basis for jurisdiction. See Savoie v State, 422 So.2d 308 (Fla. 1982). Since this issue has been briefed and argued below, and is dispositive, this Court should review this issue as well.

A summary judgment may properly be based on a conclusive showing that plaintiff will be unable to prove an essential element of his case. See

Food Fair Stores of Florida, Inc. v Patty, 109 So.2d 5 (Fla. 1959); Williams v McNeil, 442 So.2d 296 (Fla. 1st DCA 1983). The purpose of a summary judgment motion is to determine whether there is sufficient evidence to justify a trial. See Hart Properties, Inc. v Slack, 159 So.2d 236 (Fla. 1963); Connolly v Sebeco, Inc., 89 So.2d 482 (Fla. 1956). In the present case, it is abundantly clear that plaintiff was wholly unable to present any admissible evidence in support of its theories of liability against this defendant, and that the record before the trial court required the entry of summary judgment in favor of Ms. Williams.

Plaintiff relies entirely on the deposition testimony of Beverly Williams and of Linda Norris, formerly a paralegal with plaintiff's counsel's law firm, as to the alternative theory of a duty assumed by contract. Neither will support the plaintiff's theory, and it is clear that plaintiff had no admissible evidence to introduce in support of these theories of recovery.

Ms. Williams testified that her husband would occasionally get "little yellow slips" from the County and that he had stated that he was not going to do anything in response, the city would have to do it. She testified that she never really looked at these slips, and never discussed them with her husband. She stated that the slips said that if they did not maintain the

property, the city would bill them, but that she didn't know anything else about them. She testified that they never hired a tree service or the like to go to the property and do any trimming. Finally, she testified that in the five years or so they had owned the property she has no knowledge as to whether any maintenance was done on the property or not.

In short, her testimony, construed most favorably to plaintiff, is that the county unilaterally told her (now-deceased) husband to clear the property or they would do so and send him a bill, and that he never cleared the property in response. There is no evidence that the County ever followed through and cleared the property, that the County ever sent any bills, or that any bills the County might have sent were ever paid. Nor is there any evidence to indicate whether whatever clearing of the property the County had in mind was the trimming back of trees or simply the cutting of tall weeds along the right-of-way.

In order to establish that there was an agreement by the late Mr. Williams to pay the County to clear the land (and we will assume for the balance of this argument that the clearing was to include the trimming of trees, rather than simply cutting tall weeds), plaintiff must demonstrate, by admissible evidence, that the County in fact cleared the land, that the County

had then sent Mr. Williams a bill for that clearing, and that he had paid the bill or agreed to pay it. There is no evidence whatsoever to support any of these three essential elements of plaintiff's claim. Thus, plaintiff must rely exclusively on speculation and conjecture as to all three of these vital elements, or alternatively must attempt to pile one inference atop another to try to prove these essential elements of plaintiff's claim. Neither course is legally acceptable.

There must be evidence, rather than speculation or conjecture, to establish the elements of the claim. See Harris v. Josephs of Greater Miami, Inc., 122 So.2d 561 (Fla. 1960); Victoria Hospital v. Perez, 395 So.2d 1165 (Fla. 1st DCA 1981). A verdict may not rest on speculation or conjecture. See Greene v. Flewelling, 366 So.2d 777 (Fla. 2nd DCA 1978), cert. den., 374 So.2d 99 (Fla. 1979). Summary judgment is not precluded where the opposing party's evidence raises only speculation and conjecture. See Food Fair Stores of Florida, Inc. v. Patty, 109 So.2d 5 (Fla. 1959); F&R Builders v. Lowell Dunn Co., 364 So.2d 826 (Fla. 3rd DCA 1978). Here, plaintiff clearly had to rely on speculation and conjecture in attempting to avoid entry of summary judgment, which Florida law will not permit.

Nor may plaintiff rely on the pyramiding of inferences to support these

essential elements of the claim. In order to reach the result plaintiff seeks to obtain, the jury would first have to infer, from the mere fact (assuming, of course, that the jury accepted it as fact) that Mr. Williams received "little yellow slips" from the County telling him to maintain the property or the County would do so and bill him for it, that the County in fact did follow through on its stated intent and trimmed the vegetation. There is no evidence that this occurred. It is equally reasonable, if not more so, to conclude that the County did not do so, especially in light of plaintiff's claims as to the alleged overgrown vegetation.

From that first inference, the jury would then have to infer that the County then sent Mr. Williams a bill for doing so. Again, there is no evidence to support that inference. It is at least equally likely that if the County ever did clear vegetation on the right of way, it did so as part of the normal services provided by the County and that it did not send any bill to the adjoining landowner.

Finally, the jury would then have to infer that Mr. Williams paid (or agreed to pay) such a bill. Once again, there is no evidence to support that conclusion. It is at least equally likely that Mr. Williams simply ignored any

such bill, just as he had ignored whatever those "little yellow slips" said.

Under Florida law, it is forbidden to pile one inference upon another inference unless it can be shown that the first inference has been established to the exclusion of any other reasonable inference. See Nielsen v City of Sarasota, 117 So.2d 731 (Fla. 1960); Greenhouse, Inc. v Thiermann, 288 So.2d 566 (Fla. 2nd DCA 1974); Busbee v Quarrier, 172 So.2d 97 (Fla. 1st DCA 1965), cert. den., 177 So.2d 474 (Fla. 1965). Before it can support a further inference, the first inference must rise to the status of an established fact. See La Barbera v Millan Builders, Inc., 191 So.2d 619 (Fla. 1st DCA 1966); McCormick Shipping Corp. v Warner, 129 So.2d 448 (Fla. 3rd DCA 1961).

In relying on an inference as proof of a fact in a civil case, that particular inference must be proven to preponderate over all other reasonable inferences. See Sheperd v Finer Foods, Inc., 165 So.2d 750 (Fla. 1964); Borrell-Bigby Electric Co., Inc. v United Nations, Inc., 385 So.2d 713 (Fla. 2nd DCA 1980). In the present case, those tests have not been met; none of the inferences on which plaintiff attempts to rely have been established to preponderate over other reasonable inferences, much less to have been so established as to exclude other reasonable inferences and rise to the level of established fact. In short, plaintiff is left with a yawning chasm in its chain of

proof, and clearly has failed to prove essential elements of the claim against this defendant.

Plaintiff cannot bridge that chasm with the deposition testimony of Ms. Norris. Ms. Norris testified in deposition that she had had a single telephone conversation with Mr. Williams, and that in that conversation he had stated that he had paid the county a lot of money to clear that land, that the county had always cleared the land for him, and that his files would document that fact. Ms. Norris had no independent recall of this purported conversation when her deposition was taken, and could only testify to what she had written in a memorandum to file.

Ms. Norris' testimony is clearly hearsay. As such, it is insufficient to create a disputed issue of fact, since fact issues must arise from evidence admissible at trial. See Zoda v Hedden, 596 So.2d 1225 (Fla. 2nd DCA 1992); Topping v Hotel George V, 268 So.2d 388 (Fla. 2nd DCA 1972); Hurricane Boats, Inc. v Certified Industrial Fabricators, Inc., 246 So.2d 174 (Fla. 3rd DCA 1971); Florida Rule of Civil Procedure 1.510(e). Documents submitted in conjunction with a summary judgment motion must be of a type admissible at trial. See Landers v Milton, 370 So.2d 368 (Fla. 1979); Williams v McNeil, 442 So.2d 269 (Fla. 1st DCA 1983); Thompson v

Citizens National Bank of Leesburg, 433 So.2d 32 (Fla. 5th DCA 1983).

The Norris testimony does not come within the exception for admissions of a party opponent, since Mr. Williams is not and never has been a party to this action during his lifetime. The rationale for this exception is that a party cannot complain about being unable to cross-examine himself. See State v Elkin, 595 So.2d 119 (Fla. 3rd DCA 1992). That rationale does not apply here, since Mr. Williams is dead.

Nor does the testimony come within the exception for statements of then-existing state of mind under Section 90.803(3), Florida Statutes, since that exception is limited to situations in which state of mind is an issue, and that is not the situation here. See Pacifico v State, 642 So.2d 1178 (Fla. 1st DCA 1994). If there was no contract, it is entirely irrelevant if the late Mr. Williams might have thought that there was such a contract (and even that is more than the Norris testimony would prove). And if the purported statements are considered as admissions against interest so as to be admissible under either Section 90.803(18) or Section 90.804(3), Florida Statutes, plaintiff must then contend with the fact that they would then be inadmissible under the Dead Man's Statute, Section 90.602, Florida Statutes.

Serious issues of trustworthiness of the memo also exist. Leaving

aside the fact that Ms. Norris worked for plaintiff's counsel at the time of the alleged conversation, as well as the ethical difficulties of a paralegal speaking directly to an opposing party, she initially testified that she spoke to Mr. Williams after the suit had been filed (after his death) only to later state that it was before suit. Her recollection in the deposition of the conversation is quite limited, essentially consisting of what was written in the memo. It simply does not bear sufficient indicia of trustworthiness to be admissible.

Finally, even if the statements were somehow admissible, they simply do not demonstrate the existence of any contract or other agreement between Mr. Williams and the County. At most, they show that the County told Mr. Williams that if he did not cut the weeds (not trim the trees), they would do so and send him a bill. There is no evidence that he ever cut the weeds (and Mrs. Williams testified that he did not), that the County ever sent him a bill for doing so, or that he paid any bill the County may have sent him. And even if there had been evidence that he had paid a bill the County had sent for cutting the weeds, that <u>still</u> does not demonstrate the existence of a contract or show the voluntary assumption of any duty—instead, it is at most compliance with a governmental mandate to do as he was told or pay for

someone else to do it. Agreements are not forged from such a situation.

Thus, there simply is no factual basis on which plaintiff could avoid the entry of summary judgment in favor of this defendant. The trial court was correct, and its decision should be reinstated.

CONCLUSION

For all of the reasons set forth above, the trial court was correct in granting Ms. Williams a summary judgment in this case, and the District Court erred in reversing that decision. The District Court's decision should be quashed, the certified question answered in the negative, and the case remanded with directions to affirm the trial court.

Respectfully submitted,

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Jack W. Shaw, Jr.
Florida Bar # 124802
220 N. Palmetto Ave.
Orlando, FL 32801
Post Office Box 2266
Orlando, FL 32802-2266
(407) 650-9008
(407) 650-9070 Facsimile
E-mail: jshaw@ewheelerpa.com
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail, postage prepaid, this ______ day of November, 2005, to Madison B. McClellan of Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sparando, Waterside Professional Building, 221 E. Osceola Street, Stuart, FL 34994; Edna L. Caruso, 1615 Forum Place, Suite 3A, West Palm Beach, FL 33401-2320; David S. Johnson, Shook Hardy & Bacon, LLP, 100 North Tampa Street, Suite 2900, Tampa, FL 33602-5810; and to Launa Rutherford of Grower, Ketcham, More, Rutherford, Noecker, Bronson, Siboni & Eide, P.A., 390 N. Orange Ave., Suite 1900, Post Office Box 538065, Orlando, FL 32853-8065.

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Attorney

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief was prepared in 14 point Times New Roman font.

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Attorney