IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC05-1817

BEVERLY WILLIAMS,

Petitioner,

-vs-

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

Respondent.
_________________________________/

AMENDED BRIEF OF RESPONDENT ON THE MERITS

On Appeal from the Fifth District Court of Appeal of the State of Florida

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PREFACE

This is a Petition to review the Fifth District's opinion based upon a question certified to be of great public importance. Petitioner was one of the Defendants in the trial court and Respondent was the Plaintiff. Herein the parties will be referred to by proper name, or as they stood in the trial court. The following symbols will be used:

(R)	- Lower Tribunal Record-on-Appeal
(5th DCA R)	- 5th DCA Record-on-Appeal
(SR)	- Supplemental Record-on-Appeal
(A)	- Respondent's Appendix
(DA)	- Appendix to Initial Brief of Appellant Cecilia Davis filed in the Fifth District Court of Appeal
(IB)	- Petitioner's Initial Brief

STATEMENT OF THE CASE AND FACTS

This case arose out of a fatal car accident which occurred on August 25, 1997 in which the daughter of Plaintiff Cecilia Davis, Twanda Green, was killed. The original Complaint was filed on June 14, 1999 (R1:1-16). This appeal involves the entry of summary judgment on the allegations in the Third Amended Complaint, which alleged that a private owner of non-commercial property whose foliage blocks motorists' view of an adjacent intersection owes a duty of care to such motorists (SR1-19). The Fifth District Court of Appeal certified the following question to be of great public importance when it reversed the summary judgment in Williams' favor, Davis v. Dollar Rent A Car Systems, Inc., et al., 909 So.2d 297, 305 (Fla. 5th DCA 2004):

> 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?

The Third Amended Complaint alleged that Twanda was killed as she was driving a rental car in a procession of other rental cars. Dollar Rent-A-Car, one of the

other Defendants, was conducting in a car shuttling procedure whereby drivers of rental cars would form a procession with cars following each other in formation from a beginning point to a destination which may be unfamiliar or unknown by one or more of the drivers of the vehicles (SR1:1214-32). Twanda was driving a vehicle as part of the procession when she entered the intersection of Pine Street and Sidney Hayes Road in Orlando. She was killed when a dump truck approaching from her left struck her vehicle broadside (Id.;R5:1041). A number of Defendants were named in the complaint, but this appeal involves only Defendant Beverly Williams (SR1:1214-32).[1]

The Allegations of the Third Amended Complaint Alleged a Duty Owed by Property Owner Williams to Passing Motorists Such As Twanda

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1 /Ms. Williams' late husband named Shafter was named in the complaint, but he died before the complaint was filed (R5:1041); he and his estate were eventually dismissed from the case with prejudice (R4:706-7).

Count VIII (SR1:1230-31) alleged that Williams owned the property located at the southeast corner of the "T" intersection of Pine Street and Sidney Hayes Road, and that Williams' fenced property was overgrown with bushes and trees to such an extent that it obscured the view for westbound traffic on Pine Street (Twanda Green), of the northbound lane of Sidney Hayes Road up to a distance of approximately 12 feet from the intersection.[2] Davis alleged that Williams had a duty to maintain the vegetation on her property so that it would not obstruct the vision of drivers operating vehicles at or near the intersection, and that due to her failure to fulfill that duty by letting the property become overgrown, Williams became liable for damages arising from the death of Twanda Green (SR1:1230-31).

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[2]/Photographs of the overgrowth appear at various places in the record (R5:886-927,928-32,1037;A1-9), as does a survey of the Williams' property (R5:1038;A10).

Count VII was brought against Orange County, and alleged that at the time of the accident Orange County was under contract with the Williamses, who had undertaken the duty to maintain their property located at the intersection where the accident occurred, and therefore had a duty to maintain the property "so as to prevent all overgrowth of trees and bushes that might obstruct the vision of drivers traveling on Pine Street and Sidney Hayes Road." (SR1:1228-30). The result of the County's and Williams' breach of that duty was that Twanda Green was hit broadside by oncoming traffic, resulting in her death (SR1:1228-30).

The First Hearing on Defendant's Motion for Summary Judgment

A hearing took place on September 29, 2000 before Judge William C. Gridley (R5:1040-1045) on Williams' Amended Motion to Dismiss Third Amended Complaint With Prejudice and for Final Summary Judgment (R4:690-3) and on the County's Amended Motion to Dismiss (R3:508-14). At that hearing, Williams' counsel argued that Williams

could not be liable because, as a matter of law a landowner has no legal duty to passing motorists for natural conditions on the landowner's property which obstruct their view (R5:1041). Williams' counsel also argued that there was no assumption of any duty by either Mr. or Mrs. Williams with respect to the maintenance of the sight lines at the intersection, and that there was no evidence in the record of any agreement between the Williamses and the County which would imply the assumption of a duty on the part of the Williamses to maintain sight lines at the intersection (R5:1041-42). Plaintiff's counsel responded there is a common law duty on the part of a landowner not to create a foreseeable zone of risk pursuant to the Florida Supreme Court's opinion in McCain v. Florida Power Corp., 593 So.2d 500 (Fla. 1992) (R5:1041-2).

On the issue of the Williams' motion for summary judgment, Plaintiff's counsel maintained that a former paralegal with her law firm had been told by Mr. Williams before his death, and so testified in her

deposition, that there was a contractual relationship between the Williamses and the County regarding maintenance of the property (R5:1043-4; see also R5:809-85). The Williams' counsel countered that if such a conversation took place with Mr. Williams, it was untrustworthy because it would not have been through counsel, and would be hearsay (R5:1044). At the end of the hearing, the court denied the motions to dismiss and the motion for summary judgment (R5:1045), and in the written orders that followed Judge Gridley dismissed Shafter Williams and his estate with prejudice, denied the Williams' summary judgment motion without prejudice, denied the County's motion without prejudice, and ordered both Defendants to serve their answers to the Third Amended Complaint (R4:706-7, 708-9).

Williams filed her Answer and affirmative defenses (R4:737-42) and her Second Amended Motion to Dismiss Third Amended Complaint with Prejudice and for Final Summary Judgment (R5:788-91). The County argued that

Plaintiff's contentions under paragraph 64 through 69 of the Third Amended Complaint to the effect that there was a contract between Williams and the County for the County to clear the overgrowth on Williams' property on a regular basis so that it would not obstruct the vision of drivers, was unsupported by any evidence in the record of any such contract (R5:785). Consequently, the County argued that no duty to maintain the Williams property was imposed on it, and therefore it was entitled to summary judgment.

The Williams' motion also argued that the court had previously ruled that there was no duty to a passing motorist to prevent vegetation from obscuring sight lines at an intersection, that there had been no assumption by the Williams of any such duty, and that there was no admissible evidence of an agreement between the Williams and the County regarding maintenance of the property which would imply the assumption of a duty on the part of the Williams (R5:788-91).

Deposition Testimony of Beverly Williams Reveals Fact Issues Precluding Summary Judgment

At her November 3, 2000 deposition, Mrs. Williams testified that she lived at 9215 Cypress Cove Drive, Orlando, Florida, for the preceding 8 years (R5:886-927; Depo. p.4).[3] She and her husband also owned the property at the corner of Pine and Sydney Hayes Road (Id.; p.9). With regard to maintenance costs or expenses at the residential property on Pine and Sydney Hayes, Mrs. Williams testified that her husband "would get like a yellow slip or something would come in, and ... the City is going to have to - - we don't do it, the City's going to have to do it." (Id.; pp. 17-18). Mrs. Williams confirmed giving some of the yellow slips to a claims adjuster from State Farm and testified: "If we didn't maintain it, the City was going to - - would do it, and they stated something about they would bill us." (Id.; pps 21-22). Her husband showed her the

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[3]/Although Beverly Williams' November 3, 2000 deposition, with attachments is found at R5:886-927, Respondent will refer directly to the deposition page for ease of reference.

property at the corner of Pine Street and Sydney Hayes Road (Id.; pp 28-29). Mrs. Williams identified nine photographs of the property and intersection where it is situate (Id.; pps 42,44,46-48,53,60;A1-9). She could not identify who cut down a portion of the vegetation on her property (6 months after the accident) as shown in Exhibits 4 and 5 (Id.; pps 46-48,63;A4,5).

The Photographs from Williams' Deposition Show Overgrown Foliage Inside Chain Link Fencing Obstructing Motorists' View at the Intersection

Photograph Exhibit 1 to Williams' deposition shows an easterly view of Pine Street, a residential street with driveways and post boxes on either side; Plaintiff's decedent came down this street toward the "T" intersection, intending to make a left turn (A1). Williams testified the property at the top right-hand corner belonged to her husband (R5:886-927;Depo pp 43-44;A1). Exhibit 2 shows foliage on the west side of Sidney Hayes Road, across from the "T" intersection with Pine Street as the vertical line of the "T," and

Sidney Hayes Road depicted as the horizontal line of the "T" (A2;R5:1038). Exhibit 3 shows Williams' property and overgrown foliage from a view on the other side of Pine Street (A3;Depo pp 45-46). Exhibits 4 and 5 show foliage cut down at the corner of the Williams' property (A4,5).[4] Exhibit 6, taken in February of 1998 shows the corner of Williams' property; she had not previously observed that the chain link fence was partially torn down (A6;Depo p 48). Exhibit 7 (an FHP photograph taken the day of the accident) shows the Williams' property at the top left of the picture, with the fence around the foliage in disrepair (A7;Depo pp 49-50). Exhibit 8 is an FHP photograph taken the day of the accident, looking from Sidney Hayes Road, east down Pine Street, with the Williams' property on the right (A8;Depo p53). Exhibit 9 is a western view

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[4]/Those three photographs were taken in February of 1998 according to Plaintiff's counsel (R5:886-927;Depo p 48).

on Pine Street, looking toward its "T" intersection with Sidney Hayes Road (A9; Depo pp 56-57).

The Trial Court Grants Williams' Motion for Summary Judgment

A hearing was held on those motions on August 23, 2001 (SR1:1233-50). Plaintiff's position was that there was a contract between the County and the Williamses based on the statement by Mr. Williams recited in the deposition of the firm's former paralegal, Ms. Norris (SR1:1241;R5:809-85). Plaintiff argued that in addition to the contractual obligation to clear the property, Williams had a common law duty to maintain the property so as to not obstruct the view of motorists passing through the intersection (Id.). Mrs. Williams' deposition testimony confirmed the same (R5:886-927).

The trial court entered Final Summary Judgment in Williams' favor (R6:1200-1205). Plaintiff filed a Motion for Rehearing (R5:1020-29), and argued that the deposition of Linda Norris, the former paralegal for

Plaintiff's counsel's firm, supported the allegation of a contract between the Williamses and the County. And photographs of the vegetation on the property also precluded summary judgment (R5:1023). Both the Norris deposition (R5:809-85) and the Williams deposition (R5:886-927) each with its attachments had been filed prior to the hearing held before Judge Coleman (R5:807-08;SR1:1233-50).

In an amendment to the motion for rehearing, Plaintiff also cited this Court's opinion in Whitt v. Silverman, 788 So.2d 210 (Fla. 2001), where this Court held for the first time that landowners have a duty to motorists to prevent visual obstructions created by foliage growing on the landowner's property from obstructing the view of such motorists on adjoining roadways (DA38-40). The trial court denied the motion for rehearing (R6:1196-7), and Plaintiff's appeal to the Fifth District timely followed (R6:1200-05).

Proceedings on Appeal

A divided panel of the Fifth District Court of Appeal reversed the summary judgment in Williams' favor. McCain v. Florida Power Corp.

593 So.2d 500 (Fla. 1992)Whitt v. Silverman, 788 So.2d 210 (Fla. 2001), the Fifth District held "that the foreseeable zone of risk standard must be applied to determine whether a duty of care was owed by a private landowner to a motorist injured in an accident allegedly caused by foliage on the owner's property that obstructed the motorist's view of the intersection." *Whitt* by stating (788 So.2d at 222):

> Accordingly, we conclude that under our analysis in *McCain*, the landowners' conduct here created a foreseeable zone of risk posing a general threat of harm toward the patrons of the business as well as those pedestrians and motorists using the abutting streets and sidewalks that would reasonably be affected by the traffic flow of the business. Notwithstanding this conclusion, of course, cases like this must be subjected to a factual determination of whether the landowners actually breached their duty under the particular circumstances and whether the accidental death or injury was a proximate result of any breach of that duty. In other words, although we conclude that the landowners had a duty of care, a discrete factual analysis and determination is required to determine the

landowners' alleged responsibility in each case.

Thus, the issue in the case *sub judice* relating to whether private owners of non-commercial property whose foliage blocks a motorist's view of adjacent highways or intersections have a duty of care, has already been decided by this Court. Secondly, this Court need not exercise its discretionary jurisdiction as this issue is likely to affect only a discrete number of property owners.

The arbitrary distinction of rural versus urban property, is no longer an appropriate basis upon which to impose or excuse liability upon the landowner for harm or injuries which occur off the property, but are due to or arise out of a condition which exists on the property. That conclusion is equally applicable to the outdated distinction of whether the condition on the property is artificial or natural, or located in a rural, urban or suburban area. Under the Whitt v. Silverman, supra, it is the facts as alleged (or encountered) which may give rise to the duty of care

under the particular circumstances of each case. The existence of such a duty is a question of law for the courts to determine.

The application of the *McCain* analysis to determine the existence of a duty placed upon a defendant to either lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses, can be applied with sufficient uniformity in this context. Even under varied factual circumstances, the imposition of a legal duty on certain property owners accomplishes the desirable public policy goal of minimizing the unreasonable risk of harm to others (passing motorists), by placing the legal, moral and financial responsibility on the appropriate party (the property owner whose foliage may create a foreseeable risk of harm to others).

This Court need not exercise its jurisdiction over the remaining issue of whether Williams assumed a contractual duty to clear the property of foliage, as

that issue is outside the scope of the certified question.

QUESTION PRESENTED

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?

ARGUMENT

Standard of Review

The *de novo* standard of review applies to summary judgments. Menendez v. The Palms West Condo Ass'n, Inc., 736 So2d 58 (Fla. 1st DCA 1999) and the rules which govern summary judgment are all well settled. First, a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact, and the court must draw every possible inference in favor of the party against whom summary judgment is sought. Summary judgment should not be

granted unless the facts "are so crystalized that nothing remains but questions of law." Moore v. Morris, 475 So.2d 666, 668 (Fla. 1985). The crux of every summary judgment proceeding was succinctly presented in Dobbs v. Doblitz, 425 So.2d 1207 (Fla. 4th DCA 1983), where the Fourth District stated that "if pleadings, depositions, answers to interrogatories, admissions, affidavits and other evidence in the file raise the slightest doubt upon any issue of material fact, then a summary judgment may not be entered." It is crucial to remember that a defendant's burden on summary judgment is not simply to show that the facts support its theory of the case. Rather, it must conclusively demonstrate that the facts show that the plaintiff cannot prevail. Burkett v. Parker, 410 So.2d 947, 948 (Fla. 1st DCA 1982). Even where the evidence as to a material fact is undisputed, summary judgment may not be entered if there are conflicting inferences of fact reasonably deducible from that undisputed

evidence. B.D. Ham v. Heintzelman's Ford, Inc., 256 So.2d 264, 267 (Fla. 4th DCA 1971).

And as the Fifth District observed below, Clay Elec. Co-op, Inc. v. Johnson

873 So.2d 1182 (Fla. 2003)Whitt v. Silverman, supra, and stated: "In *Whitt*, we held that the landowner owed a duty of care to a pedestrian who was injured in an automobile accident as a result of foliage on the premises that impaired the driver's view of the sidewalk, thus causing or contributing to the accident." Whitt solely to cases involving ingress and egress at a commercial property.[5] Rather, as the Fifth District correctly held in *McCain* "zone of risk" analysis applies equally to private owners of non-commercial property whose foliage blocks a motorist's

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5 / "Notwithstanding this conclusion, of course, cases like [Whitt] must be subjected to a factual determination of whether the landowners actually breached their duty under the particular circumstances and whether the accidental death or injury was a proximate result of any breach of that duty." Whitt, 788 So.2d at 222.

view of an adjacent intersection. Landowners, in this case the Williamses, owed a duty of care to passing motorists, like Plaintiff's decedent Twanda Green, based on the harm posed by the obstructing foliage.

POINT I ON APPEAL

THIS COURT NEED NOT EXERCISE ITS DISCRETION TO ACCEPT JURISDICTION AS THE ISSUE IN THIS CASE IS NOT NOVEL, AND IS LIKELY TO AFFECT ONLY A DISCRETE NUMBER OF PROPERTY OWNERS

The panel's opinion is not one of exceptional importance, as it is not likely to affect large numbers of persons, nor interpret a fundamental legal or constitutional right. See *e.g.*, In The Interest of D.J.S., 563 So.2d 655 (Fla. 1st DCA 1990); Andrews v. State, 536 So.2d 1108 (Fla. 4th DCA 1988).

Williams erroneously attributes to the panel's decision, the reversal of longstanding established law in Florida with respect to duties imposed upon landowners whose property abuts a public road or street (IB12-13;M/Rhg. *En Banc*, 5th DCA R39-45,¶6). This Court, not the Fifth District panel, rejected the agrarian rule in favor of Whitt v. Silverman, supra.

POINT II ON APPEAL

PRIVATE OWNERS OF NON-COMMERCIAL PROPERTY WHOSE FOLIAGE BLOCKS MOTORISTS' VIEW OF ROADWAYS AT, OR LEADING TO AN ADJACENT INTERSECTION OWE A DUTY OF CARE UNDER THE *McCAIN* FORESEEABLE ZONE OF RISK ANALYSIS

The narrow issue in this appeal is simply whether this Court's pronouncements and reasoning in Whitt apply with equal force to private landowners of non-commercial property. The answer to that query is yes. See fn. 7, infra. The allegations of Davis' Complaint aver a duty owed by Williams to Plaintiff's decedent (SR1:1214-32):

72. At all times material hereto, Defendants WILLIAMS were the owners of real property located at the northeast corner at or near the intersection of Sidney Hayes Road and Pine Street in Orlando, Orange County, Florida.

73. That on or about August 25, 1997, decedent Twanda Green was operating a vehicle at or near the above-described intersection when she was hit broadside by oncoming traffic resulting in her death.

74. That according to the Investigative Report of the Florida Highway Patrol, said property was overgrown with bushes and trees thereby obscuring the view for westbound traffic on Pine Street, of the northbound lane of Sidney Hayes Road, up to a distance of approximately 12 feet from the intersection.

75. Defendants WILLIAMS had a duty and/or assumed a duty to maintain the vegetation growing on their property so that the vegetation would not obstruct the vision of drivers lawfully operating vehicles at or near the intersection of Pine Street and Sidney Hayes Road, Orlando.

76. That, pursuant to his duty, implied or assumed by defendant WILLIAMS, defendant WILLIAMS entered into a contract with defendant ORANGE COUNTY whereby defendant ORANGE COUNTY was to clear certain portions of defendant WILLIAMS property for consideration. For some time, ORANGE COUNTY did clear and maintain the vegetation growing on certain portions of defendant WILLIAMS' property. When defendant ORANGE COUNTY failed to clear that portion of defendant WILLIAMS property as agreed, then defendant WILLIAMS had a duty to clear the property himself and not let it become overgrown.

77. As a result of Defendant WILLIAMS failure to maintain their property in accordance with their duty to keep the property maintained in such a way so as not to obstruct the view of traffic at or near the intersection of Pine Street and Sidney Hayes Road, Twanda Green was struck and killed as she entered that intersection.

Whitt v. Silverman Imposes a Duty Upon Landowners to Maintain Their Property Free of Unsafe Obstructions to the View of Passing Motorists

In McCain's foreseeability zone of risk analysis, and held a landowner has a duty to maintain its property free of unsafe obstructions to the view of motorists. Whitt, 788 So.2d at 222. This Court held that, consistent with the trend in other jurisdictions, the conditions **on** a landowner's property resulting in injuries or damages to a plaintiff **off** the landowner's premises should be evaluated by established principles of negligence, rather than arcane references to urban versus rural descriptors. Id. Applying the Davis) rejected the very cases relied upon by Williams in her Brief (IB 12,15,19), Pedigo v. Smith, 395 So.2d 615 (Fla. 5th DCA 1981) and Bassett v. Edwards, 30 So.2d 374 (Fla. 1947); Evans v. Southern Holding Corp., 391 So.2d 231 (Fla. 3d DCA) pet. rev. denied, 399 So.2d 1142 (Fla. 1981). See Whitt v. Silverman, supra.

Williams incorrectly argues that Whitt v. Silverman, supra, applies only to commercial

landowners. However, the Whitt opinion is not limited in that manner, as the Fourth District recognized in Gibbs v. Hernandez, 810 So.2d 1034, 1037 (Fla. 4th DCA 2002), where it summarized the Whitt holding as "holding a private landowner can be held liable for negligently keeping property in a manner that obstructs a driver's view of traffic." Based on Whitt, the Williamses had a common law duty to keep vegetation on their property from blocking the line of the sight of passing motorists. The other issues in this case should be submitted to a jury upon reversal of the summary judgment. Whitt, 788 So.2d at 722 (discrete factual analysis and determination is required to determine whether the landowner actually breached his duty of care under the particular circumstances, and whether the accidental death or injury was a proximate cause of any breach of that duty).

While Plaintiff has admitted that there were no prior automobile collisions at the intersection in question, that fact is not dispositive of

foreseeability as it relates to proximate causation, which must be left to the fact finder to resolve. Whitt, 788 So.2d at 217, *citing* Springtree Properties, Inc. v. Hammond, 692 So.2d 164 (Fla. 1997) (absence of history of similar accidents did not preclude finding of duty to protect against such accidents). The panel's opinion did not misapprehend Driggers v. Locke

913 S.W.2d 269, 276 (Ark. 1996)Hoffman v. Jones

280 So.2d 431 (Fla. 1973)F.S.A. §768.81McCain, 593 So.2d at 503 (quoting Kaisner v. Kolb, 543 So.2d 732, 735 (Fla. 1989)) (citations omitted). Because the perceived risk defines the duty the defendant must undertake, the scope of the duty increases as the risk increases. McCain, 593 So.2d at 503. Therefore, in determining whether a duty was owed by Williams, "the proper inquiry for the reviewing appellate court is whether the defendant's conduct created a foreseeable zone of risk, *not* whether the defendant could foresee the specific injury that actually occurred." Davis court was correct in so holding.

Liability for Injuries that Occur Off Premises Should be Borne By a Landowner Where a Sufficient Nexus Exists Between a Condition Related to the Land and Resulting Harm

In many instances, the landowner or possessor will not be liable for injuries that occur off his premises or for injuries caused by the acts of third persons, because there will be no nexus between the landowner's mis- or non-feasance, and the unrelated harm. And while the source of a duty may arise by statute, ordinance, administrative rule, industry standard, contract, special relationship or voluntary assumption of a duty, this case involves the relatively discrete question of a property owner's duty arising from the general facts of this case. Florida Power & Light Co. v. Periera

705 So.2d 1359 (Fla. 1998)Davis court correctly observed (909 So.2d at 312): "The Florida Supreme Court has recently emphasized that "[t]he core predicate for imposing liability is one of reasonable foreseeability - - the cornerstone of our tort law. *Malicki v. Doe*, 814 So.2d 347, 362 (Fla. 2002)." Under

the facts of this case, as alleged and revealed by the evidence the photographs, the Norris deposition and Mrs. Williams' deposition testimony, Williams created a risk by allowing her foliage to grow and exist unchecked, on her property. Having created the risk, Williams was 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. Kaisner v. Kolb, McCain v. Florida Power Corp., Clay Elec. Co-op, Inc. v. Johnson, supra, the determination of whether Williams had a duty to Plaintiff's decedent is properly controlled by the foreseeable "zone of risk" analysis. In McCain, this Court explained the distinction between the elements of duty and causation as they relate to the foreseeability analysis, McCain v. Florida Power Corp., 593 So.2d 500, 502-03 (Fla. 1992):

> [F]oreseeability relates to duty and proximate causation in different ways and to different ends. The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader "zone of risk" that poses a general threat of harm to others. The

> proximate causation element, on the other hand, is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred. In other words, the former is a minimal threshold legal *requirement* for opening the courthouse doors, whereas the latter is a part of the much more specific *factual* requirement that must be proved to win the case once the courthouse doors are open. As is obvious, a defendant might be under a legal duty of care to a specific plaintiff, but still not be liable for negligence because proximate causation cannot be proven.

Picking up where Restatement (Second) of Torts, §363(a) (1965)Whitt, 788 So.2d at 214, fn. 5. This Court also noted in Whitt, 788 So.2d at 215:

> The authors of sections 364 and 368 respectively of the Restatement (Second) of Torts would impose a duty on landowners for injuries to persons and travelers on adjacent lands and highways caused by the placement of artificial conditions on a landowner's property.

And this Court noted that courts have criticized attempts to construct a rule of liability predicated solely upon the distinction between artificial and natural conditions. Id.

At a minimum, and contrary to Williams' argument in her Initial Brief (IB16), the photographs contained in

the record in this case give rise to the question of whether the land was in an "artificial" or "natural" condition at the time of the intersection accident (R5:886-932;A1-9). Those nine photographs identified by Beverly Williams during her deposition, depict the intersection and her overgrown property surrounded by chainlink, cyclone fencing. Clearly, the cyclone fencing and any resulting changes in the condition of the land were caused by an "act of a human being," and must therefore be considered **artificial rather than natural conditions**. Whitt, it is noteworthy that the Williams' property was no longer in its "natural" condition at the time of the intersection accident, and pursuant to sections 364 and 368 of The Restatement (Second) of Torts, Williams is properly charged with responsibility for the accident and resulting damages.

The Rural Versus Urban Location of Property Is No Longer a Valid Primary Determinative Factor in Assigning Liability for Foreseeable Harm

Rural, urban and suburban are defined as follows (Mirriam Webster Collegiate Dictionary (11th Ed.)):

rural: of or relating to the country, country people or life, or agriculture

suburb 1 a: an outlying part of a city or town **b:** a smaller community adjacent to or within commuting distance of a city **c** *pl*: the residential area on the outskirts of a city or large

urban: of, relating to, characteristic of, or constituting a city

Although no longer a significant distinction based on the rejection of the "Agrarian Rule" in Whitt v. Silverman, it is noteworthy that the Williams' property is not in a rural setting as urged by Williams in her Initial Brief (IB16), but is actually located in a suburban, if not urban area. It is without dispute in this record that the accident occurred at the intersection of Pine Street and Sydney Hayes Road in Orlando, Florida. That intersection is 8 miles south of downtown Orlando in an area that can only be described as urban, or perhaps a suburb of Orlando.[6]

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[6]/Pursuant to Florida Statute §90.202(12)Florida Statute §90.202(12), this Court may take judicial notice of this indisputable fact, because its location is capable of accurate and ready

Pine Street is a residential street with houses and driveways on either side, and a posted speed limit of 30 mph (A1-9).

Again, while no longer dispositive of the existence of Williams' duty to motorists using the adjacent roadways and passing through the intersection, this Court discussed section 363(2) of the Restatement (Second) of Torts in §363(1), followed by its reference to §363(2) which imposes a duty on possessors of land in **urban** areas, this Court labeled, and rejected the "rather narrow focus of the so-called agrarian rule" [referring to the urban/rural distinction], in favor of the *McCain* analysis. 364 and McCain's "restatement of the law of negligence" in Florida. Whitt, 788 So.2d at 718. This Court stated (Id.):

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determination by resort to sources whose accuracy cannot be questioned, for example GPS coordinates or aerial mapping.

> In fact, a review of Florida cases as well as those of other jurisdictions reflects a movement consistent with *McCain* toward imposing a duty on landowners in some circumstances for injuries caused by natural or artificial conditions by either creating exceptions to the no liability rule, or by completely abrogating it. [citation omitted]

Clearly, the subdivision through which Plaintiff's decedent was traveling on East Pine Street in a westerly direction, was substantially developed with what appear to be single family homes (<u>See</u> A 1, 3, 6 and 8) on both sides of Pine Street. Moreover, Exhibit 9 reveals the yield sign for westbound traffic on Pine Street at its intersection with Sydney Hayes. Surely the Williamses had a duty to clear, trim or cut back their trees and foliage at the southeast corner of their property so as to allow motorists on those abutting streets to see each other as they approached that intersection. Had that overgrown foliage not been obstructing Plaintiff Decedent's southbound view down Sydney Hayes Road (except for the last 12 feet), the motor vehicle accident would not likely have happened. At a minimum, had the weeds, trees, foliage and bushes

been cut to a height no higher than 30 inches so as to create a sight triangle of 50 feet to 100 feet in both directions, the motor vehicle accident would not be susceptible to the argument that Williams' failure to trim the trees within the sight triangle was the cause or a contributing cause of the motor vehicle accident.

The demographic location or use of the Williams' property is simply too narrow, and outdated to serve as a primary determinative factor, controlling the imposition of a duty of care. Rather, the *Whitt*, is the more appropriate method of determining whether the Defendant's conduct posed a general threat of harm to others, which gives rise to a corresponding duty of care.

Whitt's Abrogation of *Evans v. Southern Holding Corp.* Recognized that Private Owners of Non-Commercial Property Containing Foliage that Blocks Motorists' View of an Adjacent Intersection, Can Be Liable for a Resulting Motor Vehicle Accident with Injuries

In Whitt v. Silverman, 788 So.2d 210 (Fla. 2001), the underlying facts involved the Evanses' claims for personal injury in an automobile intersectional collision. The only defendants were Southern Holding Corporation and its insurer. Southern Holding was the owner and developer of a subdivision which was under construction at the time of the accident and it owned the four corners of land adjacent to the intersection where the accident occurred. Plaintiffs appealed the summary judgment in favor of defendant based upon allegations that the defendant contributed to the cause of the accident by **allowing high weeds to grow on the southwest corner** and storing heavy equipment on that corner of the property so that the drivers of the colliding vehicles had their view of approaching traffic obscured. Evans, 391 So.2d at 232. Dissenting from an affirmance of the summary judgment, Judge Schwartz noted there would be liability under the Restatement Second of Torts, §§363(2) of The Restatement. However, that distinction is arbitrary in a modern, non-agricultural society and would necessarily lead to inconsistent results. The more manageable and distinctly preferable analysis is that the foreseeable "zone of risk," which necessarily takes into account the variables of urban vs. rural, artificial vs. natural, and commercial vs. residential property use.

In McCain and that they were "helpful" to this Court's analysis of the issues presented in Whitt.

Referring to Judge Schwartz's dissent in Whitt, 788 So.2d at 222.

Thus, with the abrogation of Starke, this Court had already rejected the view that no liability can arise simply because an obstruction is natural in character.

Florida Courts Have Recognized Liability for Injuries to Persons Away From the Premises Where the Defendant's Conduct Creates a Foreseeable Zone of Risk

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7 /Bailey Drainage District v. Starke

526 So.2d 678 (Fla. 1988)Bailey Drainage District v. Starke, 526 So.2d 678 (Fla. 1988). There, the deceased motorist filed suit against Broward County and the Bailey Drainage District alleging that the motorists' view at the intersection was impeded by plant growth (brush and weeds) on both sides of the road which obstructed the driver's vision. Although involving a governmental entity, this Court wrote "we reject the contention that the petitioners cannot be liable because the brush and weeds were a naturally occurring condition, not planted by the petitioners." ... "It is irrelevant whether the brush and weeds are actually located on the governmental entity's right-of-way or on privately owned property adjacent to the right-of-way. **The relevant inquiry is whether the brush and weeds, wherever located, obstruct the view of motorists, creating a danger which is not readily apparent**." Id. at 681-82. (emphasis added)

If the harm or injury to persons away from or off of the premises is reasonably foreseeable to the owner, or possessor under the facts and circumstances of the case, liability may be established. 6 Fla. Prac., Personal Injury & Wrongful Death Actions §10.8. This is particularly true when the owner or possessor of the land has created a zone of risk that posed a general threat of harm to others. See Id. at fn. 11, *citing* Gunlock v. Gill Hotels Co., Inc., 622 So.2d 163 (Fla. 4th DCA 1993) (hotel owner owed a duty to exercise reasonable care for the safety of its invitees in passing over the highway to and from its hotel facilities); Johnson v. Howard Mark Productions, Inc., 608 So.2d 937, 938 (Fla. 2d DCA 1992) ("the general standard of care which the common law places on all landowners to protect invitees under a wide spectrum of circumstances can authorize a case-specific standard of care requiring protection of invitees on nearby property if the landowner's foreseeable zone of risk extends beyond the boundaries of his property.");

Thunderbird Drive-In Theater, Inc. v. Reed, 571 So.2d 1341 (Fla. 4th DCA 1990) (drive-in theater owner could be liable for traffic build up at entrance which created a known dangerous condition which defendant failed to ameliorate by taking steps to better regulate traffic entering the theater), rev. denied, 577 So.2d 1328 (Fla. 1991).

And in cases not involving invitees, where the vision of the passing vehicle's driver has been obstructed by the landowner's shrubbery growing onto or into the intersection, it has been held that the landowner could be liable for resulting damages. See Armas v. Metropolitan Dade County, 429 So.2d 59 (Fla. 3d DCA 1983) (motorists could maintain cause of action based on theory that lot owner was liable because motorist's view of stop sign was obstructed by foliage growing from the lot onto dedicated right-of-way); Morales v. Costa, 427 So.2d 297 (Fla. 3d DCA 1983). (landowner may be held liable in negligence action for obstructions to the public right-of-way), rev. denied,

434 So.2d 886 (Fla. 1983); Grier v. Bankers Land Co., 539 So.2d 552 (Fla. 4th DCA) (whether adjacent property owners were negligent in allowing bushes and trees to grow from their property into adjacent right-of-way so as to block view of approaching motorist and prevent him from viewing other traffic approaching and crossing intersection, precluded summary judgment), rev. denied, 539 So.2d 552 (Fla. 1989).

In a closely analogous case, although not involving a property owner, the Fourth District held that by placing large cement pipes on the corner of an intersection, a construction company created a "foreseeable zone of risk" where motorists had an obstructed view of eastbound traffic on Griffin Road. Whitt v. Silverman, 788 So.2d 210 (Fla. 2001) (**holding a private landowner can be held liable for negligently keeping property in a manner that obstructs a driver's view of traffic**)." Gibbs, 810 So.2d at 1037 (emphasis added). Having recognized the existence of a legal duty once the tortfeasor's conduct obstructed

motorists' view at the intersection, the Fourth District noted that the determination of proximate cause "should generally be left to the fact finder, unless reasonable minds could not differ that the entry was either 'foreseeable' or 'freakish'." Id. at 1037, citing 38 Fla. Jur.2d Negligence §60Gibbs, the Williamses' failure to maintain their property in a safe condition by cutting down overgrown trees and foliage obstructing the view of motorists passing through the intersection of Pine Street and Sydney Hayes Road created a foreseeable zone of risk involving those motorists, passing by the Williams' premises. The Fifth District Court of Appeal correctly reversed the summary judgment in Williams' favor on these facts. McCain v. Florida Power Corp.; Gibbs v. Hernandez, supra.

The Fifth District's Opinion in *Davis v. Dollar* Is Well Reasoned and Follows *McCain* and *Whitt* As Required

In Whitt which were "discarded by the Florida Supreme Court." Davis, 909 So.2d at 301. The Fifth District noted that the trial court was "required to

examine the factual allegations that go to the question of whether a duty was foreseeable." Davis, 909 So.2d at 303, *citing* McCain, 593 So.2d at 503 n. 1. The Fifth District, noting it was bound to apply McCain, analyzed the allegations of the Complaint, concluding that they "present[ed] a situation in which a foreseeable zone of risk was more likely than not created by Williams and that Williams owed a duty of care to Davis." Davis, 909 So.2d at 303. The Whitt "is very narrow" Judge Griffin claimed (909 So.2d at 306-07): "The holding of *Whitt* was that 'a commercial business in an urban area specifically relying on the frequent coming and going of motor vehicles' was subject to its 'foreseeable zone of risk' analysis as described in Whitt to a very narrow set of circumstances.

Claiming "there are a couple of unsettling concepts in *Whitt*" Judge Griffin complained that "*Whitt* appears to include the requirement to *anticipate* that third parties, including the victim, might themselves be negligent and to take preventative measures." Mirriam-

Webster's Collegiate Dictionary (11th Ed.). Secondly, the existence of a duty of care owed by a private landowner to a motorist injured in an accident allegedly caused by foliage on the owner's property that obstructed the motorist's view of the intersection does not supplant, or supersede the potential concurrent negligence of the motorist in failing to use reasonable care. See *e.g.*, McCain, 593 So.2d at 503; see also Fla. Std. Jur. Instr. 5.1(b). Contrary to Judge Griffin's conclusion, the 38 Fla.Jur.2d Negligence §§31, 32Whitt of what negligence laws and rules apply in the State of Florida. For example, it is quite circular to say that one has "no duty of care with respect to risks not created by the actor," when the risk of harm arose from inaction itself (failure to prune, cut down or trim). This would be akin to a literal interpretation of the metaphorical phrase "when nothing is done, nothing is left undone." Williams had a duty which corresponded to the harm she fostered.

In response to Williams' Motion for Rehearing, and ostensibly Judge Griffin's dissent, the Armas v. Metropolitan Dade County, 429 So.2d 59 (Fla. 3d DCA 1983); Sullivan v. Silver Palm Properties, Inc.

558 So.2d 409 (Fla. 1990)Davis court then observed (909 So.2d 313):

> Surely, if the danger posed by an overhanging branch that obstructs a sign is foreseeable, the danger posed by stand of foliage large enough to block the view of an entire intersection is also foreseeable.

The *Clay Electric*, the apportionment of liability between joint tortfeasors "is not a novel concept but instead an application of well established principles of negligence." Clay Electric, 873 So.2d at 1195 (Pariente, J., concurring). Applying the Caufield v. Cantele

837 So.2d 371, 377 fn. 5 (Fla. 2002)Chester v. Doig

842 So.2d 106 (Fla. 2003)Gouty v. Schnepel

795 So.2d 959, 966 n. 4 (Fla. 2001)Savoie v. State

422 So.2d 308 (Fla. 1982)Martin-Johnson, Inc. v. Savage

509 So.2d 1097, 1100 (Fla. 1987)Davis v. Orange County Bd. of County Comm'rs

52 So.2d 370 (Fla. 5th DCA 2003)Davis v. Dollar, 900 So.2d at 304. The Fifth District correctly cited cases which stand for the proposition that one who undertakes to act, even when under no obligation to do so, thereby becomes obligated to act with reasonable care. Id., *citing* Union Park Mem'l Chapel v. Hutt, 670 So.2d 64, 66-67 (Fla. 1996) and Nielsen v. City of Sarasota

117 So.2d 731 (Fla. 1960)