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.
_____/

REPLY BRIEF OF PETITONER BEVERLY WILLIAMS

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

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

This Court should exercise its discretion in favor of accepting jurisdiction, since the District Court was correct in its assessment that the decision is of great public importance. If, as the District Court held, residential landowners have a duty to maintain their property in a way that minimizes risk to passing motorists, virtually every owner of private property in this State will be affected. 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, affecting large numbers of persons. See In the Interest of D.J.S., 563 So. 2d 655, 657 n. 2 (Fla. 1st DCA 1990).

Contrary to Davis's contention, the present issue was not decided in Whitt v Silverman, 788 So.2d 210 (Fla. 2001). As discussed below, the Court in that case painstakingly limited its holding to the facts of the case before it, which involved a commercial landowner, whose business depended on a flow of traffic in and out of the property, in an urban setting. The instant case raises the issue whether that holding also applies to a

residential landowner in a rural or, at most, suburban, setting, so as to create a duty to passing motorists with no connection of any kind to the property.

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.

Davis urges the Court to apply a very simplistic approach, and to hold that, under McCain v Florida Power Corp., 593 So.2d 500 (Fla. 1992), a duty always arises if the defendant has done (or failed to do) anything which increases the preexisting "zone of risk".

The existence of a duty is, in the first instance, a question of law for the court to decide. See McCain v Florida Power Corp., 593 So.2d 500, 502 (Fla. 1992). Whether, as a matter of law, a duty exists is, in the first instance, a policy question to be determined based on a balancing of factors. As this Court said in Gracey v Eaker, 837 So. 2d 348, 354 (Fla. 2002), citing Rupp v Bryant, 417 So. 2d 658, 667 (Fla. 1982), duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection or not. In Grunow v Valor Corp. of Florida, 904 So. 2d 551, 556 (Fla. 4th DCA 2005), rev. den., 918 So. 2d 292 (Fla. 2005), the court pointed out that

forseeablility alone does not define the duty, in order to avoid subjecting an actor to limitless liability to an indeterminate class of persons conceivably injured.

In Burklow & Associates, Inc. v Belcher, 719 So. 2d 31, 35 (Fla. 1st DCA 1998), the court observed that in determining the existence of a duty, the courts must balance the probability of an occurrence causing an injury, the potential extent of the injury, and the expense and effort of adequate precautions to avoid the occurrence. In Biglen v Florida Power & Light Co., 910 So. 2d 405, 409 (Fla. 4th DCA 2005), the court, citing Levy v Florida Power & Light Co., 798 So. 2d 778, 780 (Fla. 4th DCA 2001), rev. den., 902 So. 2d 790 (Fla. 2005), pointed out that finding a legal duty in a negligence case involves the public policy decision that a defendant should bear a given loss, as opposed to distributing the loss among the general public, and that a legal duty is an allocation of risk determined by balancing the forseeability of harm, in light of all the circumstances, against the burden to be imposed.

In short, the initial legal determination of whether a duty exists is not dependent on the sole question of whether a "zone of risk" has been created or increased, but rather requires a public policy decision based on a weighing of all pertinent considerations. 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, 264 (Fla. 1st DCA 1981). The simplistic approach Davis urges would be a major shift in the tort jurisprudence of this State.

This Court in Whitt v Silverman, 788 So.2d 210 (Fla. 2001), held that the traditional rule of landowner non-liability for injuries to those outside the landowner's premises 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). We do not quarrel with the result in Whitt, but that is not the 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, and call for a public policy determination that such a duty should not be imposed on residential landowners under the instant facts.

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 or had any contact with Ms. Williams. 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. Neither the plaintiff's decedent nor the tortfeasor driver was a patron of any business of Ms. Williams'. 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.

Davis cites Gibbs v Hernandez, 810 So. 2d 1034 (Fla. 4th DCA 2002), for the proposition that the holding in Whitt applies to all landowners. But the defendant in Gibbs was not a landowner at all, but a subcontractor who had placed concrete drainage pipes at the corner of an intersection where it was working. Gibbs v Hernandez, 810 So. 2d 1034, 1035 (Fla. 4th DCA 2002). The same is true of Clay Electric Cooperative, Inc. v Johnson, 873 So. 2d 1182 (Fla. 2003), which involved a failure to fulfill a contractual duty to maintain streetlights, not landowner liability.

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."

Imposing liability on a commercial enterprise for injuries off of its premises, but resulting from the business use of its premises, makes eminent public policy sense. See, for instance, Gunlock v Gill Hotels Co., Inc., 622 So. 2d 163 (Fla. 4th DCA 1993) (hotel liable for failure to exercise reasonable care for safety of its guests in passing over highway to and from its premises); Johnson v Howard Mark Productions, Inc., 608 So. 2d 937 (Fla. 2nd DCA 1992) (night club had duty to protect patrons from dangers created by its inadequate parking); Thunderbird Drive-In Theatre, Inc. v Reed, 571 So. 2d 1341 (Fla. 4th DCA 1990) (drive-in theatre liable for injuries caused in accident resulting from traffic conditions at its entrance),

rev. den., 577 So. 2d 1328 (Fla. 1991). In such cases, the business has created the situation by encouraging its patrons to use its facilities and then failing to exercise the requisite care to avoid dangers created by the business.

In the situation of the residential landowner, however, those considerations do not apply. Here, for instance, Ms. Williams had no relationship whatsoever to any of the individuals involved in this unfortunate accident. None of them were patrons of any business of hers, and none had ever been on the property or even had any contact with her. She simply owned the land that abutted the intersection where the accident occurred.

Davis cites the dissenting opinion in Driggers v Locke, 323 Ark. 63, 913 S.W. 2d 268 (1996), as setting forth the policy justification for imposing a duty to passing motorists on residential landowners. The majority in that case, however, reviewed case law from around the country and then affirmed the trial court decision that there was no such duty, stating: "…we decline to reject the common law rule or, absent legislation to the contrary, place the burden of public safety on those whose premises abut the public streets and highways." 913 S.W. 2d at 273. This Court should align itself with the majority in Driggers, not with the dissent.

As demonstrated in our Initial Brief, a holding that residential

landowners owed a common law duty to passing motorists could not be confined to those whose property abutted an intersection. It would also apply to a landowner whose foliage or privacy fence 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. The rule espoused by the District Court majority imposes a "duty in the air" of indefinable and unbounded proportions. And, as also demonstrated in our Initial Brief, imposition of such a common law duty likewise leads to unfortunate and unjustifiable discrepancies between a landowner's duties to those on the premises and those who are merely passing by—and imposes a higher standard as to those who are passersby than those actually on the property.

We recognize that there is 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. Here, of course, there is no claim that the foliage on the Williams land obscured Ms. Green's view of the Yield sign at the intersection, or that the vegetation protruded past the property line.

More fundamentally, the crucial distinction is between a condition <u>on</u> the landowner's property and a condition protruding <u>outside</u> the property lines. Thus, in <u>Armas 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 Morales v Costa, 427 So.2d 297 (Fla. 3rd DCA 1983), the adjacent landowner had planted a black olive tree in the swale area. In Morales, the court carefully distinguished Pedigo v Smith, 395 So.2d 615 (Fla. 5th DCA 1981), and Evans v Southern Holding Corp., 391 So.2d 231 (Fla. 3rd DCA 1980), rev. den., 399 So.2d 1142 (Fla. 1981), which applied the traditional rule, stating (at 298) that an object which protrudes into and obstructs the public right of way "is an entirely different matter"

Grier v Bankers Land Co., 539 So. 2d 552 (Fla. 4th DCA 1989), rev. den., 548 So. 2d 662 (Fla. 1989), on which Davis relies, also involves the growth of vegetation from the landowner's property into the adjacent right of way. 539 So. 2d at 553.

In Sullivan v Silver Palm Properties, Inc., 558 So. 2d 409, 411 (Fla. 1990), this Court noted that "Like the District Court, we see considerable difference between the duty imposed in Morales and Armas and the duty sought to be imposed here." In Sullivan, the Court distinguished prior cases

in which liability was based on defendant having created an artificial condition on the public right of way, as well as cases in which the vegetation on the defendant's property obscured the motorist's view of a stop sign.

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—or Fabre 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.

This Court has imposed liability for artificial conditions on the property. See Price v Parks, 173 So. 903 (Fla. 1937); Gulf Refining Co. v

Gilmore, 152 So. 621 (Fla. 1933). Apparently attempting to seize on those cases, Davis suggests that the cyclone fence in this case is such an artificial condition. But the allegations of the Complaint, which Davis quotes at pages 16 and 17 of the Amended Brief of Respondent, refer only to the vegetation, not to the fence, and Davis never made this claim below.

As Judge Griffin suggested, and as we discussed in our Initial Brief, a distinction could easily be made between active conduct and passive failure to act. 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) solely to benefit total strangers who happen to use the adjoining road, and with whom the

landowner would otherwise never have had any contact.

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.

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.

The summary judgment in this case should be reinstated as to the contractual duty claim, since the Record in this case discloses that there is no factual basis for imposing liability under Davis'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, 310 (Fla. 1982).We recognize that review of issues outside the scope of the certified question is discretionary. See Chester v Doig, 842 So. 2d 106, 109 n. 5 (Fla. 2003); Gouty v Schnepel, 795 So. 2d 959, 966 n. 4 (Fla. 2001). Since this issue was briefed and argued below, and is dispositive, this Court should follow its customary practice and review this issue as well so as to avoid a piecemeal determination of the case. See Caufield v Cantele, 837 So. 2d 371, 377 n.5 (Fla. 2002); Savoie v State, 422 So.2d 308, 312 (Fla. 1982). See also Savona v Prudential Ins. Co. of America, 648 So. 2d 705,707 (Fla. 1995).

Davis cites Martin-Johnson, Inc. v Savage, 509 So. 2d 1097 (Fla. 1987), as supportive of the argument that this issue should not be considered and that we are seeking review of the reversal of an order granting summary judgment without showing irreparable harm. Martin-Johnson, of course, involved the propriety of certiorari review of orders denying a motion to dismiss or strike a punitive damage claim. In the present case, it is clear that appellate jurisdiction is present, since the order appealed from is a final judgment in favor of Williams, not an interlocutory order.

The reasons that the "contractual duty" theory in this case must fail have been set forth in detail in our Initial Brief, and we will not burden the Court by reiterating them here. Suffice to say that Davis simply has no admissible evidence upon which a jury could find in her favor on this theory.

CONCLUSION

For all of the reasons set forth above and in the Initial Brief, 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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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 6th day of March, 2006, 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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