IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2004

CECILIA DAVIS, ETC.,

Appellant,

v. CASE NO.: 5D02-599

DOLLAR RENT A CAR SYSTEMS, INC., ET AL.,

Appellees.
_____/

Opinion filed November 17, 2004

Appeal from the Circuit Court
for Orange County,
Ted P. Coleman, Judge.

Madison B. McClellan, Linda L. Weiksnar and Russell S. Bohn, of Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, Stuart; and Diran V. Seropian, of Caruso & Burlington, P.A.,West Palm Beach, for Appellant.

Jack W. Shaw, Jr. and George E. Carr of George E. Carr, P.A., Orlando for Appellee Beverly Williams.

Jeanelle G. Bronson and Stephen P. Matzuk of Grower, Ketcham, Rutherford, Bronson, Eide & Telan, P.A., Orlando, for Appellee, Orange County Board of County Commissioners.

No Appearance for Appellees Dollar Rent A Car Systems, Inc., Walden Auto Leasing, III, Inc., JSK Trucking, Inc., Jose Das Garcia Guimaraes, Diamond Transportation Services, Inc., Melanie Winn and Shafter Williams.

SAWAYA, C.J.

Cecilia Davis, as personal representative of the estate of her deceased daughter,

Twanda Green, appeals a summary final judgment rendered in favor of the defendant, Beverly Williams, in a wrongful death action arising out of an automobile accident that occurred at an intersection adjacent to property owned by Williams. There are two issues we must resolve: 1) did the failure of Davis to respond to a request for admissions asking her to admit or deny that Williams owed a duty of care to Twanda establish as a matter of law that no duty was owed; and 2) did Williams, as owner of non-commercial property, owe a duty of care regarding foliage on the property that blocked Twanda's view of the intersection that allegedly caused the fatal accident. We answer no and yes respectively. We will explain our answers by discussing the factual and procedural background of the instant case, followed by a discussion of each issue in the order presented.

Factual And Procedural Background

Twanda Green, an employee of Diamond Transportation Services, Inc., an automobile transportation service, was involved in a traffic accident as she drove in a procession of other employees who were attempting to shuttle rental cars from one location to another. The fatal accident occurred at the intersection of Sidney Hayes Road and Pine Street in Orlando. A traffic control sign at the intersection directed Twanda and the others traveling on Pine Street to yield to traffic approaching on Sidney Hayes Road. As Twanda, driving the fifth of six vehicles in the procession, approached the intersection, Twanda reduced her speed and slowly pulled out into the intersection to make a left turn. As she proceeded through the intersection, she was hit broadside by a dump truck driven by another defendant approaching

the intersection via Sidney Hayes Road. Twanda died as a result of the injuries she sustained in this collision. Davis alleges that Twanda's vision of the intersecting roadway and the approaching traffic thereon was obscured for a distance of twelve feet by foliage located on property owned by Williams at the corner of the intersection.

Davis filed a wrongful death action against several defendants, including Williams.[1] Williams served the request for admissions asking Davis to admit or deny that Williams owed or assumed a duty of care to motorists passing through the intersection adjacent to Williams' property to maintain the property so that the foliage thereon would not block the motorists' view of the intersection. Davis did not timely respond and, accordingly, the trial court entered the summary judgment under review, concluding that Williams did not owe a duty of care in the instant case. Davis appeals, contending that her failure to timely answer the request for admissions did not establish as a matter of law that Williams owed no duty of care. Alternatively, Williams argues that even if Davis' assertion is correct, as a matter of law she did not owe a duty of care based on the obstructing foliage and, therefore, the summary judgment should be affirmed. We will first discuss the failure to timely respond to the request for admissions.

Failure To Timely Respond To The Request For Admissions

The parties devote much time and effort to the issue whether Davis' failure to respond

[1]The other defendants are Dollar Rent A Car Systems, Inc., Walden Auto Leasing, III, Inc., JSK Trucking, Inc., Jose Das Garcia Guimaraes, Diamond Transportation Services, Inc., Orange County Board of County Commissioners, Melanie Winn and Shafter Williams. On July 16, 1999, Beverly Williams filed a Suggestion of Death of Shafter Williams, her deceased husband, who apparently died in June 1998.

to the request for admissions established as a matter of law that Williams did not owe a duty of care to Twanda. Specifically, Williams requested Davis admit that:

> 7. Beverly Williams at no time had a duty to motorists passing through the intersection of Pine Street and Sidney Hayes Road in Orlando, Orange County, Florida to maintain the property on the northeast corner of the intersection so that the vegetation would not obstruct the vision of such motorists.
>
> . . . .
>
> 9. Beverly Williams at no time assumed a duty to motorists passing through the intersection of Pine Street and Sidney Hayes Road in Orlando, Orange County, Florida to maintain the property on the northeast corner of the intersection so that the vegetation would not obstruct the vision of such motorists.

Requests for admission are governed by rule 1.370, Florida Rules of Civil Procedure, which provides in pertinent part that "[a] party may serve upon any other party a written request for the admission of the truth of any matters within the scope of rule 1.280(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request." Fla. R. Civ. P. 1.370(a). Prior to its 1972 amendment, this rule "provided that a party could serve a written request for '. . . the truth of any relevant matters of fact set forth in the request.'" Salazar v. Valle, 360 So. 2d 132, 134 (Fla. 3d DCA 1978). The case law that interpreted the earlier version of the rule held that only requests directed to factual issues that did not lie at the heart of the case were appropriate and that requests seeking admissions relating to conclusions of law were similarly inappropriate and did not require a response. See Old Equity Life Ins.

Co. v. Suggs, 263 So. 2d 280, 281 (Fla. 2d DCA 1972) ("Essentially, this was not a request for admission as to a fact, but rather a request for admission of a conclusion; the conclusion being that Old Equity was legally liable for the full amount claimed by Suggs. The Request for Admission was thus objectionable on its face and did not legally call for a response under the rules.") (citing City of Miami v. Bell, 253 So. 2d 742 (Fla. 3d DCA 1971); Graham v. Eisele, 245 So. 2d 682 (Fla. 3d DCA 1971)).

The committee notes appended to the current version of rule 1.370 specifically state that the rule was amended to "eliminate distinctions between questions of opinion, fact, and mixed questions." Fla. R. Civ. P. 1.370 committee notes. We conclude that while the current rule now allows for requests directed to opinions, facts, and the application of law to facts, it continues to make no provision for requests seeking a purely legal conclusion. Accordingly, because the response to a request seeking an admission or denial regarding whether a duty of care is owed is a purely legal conclusion, prior case law, which holds that such requests are inappropriate and that a response is thus unnecessary, is still applicable.[2] Therefore, we conclude that Davis' failure to respond to the request for admissions relating to the legal issue of whether Williams owed Twanda a duty of care may not be the basis for a summary judgment in favor of Williams. See Pandol Bros., Inc. v. NCNB Nat'l Bank of Fla., 450 So. 2d 592, 594 (Fla. 4th DCA 1984) ("Request number 8 was not objectionable as asking for a conclusion of law, but would more appropriately be characterized as requiring 'an application

[2]We note, parenthetically, that this view is in accord with federal decisions interpreting Rule 36 of the Federal Rules of Civil Procedure, which is substantially similar to rule 1.370. See In re Olympia Holding Corp., 189 B.R. 846 (Bankr. M.D. Fla. 1995); Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc., 130 F.R.D. 92 (N.D. Ind. 1990).

of law to fact,' permissible under Salazar v. Valle, 360 So. 2d 132, 134 (Fla. 3d DCA 1978).").

Next, we will address whether a common law duty of care was owed by Williams to passing motorists.

Common Law Duty Of Care

Williams, an owner of private non-commercial property, argues that she did not owe a duty of care to Twanda, a motorist on a public roadway whose vision of the intersection and highway adjacent to Williams' property was obscured by foliage thereon. The trial court agreed, eschewing the foreseeable zone of risk analysis that the supreme court established in McCain v. Florida Power Corp., 593 So. 2d 500 (Fla. 1992), to determine whether a duty of care exists. Instead, the trial court adopted a blanket rule that there is no common law duty owed by a private landowner whose property obscures the view of motorists on an adjacent highway or intersection. Accordingly, the trial court entered summary judgment in favor of Williams. For reasons we will now explain, we conclude that the foreseeable zone of risk standard must be applied and that application of this standard to the instant case prohibits the summary judgment entered in favor of Williams.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). The courts must exercise restraint in granting summary judgments because they deprive a party of his or her right to trial. Clay Elec. Co-op., Inc. v. Johnson, 873 So. 2d 1182 (Fla. 2003). Accordingly, if the court has any doubts, those

doubts must be resolved in favor of the nonmoving party. Clay Electric. In the instant case, we must review the trial court's ruling granting Williams' motion for summary judgment de novo because it poses a question of law. Id.

Williams contends that decisions rendered prior to McCain apply and that she owed no common law duty of care to Twanda in the instant case. See Pedigo v. Smith, 395 So. 2d 615, 616 (Fla. 5th DCA 1981) ("[T]he owner of land is under no affirmative duty to remedy conditions of purely natural origin upon his land.") (citation omitted); Evans v. Southern Holding Corp., 391 So. 2d 231 (Fla. 3d DCA), pet. for review denied, 399 So. 2d 1142 (Fla. 1981). These decisions adopted the traditional view that a property owner owed no duty of care to motorists whose vision was obscured by natural conditions on the owners' property adjacent to the highway. The traditional view recognized, however, that a duty may be owed relating to artificial conditions (for example, foliage that was planted by the landowner) on the property that obscured a motorist's vision of the highway or intersection. Whitt v. Silverman, 788 So. 2d 210 (Fla. 2001). Hence, if we were to apply the traditional view as Williams contends, summary judgment would be improper because there is nothing in the record to indicate whether the foliage was natural or whether it was planted there by Williams.

However, the traditional view has been discarded by the Florida Supreme Court. Acknowledging the recent judicial trend by many courts to reject the dichotomy between artificial and natural conditions as outdated, the Florida Supreme Court held in Whitt that this distinction would no longer be recognized in determining whether a private landowner owed a duty of care to a motorist whose vision was obstructed by a condition on the owner's premises. Rather, the court held in Whitt that the foreseeable zone of risk analysis established

in McCain was the proper legal standard to determine whether a duty of care was owed in such circumstances.

Whitt is analogous to the instant case. In Whitt, a customer of a service station was attempting to exit the premises when she struck two pedestrians, injuring one and killing the other. Because the property owners had a dense stand of foliage on the premises that blocked the driver's view of the sidewalk, the plaintiffs brought suit against the property owners. The trial court dismissed the common law negligence action, and the Third District Court of Appeal affirmed, concluding that the foliage did not protrude onto the public way and therefore there was no duty owed by the property owners to maintain the foliage for the benefit of others outside the premises. Whitt v. Silverman, 732 So. 2d 1106 (Fla. 3d DCA 1999). The Florida Supreme Court held that pursuant to McCain, the property owners' conduct created a foreseeable zone of risk posing a general threat of harm toward those entering and exiting the premises as well as those pedestrians and motorists using the abutting streets and sidewalks. Therefore, the court quashed the decision of the Third District Court and held that the property owners owed a duty of care to the pedestrians.

Duty of care is an essential element in any negligence action. The issue of duty is a question of law to be determined by the trial court as "a minimal threshold legal requirement for opening the courthouse doors" before the "more specific factual requirement" to prove causation can go to the trier of fact. McCain, 593 So. 2d at 502 (footnote omitted). In McCain, the Florida Supreme Court explained the legal analysis that we must employ when determining whether the defendant in a negligence action owed a duty of care to the plaintiff. In making this determination as a matter of law, we must focus "on whether the defendant's

conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others." Id. at 502 (citations omitted). Foreseeability is the crucial element in defining the scope of the general duty placed on every person to avoid negligent acts or omissions. "Where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses." McCain, 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, 530 So. 2d at 503. Therefore, in determining whether a duty was owed by the defendant, "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." McCain, 593 So. 2d at 504. The court then explained:

> The statute books and case law, in other words, are not required to catalog and expressly proscribe every conceivable risk in order for it to give rise to a duty of care. Rather, each defendant who creates a risk is 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. For these same reasons, duty exists as a matter of law and is not a factual question for the jury to decide: Duty is the standard of conduct given to the jury for gauging the defendant's factual conduct. As a corollary, **the trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant.**

Id. at 503 (emphasis added). Hence if we determine that a foreseeable zone of risk was more likely than not created by Williams, a duty of care was created and the courthouse doors swing

open to allow Davis to enter and litigate her claim on the merits. As the court in Henderson v. Bowden, 737 So. 2d 532 (Fla. 1999), noted in explaining the McCain zone of risk analysis, "No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists." Id. at 536 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 53, at 359 (5th ed. 1984)).

In determining the threshold issue of legal duty, a trial court is required to examine the factual allegations that go to the question of whether a duty was foreseeable. See McCain, 593 So. 2d at 503 n.1. Facts to support foreseeability can be relevant to both the element of duty and the element of proximate causation. Florida Power & Light Co. v. Periera, 705 So. 2d 1359 (Fla. 1998) (citing McCain, 593 So. 2d at 502). The necessary examination of alleged facts, which the supreme court recognizes may be essential in determining whether or not a legal duty exists, does not convert the duty analysis into a jury question.

With these principles in mind, we examine the factual allegations. Davis alleged the following as to Williams in the third amended complaint:

> 72. That 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.

Pursuant to McCain, which we are bound to apply, we conclude that these allegations present 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. It is undisputed that Williams owned the property adjacent to the intersection where the fatal accident occurred and Davis specifically alleges that the view of the highway at the intersection was obscured by overgrown foliage on Williams' property. Davis further alleges that because of this obstruction, the decedent was unable to clearly see the traffic at the intersection and this was a cause of the accident. Moreover, for purposes of the summary judgment proceedings in the trial court, we do not find in the record any evidence presented by Williams contesting the allegation that the foliage did obstruct the view of the intersection and, similar to Whitt, there is nothing in the record to indicate that it would have been unduly burdensome for Williams to have maintained the foliage to eliminate the danger. Even if we maintained any doubts about this issue, and we do not, pursuant to the standard of review we must apply to summary judgments, any doubts must be resolved in favor of Davis as the nonmoving party. See Clay Electric. Therefore, we cannot find a lack of duty in the instant case and the summary judgment must be reversed.

The record also indicates that there may be another basis upon which a duty of care may be established. Davis alleges that Williams had entered into a contract with Orange

County to clear this foliage. The alleged existence of the contract gave rise to a separate action by Davis against the Orange County Board of County Commissioners. On appeal from a summary judgment in favor of Orange County, this court reversed for further proceedings on the issue whether Orange County had entered into a contract with Williams to clear the overgrown foliage on Williams' property adjacent to the intersection where the accident occurred. Davis v. Orange County Bd. of County Comm'rs, 852 So. 2d 370 (Fla. 5th DCA 2003).

This contractual issue could be significant to the instant case because the existence of such a contract may be evidence that Williams voluntarily undertook a duty to clear the obstructing foliage to reduce the danger to those entering and exiting the intersection. "It is clearly established that one who undertakes to act, even when under no obligation to do so, thereby becomes obligated to act with reasonable care." Union Park Mem'l Chapel v. Hutt, 670 So. 2d 64, 66-67 (Fla. 1996) (citations omitted); see also Clay Electric. In Union Park, the complaint alleged, as does Davis' complaint in the instant case, that the defendants "had a duty and/or assumed a duty . . . ." The court held that this allegation was sufficient to allege a duty that may have been voluntarily assumed. It is noteworthy that the court in Union Park applied the foreseeable zone of risk analysis adopted by the court in McCain. Hence, even if there had been no common law duty of care owed by Williams as a private landowner regarding foliage on her property, then summary judgment was still improper based on the possibility that Williams voluntarily assumed a duty via the alleged contract with Orange County. See Davis.

Conclusion

Davis' failure to answer the request for admissions did not support the entry of summary judgment against her because a request for admissions seeking an admission regarding a conclusion of law is not appropriate under rule 1.370 and thus does not require a response. We also conclude, pursuant to Whitt and McCain, 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. Having applied this standard, we further conclude that the facts as alleged would create a duty of care to the decedent under the particular circumstances of the instant case and that summary judgment for Williams was improper.

We express no opinion relating to the merits of Davis' case. See Clay Electric. We simply hold that the courthouse doors should be opened to Davis so she can litigate the merits of her claim. Whether the foliage was the proximate cause of the accident, what the standard of care should be in the instant case, and whether the decedent was solely at fault are matters that should be left either to the jury or to appropriate pretrial motions presented to the trial court.

We certify to the Florida Supreme Court as a matter of great public importance the following question:

> 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?

REVERSED.

PALMER, J., concurs.
GRIFFIN, J., concurs in part and dissents in part, with opinion.

GRIFFIN, J., concurring in part; dissenting in part. 5D02-599

I respectfully dissent from the opinion of the majority on the question whether the Williamses owed a duty to provide motorists a clear view of oncoming traffic across their property.[1]

It is clear that Florida has not historically recognized any such duty. *Bassett v.* Edwards, 158 Fla. 848, 30 So. 2d 374, 376 (1947); *Pedigo v. Smith*, 395 So. 2d 615-16 (Fla. 5th DCA 1981); *Evans v. Southern Holding Corp.*, 391 So. 2d 231 (Fla. 3d DCA 1980). There is also no doubt that a recent line of cases of the Supreme Court of Florida, beginning with *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla.1992), especially *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001), may have altered this legal landscape (no pun intended). Williams urges that the decision in *Whitt,* on which the majority principally relies, is expressly limited to commercial property and that a non-commercial landowner in Florida does not have a common law duty to provide visibility across their property for the benefit of motorists traveling adjacent public roads.

According to the Florida Highway Patrol's Traffic Homicide Investigation Report, this two-vehicle accident occurred at the intersection of Sidney Hayes Road and Pine Street in Orlando, Orange County, Florida. Twanda Green ["Green"] worked as a driver for Diamond Transportation Services, Inc. Green was driving on Pine Street as she approached an intersection with Sidney Hayes Road where there is a yield sign. Guimaraes, the driver of a

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[1]I do agree that the question be certified to the supreme court as a matter of great public importance.

dump truck, was driving on Sidney Hayes Road towards Pine Street. Green pulled forward from the yield sign in an attempt to make a left turn onto Sidney Hayes Road and drove into Guimaraes' path. Guimaraes veered and braked, but could not avoid Green. Green later died from injuries sustained in the collision. The investigation report described the intersection where the accident occurred:

> There is a chain link fence on the south side of Pine St. and east side of Sidney Hayes Rd. south of Pine St. which is overgrown with bushes and trees. This obscures the view for westbound traffic on Pine St. of the northbound lane of Sidney Hayes Rd. up to a distance of approximately 12 feet from the intersection.

This property was later determined to be owned by defendant Williams. The report further stated that Green was responsible for her own death as she was in violation of the statute requiring a driver approaching a yield sign to slow down or stop before entering the intersection, and to yield the right of way to any vehicle in the intersection or any vehicle approaching the intersection.

Davis, as personal representative of Green's estate, subsequently instituted a wrongful death action and eventually alleged the following as to Williams[2] in her third amended complaint:

> 72. That 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.

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[2] On July 16, 1999, Beverly Williams filed a Suggestion of Death of Shafter Williams, who apparently died in June 1998.

> 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.
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> 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.
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> 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.

Whitt is factually similar to this case in significant ways. In *Whitt*, two pedestrians were struck and killed by a vehicle leaving the premises of a service station. It was alleged that the landowners had a stand of foliage between their service station and the adjacent property that impaired the driver's view of the sidewalk. The foliage was, however, completely on the landowners' property and did not intrude onto the public way. Following prior Florida cases, the Third District Court of Appeal concluded that, where the foliage on a landowner's property did not intrude onto the public way, the landowner had no duty to maintain the foliage for the benefit of third parties located outside the property. *Whitt* v. *Silverman*, 732 So. 2d 1106, 1108 (Fla. 3d DCA 1999).

The Florida Supreme court quashed the Third District's decision. The high court referred to the concept of duty applied by the Third District as the "agrarian rule," and

described it as being "dated." 788 So. 2d at 213-14.[3] The supreme court then engaged in an extended discussion of the duty a landowner should owe to third persons located outside the property and settled on the application of the court's previously articulated "foreseeable zone of risk" analysis to determine the existence of a duty. The actual holding of *Whitt* is very narrow, however. 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 *McCain*. *Id*. at 222.

The question is whether *Whitt's* "foreseeable zone of risk" analysis, which gave rise to the duty to maintain foliage for the benefit of third parties located outside a commercial premises, also applies in a non-commercial context, and, if so, under what circumstances. The analysis in *Whitt* suggests to the majority that if "lack of visibility" caused by foliage impairs the ability of drivers to see and react to oncoming traffic or approaching pedestrians, the failure to trim this foliage creates a "foreseeable zone of risk" that the landowner is bound to remediate. It is certainly true that much of the analysis in *Whitt* would apply equally to any site, no matter whether urban, suburban or rural, and no matter whether commercial or non-commercial. On the other hand, the *Whitt* court took pains to limit its holding to a commercial property and the holding in *Whitt* expressly tied its reasoning to the fact that the driver was

[3]This portion of the opinion appears to have been influenced by the dissent of Judge Schwartz in *Evans v. Southern Holding Corp*., 391 So. 2d 231, 232-34 (Fla. 3d DCA 1980)(Schwartz, J. dissenting). In his dissent, Judge Schwartz posited that a landowner should be subject to liability if anything on his property, no matter whether natural or artificial, has created an obstruction of the view of persons outside the land. *Id*. at 233. He suggested that it was up to a jury to decide whether the landowner's use of his land was reasonable in light of what was happening or might reasonably be expected to happen outside the land.

invited to come onto the property for business purposes and ingress/egress was controlled by the landowner. *Id*. In a non-commercial context like this case, no driver has been attracted to the property by the landowner's business and there is no need for or expectation of a "safe egress."

There are a couple of unsettling concepts in *Whitt*. If *Whitt* is not limited to a commercial context, it suggests that no defined rules of negligence apply any longer to landowners or possessors. In this regard, I note that the reporters working on the current revision to the Restatement of Torts appear to consider that separate rules still do apply. *See* Restatement Third, Torts: Liability for Physical Harm (Basic Principles), Tentative Draft No. 4 at 1(ALI, April 1, 2004). Second, the "foreseeable zone of risk" analysis used in *Whitt* appears to include the requirement to *anticipate* that third parties, including the victim, might themselves be negligent and to take preventative measures. In other words, *Whitt* requires the taking of affirmative steps to eliminate the environment in which a third party might act negligently. As in the facts of *Whitt*, for example, if the business owner could assume that the motorist leaving his property would exercise due care, then there would be no zone of risk.[4] The *Whitt* court explained its decision in this way:

> We conclude that an inquiry as to the liability of a landowner

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[4]This is the analysis that led the Supreme Court of Illinois to reach a different conclusion about a landowner's liability on facts similar to those in *Whitt*. In *Ziemba v. Mierzwa* , 566 N.E. 2d 1365 (Ill. 1991), a case acknowledged in *Whitt,* the Illinois court refused to find a duty on a landowner to maintain their property so as to not obstruct the view of travelers precisely because it required the owner to foresee third-party negligence. 566 N.E.2d at 1369. The Illinois court's view was that the hazard was the motorist who failed to exercise reasonable care in light of the presence of the foliage. *Id*. at 1368.

> 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. In addition, it is undisputed that the landowners had exclusive control over the foliage and landscaping on the business premises, and it does not appear that it would have been unduly burdensome for the landowners to have maintained this foliage consistent with the safe egress and ingress of vehicles attracted to the business and persons affected thereby.

788 So. 2d at 222.

At the end of its analysis, the supreme court in *Whitt* was willing only to say that, where the landowner operates a commercial enterprise in an urban area that causes people to drive onto the property in cars and then leave in cars, the business owner has a duty to assure that this happens safely. In *Whitt*, it is not the ownership of land or the failure to trim or eliminate a hedge that creates the zone of risk, but the conduct of a drive-in/drive-out commercial enterprise on the property in proximity to the sidewalk that creates the zone of risk and gives rise to the duty to trim the foliage.

There is a second limitation to the holding in *Whitt*. The court expressly confined its holding to "urban" settings. In its discussion of the prevailing law, the court noted that the Restatement Second of Torts had expanded landowner liability to the extent of the *condition of trees* in an *urban* area. 788 So. 2d at 216. The court noted that use of the word "condition" had generally been interpreted not to include the tree's location, only the risk that debris from

the tree might fall onto the roadway. *Id* at n.10. Although the court did not expressly accept the rural/urban dichotomy, it appears that this cautious expansion of liability to an urban setting was significant to the *Whitt* court. The absolute rhetoric of "foreseeable zone of risk" notwithstanding,[5] this suggests that ultimately the negligence inquiry remains a classic balancing test: what is the foreseeability and likelihood that defendant's conduct will result in injury to another against the burden to the defendant of avoiding the injury and what are the social consequences of imposing such a burden?[6]

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[5]The supreme court said in *Clay Elec. Co-op. v. Johnson*, 873 So. 2d 1182 (Fla. 2003):

> It is well settled in Florida that
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> > [f]oreseeability clearly is crucial in defining the scope of the general duty placed on every person to avoid negligent acts or omissions. Florida, like other jurisdictions, recognizes that a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others. As we have stated:
> >
> > > Where a defendant's conduct creates a *foreseeable zone of risk*, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.

Id. at 1192 (Pariente, J., specially concurring) (emphasis in original) (quoting *McCain v. Florida Power Corp.,* 593 So. 2d 500, 503 (Fla. 1992)).

[6]I take note of the debate between Justice Pariente and Justice Cantero in their respective opinions in *Clay Electric* concerning a "balancing" approach to tort liability. *Compare* 873 So. 2d at 1193-94 (Pariente, J., concurring), with 873 So. 2d at 1204, n.24

In *Whitt*, the court implicitly determined that where the location is urban and commercial and cars will inevitably meet pedestrians where the driveway meets the sidewalk, the foreseeability and likelihood of injury are substantial. At the same time, given the size of the property, the nature of the obstruction and the profit motive of the owner, the burden on the commercial landowner to provide visibility for safe egress is slight, thereby giving rise to a duty to provide visibility.

Just months before our supreme court decided *Whitt*, a Massachusetts court was faced with a fact pattern very close to the one in this case. In *Hackett v. Costa*, 12 Mass. L. Rep. 420, 2000 WL 1862676 (Mass. Super. 2000), a motorcyclist injured when an automobile pulling a camper pulled out in front of him at an intersection, sued the adjacent property owner, alleging that his line of sight was impaired by shrubbery located entirely within the property on the corner and that the line of sight of the driver of the automobile was "shortened." The Massachusetts court reviewed the cases on both sides of this issue in other

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(Cantero, J., dissenting). Perhaps this is an economic issue but surely it is even more fundamentally part of the common law's constant search for what is *reasonable*. Is it reasonable to base duty on foreseeability alone without any consideration of burden and social utility? Perhaps this is why foreseeable zone of risk analysis appears to be a self-fulfilling test for liability in tort. *See* William Drake*, Foreseeable Zone of Risk: Confusing Foreseeability with Duty in Florida Negligence Law*, 78 Fla. B.J. 10, 12 (2004). To say simply that any actor must eliminate the risk of his conduct without regard to any competing considerations is one thing; to say that a private landowner who *fails* to remove vegetation from his property so that third parties have an unobstructed view as they travel adjacent roads, without consideration of factors militating against such a rule does not seem wise. Applying the "foreseeable zone of risk" analysis to the conduct of a commercial business but not to a residential landowner's failure to remove vegetation for the benefit of the motoring public is a distinction appropriately made. Indeed, the supreme court in *Whitt* took cost/benefit into account by concluding that it would not "unduly burden" commercial landowners to provide safe ingress and egress. 788 So. 2d at 222.

jurisdictions and rejected this claim of liability. *Id.* at *1. The court noted that the legislature had placed the burden of safely traversing an intersection on the motorists using the road and had imposed no duty on landowners at intersections to provide an unobstructed view to motorists. *Id.* at *2. Also, the local government had enacted many ordinances designed to eliminate obstructions to the flow of traffic, but not to visibility.[7] *Id.* The court also observed that such a common law duty to eliminate obstructions to visibility would make the line between liability and no liability almost impossible to draw and would certainly turn this issue into a battle of experts opining on sight lines and traffic patterns. *Id*. at *4.

The *Hackett* court was familiar with the Third District's *Evans* decision and rejected the dissent's notion that landowner liability could appropriately be decided post-accident on a "reasonableness" basis. *Id*. The Massachusetts court expressed the view that landowners are entitled to notice of exactly what is expected of them and pointed out that in a judicially-created environment of undefined "reasonableness" a landowner would be prudent to remove *all* vegetation "that may conceivably be argued one day to violate his duty of care to motorists." *Id*. If corner properties at intersections are to be made bare of vegetation, this is a decision more appropriately made by the legislature. Unlike *Whitt*, the *Hackett* court found it important that Massachusetts courts historically had never imposed a duty on property owners to provide visibility to persons outside the land, observing that, on both large and small tracts of land adjacent to public ways and intersections, standing trees, high hedges and

[7]The *Hackett* court gave examples of ordinances that had specified the exact duty of landowners in such a context, one of which is found in the Florida case of *Pedigo v. Smith*, 395 So. 2d 615, 616 (Fla. 5th DCA 1981). 2000 WL 1862676, at *4.

flowering shrubs are customary, even encouraged. *Id*. at *3.

Although, in his *Evans'* dissent, Judge Schwartz may have been correct in saying that "the Republic will not fall"[8] solely because the question of a landowner's fault in not providing adequate visibility of approaching traffic to the motoring public is decided by a jury on a case-by-case basis, I question whether it is either fair or desirable to leave entirely to a post-hoc decision by a jury the question whether a landowner has sufficiently accommodated or protected those beyond his property who may benefit from having a clear view across it. Landowners in Florida also have the right to know what is expected of them. If the rule in Florida is going to be that a landowner has a duty to ascertain whether a risk of harm to third parties is affected by conditions on his property and to "see that sufficient precautions are taken to protect" those third parties even from their own negligence, we ought be willing (and able) to define the duty. How many feet of clearance or visibility must they provide? How good does the clearance have to be? Why would this duty not extend to keeping vehicles or other obstructions out of the line of vision? Is the landowner's duty affected by the public authority's decisions as to speed and traffic control? If, for example, there had been a traffic signal at this intersection instead of a "yield" sign, the accident would likely not have occurred. Or, if it had occurred even though a traffic light controlled the intersection, would the majority's conclusion that Williams owed a duty to Green be the same? Why shouldn't the public body be required to provide traffic control to meet the conditions on the adjacent property instead of requiring the landowner to maintain his property in light of the public body's decisions on

[8]391 So. 2d at 234 (Schwartz, J., dissenting).

traffic control?

There are several photographs of this intersection in the record, but many are photocopies. The setting does not appear to be urban, but it is difficult to characterize the location absolutely as being "rural." It is conceded, however, that the Williams' property is not used commercially. The principals to the accident were not invitees and were not enticed to the intersection by any commercial use at the location. In my view, therefore, there was no *common law* duty on Williams' part to provide visibility across the property for the benefit of the traveling public.