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## THE LATEST ON LIABILITY FOR OBSTRUCTING FOLIAGE

The landmark case on the issue of the responsibility of a landowner for allowing foliage on property to obstruct the vision of adjacent motorists is McCain v. Florida Power Corp., 593 So. 2d 500 (Fla. 1992). There the Florida Supreme Court rejected the “agrarian rule” that holds that a landowner has no liability when foliage on the landowner’s property extends to such an extent as to block the view of oncoming motorists and an accident ensues. Instead, the McCain Court held that the issue was one of foreseeability both as to duty and proximate cause. In McCain the Court held that the trial court must determine whether a “zone of risk” was foreseeable thus creating a duty to act or avoid to minimize that zone by cutting back foliage.

The Court next met this issue in the case of Whitt v. Silverman, 788 So. 2d 210 (Fla. 2001). There a pedestrian was injured when foliage on a gas station extended and blocked ingress and egress to a vehicle entering or exiting the premises. In Witt at Page 285, the Court held:

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 landowner's alleged responsibility in each case.

In Williams v Davis, 32 Fla. L. Weekly S745 (Fla. 2007) the Court, once again, was faced with a similar issue but this time relating to residential property where the foliage did not extend into the public right-of-way. In that case, the plaintiff's decedent was driving down the road when she was struck and killed by a dump truck traveling on a crossing road. The plaintiff claimed that the foliage on the property in question obstructed the decedent's view of other traffic and thereby contributed to the accident. The Court was faced with a certified question that the Court reworded as follows:

DOES THE FORESEEABLE ZONE OR RISK ANALYSIS ESTABLISHED IN *MCCAIN V. FLORIDA POWER CORP.*, 593 So. 2d 500 (Fla. 1992), APPLY TO PRIVATE OWNERS OF RESIDENTIAL PROPERTY CONTAINING FOLIAGE THAT DOES NOT EXTEND INTO THE PUBLIC RIGHT-OF-WAY SO AS TO CREATE A DUTY BY THE LANDOWNER TO ADJACENT MOTORISTS?

The Court answered the question in the negative. In analyzing the issue, the Court conceded that the facts of this case were very similar to those contained within Witt, supra. However, the Court further concluded that there was a substantial difference in the factual underpinning of Witt because a commercial business was involved and because there was a duty to provide a

safe ingress and egress for both customers and passing pedestrians. At Page S747, the Court held:

We conclude that these prior decisions can best be reconciled by a recognition that ordinarily a private residential landowner should be held accountable under the zone of risk analysis principles of *McCain* only when it can be determined that the landowner has permitted conditions on the land to extend into the public right-of-way so as to create a foreseeable hazard to traffic on the adjacent streets. . . .

In short, while we conclude that *McCain's* principles of duty should be extended in appropriate circumstances to owners or occupiers of commercial property and to other property owners who permit conditions on their property to extend into the public right-of-way, we do not believe *McCain's* principles lead to a finding of duty here. While all property owners must remain alert to the potential that conditions on their land could have an adverse impact on adjacent motorists or others, we are not convinced the existing rules of liability established by our case law that distinguish conditions having an extra-territorial effect from those limited to the property's boundaries should be abandoned.

Thus while Florida has not adopted the agrarian rule precluding liability to a landowner for allowing foliage to obstruct the vision of motorists, the zone of risk test established in McCain, supra, does not apply to residential property where the foliage does not extend beyond the property's boundaries.

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