LANDOWNER LIABILITY FOR MOTOR VEHICLE COLLISONS IN FLORIDA

By
Melvin B. Wright
Colling Gilbert Wright & Carter
801 N. Orange Avenue
Suite 830
Orlando, Florida 32801
www.TheFloridaFirm.com
MWright@TheFloridaFirm.com

Commercial Landowner Liability:

The current status of landowner liability law in Florida imposes a duty squarely upon commercial landowners to maintain their premises to permit safe ingress, egress and use of surrounding sidewalks and roadways. This duty also clearly encompasses a duty to maintain both artificial and natural conditions to satisfy this obligation to the general public.

The so-called "agrarian rule" of landowner liability provides that a landowner owes no duty to persons who are not on the landowner's property and therefore a landowner is not responsible for any harm caused to them by natural conditions on the land. *See* Restatement (Second) of Torts § 363(a) (1965); 5 Fowler V. Harper et al., *The Law of Torts* § 27.19, at 308-309 (2d ed. 1986 & Supp.1991); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 57, at 390 (5th ed. 1984 & Supp.1988). Commentators trace the ancient origins of this rule to times when much land was unsettled or uncultivated, and the burden of inspecting it and putting it in a safe condition by the owner would

have been unduly onerous and out of all proportion to any harm likely to result. *See* Keeton et al., *supra,* § 57, at 390; *see also Evans v. Southern Holding Corp.,* 391 So.2d 231, 233 (Fla. 3d DCA 1980) (Schwartz, J., dissenting) (citing *Roberts v. Harrison,* 101 Ga. 773, 28 S.E. 995 (1897)). The rule was predicated upon a perceived public policy that a landowner has a right to use and enjoy his property in any manner he sees fit." *Morales v. Costa,* 427 So.2d 297, 298 (Fla. 3d DCA 1983). Early supporters of the rule also reasoned that because a natural condition is by definition one which no human being created, a landowner was free from any duty to change or maintain it in order to prevent harm. *See Spreche v. Adamson Companies,* 30 Cal.3d 358, 178 Cal.Rptr. 783, 636 P.2d 1121, 1125 (1981).

Despite its dated origins, many courts have continued to apply the agrarian rule to bar actions in changed conditions, including those based on claims that natural or artificial conditions on a landowner's private property constituted an unsafe condition and obstructed the view of motorists. Not surprisingly, the rapidly developing State of Florida, with its growing population and busy commercial thoroughfares, is no longer one of those jurisdictions that applies this outdated concept of landowner liability.

In 2001, the Supreme Court of Florida abandoned any adherence to the "agrarian" rule, in favor of the concepts of foreseeability. The Supreme Court of Florida, in upholding and elaborating upon the "zone of foreseeability" analysis outlined in *McCain v. Florida Power Corp.,* 593 So.2d 500 (Fla. 1992), held that a legal duty will arise whenever a human endeavor creates a

generalized and foreseeable risk of harming others. Justice Anstead wrote specifically, as those concepts apply to a commercial landowner, that conditions on a landowner's property resulting in injuries or damages to a plaintiff off the landowner's premises should be evaluated by the established principles of negligence law, even if the conditions on the landowner's property are natural ones, such as foliage. *Whitt v. Silverman,* 788 So.2d 210 (Fla. 2001).[1]

In *Whitt,* the Supreme Court found that a service station owner owed a duty of care to pedestrians who were injured on adjacent property when struck by a motorist whose vision upon departing the station was allegedly obscured by foliage on the service station's premises, as the owner's conduct in permitting foliage to grow created a foreseeable zone of risk. By its very nature, the Court held, the service station involved a continuous flow of traffic entering and exiting the premises for the owner's commercial benefit, the owner had exclusive control over foliage and landscaping on its premises, and it apparently would not have been unduly burdensome for landowners to have maintained foliage consistent with safe egress and ingress of vehicles attracted to the business and persons affected thereby.

Residential Landowner Liability:

The Supreme Court of Florida recently distinguished the potential liability and duties owed by commercial landowners from those of residential

---

[1] In *Davis v. Dollar Rent-A-Car Systems, Inc.*, 909 So.2d 297 (Fla. 5th DCA 2004), the Fifth District Court of Appeal extended this holding to non-commercial landowners, holding that the absence of similar accidents at or near the premises does not render an accident unforeseeable as a matter of law, further affirming the duty of landowners to motorists in Florida.

landowners in *Williams v. Davis,* 974 So.2d 1052 (Fla. 2007). In *Williams,* the Supreme Court of Florida limited residential landowner liability. Writing for the Court, Justice Anstead stated the following:

> 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 *Hardin,* we talked in terms of a landowner being free of responsibility "unless the owner has done or permitted something to occur on his lands which he realizes or should realize involves an unreasonable risk of harm to others outside his land." 175 So. at 228. This, of course, is very similar to the foreseeable zone of risk analysis we established in *McCain* to determine the existence of a legal duty. Applying that test here, we can see little basis for imposing liability on the owner of a wooded residential lot for passively permitting the property to remain in its natural condition so long as the growth does not extend beyond the property's boundaries. Unlike the situation in *Whitt,* wherein we concluded that it should be foreseeable to the operator of a commercial service station that obstructions to the vision of an exiting motorist could constitute a danger to adjacent pedestrians, we find it unlikely that a residential landowner would foresee that adjacent motorists would be endangered by the mere presence of foliage on the property.
>
> 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.

Undertaker Doctrine:

This will likely not completely shut the door on residential landowner liability. The "Undertaker Doctrine" is still a potential avenue of liability upon a residential, or a commercial property owner, depending upon the facts at issue. Citing *The Restatement of Torts, Section 324A*, the Supreme Court of Florida has stated:

> **One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if**
>
> **(a) his failure to exercise reasonable care increases the risk of such harm, or**
>
> **(b) he has undertaken to perform a duty owed by the other to the third person, or**
>
> **(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.**

See *Union Park Memorial Chapel v. Hutt*, 670 So.2d 64 (Fla., 1996).

Comparative Fault:

As noted by the Supreme Court of Florida in *Whitt,* the imposition of a duty upon the landowner does not relieve the motorists of their duties of care, and the jury will, of course, be required to apportion the fault of the motorists

and the landlord together with their landscape maintenance company in assessing liability in this case.

Section 768.81, Fla. Stat. **contains the provisions of Florida's Comparative Fault Statute and provides as follows:**

> **(3) APPORTIONMENT OF DAMAGES.--In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability, except as provided in paragraphs (a), (b), and (c):**
>
> **(a) Where a plaintiff is found to be at fault, the following shall apply:**
>
> **1. Any defendant found 10 percent or less at fault shall not be subject to joint and several liability.**
>
> **2. For any defendant found more than 10 percent but less than 25 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $200,000.**
>
> **3. For any defendant found at least 25 percent but not more than 50 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $500,000.**
>
> **4. For any defendant found more than 50 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $1 million.**
>
> **For any defendant under subparagraph 2., subparagraph 3., or subparagraph 4., the amount of economic damages calculated under joint and several liability *shall be in addition to the amount of economic and noneconomic damages already apportioned to that defendant based on that defendant's percentage of fault.***
>
> **(b) Where a plaintiff is found to be without fault, the following shall apply:**

1. Any defendant found less than 10 percent at fault shall not be subject to joint and several liability.

2. For any defendant found at least 10 percent but less than 25 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $500,000.

3. For any defendant found at least 25 percent but not more than 50 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $1 million.

4. For any defendant found more than 50 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $2 million.

For any defendant under subparagraph 2., subparagraph 3., or subparagraph 4., the amount of economic damages calculated under joint and several liability *shall be in addition to the amount of economic and noneconomic damages already apportioned to that defendant based on that defendant's percentage of fault.*

(c) With respect to any defendant whose percentage of fault is less than the fault of a particular plaintiff, the doctrine of joint and several liability shall not apply to any damages imposed against the defendant.

Obviously, the comparative fault of drivers will be an issue for the jury, as will the comparative fault, if any, of the injured plaintiff.