IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-902
(Lower Tribunal Case No. 3D07-906)

MIAMI-DADE COUNTY,

Petitioner,

vs.

DEERWOOD HOMEOWNERS ASSOCIATION and TECHLAWN, INC.

Respondents.

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ON PETITION FOR DISCRETIONARY REVIEW FROM A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

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# JURISDICTIONAL BRIEF OF PETITIONER

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## STATEMENT OF THE CASE AND OF THE FACTS

Deerwood Homeowners Association ("Deerwood') planted a tree right next to a Miami-Dade County sidewalk.[1] Deerwood and Techlawn ("Respondents") then exclusively maintained this tree for 9 years. The County did not maintain the tree because Respondents were maintaining the tree.

As would be expected, the roots of Deerwood's tree intruded on County property and damaged the County sidewalk. This was apparent to Respondents because of the shallow root system. Respondents, however, did nothing to stop the roots from damaging the sidewalk. Indeed, Respondents did not even notify the County of the damage.

In the underlying lawsuit, Plaintiff Patricia Perdomo alleged that she tripped over a vertical separation in the sidewalk that was caused by the roots from Deerwood's tree. Plaintiff sued the County, as well as Respondents for negligence. The County then asserted cross-claims/third-party claims against Deerwood and Techlawn for indemnification, contribution, and negligence. The Circuit Court dismissed the County's claims against Respondents with prejudice, however, finding as a matter of law that there was no duty of care. In affirming the decision,

[1] This case was decided on a motion to dismiss. Accordingly, the facts addressed by the Third District were those stated in the Second Amended Cross-Claim and/or Third Party Complaint. Third District Opinion ("Opinion") at 2.

the Third District held that a landowner has no duty to the government or to bystanders for damage to a County sidewalk even if the landowner itself planted the tree right next to the sidewalk and maintained that tree for 9 years. Opinion at 3. The County timely filed its Notice invoking the discretionary jurisdiction of the Supreme Court.

## SUMMARY OF ARGUMENT

The Third District's Opinion essentially grants a license to property owners in Florida to plant trees right next to government property and then do nothing when the tree foreseeably damages that property. The Opinion is an incorrect reading of this Court's decision in Sullivan v. Silver Palm Properties, Inc., 558 So. 2d 409 (Fla. 1990), and is in direct and express conflict with Silver Palm as well as numerous more recent decisions of this Court that apply a zone of risk analysis to the actions of property owners, including McCain v. Fla. Power Corp., 593 So. 2d 500, 503 (Fla. 1992) and Williams v. Davis, -- So. 2d --, 2007 WL 4124479 (Fla. Nov. 21, 2007).

## ARGUMENT

### 1. Opinion Expressly and Directly Conflicts With Silver Palm

The Third District refused to analyze whether planting a tree next to a sidewalk, and then maintaining that tree for 9 years, could result in a duty of care relating to any damage foreseeably caused to the sidewalk. Instead, the Third

District cited to this Court's decision in Sullivan v. Silver Palm Properties, Inc., 558 So. 2d 409 (Fla. 1990). Of course, this case involves the exact opposite situation from Silver Palm.

Silver Palm involved a preexisting, fifty to seventy year old tree that was not planted by the landowner. Id. at 410. The root growth was subterranean (id.) and the County had previously maintained the tree's roots. Id. at 410 n.2. As a result, and expressly "under the circumstances presented," the Supreme Court found any injury to be too remote and unforeseeable by the landowners to support a cause of action. Id. at 410 (emphasis added). That is not the case here. The obvious difference between Silver Palm and this case is that the property owner here planted the tree right next to the preexisting sidewalk. Further, the Respondents then maintained the tree for 9 years. Moreover, unlike in Silver Palm, the County did not previously maintain the tree. The Third District erred by treating Silver Palm as if it creates an absolute rule of no duty, where Silver Palm expressly held that it was limited to "the circumstances presented."[2]

[2] Indeed, as further explained below, the Florida Supreme Court recently expressly held that Silver Palm was one of the decisions that "rejected any absolute rule of no liability in favor of an application of McCain's principles." Williams v. Davis, 974 So. 2d 1052, 1060 (Fla. 2007).

### 2. Opinion Expressly and Directly Conflicts With Williams v. Davis

The Florida Supreme Court just recently issued a decision that strongly counseled against any absolute rules relating to duty. Williams v. Davis, 974 So. 2d 1052, 1061 (Fla. 2007) ("As a consequence, courts must remain alert to the changes in our society that may give rise to the recognition of a duty even where none existed before. Absolute rules, while predictable in the outcomes they produce, may not be suitable to protect societal interests."). The Williams Court also made a crucial distinction between hazards that are permitted by the landowner to intrude on the public way, in which case there is liability, and those that are not:

> 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.

Williams, 974 So. 2d at 1062 (emphasis added).

Here, Respondents created a foreseeable risk themselves when Deerwood itself planted the tree right next to the sidewalk, when Respondents themselves undertook to exclusively maintain the tree, and when Respondents themselves allowed the shallow root system to intrude on County property and visibly interfere with the County's sidewalk. Accordingly, the Opinion should have applied a zone of risk analysis instead of relying on an absolute rule.

Lastly, Williams even expressly cited Silver Palm, along with other decisions, and stated that "[i]t is important to note that these earlier decisions, like our decision in Whitt, rejected any absolute rule of no liability in favor of an application of McCain's principles." Id. at 1060. The Third District's decision to treat Silver Palm as if it created an absolute rule was therefore in conflict with Williams as well.

### 3. Opinion Expressly and Directly Conflicts With McCain

The Third District failed to conduct a zone of risk analysis to determine whether Respondents' conduct resulted in the creation of a duty of care, as required by the Florida Supreme Court's decision in McCain v. Fla. Power Corp., 593 So. 2d 500, 503 (Fla. 1992) ("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.") (citation omitted).[3] Indeed, the McCain Court expressly held that "each defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result." Id.

[3] Hardin v. Jacksonville Terminal Co., 175 So. 226, 228 (Fla. 1937) (holding that there is liability on the part of a landowner to persons injured outside his lands where "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, and therefore imposes on him, as an owner or possessor of the land, the duty of abating or obviating the use or condition from which the risk is encountered.").

Here, Deerwood created a risk by planting a tree right next to the County sidewalk when it was foreseeable that the tree would damage the sidewalk. Likewise, Deerwood and Techlawn both created a risk when they maintained the tree for 9 years, could observe the shallow root system damaging the sidewalk, and yet did nothing to intervene or inform the County. The Third District was therefore required to apply the principles of McCain to this case and could not hold that it was inapplicable. Williams, 974 So. 2d 1060 (determining that Silver Palm and other earlier decisions "rejected any absolute rule of no liability in favor of an application of McCain's principles.").

## CONCLUSION

The Supreme Court should accept jurisdiction of this matter as the Third District clearly did not apply a zone of risk analysis to this matter, which is in express and direct conflict with the Florida Supreme Court's decisions in Silver Palm, Williams, and McCain.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by Federal Express on May 19, 2008 to the Florida Supreme Court and to to counsel for Deerwood Home Owners Association, Inc., John H. Richards, Esq., Cooney, Mattson, Lance, Blackburn, Richards & O'Connor, P.A., 1600 W. Commercial Blvd., Suite 200, P.O. Box 14546, Fort Lauderdale, FL 33302, and counsel for Techlawn, Inc., Susan S. Lerner, Esq., Josephs Jack, P.A., P.O. Box 330519, Miami, Florida 33233-0519, and counsel for Plaintiffs, Joseph I. Lipsky, Esq., Cornerstone One- Suite 320, 1200 S. Pine Island Rd., Plantation, FL 33324

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Assistant County Attorney

## CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been generated in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a) of the Florida Rules of Appellate Procedure.

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Assistant County Attorney