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FLORIDA PREMISES LIABILITY ON EASEMENTS OF WAY: LIABILITY FOR INJURIES TO THIRD PARTIES

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* J.D. expected May 2010, University of Florida Levin College of Law; B.A., B.B.A., 2007, Stetson University. This Note is dedicated to my wife Michelle, whom words cannot describe and with whom I look forward to experiencing all the joys life has to offer. I would also like to thank my parents, Harold and Jill Smith, whose endless love and support have encouraged me throughout every stage of my life. I am especially grateful for the diligence and insight of the Editorial Staff of the *Florida Law Review* during the production of this Note, and for the meaningful friendships I have developed over the past three years of law school.

I. INTRODUCTION

Imagine for a moment that you are the proud homeowner of a single-family home in Florida. Now imagine that you and three neighboring homeowners share a private driveway that straddles the property line between the four lots, allowing vehicular and pedestrian ingress and egress for all four owners to and from a public road. Assume this private easement of way is expressly granted in the deeds to all four lots and duly recorded with the local municipality. Perhaps the driveway has a dirt or gravel-type surface, because neither you nor your neighbors wish to foot the bill to have the driveway paved. You and your neighbors use the driveway daily, driving across it when traveling to and from work, walking across it when exercising your dog, and walking on it when playing a game of catch with neighborhood children. Although you and your neighbors have never met to discuss who should shoulder the responsibility of the driveway's maintenance, you and your neighbors are all very amicable towards one another, and no disputes ever seem to arise regarding the driveway use and maintenance.

Suppose, however, your neighbor's elderly Aunt Ida visits and steps into a pothole on the driveway while walking out to get the mail in front of your neighbor's house. She breaks her ankle, and the impact from her fall severely aggravates her arthritic back condition. You may be surprised to learn that although the injury occurred on the portion of the easement crossing your neighbor's land, and to one of his guests, a Florida court may find that you are at least partly responsible for her injuries.[1]

Suppose alternatively that you, being a responsible and prudent person, foresee the possibility of such an incident occurring and spend several hundred dollars and an entire Saturday repairing potholes on the driveway. Or perhaps you go even further and hire professionals to grade the road and make it safer for travel. You may be surprised to learn that such action on your behalf may actually make you *more* likely to be held liable for Aunt Ida's injuries.[2] To the average reader, this result does not make sense! Why should the law punish those who exercise foresight and care, including making repairs, while neighbors who sit idly by are effectively rewarded for their lack of care?

1. *See* Collom v. Holton, 449 So. 2d 1003, 1005 n.1 (Fla. 2d DCA 1984).
2. *See id.*

Suppose that instead of Aunt Ida being injured, a local jogger mistakenly runs down the driveway one night. He trips and falls in a pothole and suffers injuries, and then surprises you and your neighbors with a lawsuit. Should your liability hinge on whether he fell on that part of the driveway that runs over your property or a part that runs over one of your neighbors' property? Should the fact that his presence on the driveway, unlike Aunt Ida's, was not invited or authorized, carry significance? Should the fact that you or one of your neighbors previously attempted to make repairs to the driveway make either of you either more or less responsible for the injuries? Should you purchase liability insurance covering your portion of, or the entire, driveway?[3] The answers to these questions lie within the confusing area of easement liability issues, which are dependent upon the law of negligence (specifically premises liability) and on real property law.[4] This Note focuses on these liability issues where easement law in Florida and other states is unclear.

In Part II, this Note briefly reviews easement law terminology and introduces existing secondary commentary. In Part III, this Note thoroughly examines the current status of the law in Florida, with a particular focus on *Collom v. Holton*.[5] In Part IV, this Note focuses on the effect a third-party entrant's status has on the duty and liability of dominant and servient estate owners. Then, in Part V, this Note analyzes other jurisdictions' approaches for guidance in formulating possible standards. Finally, in Part VI, this Note examines several possible solutions that Florida could adopt to resolve ambiguity and foster more predictable future decisions. This Note concludes by arguing for adoption of the "control" standard, similar to that of New York, so that Florida can provide transparency and predictability to its property owners. This increased transparency and predictability would provide Floridians with better notice and facilitate informed decisions regarding whether to insure their interest and when and whether to make the repairs necessary to protect against injuries.

II. A BACKGROUND OF EASEMENT LIABILITY ISSUES

A. *A Brief Review of Terminology*

An easement, in the simplest terms, is a nonpossessory interest in land that grants one party a limited right to use the land of another.[6] The

3. It is vital for dominant and servient owners owning or subject to easements to know for which types of injuries they might be forced to compensate, and for which portion of the easement they are responsible, so that they may adequately insure themselves against liability. This knowledge is also important so that, if they choose, they may enter express maintenance agreements that adequately protect themselves.

4. Andree Brooks, *Talking: Easements; Law Can Trip the Unwary*, N.Y. TIMES, Sept. 13, 1987, at R9, *available at* http://www.nytimes.com/1987/09/13/realestate/talking-easements-law-can-trip-the-unwary.html.

5. 449 So. 2d at 1005 n.1.

6. 4 POWELL ON REAL PROPERTY § 34.01[1] (Michael Allan Wolf ed., 2009).

easement owner, the party who owns the limited right of use, is commonly referred to as the "dominant" estate.[7] The underlying land owner, the party whose land is subject to another's limited right of use, is commonly referred to as the "servient" estate.[8] Thus, with a shared private driveway easement, each party is a dominant estate with respect to that portion of his neighbor's property which he possesses the right to cross, and each party is a servient estate with respect to that portion of his own property that is subject to the neighbor's right to cross. Additionally, a servient owner subject to a nonexclusive easement may continue to make any use of that property, so long as he does not unreasonably interfere with the dominant owner's right of limited use.[9] Another important general rule of easement law is that a dominant owner has the right to enter the servient land, even on portions not on the actual easement, to the extent reasonably necessary to make repairs.[10] This right is known as a "'secondary easement.'"[11]

B. *Existing Secondary Commentary*

Secondary commentary is sparse regarding easement liability issues, which implicate principles from both negligence law and real property law.[12] The few secondary sources that acknowledge the issue briefly gloss over it with generalized statements.[13] *Thompson on Real Property* explains that the dominant owner is responsible where the servient owner is subject to an exclusive easement or where the servient owner makes no use of the easement, but it fails to address the issue of liability for injuries on shared easements.[14] Jon W. Bruce and James W. Ely, Jr. offer that though a servient owner usually does not have an obligation to perform maintenance on the easement absent express agreement, "arguably the servient owner may be liable in tort for injuries suffered by third parties in the easement area owing to the servient owner's negligence."[15] Other sources cite similar language that the servient owner might be held liable in certain situations.[16]

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7. *Id.*

8. *Id.*

9. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.9 (2000).

10. JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 8:38 (2009).

11. *Id.*

12. Brooks, *supra* note 4.

13. *See* 41 FLA. JUR. 2D *Premises Liability* § 7 (2008); 65A C.J.S. *Negligence* § 395 (2000); BRUCE & ELY, *supra* note 10, § 8:37. For example, *Thompson on Real Property* states generally that "[d]ominant owners are responsible not only for the repair and maintenance of an easement, but also for any damage occurring from failure to maintain and repair." 7 THOMPSON ON REAL PROPERTY § 60.05(b) (David A. Thomas, ed., 2006).

14. *See* 7 THOMPSON ON REAL PROPERTY, *supra* note 13, § 60.05(b).

15. BRUCE & ELY, *supra* note 10, § 8:37.

16. *See, e.g.*, 41 FLA. JUR. 2D *Premises Liability* § 7 (2008); 65A C.J.S. *Negligence* § 395 (2000).

C. *Current State of the Law in Florida*

In Florida, as in other states,[17] the law regarding tort liability associated with easements where no express agreement exists remains uncertain and undeveloped. It is the long-established rule that the duty to improve or maintain an easement rests on the owner of the easement, the dominant estate.[18] This principle has been fully accepted in Florida.[19] It is quite unclear, however, under what circumstances, in the absence of express agreement, this duty shifts to the servient owner. Similarly, it is unclear when the duty to protect against injury shifts entirely to the servient owner, or when both the dominant and servient owners may each be held liable for injuries to third parties. Additionally, it remains ambiguous what role the status of the third party on the easement plays in determining liability. Such ambiguity leaves Florida landowners little guidance as to what maintenance measures they should undertake and what insurance coverage they should purchase to protect themselves from liability for injuries on their easement holdings, particularly on easements of way such as private driveways. To resolve disputes in recent times, courts and commentators have relied heavily and ironically on the ambiguous Footnote 1 in *Collom v. Holton*.[20]

III. THE SIGNIFICANCE OF *COLLOM V. HOLTON*

A. Collom v. Holton, *Footnote 1*

In Florida, the primary authority regarding premises liability for injuries suffered due to a negligent condition on an easement is the Second District Court of Appeal's 1984 opinion *Collom v. Holton*.[21] In fact, *Collom v. Holton* is the sole authority regarding this issue cited by Florida's legal encyclopedia[22] and by national legal encyclopedias such as Corpus Juris Secundum.[23] Peculiarly, these secondary sources cite not to the holding of the case, but to a footnote, which arguably constitutes mere dicta.[24] The *Collom v. Holton* footnote states:

> The duty to maintain an easement in a safe condition to prevent injuries to third parties generally rests on the owner of the dominant estate, *Morrill v. Recreational Development, Inc.*, 414 So. 2d 590 (Fla. 1st DCA 1982), unless (1) there is

17. *See* Brooks, *supra* note 4.
18. Morrill v. Recreational Dev., Inc., 414 So. 2d 590, 591 (Fla. 1st DCA 1982).
19. Zipkin v. Rubin Constr. Co., 418 So. 2d 1040, 1043 n.5 (Fla. 4th DCA 1982).
20. Collom v. Holton, 449 So. 2d 1003, 1005 n.1 (Fla. 2d DCA 1984).
21. *Id.*
22. 41 FLA. JUR. 2D *Premises Liability* § 7 (2008).
23. 65A C.J.S. *Negligence* § 395 (2000).
24. 41 FLA. JUR. 2D *Premises Liability* § 7 (2008); 65A C.J.S. *Negligence* § 395 (2000).

> an agreement requiring the servient owner either solely or concurrently to maintain and control the easement, *Sebastian River Drainage District v. Ansin*, 29 Fla. Supp. 77, *aff'd*, 223 So. 2d 57 (Fla. 4th DCA 1969); or (2) the evidence indicates that the servient owner affirmatively and voluntarily otherwise assumed responsibility for maintaining the easement in a safe condition as to persons with the same status as the decedents. *Cf.*, *Banfield v. Addington*, 104 Fla. 661, 140 So. 893 (1932); *Fidelity and Casualty Co. of New York v. L.F.E. Corp.*, 382 So. 2d 363 (Fla. 2d DCA 1980) (the latter two cases state the general rule with respect to voluntary assumption of a duty).[25]

To properly understand the context of the footnote, one must consider the earlier decision of *City of St. Petersburg v. Collom*.[26] In this case, Collom alleged that his wife and daughter were walking across private property owned by Mr. Holton[27] during a heavy rainstorm.[28] While crossing this property, they unknowingly stepped into a storm sewer drainage ditch on a drainage easement owned by the City of St. Petersburg.[29] The rushing water swept them through an unprotected sewer pipe opening to their deaths.[30] Collom subsequently filed wrongful death actions against both the City of St. Petersburg and Mr. Holton, the servient owner.[31] Presumptively because the City of St. Petersburg's duty as a dominant estate was widely recognized and not contested, the *City of St. Petersburg v. Collom* decision hinged on the distinction between government liability for "operational-level" functions versus government immunity for "planning-level" functions[32] instead of on easement law.[33] However, in *Collom v. Holton*, easement law was the primary focus.

The *Collom v. Holton* decision provides some insight into easement law and the issue of whether Mr. Holton, the servient owner,[34] can also be held liable for the deaths of Mr. Collom's wife and daughter. In *Collom v.*

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25. Collom v. Holton, 449 So. 2d at 1005 n.1.

26. 419 So. 2d 1082 (Fla. 1982). Here, the Florida Supreme Court affirmed Bert H. Collom's successful appeal of the circuit court's grant of summary judgment for the city in his wrongful death action for the death of his wife and daughter. Collom v. City of St. Petersburg, 400 So. 2d 507, 508–10 (Fla. 2d DCA 1981), *aff'd*, 419 So. 2d 1082, 1087 (Fla. 1982).

27. Collom v. Holton, 449 So. 2d at 1004.

28. City of St. Petersburg v. Collom, 419 So. 2d 1082, 1084 (Fla. 1982).

29. *Id.*

30. *Id.*

31. *See* Collom v. Holton, 449 So. 2d at 1004; Collom v. City of St. Petersburg, 400 So. 2d at 508–10.

32. City of St. Petersburg v. Collom, 419 So. 2d at 1083.

33. *See* Morrill v. Recreational Dev., Inc., 414 So. 2d 590, 591 (Fla. 1st DCA 1982).

34. Collom v. Holton, 449 So. 2d at 1004.

Holton, the trial court found that the wife and daughter were "uninvited licensees" on Mr. Holton's property and granted summary judgment for Mr. Holton.[35] While the Second District Court of Appeal agreed with the trial court that the decedents were uninvited licensees, it nevertheless found genuine issues of material fact existed regarding whether a duty actually existed[36] and, if so, whether Mr. Holton breached this duty of care owed to the decedents.[37] Specifically, the court listed five questions to be answered by the jury:

> (1) whether a dangerous condition relating to the drainage ditch in fact existed on Holton's property; and if so, (2) whether any duty normally owed by Holton as a landowner was negated by the presence of an easement, if one in fact exists, in the City's favor;[1] and, if not negated, (3) whether the dangerous condition was not open to ordinary observation by the decedents as they crossed onto Holton's property; (4) whether Holton actually knew (this can be shown by circumstantial evidence) of the existence of the hazardous condition; and (5) whether Holton breached his duty to warn (a reasonable person standard) the decedents of the dangerous condition.[38]

It is in this list that Footnote 1 appears. These exact questions would not apply to every third party injured on an easement, because the court derived them from the standard of care owed to an uninvited licensee, which is to

> refrain from wanton negligence or wilful misconduct which would injure [the uninvited licensee], to refrain from intentionally exposing [the uninvited licensee] to danger and to warn [the uninvited licensee] of a defect or condition known to the landowner to be dangerous when such danger is not open to ordinary observation by the licensee.[39]

The court concluded by emphasizing that *City of St. Petersburg v. Collom*'s holding, that a jury was allowed to decide whether the City was liable, *does not* preclude a jury from determining whether Mr. Holton was also liable for the deaths.[40]

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35. *Id.*

36. This is an unusual instance where the existence of a duty of care is a question of fact for the jury. Usually, duty is determined by the judge as a matter of law.

37. Collom v. Holton, 449 So. 2d at 1004–05.

38. *Id.* at 1005.

39. *Id.* (quoting Libby v. West Coast Rock Co., Inc., 308 So. 2d 602 (Fla. 2d DCA 1975)).

40. *Id.* at 1005 n.2.

B. *The "Unless" Language in* Collom v. Holton, *Footnote 1*

Upon first glance, the word "unless" in Footnote 1 may lead one to believe that the presence of an agreement regarding, or an affirmative or voluntary assumption by the servient owner of, the duty to maintain an easement absolves the easement owner's liability.[41] However, such a conclusion requires an unwarranted logical leap. Footnote 1 focuses on when a servient owner may be held liable, not on when the dominant owner is absolved from liability. For example, the presence of an agreement requiring the servient owner to "concurrently" maintain the easement logically should not absolve the dominant owner's duty to third parties, because the agreement requires him to maintain the easement along with the servient owner. With such an agreement, it seems logical that both owners should be jointly liable, a conclusion several courts have reached.[42] This apparently is also the interpretation reached in *Florida Jurisprudence, Second*, which clarifies Footnote 1's language by eliminating the word "unless" and instead writes "the servient owner may *also* be held responsible" where there is an agreement, or where the servient owner affirmatively and voluntarily otherwise assumes maintenance responsibility.[43] This is the better-reasoned interpretation of Footnote 1.

C. *What Constitutes "Affirmatively and Voluntarily Otherwise" Assuming Responsibility for Maintaining an Easement in a Safe Condition?*

Another confusing aspect of Footnote 1 is that it gives little guidance concerning how or when a servient owner "affirmatively and voluntarily otherwise" assumes "responsibility for maintaining the easement."[44] The *Collom v. Holton* court probably did not envision this phrase to apply to a *contractual* assumption of the maintenance responsibility. A contractual assumption appears to be covered by point (1) of Footnote 1, as an "agreement requiring the servient owner . . . to maintain and control the easement."[45] Accordingly, this assumption must be some physical action undertaken by the servient owner, as opposed to a contractual agreement. However, several questions linger: How much action must the servient owner undertake before he assumes the responsibility to maintain the easement in a safe condition with respect to third parties? And is the responsibility assumed by merely making rudimentary repairs on a casual basis, or only by comprehensively undertaking a grading or repaving effort that affects the entire easement?

41. *See id.* at 1005 n.1.
42. *See, e.g.*, Mills v. City of New York, 71 N.Y.S.2d 507, 510 (N.Y. Sup. Ct. 1947).
43. 41 FLA. JUR. 2D *Premises Liability* § 7 (2008) (emphasis added).
44. Collom v. Holton, 449 So. 2d at 1005 n.1.
45. *Id.*

The cases cited after point (2) of Footnote 1 offer little value in answering these questions.[46] These cases did not involve easements whatsoever. Possibly more helpful, however, is the parenthetical accompanying these cases, stating that "the latter two cases state the general rule with respect to voluntary assumption of a duty."[47] This parenthetical references the "undertaker's doctrine"—negligence law's general principle that anyone providing services, whether by contract or gratuitously, is under an obligation to exercise reasonable care.[48] This "undertaker's doctrine" imposes a duty on the individual to act carefully and to not put others, including third parties, at an undue risk of harm.[49] Herein lies the rationale behind why a servient owner subject to a private driveway easement, who gratuitously repairs potholes or otherwise attempts to maintain the driveway in a safe condition, may actually be exposing himself to additional liability for injuries to third parties.

IV. SERVIENT OWNERS OF NONEXCLUSIVE EASEMENTS IN FLORIDA MIGHT ALWAYS BE LIABLE IN THE ABSENCE OF EXPRESS AGREEMENT

A. Zipkin v. Rubin Construction Co.

Regardless of whether servient owners are liable under Footnote 1, servient owners subject merely to easements for ingress and egress may nonetheless remain liable for injuries to third parties.[50] This is because the servient owner retains some authority over the easement road.[51] Wilkinson, a defendant in *Zipkin v. Rubin Construction Co.*[52] owned land subject to an easement roadway for ingress and egress which spanned a dike separating the water and drainage systems of neighboring farms.[53] The Rubin Construction Co. extracted shell rock regularly from Wilkinson's neighbor Gilbert, who owned the easement.[54] Due to Rubin's need to increase heavy traffic on the easement, it agreed with a trucking contractor to resurface the

46. *See generally* Banfield v. Addington, 140 So. 893 (Fla. 1932) (stating the general rule for assumption of a duty); Fid. & Cas. Co. of N.Y. v. L.F.E. Corp., 382 So. 2d 363 (Fla. 2d DCA 1980) (stating the general rule for assumption of a duty).

47. Collom v. Holton, 449 So. 2d at 1005 n.1.

48. Union Park Mem'l Chapel v. Hutt, 670 So. 2d 64, 66–67 (Fla. 1996) ("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."); *see* 38 FLA. JUR. 2D *Negligence* § 21 (2005).

49. *See* Clay Elec. Coop., Inc. v. Johnson, 873 So. 2d 1182, 1186 (Fla. 2003); 38 FLA. JUR. 2D *Negligence* § 21 (2005).

50. Zipkin v. Rubin Constr. Co., 418 So. 2d 1040, 1042 (Fla. 4th DCA 1982); *cf.* Sutera v. Go Jokir, Inc., 86 F.3d 298 (2d Cir. 1996) (holding that "joint liability can attach where the property is used by both the dominant and servient owners").

51. *Zipkin*, 418 So. 2d at 1042.

52. 418 So. 2d 1040 (Fla. 4th DCA 1982).

53. *Id.* at 1041.

54. *Id.* at 1041–42.

easement road.[55] Tragically, during the resurfacing about two feet of the road at the edge of the dike gave way, sending a loaded truck upside-down into the canal waters twelve feet below, drowning one of the contractor's truck drivers.[56] Zipkin, the representative of the decedent's estate, sued several individuals, including Wilkinson.[57]

Wilkinson argued that because he could not exclude individuals, he was absolved of any duty to third parties.[58] The *Zipkin* court disagreed, however, pointing to the *Restatement (Second) of Property* § 486, which states that "[t]he possessor of land subject to an easement created by conveyance is privileged to make such uses of the servient tenement as are not inconsistent with the provisions of the creating conveyance."[59] The court reasoned that the defendant landowner retained some authority over the easement road, because he could use it himself and permit others to use it, so long as such use did not impede the dominant estate's right of ingress and egress.[60] Consequently, the court held that the presence of the easement did not preclude consideration of the landowner's duty to third parties.[61]

It makes sense that while a servient owner subject to a nonexclusive easement might be liable for injuries on easements of way, a servient owner subject to an exclusive easement is not.[62] This is because the latter servient owner himself cannot make any use on land subject to an exclusive easement, nor can he authorize others to enter it.[63] Nevertheless, to hold a servient owner liable for injuries to persons on a nonexclusive easement of way directly contradicts the general rule that the duty to protect against injuries to third parties generally lies with the dominant estate.[64] However, this contradiction triggers more questions: Should it matter whether the injured party was on the easement at the authorization or invitation of the servient owner, as opposed to at that of the dominant owner? Should it matter whether the injured party bears no relation to either the dominant or servient owner? Perhaps liability should hinge on the status of the entrant with respect to both the dominant and servient owners.

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55. *Id.* at 1042.

56. *Id.* at 1041–42.

57. *Id.* at 1042.

58. *Id.*

59. *Id.* (quoting RESTATEMENT (SECOND) (SIC) OF PROPERTY § 486).

60. *Id.*

61. *Id.* Ultimately, the court affirmed summary judgment in Wilkinson's favor, finding that the decedent possessed the status of an uninvited licensee with respect to Wilkinson. *Id.* at 1043–44. Because the dangers presented by the situation were open and readily comprehensible, not hidden, Wilkinson did not breach any duty owed to the decedent by failing to warn him of the perils involved. *Id.* at 1044. For a further discussion of the duties owed to an uninvited licensee, see *infra* Part IV.B.2.

62. *See* 65A C.J.S. *Negligence* § 395 (2000).

63. *See* Sutera v. Go Jokir, Inc., 86 F.3d 298, 303 (2d Cir. 1996).

64. *See* Morrill v. Recreational Dev., Inc., 414 So. 2d 590, 591 (Fla. 1st DCA 1982).

B. *Do Dominant and Servient Owners' Liability Hinge on the Status of the Third Party?*

1. Trespassers

In cases involving injury to trespassers on easements, often neither the dominant nor the servient owner is held liable. With respect to trespassers, easement holders owe a duty only to refrain from willfully or wantonly inflicting injury.[65] Trespasser plaintiffs face great difficulty proving such conduct by defendants, as illustrated by the Maryland decision *Wagner v. Doehring*.[66] The defendants in *Wagner* owned an easement for ingress and egress to and from their residence, which was on a landlocked parcel surrounded by an undeveloped investment parcel.[67] The easement driveway connected to an unlighted public road, running through a rural wooded area.[68] The defendants operated a dog kennel on their parcel.[69] Unauthorized motorcyclists frequently raced across part of the easement to access dirt trails on the servient parcel, startling the defendants, their grandchildren, and their dogs.[70] Ostensibly in an attempt to deny the motorcyclists access to their driveway, the defendants stretched a chain across its entrance, attaching it to two poles.[71]

Tragically, late one night the plaintiff struck the chain while riding his motorcycle without a helmet and without the use of headlights, sustaining fatal injuries.[72] In holding the defendants owed only a duty to refrain from willfully or wantonly injuring the decedent, the court explained that such limited liability allows "'a person to use his own land in his own way, without the burden of watching for and protecting those who come there without permission or right.'"[73] The court cautioned that if the injured party were one whom the defendants could not exclude, such as an invitee of the servient estate, they would certainly have owed a different duty of care.[74] However, the *Wagner* court found that the holder of a right-of-way is not entitled to such limited liability[75] and explained that a "possessor of land" in tort law is altogether different from a "possessor of land" in property law.[76] The duty of an easement owner to a third party is derived

65. *See* Wagner v. Doehring, 553 A.2d 684, 687 (Md. 1989).
66. *Id.* at 689.
67. *Id.* at 685.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 686.
73. *Id.* at 687 (quoting W. PROSSER, THE LAW OF TORTS § 58, at 395 (W. Keeton 5th ed., 1984)).
74. *Id.* at 689 n.5.
75. *Id.* at 687.
76. *Id.* at 688.

from the tort definition of "possessor."[77] "By exercising control over and using the right-of-way, the easement holder is in occupation of the land—thus, in possession of that land."[78] Finding that the defendants did not willfully or wantonly seek to injure the decedent, the court concluded that the defendants' actions were entirely within their rights as possessors of the land.[79]

2. Uninvited Licensees

Further emphasizing the importance of third-party status, *Zipkin v. Rubin Construction Co.*, addresses uninvited licensees and illustrates the widely-accepted principle that a third-party entrant on an easement may have a different legal status with respect to the dominant owner than he has with respect to the servient owner.[80] In fact, an "easement is a particularly relevant factor in determining the entrant's status vis-à-vis the landowner."[81] An entrant's status and the corresponding duty owed by a landowner "must be gleaned from the relationship between the two. '[I]t is the *relationship* established between persons which must be the criterion for the duty owed.'"[82] An uninvited licensee in Florida is one who is neither an invitee nor a trespasser, but who "enters upon the property of another for his own convenience, pleasure, or benefit."[83] The truck-driver plaintiff in *Zipkin*, for example, presumptively an invitee of the dominant owner for whom he was working, was held an uninvited licensee with respect to the servient owner.[84] The duty owed to a licensee is to refrain from willfully or wantonly inflicting injury, to refrain from intentionally exposing him to danger, and to warn him of a known dangerous defect or condition not open to ordinary observation.[85] Interestingly, even though the duty owed an uninvited licensee varies slightly from the duty owed a trespasser, this difference appears to have little or no bearing on whether a dominant owner is any more or less likely to be held liable for injuries to an uninvited licensee.

3. Invitees

One might intuitively think that the party, whether the dominant or servient owner, who invites the injured third party should be held responsible for the third party's injuries. After all, one might argue that the

77. *Id.*
78. *Id.*
79. *Id.* at 689.
80. Zipkin v. Rubin Constr. Co., 418 So. 2d 1040, 1042–43 (Fla. 4th DCA 1982).
81. *Id.* at 1042.
82. *Id.* at 1043 (quoting Wood v. Camp, 284 So. 2d 691, 694 (Fla. 1973)).
83. *Id.* at 1043 n.3.
84. *Id.* at 1043.
85. *Id.* at 1044.

party who expects a third party's presence on the easement is in a better position to protect against injury to that person. Most decisions, however, focus not on the relationship between the third party and the dominant and servient owners to determine liability, but rather on the level of control each owner exerted over the easement.[86] However, the relationship of each owner to the injured third party is not without consequence because it determines the duty owed by each owner, and in that respect it can affect the outcome of a case.[87]

Cesario v. Chiapparine provides an excellent example of this outcome-determinative effect.[88] The plaintiff in *Cesario*, Vincenza Cesario, was a social guest residing temporarily at the defendant's, Emelia Cesario, home.[89] A concrete driveway alley approximately seven or eight feet in width spanned the gap between Emelia Cesario's home and the home of the other defendant, Chiapparine.[90] Cesario owned two feet of the alley, Chiapparine owned the remaining five feet, and Cesario owned an easement over Chiapparine's five feet for ingress and egress to a garage behind Cesario's house.[91] A drainpipe gutter regularly discharged water from Chiapparine's roof onto the driveway alley and into a drain.[92] On a cold day, the plaintiff (Vincenza Cesario) slipped and fell on ice that had formed on the alley, landing on her back and sustaining injuries.[93] The trial court dismissed the complaint in favor of both defendants (Emelia Cesario and Chiapparine).[94]

The appellate court affirmed the dismissal with respect to the defendant, Emelia Cesario, holding that she owed the plaintiff only the duty owed to licensees—the duty not to willfully injure, to make dangers known, and to warn.[95] The appellate court reversed with respect to the defendant, Chiapparine, however, holding that she owed the plaintiff the duty owed to business invitees.[96] The court explained that as a social guest of Emelia Cesario, the plaintiff enjoyed the same status vis-à-vis Chiapparine as did her host—that of a business invitee—due to Emelia Cesario's purchase of the easement from Chiapparine.[97] Thus, the duty

86. *See* Sutera v. Go Jokir, Inc., 86 F.3d 298, 308 (2d Cir. 1996); Cardinal v. Long Island Power Auth., 309 F. Supp. 2d 376, 385 (E.D.N.Y. 2004); McIntyre v. Boston Redevelopment Auth., 595 N.E.2d 334, 336 (Mass. App. Ct. 1992).

87. *See* Cesario v. Chiapparine, 250 N.Y.S.2d 584, 591 (N.Y. App. Div. 1964).

88. *Id.* at 591.

89. *Id.* at 586.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 587.

94. *Id.*

95. *Id.* at 589.

96. *Id.* at 590, 592.

97. *Id.* at 589.

owed to the plaintiff by Chiapparine was equivalent to the standard exercise of reasonable care in maintaining the premises.[98] Accordingly, the appellate court remanded the case for a new trial.[99] Thus, *Cesario* shows that while not ipso facto determinative of whether the dominant or servient estate will be liable for injuries to third parties, the status of the third party with respect to each can ultimately influence liability.

V. GUIDANCE FROM OTHER JURISDICTIONS

A. *General Acceptance of the* Zipkin *Principle: North Carolina's* Hartman v. Walkertown Shopping Center, Inc.[100]

It appears that the *Zipkin* principle, or the possibility of holding servient owners liable for injuries on nonexclusive easements based on their status as underlying landowners[101] is well-recognized in other states. One example is North Carolina, which also holds that a servient owner may be held liable for injuries despite the presence of an easement.[102] In *Hartman*, upon returning to his car from a video store, the plaintiff stepped off a sidewalk into a depressed water meter cover in the blacktop surface of a parking lot owned by the defendant shopping center owner.[103] The water meter, which the plaintiff testified was four to six inches below the parking lot surface, laid on an easement granted by the defendant to the local sanitary district.[104] The plaintiff alleged that as an invitee, the defendant failed to warn him of the dangerous condition, the existence of which the shopping center should have known.[105] The trial court granted summary judgment for the defendant, and the plaintiff appealed.[106]

In reversing the trial court, the *Hartman* court applied the landowner's general standard of care owed to invitees—the "'duty to exercise ordinary care to maintain the premises in a safe condition and to warn the invitee of hidden dangers or unsafe conditions, discoverable by the owner through reasonable inspection and supervision.'"[107] The court found that regardless of the rule that the dominant owner is liable for injuries to third parties, the defendant servient owner had an affirmative duty to warn.[108] Thus, in the presence of this duty to invitees, the trial court's grant of summary

98. *Id.* at 590.
99. *Id.* at 592.
100. 439 S.E.2d 787 (N.C. Ct. App. 1994).
101. *See* Zipkin v. Rubin Constr. Co., 418 So. 2d 1040, 1042 (Fla. 4th DCA 1982).
102. *Hartman*, 439 S.E.2d at 791.
103. *Id.* at 788.
104. *Id.*
105. *Id.* at 788–89.
106. *Id.* at 789.
107. *Id.* at 791 (quoting Stoltz v. Burton, 316 S.E.2d 646, 647 (N.C. Ct. App. 1984)).
108. *Id.*

judgment to the defendant was in error.[109] However, the *Hartman* court did not discuss whether action by the defendant servient owner to guard against or correct the condition would have interfered with the easement rights granted to the sanitary district.[110]

Notably, however, a *Zipkin*-like situation may potentially result in a finding of no liability on behalf of the servient owner in the case of a nonexclusive easement, as seen already in the Maryland high court decision *Wagner v. Doehring*.[111] In *Wagner*, the dominant estate owned a nonexclusive easement for ingress and egress.[112] The servient estate, however, apparently owed no duty to third parties on the easement, because it made no actual use whatsoever of the easement across its undeveloped land.[113]

B. *An Alternative Method: Pennsylvania's "Abutting" Standard in* Borgel v. Hoffman

Beginning with the 1971 opinion *Borgel v. Hoffman*, Pennsylvania undertook a rather unique equitable approach to liability for injuries to third parties.[114] The approach provides that when multiple owners share a private road easement, in the absence of any maintenance agreement, each owner is responsible for maintaining and repairing only the portion of the driveway that abuts his own land.[115] In *Borgel*, the plaintiff fell on a private driveway which ran between two rows of houses, sustaining injuries.[116] The plaintiff named only one defendant, the Hoffmans, who owned the portion of the driveway on which the injuries occurred.[117] The Hoffmans claimed that the other homeowners who shared the driveway were jointly or severally liable, or liable to the Hoffmans for contribution for the plaintiff's injuries.[118] No maintenance agreement existed.[119]

The *Borgel* court rejected the general rule that the dominant estate owes the duty to protect against injuries to third parties, because the property owners in this situation were each dominant and servient owners.[120] The court ruled that "the respective rights and burdens of each of the property owners must necessarily be determined by considerations of the equities

109. *Id.*
110. *See* Piluso v. Bell Atl. Corp., 305 A.D.2d 68, 71 (N.Y. App. Div. 2003).
111. 553 A.2d 684, 689 (Md. 1989); *see supra* Part IV.A.
112. *Wagner*, 553 A.2d at 685.
113. *See id.* at 689; 7 THOMPSON ON REAL PROPERTY § 60.05(b) (David A. Thomas, ed., 2006).
114. Borgel v. Hoffman, 280 A.2d 608, 610 (Pa. Super. Ct. 1971).
115. *Id.*; Okkerse v. Howe, 593 A.2d 431, 433 (Pa. Super. Ct. 1991); Oswald v. Hausman, 548 A.2d 594, 597 (Pa. Super. Ct. 1988); Mscisz v. Russel, 487 A.2d 839, 840 (Pa. Super. Ct. 1984).
116. 280 A.2d 608, 610 (Pa. Super. Ct. 1971).
117. *Id.*
118. *Id.* at 609.
119. *Id.*
120. *Id.*

and expediencies involved."[121] The court reasoned that to hold each dominant owner liable, no matter how far removed the site of injury from that dominant owner's land, would be unreasonable, inconvenient, and inequitable.[122] The court also reasoned that similar inequity would result from attempting to arbitrarily pin liability on those dominant owners residing "close" to the site of injury.[123] Thus, the court concluded that holding each owner responsible for repairing and maintaining only the portion of the driveway abutting or located on his own land was the most reasonable, expedient, and equitable rule.[124]

This rule regarding maintenance liability was cited with approval in *Mscisz v. Russell*, which illustrates that the rule only applies in the complete absence of any maintenance agreement.[125] The plaintiff in *Mscisz* was riding a motorcycle on a private driveway with multiple dominant owners, when he fell and sustained injuries.[126] The plaintiff sued the owners of the parcel abutting the portion of the driveway at issue.[127] The defendants then joined over fifty neighbors who shared the private driveway, claiming each had an equal duty to maintain.[128] In reversing the trial court's summary judgment finding for these fifty-plus neighbor defendants, the *Mscisz* court stressed that the presence of a covenant in the deeds to each of the defendants' parcels, which discussed sharing maintenance expenses of the driveway, gave rise to genuine issues of material fact.[129] Thus, the court remanded the case for further proceedings.[130]

This equitable rule from *Borgel* was again affirmed in *Oswald v. Hausman*, where an elderly man got caught in a snowstorm and died of hypothermia while driving on an unpaved section of a private driveway.[131] No agreement existed regarding maintenance of the driveway, which had multiple owners, so the responsibility fell on the owner whose land abutted the portion of the driveway at issue.[132] The court deemed the decedent a trespasser, [133] however, and dismissed the case, finding that the defendant owner did not breach any duty owed to trespassers.[134]

121. *Id.* at 609–10.
122. *Id.* at 610.
123. *Id.*
124. *Id.*
125. 487 A.2d 839, 840 (Pa. Super Ct. 1984).
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 841.
130. *Id.*
131. 548 A.2d 594, 595–96 (Pa. Super. Ct. 1988).
132. *Id.* at 597.
133. *Id.* at 599.
134. *Id.* at 600.

C. *New York: The "Control" Standard in* Sutera v. Go Jokir, Inc.[135]

The United States Court of Appeals for the Second Circuit provided an informative discussion regarding the duties owed to third parties by the dominant and servient estates when it applied New York law in *Sutera v. Go Jokir, Inc.*[136] The plaintiff in *Sutera*, a police radio dispatcher, upon exiting her car and walking towards the police department, slipped and fell on a parking lot's icy surface.[137] She filed a complaint against Go Jokir, Inc., the defendant, which, as the dominant estate, owned an easement to use the parking lot on which the incident occurred.[138] The servient owner of the parcel was the Village of Spring Valley.[139] The plaintiff alleged the fall caused her to suffer back injuries and incur damages, including several surgeries for a herniated disc.[140] At issue, and of particular relevance, was the fact that the defendant had a covenant with the Village, in the duly-recorded easement document, which required the Village to clear snow and ice from the parking area.[141] Based on this agreement, the district court granted the defendant's motion for summary judgment.[142]

In reversing the district court's decision and remanding the case for trial, the *Sutera* court held that once established, a dominant estate's duty toward third parties is not abrogated by a covenant for maintenance with the servient owner.[143] The court explained that the general rule allowing servient owners to assume maintenance duties does not apply when the rights of injured third parties are implicated; rather, it only applies to disputes between dominant and servient owners themselves.[144] In reaching this result, the *Sutera* court explained that just like a landowner who under New York law has certain non-delegable duties towards third parties, the dominant owner's duty is predicated on ownership control.[145] Thus, the court concluded, the maintenance covenant with the servient owner did not

135. 86 F.3d 298 (2d Cir. 1996).
136. *Id.* at 301.
137. *Id.* at 300.
138. *Id.* at 301.
139. *Id.*
140. *Id.* at 300.
141. *Id.* at 301.
142. *Id.*
143. *Id.* at 308.
144. *Id.* at 308–09.
145. *Id.* at 308; *cf.* Cardinal v. Long Island Power Auth., 309 F. Supp. 2d 376, 385 (E.D.N.Y. 2004); McIntyre v. Boston Redevelopment Auth., 595 N.E.2d 334, 336 (Mass. App. Ct. 1992) (holding that the presence of a highway easement owned by the city did not preclude the servient landowner's duty to third parties because the critical test was "who had the right to control the property," an issue of fact for the jury). Other jurisdictions have similarly held. *See* Reyna v. Ayco Dev. Corp., 788 S.W.2d 722, 724 (Tex. Ct. App. 1990) (stating that when an owner transfers control of the premises to another, the owner owes no duty to those who enter the premises).

absolve the dominant owner of its duties to third parties.[146] Rather, joint liability can attach where the easement is used by both the dominant and servient owners.[147]

In 2003, a New York state court, approving the analysis in *Sutera*,[148] held that a servient owner may be liable for injuries to third parties based not on duties corollary to the easement, but rather on the duty to warn invitees.[149] The plaintiff in *Piluso v. Bell Atlantic Corporation* was jogging with his dog one evening in the back parking lot of a housing complex owned by the defendant.[150] In poor visibility conditions, running in an area with which he was unfamiliar, the plaintiff tripped over an "outer anchor guy wire" running from a utility pole diagonally down to the ground.[151] The plaintiff suffered two broken bones in his hand as a result of his subsequent fall.[152] The court noted that a servient owner has no duty to maintain an easement, and that the defendant demonstrated through uncontroverted evidence that it neither owned nor controlled the utility pole and the guy wire.[153] Although the anchor wire was owned by a utility company and located on an easement of which the defendant was the servient owner, the trial court denied the defendant's motion for summary judgment, and the appellate court affirmed.[154]

In reaching its conclusion, the appellate court pointed out that the defendant may be liable to the plaintiff on the theory that it failed to warn the defendant of the dangerous condition presented by the guy wire.[155] The court held that despite the presence of the easement, negligence principles, including the duty to protect entrants from a latent hazard, controlled.[156] The court rejected the defendant's reliance on similar cases granting summary judgment to servient owners, where entrants were injured by contact with electrical transformers and other power equipment.[157] The court determined that the distinguishing factor at bar was that the servient owner could have easily protected against the hazardous guy wire without interfering with the utility companies' easement rights, whereas any tampering with a utility company's transformer "'would clearly encroach upon the rights'" granted by the easement.[158]

146. *Sutera*, 86 F.3d at 308–09.
147. *Id.* at 304.
148. Piluso v. Bell Atl. Corp., 305 A.D.2d 68, 71 (N.Y. App. Div. 2003).
149. *Id.* at 72.
150. *Id.* at 69.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 70.
156. *Id.*
157. *Id.* at 71–72; *see* Green v. Duke Power Co., 290 S.E.2d 593, 598 (N.C. 1982).
158. *Piluso*, 305 A.D.2d at 71 (quoting *Green*, 290 S.E.2d at 598).

VI. SUGGESTED SOLUTIONS AND THEIR IMPACTS

Although other jurisdictions have articulated easement liability standards, Florida law remains unclear regarding the liability of dominant and servient owners in the absence of express agreement. Secondary sources and attorneys alike urge that the first step a landowner concerned about liability for injuries should take is to carefully articulate the maintenance responsibility in an express agreement, preferably at the time the express easement is granted.[159] Carrying adequate liability insurance to cover potential injuries on easements is another important step.[160] The servient owner may also go so far as to require in the easement granted that the dominant owner obtain and maintain casualty and liability insurance over his interest on the servient estate.[161] However, many individual owners of either easements or land subject to easements do not properly or thoroughly address maintenance duties. Additionally, in the absence of prudent legal counsel, these individuals do not become aware of the need for express agreements and of the liability to which they are subject until something goes awry. Thus, it is vital to construct a concrete standard that clears up what result to expect in the absence of an express maintenance agreement, which is indeed "'a gray area'"[162] in the law.

Three potential candidates emerge as potentially viable solutions—legislative action in the form of statutory liability, judicial adoption of the new *Restatement* approach,[163] and judicial adoption of the "control" standard. Ultimately, only one of these three best comports with Florida case law while yielding predictable, equitable results consistent with traditional tort and property law principles.

A. *Legislative Action*

In Florida, one possible solution to this ambiguous area of the law is legislative action: for example, a statute passed by the state legislature declaring the respective liabilities of dominant and servient owners for injuries incurred on easements in the absence of express agreement.[164] One state, Oregon, has decided to take legislative action regarding the duty to maintain easements.[165] The relevant provision provides:

> The cost of maintaining the easement in repair in the absence of an agreement and in the absence of maintenance

159. BRUCE & ELY, *supra* note 10, § 8:37; 4 POWELL ON REAL PROPERTY § 34.12[2]; Brooks, *supra* note 4.

160. BRUCE & ELY, *supra* note 10, § 8:37; Brooks, *supra* note 4.

161. BRUCE & ELY, *supra* note 10, § 8:37; *see* Stevens v. Grody, 746 N.Y.S.2d 510, 511 (N.Y. App. Div. 2002).

162. Brooks, *supra* note 4 (quoting Catherine C. Kirk).

163. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES, *supra* note 9, § 4.13.

164. BRUCE & ELY, *supra* note 10, § 8:37 n.11.

165. *Id.* § 8:37 n.11; OR. REV. STAT. § 105.175 (3) (2009).

> provisions in a recorded instrument creating the easement shall be shared by each holder of an interest in the easement in proportion to the use made of the easement by each holder of an interest in the easement.[166]

In determining proportionate use, the Oregon statute provides that the size, weight, and frequency of use of vehicles on the easement are relevant factors.[167] The normal distance of use over the easement by the parties involved is also relevant in calculating proportionate use.[168] The statute concludes by clarifying that if an easement holder damages the easement by negligence or abnormal use, that dominant owner must bear the expense of repair.[169]

Such legislative action can significantly help ameliorate the ambiguity surrounding these issues by creating a clear, general rule. Easement owners and those who own land subject to easements of way alike can rely upon such a rule in helping them determine what insurance coverage is necessary and when, and at what cost, they should pursue express maintenance and liability agreements. However, a statutory standard has its drawbacks. By creating a bright-line rule, the statute prohibits a case-by-case factual inquiry that helps courts determine an equitable outcome to each individual case. Such analysis has become a critical, and often dispositive, factor in determining these types of cases, especially under the "control" standard explained and applied in cases such as *Sutera*.[170]

B. *The New Restatement Approach*

An alternative approach is to adopt the *Third Restatement of Property: Servitudes*, which allows consideration of duties owed to third parties on easements to creep into its provision regarding duties of repair and maintenance.[171] Section 4.13 states that absent express agreement, the dominant estate has a duty to repair and maintain the portions it controls of the servient estate, "to the extent necessary to (a) prevent unreasonable interference with the enjoyment of the servient estate, or (b) avoid liability of the servient-estate owner to third parties."[172] Apart from citing to and rehashing the general "may be liable in tort for injuries to third persons" language from Bruce and Ely's *The Law of Easements and Licenses in*

166. OR. REV. STAT. § 105.175 (3) (2009).

167. *Id.* § 105.175 (4)(a).

168. *Id.* § 105.175 (4)(b).

169. *Id.* § 105.175 (4)(c).

170. Sutera v. Go Jokir, Inc., 86 F.3d 298, 308 (2d Cir. 1996); *see also* Cardinal v. Long Island Power Auth., 309 F. Supp. 2d 376, 385 (E.D.N.Y. 2004); McIntyre v. Boston Redevelopment Auth., 595 N.E.2d 334, 336 (Mass. App. Ct. 1992).

171. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES, *supra* note 9, § 4.13.

172. *Id.*

Land, however, the comment, illustrations, and reporter's note following § 4.13 fail to further explore the liability of servient owners.[173]

The language of the provision itself is still helpful nonetheless. First, the provision distinguishes "prevent[ing] unreasonable interference with the enjoyment of the servient estate" as distinct from avoiding liability to third parties.[174] Such a distinction is important because it acknowledges that some maintenance duties benefit the servient estate, while others benefit third parties. In contrast, most treatises only address duties owed between the dominant and servient owners. Second, the provision restricts the dominant estate's duty to avoid liability for injuries to third parties to "the portions of the servient estate and the improvements used in the enjoyment of the servitude that are *under the [dominant estate's] control*."[175] This limitation appears to come directly from the line of cases holding that liability for injuries to third parties is premised on control of the property at issue.[176] However, the provision fails to address the result when both the dominant and servient estates may be said to have "control" over the easement, and it omits the possibility that the servient estate may alone be liable for injuries to third parties.[177]

C. *The "Control" Standard*

To best tackle this complex area of the law, Florida should adopt and articulate New York's "control" standard.[178] This standard best protects "innocent" dominant and servient owners, allowing for the application of traditional negligence principles to yield equitable results, while remaining consistent with existing Florida case law.[179] Florida case law appears to reflect the principles underlying the control standard, but the vague, undeveloped language of its opinions has left landowners and attorneys guessing. A clear articulation of the control standard, perhaps by the Florida Supreme Court, would firmly establish that for injuries to third parties on easements of way, in the absence of express agreement, both the dominant and servient owners may be held liable, depending on a finding of which party can be said to "control" the easement. Such finding would be based on examination of all relevant factors, including prior maintenance on the easement, the frequency and intensity of use by both owners, and the status of the third party with respect to both owners. Thus, the owner who can be said to "control" the easement may be held liable for

173. *Id.*

174. *Id.*

175. *Id.* (emphasis added).

176. *See* Sutera v. Go Jokir, Inc., 86 F.3d 298, 308 (2d Cir. 1996).

177. *See id.*

178. *See supra* Part V.C.

179. *See* Collom v. Holton, 449 So. 2d 1003, 1005 n.1 (Fla. 2d DCA 1984); Zipkin v. Rubin Constr. Co., 418 So. 2d 1040, 1043 (Fla. 4th DCA 1982); Morrill v. Recreational Dev., Inc., 414 So. 2d 590, 591 (Fla. 1st DCA 1982).

injuries to a third party. Similarly, if both owners are found to exert some degree of "control" over the easement, each may be held liable to the extent he is found to control the easement. Such a standard is consistent with, yet greatly clarifies, the *Collom v. Holton* and *Zipkin* decisions, providing superior guidance to Florida's dominant and servient owners while yielding equitable results.[180]

VII. CONCLUSION

This Note has unveiled a plethora of potential situations, circumstances, and factors that play into determining liability for injuries to third parties on easements of way. These factors include the nature of the agreement between the dominant and servient estates, the ongoing relationship between the two with respect to the easement, the nature of the easement itself, and the status of the third party. *Corpus Juris Secundum* best summarizes this area of the law, writing "[c]ircumstances surrounding a grant of an easement and its use are sufficiently divers so as to preclude a universal rule either of liability or immunity for easement owners in actions for wrongs brought by third parties."[181] Attempts by Pennsylvania[182] and Oregon[183] to corner this complex area of the law using bright-line rules are facially attractive by virtue of their simplicity, but can yield inequitable results because they reject the application of traditional tort principles, such as the undertaker's doctrine.[184] To minimize the confusion surrounding existing law while providing an equitable solution to Floridians, this Note argues that the best resolution is an adoption of New York's "control" standard. By adopting this standard, Florida will provide clarity and guidance to this complicated area of the law, while simultaneously remaining consistent with its case law and yielding equitable results.

180. *See* Collom v. Holton, 449 So. 2d at 1005 n.1; *Zipkin*, 418 So. 2d at 1043; *Morrill*, 414 So. 2d at 591.

181. 65A C.J.S. *Negligence* § 395 (2000).

182. *See supra* note 115 and accompanying text.

183. *See supra* notes 165–69 and accompanying text.

184. *See supra* notes 48–49 and accompanying text.