OA 1-11-89

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO.: 72,492

WESTLAND SKATING CENTER, INC. and
HIALEAH SKATING CENTER, LTD.,
by and through WAYNE D. LIPPMAN and
STEWART L. CAUFF, as General Partners,

Plaintiffs, Petitioners,

v.

GUS MACHADO BUICK, INC. and
MORRISON ASSURANCE CO.,

Defendants, Respondents.

DEFENDANTS', RESPONDENTS' ANSWER BRIEF

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STATEMENTS OF THE FACTS

GUS MACHADO BUICK (formerly Seipp Buick), WESTLAND SKATING CENTER and K-Mart occupied adjoining parcels of property in Hialeah, Florida. These parcels, like much of the land in Hialeah, was initially part of the Everglades. (T. 320). Before any commercial development, the lands were primarily used for the pasturing of cattle. (T. 320, 480). GUS MACHADO BUICK'S, property abuts West 49th Street and extends 900 feet to the south. The property immediately east of the MACHADO property was owned by Maurice Revitz and the property immediately east of that property was the K-Mart Shopping Center. WESTLAND SKATING CENTER came to occupy the southern 450 feet of the Revitz property while Revitz himself continued to occupy the northern 450 feet in a strip shopping center.

In its original condition, the land in the area generally sloped downward to the southwest. (T. 292). The changing elevation measured approximately one inch in elevation for each thirty feet of horizontal distance, an almost imperceptable change. The land, of course, did not slope continuously to the southeast, but contained various high and low points. (T. 294). When rains occurred, the lower areas would always fill before any flow began in any direction. (T. 294). There were surfaces on the property which became the MACHADO BUICK dealership which were actually higher than the land which was to be occupied by WESTLAND. (T. 305). In its natural state there was a depression on the property which would later be occupied by the WESTLAND

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building which would allow some water to flow off the MACHADO property. (T. 305).

Regardless of the land's original condition, at the time WESTLAND entered the picture, the elevations and configerations of the various properties had been significantly altered by their occupants over many years. The first on the development parcels was the K-Mart Shopping Center, which was constructed in the mid 1960's. (T. 296). The K-Mart property was immediately to the east of the property owned by Revitz. During the construction of the K-Mart Shopping Center, fill was added to the property raising its elevation by approximately three to four feet. (T. 295). This change obviously altered the land as from its original state and the increasing elevation changed the water flow in the area. (T. 295).

In 1969, MACHADO'S predecessor in interest, Seipp Buick, constructed an automobile dealership on its property. (T. 1017, T. 296). The building was constructed in compliance with the code. (T. 281- 282). Initially, the dealership occupied only the northern 450 feet, i.e. the front of the property, directly adjacent to West 49th Street. (T. 296). The elevation of this area was also raised by fill when the dealership was constructed. (T. 773, 499). From time to time, in the ensuing years, fill was added to the rear 450 feet of the MACHADO property. There was no flooding on the MACHADO property until 1979. (T. 478).

At about the same time, Revitz began the development of the

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adjacent northern 450 feet of his property. He constructed a strip shopping center known as the Village Shopping Center. (T. 545). During the development of the northern portion of the Revitz property, the east and west edges were raised so that the rain water drained to the center of the property. (T. 304).

The back 450 feet of the Revitz property remained undeveloped and in its natural state until 1975 when it was leased to the developer of a miniature golf course (Putt Putt Golf). (T. 769). At the time of that lease, the property was subjected to torrents of water flooding from the K-Mart property, as well as seepage of water from the MACHADO property. (T. 772, 773). The water from the MACHADO property joined with the water from the K-Mart property to form a pocket at least two to three feet deep. (T. 773). This pocket of water extended the full width of the property on its southern boundary with West 46 Street. (T. 772).

A major part of the problem of the flooding was solved when K-Mart installed a deep ditch on the rear of its property. (T. 774). In order to contain the water falling onto the golf course property and to make sure that no water flowed onto the golf course property, the developer added fill to its land. (T. 779, 780). More specifically, the golf course property was built up along the property line next to the MACHADO property. (T. 780). The raising of the western edge of the Putt Putt Golf Course served to prevent the flow of water of the MACHADO property and also served to cause the golf course property to drain to its center.

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In early 1979 Revitz leased the property occupied by the Putt Putt Golf Course to the Hialeah Skating Center for a period of 40 years. (T. 416). Hialeah Skating Center then leased the building to WESTLAND. WESTLAND again changed the contours of the land and increased its elevation by adding fill. WESTLAND then constructed a warehouse like building having its western edge only ten feet from the MACHADO property line. (T. 258). A portion of the building was constructed over the depression which had previously existed on the WESTLAND property. (T. 306).

The WESTLAND property had a pitched roof which drained half to the east and half to the west. (T. 193). Rainwater on the west side of the roof flowed into a gutter at the roof's lower edge. The water which collected in the gutter emptied into five downspouts which projected the water onto the ground. (T. 193). The area of the roof drained by these downspouts was approximately 1200 square feet. (T. 526). As the water left the downspouts it spread in a fan shaped pattern across the ground. (T. 520). The water fanned out as it approached the property line, forming a triangle with the apex at each downspout. (T. 522). The area into which each downspout drained was 39.6 square feet. The total area into which the five downspouts discharged was effectively 198 square feet. (T. 524). It is also important to note that the water came down the downspouts from at least two stories in height at a considerable velocity.

For a roof 200 by 60 feet, with an area of 12,000 square feet the minimum amount of permeable area, i.e. grass area

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necessary for drainage is 1,200 square feet according to the design standard of the South Florida Building Code. (T. 526). As the actual amount of effective drainage area was only 198 square feet, the effective area is less than one sixth of that required by the code. As the Plaintiff's own architect testified, if the water from the roof did not get to permeable ground, the system is not going to work. If the impervious areas cannot drain into the permeable land, there is no compliance with the code. (T. 254-257).

Obviously, as the effective amount of permeable area was 198 square feet, there was water flowing onto MACHADO'S property with greater force than the natural flow of rainwater. (T. 376-377). Again, according to Plaintiff's architect, if water is allowed to run onto someone else's property it is a clear nuisance according to the code. To correct this action, one must install additional drainage. (T. 283-284).

In April or May of 1979 Seipp experienced its first major flood. The flooding began in the back lot of the property which was used to store new and used cars. These cars sustained water damages as a result of the flood and it cost approximately $33,000.00 to repair and reinspect these cars. (T. 477-478). After this flooding and extensive damage in 1979, a wall was erected entirely on the Seipp property. The wall on the Seipp property was built in complete compliance with the South Florida Building Code and was completed in July of 1981. (T. 746, 281, 927).

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As is common in South Florida, heavy seasonal rains occurred in August and September of 1981. Two months after the completion of the wall, WESTLAND claimed damages due to flooding that occurred in August of 1981 and on September 25, 1981. During the September 25 rainfall, WESTLAND'S employees sledge hammered holes in the wall to release accumulated water onto Seipp's property. After the second incident, WESTLAND put in an additional positive drainage system on its own property that completely eliminated its flooding problems. (T. 199-201).

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STATEMENT OF THE CASE

On September 29, 1981, WESTLAND filed an action for damages and a mandatory injunction against Seipp Buick. (R. 1-8). Seipp Buick counterclaimed for damage and an injunction against WESTLAND based on nuisance, assault and negligence on November 19, 1981. (R. 10-16). When GUS MACHADO BUICK, INC. bought Seipp Buick, it was substituted as a Defendant in the case since MACHADO BUICK assumed all liability of Seipp Buick when the two merged.

An order granting Partial Summary Judgment in favor of Petitioner was entered with respect to the law which would govern the case on December 15, 1983. (R. 191). Petitioners argued in their Motion for Summary Judgment that "since the natural flow of surface waters is from higher land to lower, the courts of Florida recognize that the higher of two adjacent land owners has a servitude land owner for the discharge of the surface waters". (R. 191). As a result of this argument, Petitioner prevailed upon the trial court to enter the following "rule" which was to govern the case:

> "That the higher elevation land imposes a servitude on the owner of neighboring lower elevation land to accept the run off of water naturally flowing from a high elevation to the owner".

In entering this order the court failed to set forth the complete civil law rule pertaining to surface water. In other words, the court failed to note that the servitude created extends only to surface water arising from natural causes, and

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cannot be increased or made more burdensome by the acts or industry of man.

The cause proceeded to a jury trial on September 18, 1985 and lasted until September 27, 1985. On September 27, 1985, the trial court instructed the jury on Petitioners claims. (T. 1212-20). At that time, the trial court incorporated the Partial Summary Judgment into the instructions. (T. 1215-17). Mr. Spring, attorney for Respondents, objected to the giving of instructions No. 10.

THE COURT: Ten is okay?

MR. SPRING: You are giving number ten, Your Honor?

THE COURT: Yes.

MR. SPRING: We object to you giving number ten.

THE COURT: Is that what it says in Judge Hickey's order?

MR. SPRING: It may say that, Your Honor, but we do not belive that it fully states the law.

THE COURT: Well, you have already said that. I told you I will come back to you if there is any additions that has to be done.

Therefore, despite Respondents objections, the instruction was given. The jury returned a verdict for WESTLAND and against GUS MACHADO BUICK in the sum of $800,000,00 in damages; the amount representing the total value of the WESTLAND SKATING CENTER, INC. business. A verdict for HIALEAH SKATING CENTER and against GUS MACHADO BUICK INC., in the sum of $324,000.00 was also returned with MACHADO BUICK liable for 90% of the amount and WESTLAND liable for the remaining 10%. (T. 1220-1225). The

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issues before this Court do not concern damages, and although Respondent is not addressing damages it does not adopt Petitioners' version of same.

On October 9, 1985, the Honorable Milton A. Friedman entered final judgment in the sum of $1,240,000.00 for the Plaintiffs. On October 23, 1985, MACHADO BUICK'S Motion for New Trial or Motion for Judgment Notwithstanding the Verdict were denied. (R. 333).

On September 20, 1985, MACHADO BUICK and MORRISON ASSURANCE filed their Notice of Appeal to the Third District Court of Appeal of Florida. (R. 326).

On May 19, 1987, the Third District Court reversed the separate Final Judgments which were entered for Petitioners. (App. 1-3). Gus Machado Buick, Inc. v. Westland Skating Center, Inc., 523 So.2d 596 (Fla. 3d DCA 1987). The Third District Court held that the trial court erred by entering Partial Summary Judgment and instructing the jury in accordance with the "reasonable use rule" concerning the disposal of surface water. (App. 2-3). The Court stated that Florida follows the civil law rule regarding surface water. The Third District further stated that although under the civil law rule the owner of higher elevation land has an easement on lower elevation land for the natural flow of surface water; the rule does not extend to permitting the upper elevation owner to increase the natural flow of the surface water onto the lower elevation owner's land. (App. 2). Thus the Third District concluded that the sole issue

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before the Court was whether WESTLAND'S construction increased or diverted the surface water flowing onto MACHADO BUICK'S property, and not whether WESTLAND developed its property reasonably under the circumstances.

On May 29, 1987, Petitioners filed their Motion for Rehearing and Rehearing En Banc. On April 26, 1988, the Third District denied Petitioner's Motion for Rehearing per curiam. (App. 4). That same day, it denied the Motion for Rehearing En Banc by a six to three vote.

On May 25, 1988, Petitioners filed their Notice to Invoke the Discretionary Jurisdiction of the Supreme Court of Florida. Petitioners argued that the Third District's decision expressly and directly conflicts with the decision of the Fifth District and the Second District Court of Appeals of Florida on the same issue and requested that this Court resolve the conflict. On September 29, 1988 this Court accepted jurisdiction in the cause.

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SUMMARY OF THE ARGUMENT

The petitioner's brief gives the impression that throughout the case the petitioner consistently argued for the application of the "reasonable use doctrine". In reality, however, the petitioner stitched together bits and pieces from property and tort law to form a patchwork quilt of inconsistent theories. Because of this, it is essential that this court understand that the errors of which the petitioners now complains were actually invited by the petitioners.

From the inception of the case the petitioner took the position that the "civil law rule" was governing. For example, in the complaint and again in the amended complaint the petitioner claimed that as an "upper landowner" it had a "natural easement" to have runoff water drain onto the Machado Buick property. (R 1-8) In support of this contention, the petitioner's motion for summary judgment argued:

> "Since the natural flow of surface waters is from a higher land to lower, the courts of Florida recognize that the higher of two adjacent land owners has a servitude land owner for the discharge of the surface waters". (R. 190).

Based on this argument the petitioner prevailed upon the trial court to enter the following "rule" which was to govern the case:

> "That higher elevation land imposes a servitude on the owner of neighboring lower elevation land to accept the run off of water naturally flowing from a higher elevation to the lower".

While this statement is true under the "civil law rule" it only

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partially states the rule. The completed rule is as follows:

> "The servitude that the owner of a higher adjoining land has on the lower land for the discharge of surface water naturally falling on to the lower land from the dominant estate ordinarily extends only to surface water arising from natural causes, can not be increased or made more burdensome by the acts or industry of man." New Homes Inc. v. Mayne 169 So.2d 345 (Fla. 1st DCA 1964) (emphasis added).

Thus, when the truncated "rule" was given as a jury charge, the rights of lower land owners were totally ignored. Importantly, the petitioner's expert witness, Vincent Amy, testified at trial that construction of the skating center did, in fact, increase the speed and volume of the run off water onto Machado's property. Thus, if the civil law was applied properly, the petitioner would have lost.

While arguing for the application of the "civil law rule", with its resulting easements and servitudes, the petitioner at the same time argued that the upper land owner has a right to increase the runoff water so long as its use of the land is "reasonable". The test of reasonableness was, according to the petitioner, whether or not the upper land owner complied with the South Florida Building Code. As with the "civil law rule", however, the petitioner argued that only a portion of the code should actually be applied. The relevant portion of the South Florida Building Code is as follows:

> (a) Rainwater or other liquid wastes from any premises shall be disposed of where same originates and/or falls in such manner as herein provided. The disposal of any rainwater or other liquid waste by causing or

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allowing same to be disposed of or flow on or across any adjoining property or sidewalk, either public or private, shall be deemed a nuisance, and shall be corrected by properly disposing of same and in accordance with the provisions of this Code.

(b) Rainwater shall be disposed of as follows, with the required preference in the order listed:

(1) To a storm sewer or a storm sewer catch basin were permitted by the Engineer Department.

(2) To a street gutter but only if first approved by the Engineering Department.

(3) Into a drainage well if approved by the Florida Department of Pollution Control.

(4) Into a soakage pit. (See subsection 4611.6).

(5) Upon pervious ground.

In these proceedings the petitioner ignores, as it did in the past, that portion of the code which prohibits the discharge of rainwater across property lines. Indeed, the petitioner must do so, or else, again, it will surely lose. The trial court, at the petitioner's urging, accepted a truncated version of the South Florida Building Code, which resulted in the following law of the case:

> "That the owner of higher elevation land has a right to use and improve his land by constructing a building on its property in accordance with the applicable building code requirements."
>
> "That if the higher elevation owner complies with the applicable building code and rainwater then falls onto the building constructed on the higher elevation land, and from that building on to the lower elevation

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> land, a servitude on the lower elevation land is still imposed as it is for naturally flowing water.

These "rules" were given as jury charges. (T 215-50) As with the charge based on the "civil law rule", these charges focused only on the rights of the upper land owners and totally ignored those of the lower land owner. This omission suggested that only the upper land owner may develop his property in conformance with the building code. The building code, of course, applies to all land owners not just "upper" land owners. In this case the evidence is clear that the wall constructed by Machado Buick did, in fact, comply with the building code. (T 281-282)

There is an obvious tension between the "civil law rule" which permits an upper land owner to continue to discharge runoff water across his property line so long as the rate and volume of the flow is not increased and the South Florida Building Code which prohibits the discharge of run off water across property lines altogether. In this case, however, since the petitioner not only continued to discharge runoff water onto Machado Buick's property but also increased the rate and volume of the flow, if either the "civil law rule" or the South Florida Building Code is applied in its entirety the petitioner must lose as a matter of law.

In recognition of this dilemma, the petitioner now argues that the "civil law rule" which it invoked at the beginning of the case and maintained throughout the prior proceedings should now be abandoned. If this is to be done, a fortiori, the summary

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judgment "rules" and the jury charges based on them were plainly erroneous and must also be cast aside.

The petitioner now argues that the "reasonable use rule" must now prevail. The "reasonable use rule" has not been tried in the trial court. There was absolutely no evidence going to the balancing of equities. In fact, a majority of plaintiff's case was spent trying to establish Westland as the upper landowner and suggesting bare compliance with the code was enough to prevail.

The "reasonable use rule" envisioned by the petitioner is to be measured by a bare compliance with the minimum design criteria of the code. The petitioner continues to ignore the fact that the code provision on which it relies prohibits the discharge of runoff water across property lines. The petitioner thus reaches the anomalous conclusion that the building code, which by its very terms prohibits the discharge of rainwater across property lines, actually allows the upland owner to increase the runoff of water.

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ISSUE I

THE TRIAL COURT ERRED IN FAILING TO PROPERLY APPLY THE SOUTH FLORIDA BUILDING CODE WHERE THE RIGHTS OF MACHADO WERE TOTALLY IGNORED AND WESTLAND NEVER MET THE PERFORMANCE CRITERIA OF THE CODE

Throughout Petitioners' argument, they continuously assert that the WESTLAND building was designed to comply with the South Florida Building Code. However, they fail to state two essential factors: MACHADO also fully complied with the code and WESTLAND never met the performance criteria of §4611.11(a) of the Code. Petitioners also completely omit the fact that compliance with the design criteria without compliance with the performance criteria is very simply a means with no end. In order to comply with the Code one must meet both the design and performance criteria of the §4611.11(a) and (b) of the Code.

The roof of the WESTLAND SKATING CENTER was pitched with approximately one-half of the water draining to the east and one-half of the water draining to the west. On the western portion of the roof, that closest to the MACHADO property, there was a gutter system where rainwater drained into five downspouts. (T. 524, 525). The water was coming down the downspouts from at least two stories in height and at a considerable velocity. The effective area of drainage would be 198 square feet. It is important to remember that the code requires an effective area of drainage for this portion of the roof of at least 1,200 square feet. (T. 526). Therefore, it is very clear that although the Petitioners contend they met the design criteria of the code, that too is an error.

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Both parties agree that the South Florida Building Code is applicable to the instant case. The Dade County Code, Chapter 8, §8-1 and 8-4 provides that the South Florida Building Code is applicable in both the incorporated and unincorporated areas of the county.

The South Florida Building Code §4611.11, provides for the disposal of rainwater in the following manner:

> (a) Rainwater or other liquid wastes from any premises shall be disposed of where same originates and/or falls in such manner as herein provided. The disposal of any rainwater or other liquid wastes by causing or allowing same to be disposed of or flow on or across any adjoining property or sidewalk, either public or private, shall be deemed a nuisance, and shall be corrected by properly disposing of same in accordance with the provisions of this Code.
>
> (b) Rainwater shall be disposed of as follows with required preference in the order listed:
>
> (1) To a storm sewer gutter but only if first approved by the Engineering Department.
>
> (2) To a street gutter but only if first approved by the Engineering Department.
>
> (3) Into a drainage well, if approved by the Florida Department of Pollution Control.
>
> (4) Into a soaking pit. (see Subsection 4611.6).
>
> (5) Upon previous ground.

Although WESTLAND used the soakage pits and pervious ground options authorized under the Code to dispose of their rainwater, the evidence is clear that the disposal of rainwater from the Petitioners' premises failed to met the performance criteria set forth in subsection(a) of the same code. The entire purpose for using the soakage pits and pervious ground is to prevent the

rainwater from "flowing on or across any adjoining property". Thus, if such water does flow on or across any adjoining property according to part(a), it shall be corrected by properly disposing of same in accordance with the provisions of this code." It is also clear that if such water does flow across adjoining property it is deemed a nuisance as a matter of law.

The evidence is clear that water was allowed to flow on and across Respondents' adjacent property. Although WESTLAND may have met the design criteria of the South Florida Building Code, WESTLAND failed to meet the performance criteria of the code. However, simply meeting these minimum standards for construction and design will not free one from liability for negligence if the performance criteria of the Building Code is not met.

Courts have consistently held that simply meeting a prescribed minimum standard will not free one from liability. "Where the violation of a criminal statue is negligence, it does not follow that compliance with it is due care. The statutory standard is no more than a minimum, and it does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions". (Prosser on Torts, §36, p. 203). Thus, even though Petitioners may have met the minimum design standards as set out by the South Florida Building Code, WESTLAND can still be held liable for negligence in not meeting the performance standards of the Code. Indeed, had WESTLAND complied with the performance criteria of the Code, this case would not have arisen.

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In the case of Hubbard-Hall Chemical Company v. Silverman, 340 F.2d 402 (1st Cir. 1965), the Court held that a manufacturer of insecticides would be held liable for the death of two farm laborers of limited education and reading ability where a warning regarding the product's use was on the label. The Court found that:

> The approval of the label given by the Department of Agriculture merely satisfied the conditions laid down by Congress for the shipment of the product in interstate commerce. Neither Congress nor the Department explicitly or implicitly provided that the Department's approval of the label carried with it as a corollary the proposition that Defendant had met the possibly higher standard of due care imposed by the common law of torts applied under the local state law . . . in actions of tort for negligence.

A manufacturer of fabric used in pajamas was not freed from liability simply because the fabric complied with the flammability-testing method prescribed by law. In that case, Sherman v. M. Lowenstein & Sons, Inc., 28 A.D.2d 922. 282 N.Y.S.2d 142 (1967), the Court stated that, "While a defendant's compliance with statute 'is some exercise of due care', it does not preclude a conclusion that he was negligent".

As the Court found in Cronk v. Iowa Power and Light Company, 138 N.W.2d 843 (Iowa, 1966), "Whether one complies with a code is a relevant fact on the question of due care and that proof of compliance is not conclusive of one's having taken due care". The case involved an action against an electric company for the death of a waterworks employee who was electrocuted while working

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near uninsulated wires. "Actionable negligence may exist even though the utility involved has complied with the requirements of the safety code. Whether a utility is negligent despite compliance with safety code is ordinarily a question for the jury or trier of fact". In Scott v. Midyette-Moor, Inc., 221 So.2d 178 (Fla. 1st DCA 1969), a non-employee fell down a stairway and sustained injuries which led to his death. The safety rule under consideration was whether a handrail should be provided on such a stairway as required by the Florida Industrial Commission safety rule. The evidence demonstrated that there was a handrail present and therefore no violation of the safety rule had occurred. The Court held, however, that "The Commission's safety rule prescribing handrails was nonetheless admissible as evidence of what a reasonable and prudent person might provide with respect to the stairway in question". Under this rule and the rule enunciated in Cronk, the information regarding WESTLAND'S compliance with the South Florida Building Code with regard to the disposal of the surface waters from WESTLAND'S property onto MACHADO'S property, should have been submitted to the jury to determine the issue of due care.

Another case which supports the idea of jury determination of due care is Paolinelli v. Dainty Foods Manufacturers, Inc., 54 N.E.2d 759 (Ill.App.Ct. 1944). This case also involves products liability, but there is no reason to believe that the same philosophy behind the rules enunciated in the products liability cases cannot be applied to the case at bar. The entire issue

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rests on whether or not one should be freed from liability because one has met certain minimum statutory standards.

In Paolinelli, supra, a child died due to swallowing a bone which was allegedly contained in a noodle soup mixture manufactured by the Defendant. The Court found that even though the chicken fat or oil was government inspected, "It is well established that government inspection is not a substitute for due care . . . there was sufficient evidence to warrant the jury in finding that Plaintiff proved Defendant negligent in the manufacture, preparation and inspection of its product." Again, as stated previously and as articulated by the Court in D.J. Muncy, Jr. v. Magnolia Chemical Company, 437 S.W.2d 15 (Tex.Civ. App. 1969), "The statutes and regulations set minimum standards . . . a failure to comply would constitute negligence per se, however, mere compliance does not mean the manufacturer or seller is free from negligence as a matter of law." See also: Plunkett v. State of Texas, 591 S.W.2d 907 (Tex.Crim.App. 1980); Rumsey v. Freeway Manor Minimax, 423 S.W.2d 387 (Tex.Civ.App. 1968); and Lubbock Manufacturing Company v. Perez, 591 S.W.2d 907 (Tex.Civ. App. 1979). The case involved a worker who was sprayed by an insecticide and sustained injuries therefrom while moving cattle from one pen to another in order for them to be sprayed for lice.

The trial court accepted a truncated version of the South Florida Building Code. In other words, the Court, on Petitioners urging, focused on whether WESTLAND had complied with the Codes' design requirements on how to dispose of rainwater and completely

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ignored whether the chosen design met the performance requirements of the code. As a result the trial court granted a Partial Summary Judgment in favor of Petitioners resulting in the following law of the case:

> "That the owner of higher elevation land has a right to use and improve his land by constructing a building on its property in accordance with the applicable building code requirements."
>
> "That if the higher elevation owner complies with the applicable building code and rainwater then falls onto the building constructed on the higher elevation land, and from that building on to the lower elevation land, a servitude on the lower elevation land is still imposed as it is for naturally flowing water.

These "rules" were later given as jury charges. (T. 1212-20). These charges focused only on the rights of the upper land owners and totally ignored those of the lower land owner. This omission suggested that only the upper land owner may develop his property in conformance with the building code. The building code, of course, applies to all land owners not just "upper" land owners. In this case the evidence is clear that the wall constructed by MACHADO BUICK did, in fact, comply with the building code. (T. 746).

Clearly, the Florida Building Code was promulgated to promote, among other things, uniformity and predictability in the construction field. In fact, the Code allows a potential buyer of property the opportunity to have a general contractor and/or an architect inspect the premises in order to let the buyer know what can and cannot be done under the South Florida Building

Code. Thus, the buyer is given a set of guidelines to follow as well as a sense of security that upon following these guidelines he will have complied with the provisions of the Code.

Respondent does not question the applicability of the code to the facts of this case. Instead, Respondent objects to the "picking and choosing" of Code sections that Petitioners engage in. The language of the Code is clear. If rainwater is disposed of or allowed to flow on or across any adjoining property it shall be deemed a nuisance.

This part of the Code was ignored by the trial court as is evidenced by its decision to grant Petitioners Partial Summary Judgment Motion. Respondent contends that the South Florida Building Code should apply to this case in its entirety. If all the pertinent parts of the Code are applied to the facts of this case, Petitioners actions will be held to have been a nuisance as a matter of law and Respondent will prevail.

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ISSUE II

THE THIRD DISTRICT COURT OF APPEAL WAS CORRECT IN APPLYING THE CIVIL LAW RULE AS IT IS THE LAW IN FLORIDA AS WELL AS IN A MAJORITY OF STATES AND PROMOTES UNIFORM RESULTS AND PREDICATABILITY

In its Brief, Petitioners consistently argue that the Third District erred by applying the strict civil law rule regarding the disposal of surface water. Even more amazing is that Petitioners devote much of their brief to argue in favor of the "reasonable use" rule regarding the disposal of surface water. The reason that Petitioners' current position is so surprising is that up until now, Petitioners claimed that as an "upper landowner" it had a "natural easement" to have runoff water drain onto the MACHADO BUICK property. (See Petitioner's Complaint, Amended Complaint and Motion for Partial Summary Judgment). Clearly, this is classic civil law rule language. The reasonable use rule would not have mentioned easements, but rather, would have involved an analysis of the benefit-burden on each party.

There are three basic rules which have been used to resolve the problem of disposal of surface waters. It is important to go through a brief historical discussion of these rules to understand what the present state of the law is in the State of Florida and why the Third District found that the trial court incorrectly granted WESTLAND'S Motion for Partial Summary Judgment.

The first rule is the common enemy rule. In its purest form, the common enemy rule gives each landowner the right to deal with surface water on his land without regard for the

consequences to his neighbor. F. Maloney, S. Plager, R. Ausness, B. Canter, Florida Water Law (1980). For the most part, the common enemy rule allows the upper owner to drain or divert the flow of surface waters onto the land of his neighbor at will, and the lower owner to obstruct the water as he pleases and cast it back onto the upper owner's land. This doctrine developed during a period when the law held in high regard one's ability to do with his land what he pleased.

The rigor of the common enemy rule has led the courts adopting it to affix qualifications to meet the various situations that have arisen. The modern common enemy rule allows the landowner to obstruct or divert surface water only so long as such obstruction or diversion is incident to ordinary use, improvement, or protection of his land, and is done without malice or negligence. Maloney, supra at 593. In Davis v. Ivey, 93 Fla. 387, 112 So. 264 (Fla. 1927), however, the Florida Supreme Court rejected the common-enemy rule.

The second rule used to resolve the problem of drainage of surface waters is the civil law rule. This is the rule that the Third District Court accepted as governing in the case at bar. This doctrine was first adopted in Louisiana in 1812. The roots of the civil law doctrine are found in Roman law and the Napoleonic Code. The rule, simply stated, is that "a person who interferes with the natural flow of surface water so as to cause an invasion of another's interests in the use and enjoyment of his land is subject to liability to the others". Kinyon &

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McClure, Interference With Surface Waters, 24 Minn.L.Rev. 892 (1940). Under the civil law rule, the lower landowner is bound under a servitude to accept the water which naturally flows onto his land.

As correctly stated by the Third District, Florida follows the civil law rule regarding surface water. Under this rule, the owner of higher elevation land has an easement on lower elevation land for the natural flow of surface water. See: Koger Properties, Inc. v. Allen, 314 So.2d 792 (Fla. 1st DCA 1975), cert. denied, 328 So.2d 842 (Fla. 1976). However, as the Court pointed out in New Homes of Pensacola, 169 So.2d at 347:

> The servitude that the owner of the higher adjoining land has on the lower land for the discharge of surface water naturally flowing into the lower land from the dominant estate ordinarily extends only to surface water arising from natural causes and cannot be increased or made more burdensome by the acts or industry of man. No person has the right to gather, by drainage ditches, dams, or other means, surface waters that would naturally flow in one direction and divert them from their natural course, and cast them onto lands of a lower owner to his injury. Id. at 347. (emphasis added)

WESTLAND, after construction of its building, caused rainwater to collect and fall with grater force than the natural flow of rainwater onto Appellant's property. The testimony of Vincent P. Amy supports this conclusion:

QUESTION: By Mr. Spring:

> What we have done, we have collected water that falls on half of that roof and the roof measured is 200 feet by 60 feet. We are talking about 1,200 square feet. We are taking that water and

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we have concentrated it into those cove shaped areas of flow out from the downspouts, haven't we?

ANSWER: Yes.

QUESTION: So, in those cone shaped areas there is going to be a larger volume than would naturally occur?

ANSWER: Yes, within those areas. That's basically correct.

QUESTION: And it's going to be moving much more rapidly than would naturally occur?

ANSWER: At the point of discharge only. (T. 376-377).

The law in Florida is clear that the disposition of rainwater cannot be increased by the acts or industry of man. It is also clear from Petitioner's own expert that, in fact, the force and amount of water that fell onto MACHADO'S property was increased due to the construction of the WESTLAND SKATING CENTER.

Under §4611.11 of the South Florida Building Code, this action by Appellee is considered a nuisance. The Court in Hodge v. Justus, 312 So.2d 249 (Fla. 1st DCA 1975), stated that this type of action cannot be permitted because an upland landowner does not have "the right to collect surface water and dispose of same in any manner that he selects even though such action substantially increases the quantity of surface water that flows onto adjacent land."

Several Florida cases have held that allowing surface rainwater to gather and be cast onto another's property is a nuisance. Atlantic Coast Line R. Co. v. Hendry, 150 So.2d 598 (Fla. 1933); Dade County v. South Dade Farms, 182 So. 858 (Fla. 1938); Lawrence v. Eastern Airlines, 81 So.2d 632 (Fla. 1955).

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The case of Seaboard A.F.R. Co. v. Underhill, 141 So. 306 (Fla. 1932), held that regular and recurrent flooding of another land, due to surface rainwaters, constitutes a nuisance as well as an actionable wrong.

WESTLAND clearly has no legal right to create a nuisance and/or maintain a nuisance that has been found to exist as a matter of law. The rule of law in Florida with regard to the disposal of surface waters has been well established and WESTLAND should have been found liable under that law.

In Lawrence, 81 So.2d at 632, the Court held that the law in actions alleging a private nuisance with respect to the diversion of the natural flow of water was the following:

> No person has the right to gather surface waters that would naturally flow in one direction by drainage, ditches, dams, or otherwise, and divert them from their natural course and cast them upon the lands of the lower owner to his injury.

If an upper owner in draining his land substantially alters the natural drainage pattern, he not only may increase the quantity of water cast onto the lower land, but he may also cause it to discharge at a different point, or even onto land where it would not other wise have found its way. Such diversion by an upper owner is forbidden by the civil-law rule even in its modified forms. Maloney, Florida Water Law, supra at 599.

As the law in Florida clearly holds, the disposition of rainwater cannot be increased by the acts or industry of man. Therefore, WESTLAND should be held liable for increasing the force and amount of water that fell onto Seipp's property due to

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the construction of WESTLAND SKATING CENTER. Thus, the rule of law the trial court chose to adopt in its Order Granting Partial Summary Judgment of December 15, 1983, is not the law in Florida.

The "reasonable use" rule is the third rule used in solving the problem of drainage of surface waters. This rule was created out of the standards set down by modern tort concepts. Under the reasonable use rule, landowners may improve their land and are not liable for the increased flow of surface water onto adjoining land as long as their actions are reasonable under the circumstances. Unlike the other two rules, no specific privileges or obligations are laid down, the only test being a jury's decision of reasonableness as based on all the circumstances involved in determining the optimum enjoyment of all landowners. Waters: Surface Water Drainage, 2 U.Fla.L.Rev. 392, 399 (1949).

Petitioners' recent espousal of the "reasonable use" rule is confusing at best, since from the inception of the case, Petitioner took the position that the "civil law" rule was governing. It seems that Petitioners now want to argue a new position.

Florida Courts have uniformly adhered to the civil law rule as evidenced by the decision in New Homes of Pensacola. The law must take into consideration the continual changes occurring in property due to development and urbanization. In cases such as this, the Court is no longer concerned with land in its natural

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state, but with the realization that a property owner's status can change from year to year. It is due to these fluctuations in status that the reasonable use rule is not practical in Florida. As was previously stated, the rule is that a landowner is privileged to improve his land so long as the improvement is "reasonable." However, due to the fluctuations in the status of a landowner and the improvements that are continually taking place around a landowner, what is reasonable one year may not be reasonable the next year. Whether or not it is reasonable is regarded as a question of fact to be decided upon a case-by-case basis.

In the case sub judice, the Third District Court's opinion acknowledges the distinctions between these two rules. Judge Nesbitt correctly points out that the civil law rule extends only to surface waters arising from natural causes, and that these waters cannot be increased or made more burdensome by the acts or industry of man. Footnote one of the opinion, however, indicates that in jurisdictions applying the reasonable use rule, the benefit of use to the upper elevation landowner must be weighed against the burden imposed upon the servient land (See opinion). The Third District Court then goes on to apply the civil law rule.

An analysis of Seminole County v. Mertz, 415 So.3d 1286 (Fla. 5th DCa 1982), cert. denied., 424 So.2d 763 (Fla. 1982), indicates that the Fifth District also adhered to the civil law rule. It is true, as Petitioners point out that the court in

Mertz turned to Brumley v. Donner, 83 So. 912 (Fla. 1919) to uphold the proposition that it is impermissible to divert surface water from its natural flow. The court, however, also cited to New Homes of Pensacola for the law to follow when surface water has been diverted. Again, the rule is that the discharge of water from the dominant estate onto the servant estate cannot be increased or made more burdensome by the acts or industry of man.

The Mertz court pointed out that the law regarding a natural watercourse differs from the law regarding diffused surface water. Where a natural watercourse is present the upper landowner may increase the flow of surface water, even to the detriment of the servient landowner. Yet, when no watercourse exists there can be no such increase. See: New Homes of Pensacola. The case sub judice does not involve a natural watercourse; instead, the case deals with the disposal of diffused surface water from the WESTLAND property onto the MACHADO property.

Petitioners also cite the Second District's decision in Pearce v. Pearce, 97 So.2d 329 (Fla. 2d DCA 1957), as being in conflict with the Third District's decision in this case. In Pearce the Plaintiff sued the Defendant for closing certain natural drains and causing surface waters to be diverted and cast upon the Plaintiff's land. There are several distinguishing facts in Pearce that must be recalled prior to its application as the law with respect to surface waters.

First, the Plaintiff's construction of a dike did not impede

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the natural flow of waters so as to measurably increase water on the Defendant's land. Second, the Plaintiff's property naturally sloped and drained across his land to the Defendant's land and on into a lake.

As previously stated, the court in Mertz, 415 So.2d at 1289, recognized that when surface water drains into a natural watercourse the quantity of the surface water can be increased by the upper landowner, even to the detriment of the subservient landonwer. In Pearce, the surface water drained into a natural watercourse, i.e., a lake. Thus the fact that the Plaintiff prevailed in Pearce is because of a difference in facts, not a conflict in law between the Second and Third District Courts of Appeal.

Clearly, Florida Courts have been consistent in their application of the civil law rule when dealing with the disposal of diffused surface water. Given the continual changes occurring in property as a result of development and urbanization in Florida, it seems clear that the civil law rule is more compatible and adoptable than the reasonable use rule espoused by Petitioners.

However, if this court chooses not to follow the civil law rule then it should follow the South Florida Building Code in its entirety. The Code provides the design and performance specifications which must be followed to dispose of surface water. The Code sets out that disposal of surface water by causing or allowing it to be disposed of or flow on or across

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adjoining property shall be deemed a nuisance. The Code's language is unambiguous and as such promotes predictability of result, something which its drafters obviously felt was needed in this area. As such, this Court should apply the South Florida Building Code in its entirety to resolve the dispute in this case.

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ISSUE III

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY AND COMMITTED REVERSIBLE ERROR WHERE THE RULE OF LAW IN IT'S CHARGE TO THE JURY WAS A PATCHWORK OF INCONSISTENT AND INCOMPLETE RULES

On December 15, 1983, the lower court entered a Summary Judgment on the law to be followed in the case at bar. This law was ultimately used by the Court when instructing the jurors during the charge. The law determined by the lower court when it entered the Summary Judgment for WESTLAND was erroneous and resulted in jury charges so flawed that the verdict must be reversed. Meinhardt Bros. v. Mode, 5 So. 672 (Fla. 1889).

As stated previously, Florida Building Code §4611.11(a) provides a performance standard; i.e., the developer of property may not dispose of rainwater or other liquid waste by causing or allowing it to flow on or across adjacent land. This standard is clearly in conflict with the civil law rule enunciated by the trial court which would permit the higher landowner to hold a servitude over the lower landowner to accept the run-off of water flowing from the higher elevation to the lower.

When the lower court entered the Summary Judgment, it ignored the performance standard set by the Code and looked only to the minimum design standard. In the Summary Judgment the Court ruled: "Higher elevation land imposes a servitude on the owner of neighboring lower elevation land to accept the run-off of water naturally flowing from the higher elevation to the lower." (T. 1215-1216). This, of course, is a partial statement of the law as applied by the Florida Courts. The

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statement is incorrect in areas where the South Florida Building Code is in effect.

The Court also found that: "The owner of higher elevation land has a right to use and improve his land by constructing a building on his property in accordance with applicable building code requirements." (T. 1216). This statement is misleading as it mentions only the owner of higher elevation land who has an equal right to construct in accordance with the South Florida Building Code. The ruling also suggests that mere compliance with the minimum design standard is sufficient even if the performance standard is violated.

The Court also ruled that: "Where the higher elevation owner complies with the applicable code, and rainwater then falls onto the building constructed on the higher elevation land, and from that building onto the lower elevation land, a servitude on the lower elevation landowner is still imposed as it is for naturally flowing water." (T. 1216). This ruling does not comport with either the mandate of the South Florida Building Code or the law in Florida with respect to the drainage of surface waters. Under the Code, the upper landowner may not drain his building onto adjacent land. He certainly does not have a "servitude" on the lower landowner. If the upper landowner complies with the performance standard of the Code, he will not drain water onto adjacent land. Indeed, if he does, he will be in violation of the Code.

It is possible to meet the minimum design standard of the

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Code and still violate the performance standard. Indeed, mere compliance with the minimum design standard may, as in this case, cause an increase in water run-off. The Court's ruling suggests that if the upper landowner meets the Code's minimum design standard, but water run-off is increased, the lower landowner must nonetheless accept it. This is a ludicrous position and one that is completely incompatible with an urban society.

Finally, the Court ruled:

> The owner of lower elevation land may not lawfully construct a barrier between its land and the adjoining higher elevation land for the purpose, in whole or in part, of preventing water from flowing from the higher elevation land to the lower elevation land unless:
>
> (a) The owner of the higher elevation land grants permission for the barrier constructed by the lower elevation landowner; or
>
> (b) The building on the higher elevation was not constructed in accordance with applicable building code requirements, which deviates from code cause the natural water flow to be increased or made more burdensome; or
>
> (c) The barrier built by the lower landowner provides adequate drainage to protect the higher elevation landowner from flood. (T. 1216-1217).

This ruling had the effect of holding that the lower landowner may not lawfully develop his land in accordance with the South Florida Building Code.

As discussed, the South Florida Building Code prohibits the drainage of water across property lines. The trial court ruling

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> (b) The building on the higher elevation was not constructed in accordance with applicable building code requirements, which deviates from code cause the natural water flow to be increased or made more burdensome; or
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holds that such drainage is permissible even though it is prohibited by the Code. Moreover, the ruling allows the upper landowner to increase the run-off water as long as he meets the building code requirements - presumably the minimum design standard.

As the Court in Stark v. Smith, 310 So.2d 334 (Fla. 3d DCa 1975) held: "The trial court has the responsibility of correctly instructing the jury regarding the law which is applicable to the facts of the case." The Court failed to include the last part of the holding in New Homes of Pensacola, to wit: "[surface water] cannot be increased or made more burdensome by the acts or industry of man." As this rule of law is a key element in the finding of liability, the failure by the Court to include this statement during its charge is not only misleading as to the law of Florida, but is an erroneous statement of the law.

The Court in American National Bank of Jacksonville v. Norris, 368 So.2d 8897 (Fla. 1st DCA 1979) stated that the test to be employed in determining whether the trial court erred in an instruction given to the jury is: ". . . whether under the particular facts in this case, the instructions could have misled the jury or prejudiced the . . . right to a fair trial." In the case at bar, the instruction given to the jury was misleading in that it placed total liability upon MACHADO when WESTLAND should actually have been held liable. Where the jurors are dependent upon the Court's interpretation of the appropriate law to govern their decision-making, an incorrect jury instruction seriously

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weakens the foundation upon which the jury verdict rests.

Under Fla.Stat. §559.041, where the misdirection of the jury has resulted in a miscarriage of justice, the judgment can be set aside or reversed. As early as 1889, the Florida Supreme Court in Meinhardt Bros., 5 So. at 673, held that where a charge taken as a whole may have misled the jury, the case would have to be reversed on that ground. In Southern Pine Co. of Georgia v. Powell, 37 So. 570 (Fla. 1905), the Court followed the conclusion of the Meinhardt Court when they held that a jury instruction which may have misled the jury and caused the jury to arrive at a wrong conclusion, was cause for reversal.

Therefore, under the test articulated in American National Bank of Jacksonville, the jury instruction given in the case at bar was misleading since it was an erroneous statement of the law.

Petitioners contend in their brief that Respondent "did not specifically object to any of the [jury] instructions given by the Court." In fact, Mr. Spring, attorney for Respondents, objected to the giving of instruction number 10. Instruction number 10 read in its entirety:

> Higher elevation land imposes a servitude on the owner of neighboring lower elevation land to accept the run-off of water naturally flowing from the higher elevation to the lower.
>
> The owner of higher elevation land has a right to use and improve his land by constructing a building on his property in accordance with applicable building code requirements.

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> Where the higher elevation owner complies with the applicable building code, and rain water then falls onto the building constructed on the higher elevation land, and from that building onto the lower elevation land, a servitude on the lower elevation landowner is still imposed as it is for naturally flowing water.
>
> The owner of lower elevation land may not lawfully construct a barrier between its land and the adjoining higher elevation land for the purpose, in whole or in part, of preventing water from flowing from the higher elevation land to the lower elevation land unless:
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> (a) The owner of the higher elevation land grants permission for the barrier constructed by the lower elevation landowner; or
>
> (b) The building on the higher elevation was not constructed in accordance with applicable building code requirements which deviates from code cause the natural water flow to be increased or made more burdensome; or
>
> (c) The barrier built by the lower landowner provides adequate drainage to protect the higher elevation landowner from flood.

The following is an account of what transpired in the charge conference with respect to jury instruction number 10:

THE COURT: Ten is okay?

MR. SPRING: You are giving number ten, Your Honor?

THE COURT: Yes.

MR. SPRING: We object to you giving number ten.

THE COURT: Is that what it says in Judge Hickey's order?

MR. SPRING: It may say that, Your Honor, but we do not believe that it fully states the law. (emphasis added)

THE COURT: Well, you have already said that. I told you I will come back to you if there is any additions that has to be done.

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Indeed, the Third District Court agreed with Mr. Spring's interpretation of the law regarding surface waters in this case. In fact, the Third District stated in its opinion reversing and remanding the case that, "had MACHADO been able to prove that WESTLAND had increased the flow of surface water naturally flowing onto MACHADO'S property it may have been entitled to have protected its property as it did, and would, therefore, not have been liable to WESTLAND." (Third District Opinion)

There is clearly no question that Respondent objected quite strongly to the trial court's decision to instruct the jury on instruction number ten. Respondent's attorney correctly cited the reason for his objection as the failure on the part of the trial court to instruct the jury on all the law on the subject. As such, the Third District correctly held this instruction to be erroneous and properly reversed and remanded the case for a new trial.

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CONCLUSION

It is clear that the civil law rule is the rule applied by Florida Courts to solve the problem of surface water drainage. In Florida, the law is that surface waters arising from natural causes can not be increased or made more burdensome by the acts or industry of man. If such water is increased or made more burdensome the owner of the higher adjoining land does not have a servitude on the lowerland for the discharge of surface water naturally falling onto the lower land from the dominant estate.

The jury instructions given by the trial court in this case failed to state the complete civil law rule. The trial court instructed the jury:

> "That higher elevation land imposes a servitude on the owner of neighboring lower elevation land to accept the run off of water naturally flowing from a higher elevation to the lower."

This instruction, aside from being an incomplete statement of the civil law rule as it stands in Florida, was extremely prejudicial to Respondents' case.

The Third District was correct in concluding that the trial court did not state the civil law rule in its entirety to the jury. Consequently, the Third Districts' reversal of the trial court's decision should be affirmed.

If this court does not adhere to the civil law rule it should then follow the South Florida Building Code in its entirety. WESTLAND clearly failed to meet the performance criteria of the South Florida Building Code §4611.11(a). This

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provision specifically states that "the disposal of any rainwater . . . by causing or allowing same to be disposed of or flow on or across any adjoining property . . . shall be deemed a nuisance." The trial court failed to instruct the jury on this provision of the Code. This again was to the obvious detriment of Respondent. It is clear that if all the pertinent parts of the Code are applied to the facts of this case Petitioners' actions are a nuisance as a matter of law and judgment should be entered for Respondent.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this **10th** day of **November**, 1988, to: STEVEN M. GOLDSMITH, ESQ., ALAN T. DIMOND, ESQ., Greenberg, Traurig, et al., Attorneys for Petitioners, 1221 Brickell Avenue, Miami, Florida 33131.

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By: _____
PAMELA BECKHAM

By: _____
MICHAEL C. SPRING