O/a 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.

PLAINTIFFS', PETITIONERS' INITIAL BRIEF

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STATEMENT OF THE CASE

On September 29, 1981, Petitioner, Westland Skating Center, Inc. ("Westland")[1/], filed its Complaint against Defendant, Seipp Buick, Inc. ("Seipp Buick"), predecessor-in-interest of Respondent, Gus Machado Buick, Inc. ("Machado Buick") (Record on Appeal at 1-8) ("R. ____").[2/] Westland pled four counts for negligence, nuisance, intentional interference with natural easement and trespass, respectively, and sought both damages and injunctive relief (R. 1-8). It alleged that: (a) historically and prior to June, 1981, surface rainwater flowed from the upland property that it leased in Hialeah, Florida, downhill to contiguous property owned by Seipp Buick; (b) in June, 1981, Seipp Buick constructed an 8 foot wall that ran the entire length of Westland's boundary line; and (c) on August 15 and September 25, 1981, the wall acted as a dam to the natural flow of surface rainwaters and flooded its building (R. 2-4).

On June 16, 1982, Westland filed an Amended Complaint (R. 56-64), in which Petitioner, Hialeah Skating Center, Ltd. ("Hialeah Skating"), acting through its general partners, joined

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1/ Petitioners will refer to Petitioner, Westland Skating Center, Inc., as "Westland" and will refer to the building which it leased and operated as the "Westland Skating Center".

2/ On or before August 25, 1982, Machado Buick merged with Seipp Buick by purchasing all its shares of stock, thereby becoming its successor-in-interest under Florida Statutes § 607.231 (1985).

the action as party-plaintiff (R. 56).[3/] Hialeah Skating built the Westland Skating Center and leased it to Westland (Id.). Petitioners also named Respondent, Morrison Assurance Co. ("Morrison Assurance"), the liability insurance carrier for Seipp Buick, as a Defendant (Id.).[4/]

On August 25, 1982, Petitioners substituted Respondent, Machado Buick, as party-defendant for Seipp Buick (R. 77-79). Machado Buick answered the Amended Complaint and alleged that Westland and Hialeah Skating negligently caused their own damage by: (a) negligently altering the natural flow of surface rainwaters; and (b) failing to provide adequate drainage for the natural flow of surface rainwaters after the August 15, 1981 flood (R. 113). It did not allege that Hialeah Skating failed to mitigate its damages other than by providing additional drainage after the first flood, nor did it allege any counterclaims (R. 113-14).

On August 1, 1983, Petitioners moved for a Partial Summary Judgment in which they sought a declaration of law that a lower elevation property owner is liable for damages if he obstructs the natural flow of surface water from an upper elevation property which results in flooding of the upper elevation

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3/ Petitioners will refer to Westland and Hialeah Skating collectively as Westland, except where necessary to fully explain the facts and apply the law to a specific individual Petitioner.

4/ Counsel for Machado Buick also represented Morrison Assurance, its insurance carrier. For convenience, Petitioners will refer to both Respondents as Machado Buick.

property (R. 125-26). Respondents responded thereto by stating that Westland negligently caused its own damages by construction in compliance with the South Florida Building Code (R. 111-14).

On December 15, 1983, the trial court granted Partial Summary Judgment. It specifically noted that it was not resolving any issue of fact, nor making any determination regarding liability (R. 191). Instead, the trial court merely declared one of the general principles of law which would govern the case (Id.)

On September 18, 1985, the parties began a seven (7) day jury trial (Transcript at 1-1227) ("T. ___"). On September 27, 1985, the trial court instructed the jury on Petitioners' claims (T. 1212-20). Machado Buick did not specifically object to any of the instructions,[5/] nor request any alternatives (T. 1133).[6/] The trial court instructed the jury under the Florida standard negligence instruction that Westland could not recover if it was negligent (T. 1217). The trial court also incorporated the Partial Summary Judgment into the instructions (T. 1215-17). It submitted the counts for nuisance, negligence, and

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5/ Instead, Machado Buick merely stated generally "[w]e object to you giving No. 10" (T. 1133).

6/ Consistent with its failure to object or request any alternative instructions, Machado Buick did not present any evidence that construction in strict compliance with the South Florida Building Code was unreasonable. Instead, it introduced evidence attempting to establish a violation of the civil law rule -- that construction caused the flow of surface water to increase or to deviate.

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intentional interference with a natural easement[7/] to the jury, along with a Special Verdict form (R. 329-30). The Special Verdict form contained special interrogatories which required the jury to enter a special verdict on Westland's claims for nuisance, negligence and intentional interference with a natural easement and specifically find the comparative negligence, if any, of Westland, Hialeah Skating and Machado Buick in returning its verdict (T. 330).

On September 27, 1985, the jury returned its verdict (T. 1220). It (a) returned a verdict for Westland and Hialeah Skating on Counts I, II and III for nuisance, negligence and intentional interference with a natural easement, respectively; (b) assessed the damages sustained by Westland at $800,000; (c) found that Westland was ten percent (10%) negligent, while Machado Buick was ninety percent (90%) negligent; and (d) assessed Hialeah Skating's damages at $324,000 (R. 329-30).

On October 9, 1985, the trial court entered separate Final Judgments for Westland (R. 331) and Hialeah Skating (R. 332) of $800,000 and $291,600, respectively, thereby reducing the damages for Hialeah Skating by ten percent (10%) (Id.). Machado Buick moved for a new trial or judgment notwithstanding the verdict, which was denied on October 22, 1985 (R. 333-34).

7/ The trial court did not submit Westland's claim for trespass to the jury.

On September 20, 1985, Machado Buick and Morrison Assurance filed their Notice of Appeal to the Third District Court of Appeal of Florida ("Third District")[8/] (R. 326).

On May 19, 1987, the Third District 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 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). It reasoned that the sole issue before the court was whether Westland's construction increased or diverted the surface water flowing onto Machado Buick's property, not whether Westland used its property reasonably under the circumstances. (App. 3).

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. (App. 5). Judge Wilkie Ferguson authored an eight (8) page dissenting opinion in which Chief

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8/ On October 16, 1985, Petitioners moved to tax costs against Machado Buick in the amount of $66,287.89 (R. 336-39). On January 27, 1986, the trial court entered a Judgment for Costs of $50,257.46 (R. 335). On February 24, 1986, Machado Buick alone filed its Notice of Appeal from the Judgment for Costs (R. 340-41). On March 6, 1986, the appeals were consolidated by Order of this Court. Morrison Assurance did not join in the Notice of Appeal (R. 340-41), even though the Judgment for Costs was also entered against it (R. 335). Machado Buick abandoned its appeal on the Judgment for Costs by failing to even mention it on appeal.

Judge Daniel S. Schwartz and Judge Daniel S. Pearson concurred. (App. 5-12). The dissenting Judges concluded that the trial court correctly instructed the jury in accordance with the reasonable use rule regarding disposal of surface water (App. 10). The instructions, they found, considered in totality, were not so misleading or confusing so as to cause the jury to arrive at a conclusion it otherwise would not have reached (App. 11-12).

On May 25, 1988, Petitioners filed their Notice to Invoke the Discretionary Jurisdiction of the Supreme Court of Florida. On June 6, 1988, Petitioners filed their Brief on the Discretionary Jurisdiction of the Supreme Court. Petitioners argued that the decision of the Third District expressly and directly conflicts with the decision of the Fifth District Court Appeal of Florida ("Fifth District") in Seminole County v. Mertz, 415 So.2d 1286, 1289 (Fla. 5th DCA), cert. denied, 424 So.2d 763 (Fla. 1982), thereby requesting that this Court exercise its jurisdiction to resolve the conflict. On September 29, 1988, this Court accepted jurisdiction in the cause.

STATEMENT OF FACTS

In 1979, Petitioner, Hialeah Skating, built a building and skating center in the City of Hialeah, Florida (T. at 715-16). Hialeah Skating built the building and skating center in strict compliance with the South Florida Building Code ("Building Code"), which had been adopted by the City of Hialeah and governed construction therein, including its specific alternatives, exact mathematical formulas and methods for the disposal of rain-

fall (T. 221). After construction, Hialeah Skating leased the building and skating center to Westland (T. 115-16). The Westland property is contiguous to property owned by Machado Buick, with the rear of the Westland Skating Center building approximately ten (10) feet from the property line of Machado Buick (T. 248).

Before Hialeah Skating constructed the building and skating center, the Westland property had a higher elevation in its natural condition than the Machado Buick property (T. 289-290, 315). A 1961 survey of the Westland property in its natural condition shows that it was at a higher elevation than the adjacent Machado Buick property (T. 289-90, 315). Because water naturally flows from higher to lower elevation, rainfall which accumulated and became surface runoff moved roughly from east to west from the Westland property downhill to the Machado Buick property before construction on either property (T. 291, 318-19, 323).

In October 1970, Machado Buick's predecessor-in-interest (Seipp Buick) constructed its automobile dealership and opened for business (T. 1017). At that time, Seipp Buick did not "fill" its property and it remained at a lower elevation than the Westland property (T. 1028-29). Thereafter, as before, whenever there was a rainstorm, rainwater would run off and flow from the property where the Westland Skating Center later would be constructed downhill to the Machado Buick property (T. 1029). In fact, in April 1979 and 1980, before Hialeah Skating constructed

the Westland Skating Center, floods occurred because rain water flowed down and Seipp Buick suffered flood damage to its vehicles on the lower elevation back lot (T. 473-475).

In 1979, twenty (20) persons formed Hialeah Skating, a Florida limited partnership, to build and equip the skating center building (T. 121, 716). Hialeah Skating leased the land from Maurice Revitz for forty (40) years (T. 418) and spent approximately $1,000,000 in building and equipping the skating center (T. 716). Hialeah Skating employed Stuart Cohen, an architect licensed in Florida, to design the Westland Skating Center (T. 214). Cohen specifically designed the Westland Skating Center to comply strictly with the Building Code, which had been adopted by the City of Hialeah, including its specific provisions regarding the disposal of rainwater (T. 221).

The Building Code provided five (5) specific alternatives for the disposal of rainwater and specified mathematical formulas for a builder to follow to comply with Building Code requirements for each alternative (Id.). The Building Code requirements are designed to dispose of the rainfall in a normal rain (approximately a half an inch of rain per hour) (T. 225), but are not designed to prevent rainfall in an unusually heavy rainstorm from flowing from the property leased to Westland. (T. 256). Cohen chose a combination of "soakage pits" and "pervious ground", both which were authorized for use together by the Building Code (T. 221). See Hialeah, Florida, Building Code § 4661.1(b)(4) and (5) (1985).

A soakage pit is a subterranean concrete box which permits drainage and holds water until it is absorbed into the ground by percolation (T. 230). A soakage pit has to provide a minimum of .0417 cubic feet of volume for each square foot of impervious area drained into the soakage pit. See Building Code § 4611.4(a)(5). The "pervious" ground Building Code alternative to soakage pits also selected by Cohen required him to provide ten (10) square feet of green area for every one hundred (100) square feet of "impervious" material (T. 221).[9/] Cohen specifically designed both the soakage pits and the pervious area in back of the Westland Skating Center to drain more rainwater than required by the Building Code (T. 221). Further, he designed the Westland Skating Center with 2,000 square feet of pervious grassy area behind the building, further exceeding the Building Code requirement (T. 258).

The City of Hialeah has a number of departments charged with the responsibility to ensure that construction complies with the Building Code (T. 265). Cohen submitted his plans for the Westland Skating Center to each responsible building department (T. 221), which reviewed the plans for the Westland Skating Center and determined that Cohen's design complied with the Building

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9/ "Pervious" ground is ground which will allow water to permeate it and eventually will absorb the water (T. 220-21). In contrast, an "impervious" area is one which does not absorb rainwater, such as a paved asphalt area (Id.).

Code (T. 262-65). The City of Hialeah then issued a construction permit for the Westland Skating Center to Hialeah Skating. (T. 262-65). After construction commenced, the responsible building departments inspected the job site to determine whether work was being done in accordance with the approved plans (T. 264). The City of Hialeah determined that actual construction of the Westland Skating Center complied with the Building Code and issued a Certificate of Occupancy (T. 222, 263).

After the Westland Skating Center and Machado Buick dealership were constructed, the Westland property remained higher to the north and east and the Machado Buick property lower to the south and west (T. 234). The surface flow of water remained the same as it was before construction (T. 324).

In 1980, because Machado Buick's predecessor-in-interest (Seipp Buick) was concerned about the rainwater runoff, John Seipp, its President, met with Maurice Revitz (T. 417). Revitz owned the property upon which Westland Skating Center was located and certain adjoining property (T. 416), but did not own Westland or represent its interests (T. 421). Revitz and Seipp never discussed the Westland Skating Center (Id.). Revitz did not consent to Seipp's request for permission to construct a wall (or curb) that was higher than six to twelve inches (T. 417-22). Rather, he agreed to consider the construction by Seipp Buick of a six-to-twelve inch curb which would be 450 feet long and both parties would share the expense (T. 420).

In November 1980, Revitz received a letter from Seipp's attorney allegedly regarding what Seipp told him had transpired at the meeting (T. 424-25). Revitz considered the letter "ludicrous" because Seipp had "forgotten" that he only had agreed to up to a twelve inch curb (T. 425). Revitz then refused to have further dealings with Seipp never consented to the construction of anything, let alone an eight (8) foot wall (T. 427).

Prior to construction of the wall (T. 529-30), Seipp Buick had retained an engineer, Neil Orange, who advised Seipp of a number of alternatives that would control the water runoff without flooding the Westland Skating Center (T. 530-32). These included raising the grade of the Seipp property, or building dry wells or soakage pits on the Seipp property. (T. 460). However, Seipp Buick ignored its engineer's advice regarding those alternatives that would have controlled any water runoff without flooding the Westland Skating Center (T. 522). Had Seipp Buick complied with its engineer's advice and taken any of his recommended alternatives, it would have cost more money than merely building a wall to act as a dam (T. 1033). Building a wall was the most attractive alternative because it was the cheapest way to stop the downward flow of water (Id). Therefore, contrary to its engineer's advice, Seipp constructed a wall that did not provide for the disposal (or channeling) of the rainwater which would then be blocked by the wall (T. 532).

Seipp Buick then constructed a wall approximately 8 feet high and 2 feet, 8 inches deep (T. 458), which ran 450 feet

along the entire eastern side of its property and along the west side of the Westland property (T. 440-441). Seipp Buick designed the wall with one specific purpose in mind -- to stop the flow of water from the Westland property down onto the Seipp Buick rear lot (T. 1029-33). Seipp Buick did not make any provision to dispose of, or to channel, the water which the wall blocked (T. 314, 460). Instead, the wall acted as a dam to the natural flow of water and caused rain runoff to hit the wall and return to flood the Westland Skating Center (T. 320-25, 458). Seipp Buick knew that the wall would have this effect when it constructed the wall, but still selected this alternative as the cheapest. (T. 1033).

Despite its specific knowledge, Seipp Buick never warned Westland about the purpose or design of the wall (T. 1036). It did not obtain permission from any person to construct the wall with or without drainage (Id.). Instead, Seipp Buick remained silent and waited for the next heavy rainfall.

In August and September, 1981, heavy seasonal storms hit Hialeah and the reasons why Seipp Buick had constructed the wall became apparent to the Petitioners. On both occasions, the wall obstructed the flow of surface water down from the Westland property and returned it uphill, causing floods of the Westland Skating Center (T. 388). In August 1981, after the first heavy rainfall (T. 134), Wayne Lippman, Executive Vice-President of Westland, received a call from his skating center manager that the wooden skating surface was rising (T. 134). Lippman arrived

and observed the wooden skating floor surface "buckle" or rise in places (T. 125). Lippman immediately retained a skating center floor expert who determined that there was more than a 30% moisture content in the wood (T. 143). Because the skating center floor was then unskateable, Lippman immediately shut down the skating center (T. 125). Westland determined that it could not repair the floor, but had to build a new one (T. 145).

Westland then tore out the now unskateable wooden floor and paid about $96,000.00 to build a new one (T. 144, 179). Attempting to remedy future potential water problems, Westland built its floor higher by putting a concrete 3-inch barrier beneath the floor (T. 148-49). During construction, Westland was closed to the public for about 3 weeks (T. 140-49). By the middle of September, Westland reopened for business (T. 156). However, its business volume was measurably reduced (T. 569-78). Westland had an operating profit of $16,000.00 during the month which preceded the flood, while in August it lost about $15,000.00, a swing of $31,000.00 in the month of the flood (T. 585-86).

On September 25, 1981, the Westland Skating Center suffered a second flood despite these precautions (T. 163). Rain water again flooded the skating center and again there was standing water on the skating floor (T. 163, 1026). Lippman advised a Westland employee to take a sledge hammer and knock holes in the Seipp wall to relieve the water pressure which was causing the flooding (T. 164-65). After making holes in the wall adjacent to

the two exit doors of the skating center, the water level immediately and dramatically subsided (T. 165).

Westland did not again replace the entire floor following the flood of September 25, 1981 (T. 177-78). Because of its loss of business due to the first flood, Westland could not afford to wait three (3) months without operating to replace the floor (Id.). Instead, Westland patched and "sanded" the buckled floor so that it was not completely unskateable, but the floor was never the same quality (T. 179).

During the twelve months immediately preceding the first flood, Westland was very profitable and had an operating income of approximately $300,000.00 (T. 567-69). Although it averaged 17,000 to 20,000 skaters per month before the flood, after both floods it was down to 10,000 skaters per month (T. 578-80), and lost money every month thereafter (T. 585). Because of the consistent losses which the floods caused (T. 574), Westland ceased operating in July 1982, and was unable to pay $325,000.00 in rent to Hialeah Skating during the remainder of its lease. (T. 717-18).

After the floods, Hialeah Skating and Westland retained Robert Jerome Filer, an architect licensed to practice in Florida who is familiar with the Building Code, to render an opinion on the reasons for the flooding in August and September 1981 (T. 398). To arrive at his opinion, Filer first reviewed the plans and permits for the wall constructed by Seipp Buick, spoke with its engineer, and then evaluated surveys which were provided

by Machado Buick's expert (T. 398-99). Second, Filer physically inspected the Westland Skating Center and actually entered the soakage pits to measure their "as built" dimensions and determine the volume of storage capacity contained in each soakage pit (T. 399). Third, Filer analyzed the roof and grassy area into which it drained to ascertain whether the Westland Skating Center met the Building Code requirements for pervious ground (T. 400). Finally, Filer sought to determine the "porosity" of the grassy area, which is the amount of water it would absorb, to determine whether it was sufficiently "pervious" to meet the Building Code (Id.)

After his extensive review, Filer determined that: (a) the Westland Skating Center was built entirely within the requirements of the Building Code (T. 400, 411); (b) the soakage pits were constructed with storage capacity in excess of the Building Code requirement (T. 411-12); (c) the Westland Skating Center had 55,000 square feet of paved area, so that the Building Code required a cubic volume of .0417 times 55,000 square feet of paved area, or approximately 2,300 cubic feet (T. 413); and (d) the soakage pits alone had 2,332 cubic feet of water storage capacity. (Id.).

Filer also concluded that the Westland Skating Center was built with a greater amount of grassy area than required by the Building Code. (Id.). The roof on the Westland Skating Center which faces Machado Buick is approximately sixty (60) by two hundred (200) feet (T. 405). Although the Building Code only

required 1200 or 1300 square feet of grass next to the building to dispose of the rainwater which ran off the roughly 12,000 square feet of roof facing Machado Buick, there was approximately 1800 square feet of grass behind the Westland Skating Center (T. 406). Moreover, there was additional grassy area between the "impervious" paved area and the soakage pits so that water would run off partially into the grassy area even before it reached the soakage pit, yet another safety margin (T. 408).

Filer had also conducted tests to determine the porosity of the grassy area during the flood which occurred in August, 1981. At the time Filer conducted the tests, it had rained continuously for two or three days and almost every day during the week (T. 448). Filer emptied a five-gallon bucket of water into a bottomless tub and observed as the water went into the already saturated ground within five or six minutes (T. 451). Consequently, Filer concluded that the soil surrounding the Westland Skating Center was of good porosity and certainly would have drained any rainwater which fell onto it from the sky or roof of the Westland Skating Center (T. 451).

Westland also retained Vincent P. Amy, a hydrogeologist, to render an opinion on the cause of the flooding in August and September, 1981. Like Filer, Amy determined from the original survey of the property that water flowed across the Westland property in its natural condition and down to the Machado Buick property (318-19). He also concluded that the wall would act as a dam to the flow of water in a heavy rainfall (T. 320-23). Amy

then reviewed the rainfall records for South Florida to determine whether the wall caused the floods (T. 334-37). He found that the Westland Skating Center land did not flood before the wall was constructed during rainfalls in April and July of 1980 which were strikingly similar in volume to those which occurred in August and September, 1981 (T. 339). These rainfalls also caused Amy to attribute causation to the wall because rainfalls of similar magnitude as those occurring after the wall was constructed did not cause a flood (Id.).

SUMMARY OF ARGUMENT

The Third District erred by applying the "civil law" rule regarding the disposal of surface water, thereby ignoring the national trend toward adopting the "reasonable use" rule. The "civil law" rule, even with the various modifications and exceptions adopted by other Florida courts, is inflexible and does not lead to just results consistent with the facts in each case. It restricts development in Florida and does not permit the equitable allocation of the economic costs of development. The "civil law" rule is inconsistent, furthermore, with the mandate of the Florida legislature to adopt a building code and its express sanction of construction in compliance with South Florida Building Code. Moreover, it is inconsistent with the Florida legislative policy expressed in the Water Resources Act of 1972.

The Supreme Court should resolve the conflict between the Third and Fifth Districts which irreconcilably conflict regarding the controlling rule of law in Florida. Like the

Supreme Courts of over twenty other states, the Supreme Court of Florida should adopt the "reasonable use" rule as the controlling rule in Florida. Adoption of this rule will enable Florida courts to consider the facts and circumstances before them and render justice. It also will promote the growth and development in Florida, while permitting a more equitable allocation of the economic costs of development. Finally, it readily can be harmonized with both the legislative mandate to adopt a building code and the Water Resources Act of 1972. Accordingly, the Supreme Court should adopt the "reasonable use" rule as the governing rule controlling the disposal of surface water in Florida.

The Third District erroneously held that the trial court erred in granting Partial Summary Judgment because it was based on the "reasonable use" rule. The issue before the trial court on the Motion for Partial Summary Judgment was whether Westland was negligent per se if it built in compliance with the South Florida Building Code, but increased the flow of surface water or made it more burdensome. The trial court correctly applied the "reasonable use" rule and ruled that construction of the Westland Skating Center was not negligence per se. The Partial Summary Judgment became part of the jury instructions which supplemented it regarding reasonableness. Construing the Partial Summary Judgment and instructions regarding reasonableness together, the trial court accurately stated the "reasonable use" rule.

The Third District erroneously held that jury instruction No. 10 was erroneous because it applied the "reasonable use" rule regarding the disposal of surface water. The trial court properly instructed the jury on the claims and defenses alleged by the parties that were supported by evidence presented at trial. Machado Buick did not specifically object thereto, nor request alternative instructions. Jury Instruction No. 10, when considered with the other instructions, verdict form, special interrogatories, and evidence, did not mislead or confuse the jury regarding the "reasonable use" standard.

The Third District further erred regarding the jury instructions because the verdict form and special interrogatories "cured" any arguable error. The jury was instructed pursuant to the Supreme Court's approved Florida standard form instruction on negligence to determine whether Machado Buick, Hialeah Skating and Westland had been negligent. The jury actually returned a verdict after finding Westland culpable of contributory negligence. Any alleged error in the instructions, therefore, was harmless.

ARGUMENT

I. THE THIRD AND FIFTH DISTRICT COURT OF APPEALS OF FLORIDA IRRECONCILABLY CONFLICT REGARDING THE DISPOSAL OF SURFACE WATER AND BOTH IGNORE THE NATIONWIDE TREND ADOPTING THE REASONABLE USE RULE.

A. The Third District Erred By Applying The Strict Civil Law Rule Regarding The Disposal Of Surface Water And Ignoring The Modern Trend Adopting The Reasonable Use Rule.

The Third District erroneously held that the trial court incorrectly granted Westland's Motion for Partial Summary Judgment when the trial court relied on the "reasonable use" rule concerning the disposal of surface water (App. 2-3).[10/] Instead, the Third District held that "Florida follows the civil law rule regarding surface water" (App. 2). Thus, it ignored the modern trend of courts nationwide, including Florida, which have rejected the strict civil law rule and adopted the reasonable use rule regarding the disposal of surface water (App. 2-3). See generally F. Maloney, S. Plager, R. Ausness, B. Canter, Florida Water Law 617 (1980) ("Florida Water Law"). Cf. Seminole County v. Mertz, 415 So.2d 1286, 1289 (Fla. 5th DCA), cert. denied, 424 So.2d 763 (Fla. 1982).

10/ "Surface water" means water which is derived from rain or melting snow or rises to the surface in springs and is diffused over the ground surface, losing itself by percolation and evaporation. See Libby, McNeil & Libby v. Roberts, 110 So.2d 82, 83-84 (Fla. 2d DCA 1959). The civil law rule for the disposal of surface water adopted by the Third District conflicts with the reasonable use rule that governs the disposal of subsurface water in Florida. See, e.g., Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663 (Fla. 1979). See also p. 37-38, infra.

Under the civil law rule, the Third District notes that the owner of higher elevation land has an easement on lower elevation land for the natural flow of surface water (App. 2). Reasoning that the civil law rule does not permit an upper elevation owner such as Westland to "increase or divert" the natural flow of surface water onto the lower elevation owner's land, regardless of whether it acted reasonably, the Third District suggests that the common enemy rule, which was rejected in Florida over sixty (60) years ago, may have entitled Machado Buick to protect its land by building a dam (Id. at 3). But see Davis v. Ivey, 93 Fla. 387, 112 So. 264, 271-72 (Fla. 1927) (rejecting common enemy rule in Florida); Pearce v. Pearce, 97 So.2d 329, 332-34 (Fla. 2d DCA 1957) (rejecting arguments similar to Machado Buick's). Consequently, the Third District holds that the Partial Summary Judgment incorrectly declared the reasonable use rule as governing Florida law rather than the civil law rule. (App. 3).

B. The Fifth District Irreconcilably Conflicts With The Third District By Acknowledging The Modification Of The Strict Civil Law Rule As Controlling Florida Law.

In Seminole County v. Mertz, supra, the Fifth District Court of Appeal ("Fifth District") acknowledged that modern courts in Florida, similar to courts nationwide, have modified the civil law rule. It stated that "[c]ourts of Florida have applied, in an almost unbroken line of decisions, practically all the elements of the modified civil law rule of surface water."

Seminole County v. Mertz, 415 So.2d at 1289 (citing Florida Water Law, supra p.20, at 617). Under the modified civil rule, the upper owner may improve and enhance the natural drainage of his land as long as he acts "reasonably" and does not divert the flow. See id. (emphasis added). If so, the lower landowner remains subject to an easement for such flow of surface water as the upper landowner reasonably is permitted to cast upon him. Id. Accordingly, the Fifth District applied a standard of reasonableness that is expressly rejected by the Third District.

C. American Courts Throughout The Nation Have Modified Their Governing Doctrines Regarding The Disposal Of Surface Water By Adopting A Standard Of Reasonableness.

American courts historically have adopted two diametrically opposed doctrines to resolve disputes regarding the disposal of surface water. The first is the common-enemy doctrine. Under this rule, each landowner has an unqualified privilege to dispose of surface water as he sees fit without regard to the consequences to adjacent landowners. See generally Florida Water Law, supra p. 20, at 592-94. Contrary to the suggestion of the Third District herein (App. at 3), the common-enemy doctrine has been rejected in Florida for over sixty (60) years. See Davis v. Ivey, supra.

The second rule which courts throughout the country, including Florida, have adopted to govern the disposal of surface water is the civil law rule. See, e.g., Lawrence v. Eastern Air Lines, 81 So.2d 632, 634 (Fla. 1955). Under this rule, any landowner who interferes with the natural flow of surface water and

causes an invasion of another landowner's interest in the use and enjoyment of his land is subject to liability to him. See generally Florida Water Law, supra p.20, at 590-92. Florida courts traditionally have applied the civil law rule to resolve disputes concerning the disposal of surface water in Florida.

Under rapid development and urbanization and confronted with cases that could not be decided equitably under the strict traditional rules, modern courts nationwide adopted exceptions and modifications to the original rules regarding the disposal of surface water. See, e.g., Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4, 9 (N.J. 1955). See generally Kinyon & McClure, Interferences with Surface Waters, 24 Minn. L.Rev. 891, 913-45 (1940) ("Interferences With Surface Waters"). They generally modified or created exceptions so that they could obtain more equitable results under the specific facts before them. See, e.g., Butler v. Bruno, 115 R.I. 264, 341 A.2d 735, 738 (R.I. 1975). These modifications and exceptions to both doctrines, however, blurred the distinction between them so that courts reached similar results. See Interferences with Surface Waters, supra p. 22, at 916 and 920. In fact, regardless of which rule they modify, courts in numerous jurisdictions generally reach the same conclusion as they would under a pure reasonable use rule. See Butler v. Bruno, 341 A.2d at 738.

By 1988, over twenty states across the country had adopted a "pure" reasonable use rule, rather than grafting excep-

tions or modifications on existing rules.[11/] The Supreme Courts in these states reason that, among other things, the reasonable use rule is more flexible and will result in justice in individual cases. See, e.g., Armstrong v. Francis Corp.; Butler v. Bruno, 341 A.2d at 735. Under the reasonable use rule, a landowner is legally privileged to reasonably use his land, even though the flow of surface water is thereby altered and may cause some harm to another, without liability unless his interference with the flow of surface waters is unreasonable. See, e.g., Mulder v. Tague, 85 S.D. 544, 186 N.W. 2d 884, 888-89 (S.D. 1971). See generally Florida Water Law, supra p. 20, at 594-96. The issue of the reasonableness of the landowner's use normally is a question of fact to be determined in each case by considering all the relevant circumstances. See, e.g., Keys v. Romley, 64 Cal.2d 396, 412 P.2d 529, 537 (Cal. 1966); Enderson v. Kelehan, 226 Minn. 163, 167, 32 N.W. 2d 286, 289 (Minn. 1948).

II. THE SUPREME COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE THIRD AND FIFTH DISTRICTS AND REMEDY THE CONFUSION IN FLORIDA LAW BY ADOPTING THE REASONABLE USE RULE GOVERNING THE DISPOSAL OF SURFACE WATER.

Although the Supreme Court decided a number of cases involving the disposal of surface water many years ago, see,

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11/ See, e.g., Weinberg v. Northern Alaska Development Corp., 384 P.2d 450, 452 (Ala. 1963); Page Motor Co., Inc. v. Baker, 182 Conn. 484, 438 A.2d 739, 742 (Conn. 1980); Rodrigues v. State, 52 Haw. 156, 472 P.2d 509, 515-16 (Haw. 1970); Jones v. Boeing Co., 153 N.W. 2d 897, 904 (N.D. 1967); Sanford v. University of Utah, 26 Utah 2d 285, 488 P.2d 741, 744 (Utah 1971).

e.g., Bray v. City of Winter Garden, 40 So.2d 459 (Fla. 1949); Panama City v. York, 26 So.2d 184 (Fla. 1946), it has not addressed this issue in over thirty years. Moreover, it never expressly has considered whether Florida courts should apply the strict civil law, modified civil law or reasonable use rule to govern disputes concerning the disposal of surface water. The Third and Fifth Districts irreconcilably conflict regarding which rule governs in Florida, but neither state that Florida is governed by the reasonable use rule which has gained widespread national acceptance. The Florida courts need guidance from the Supreme Court and its express adoption of a rule which will enable an equitable result to be reached under the facts in each case.

The Supreme Court should adopt a controlling rule in Florida which will promote justice based upon the facts in each case. Indeed, as long ago as 1919, this Supreme Court noted the need to modify the civil law rule of surface water by stating that it had "been considerably modified by the courts, and it seems to be almost a unanimous verdict of the courts that each case must stand upon its own facts." Brumley v. Dorner, 78 Fla. 495, 83 So. 912, 913-14 (Fla. 1919) (emphasis added). Unfortunately, application of the civil law rule by the Third District herein did not permit it to give weight to the undisputed facts. See p. 25-27, infra.

Florida should reject the civil law rule which is premised on outdated property notions and join the over twenty states nationwide which have adopted the reasonable use rule. The

Supreme Court should use this opportunity to adopt the more flexible reasonable use rule which will enable Florida courts to reach equitable results in the cases before them. The reasons for adopting the reasonable use rule which have been expressed by the Supreme Courts of numerous other states have equal validity in Florida and compel its adoption.

A. The Reasonable Use Rule Should Be Adopted In Florida Because It Promotes Justice By Its Emphasis On The Facts In Each Case And Requirement Of Causation.

The strict civil law rule applied by the Third District does not permit the court to give any consideration to the relevant facts in each case. Unbelievably, the uncontroverted evidence regarding the reasonable conduct of Westland and aggregous misconduct of Machado Buick is irrelevant under the strict civil law rule. Instead, the sole question considered by the Third District was whether Westland may have increased the amount or diverted the flow of surface water by building on its property (App. 3). See, e.g., New Homes of Pensacola, Inc. v. Mayne, 169 So.2d 345, 347-48 (Fla. 1st DCA 1964). If so, Westland was liable for the changed flow onto its neighbor's land. See Hodge v. Justus, 312 So.2d 248, 249 (Fla. 1st DCA 1975).

Not surprisingly, application of the civil law rule often leads to injustice because its sanctions disregard of virtually all of the relevant facts. See, e.g., Enderson v. Kelehan, 226 Minn. 163, 32 N.W. 2d 286, 289 (Minn. 1948); City of Franklin v. Durgee, 71 N.H. 186, 51 A. 911-13 (N.H. 1902). Numerous courts have rejected the civil law rule, therefore, and

adopted the reasonable use rule because it emphasizes the facts and promotes equitable results. See, e.g., Keys v. Romley, 412 P.2d at 534-37. Florida should not be governed by a rule which authorizes complete disregard for the particular facts and circumstances in each case. As the Supreme Court of California stated in Keys v. Romley, "[N]o rule can be applied by a court of justice with utter disregard for the peculiar facts and circumstances of the parties and properties involved." 412 P.2d at 536.

The inadequacy of the civil law rule is demonstrated compellingly by the facts in this case. The Third District reversed the Final Judgment of the trial court on now essentially undisputed facts -- Hialeah Skating built on its land in strict compliance with the law (the Building Code) and then was flooded out of business by the lower elevation landowner's intentional act of building a dam. Among other things, it was irrelevant under the civil law rule that: (a) Machado Buick was not damaged by construction of the Westland Skating Center because it sustained floods to its property before construction (T. 473-75); and (b) Machado Buick ignored viable alternatives to protect its land because building a dam was cheaper, without regard for the foreseeable impact on the Westland Skating Center (T. 1033).

Application of the civil law rule to these facts could have only one result -- an upper elevation landowner cannot build a building on his property (despite strictly following the applicable building code) without changing the flow of surface water

and creating liability for the altered flow onto the neighbor's land. See, e.g., Panama City v. York, 157 Fla. 425, 26 So.2d 184, 186 (Fla. 1946). The law governing the disposal of surface water in Florida must enable the court to attach importance to the peculiar facts and circumstances before it. See Keyes v. Romley, supra. This blatantly inequitable result clearly illuminates the need to adopt the reasonable use rule so that all relevant facts can be considered by the court. See Gus Machado Buick, Inc. v. Westland Skating Center, Inc., Case Nos. 85-2601 and 86-482, at 7-8 (Fla. 3d DCA 1988) (Westland Dissenting Opinion to Order denying Rehearing En Banc) ("Westland Dissenting Opinion, at ____").

B. The Reasonable Use Rule Should Be Adopted In Florida Because It Will Promote Growth And Development In Our Growing State.

Florida is one of the fastest growing states in the United States. Indeed, it is estimated that over one thousand new residents move to Florida every day. Compare Bureau of Economic & Business Research, College of Business Administration, University of Florida, Florida 1987 Estimates of Population (1987) (estimated 1987 population of 12,043,608), with Bureau of Economic & Business Research, College of Business Administration, University of Florida, Florida 1986 Estimates of Population (1986) (estimated 1986 population of 11,657,843). These new residents require the growth and development that creates new homes, schools, offices and all of the services necessary for living in Florida. It is clear, therefore, that Florida should

adopt a rule which accomodates growth and the necessary development of land.

However, the civil law rule has been assailed as hampering land development and growth. See, e.g., Keys v. Romley, 412 P.2d at 532-33; Butler v. Bruno, 341 A.2d at 738. See generally Kinyon and McClure, Interferences With Surface Waters at 893. It prohibits any alteration to land which increases the natural flow of surface water or causes it to deviate onto the lower elevation owner's land -- regardless of its utility in Florida. See, e.g., Keys v. Romley, 412 P.2d at 535 ("It places the entire liability for damages on one owner on the basis of the unvarying formula that he who changes conditions is liable."); New Homes of Pensacola, Inc. v. Mayne, 169 So.2d 347-348. The civil law rule, therefore, no longer is in the best interest of our growing state. See Westland Dissenting Opinion, at 4-11. Accordingly, public policy dictates that the Supreme Court adopt a rule governing the disposal of surface waters which accepts, rather than restricts, reasonable growth and development.

Unlike the civil law rule, the reasonable use rule permits such development if it is reasonable under the circumstances. See, e.g., Butler v. Bruno, 341 A.2d at 741; Armstrong v. Francis Corp., 120 A.2d at 10. Growth and development is permitted, regardless of its impact upon the flow of surface water, if its social utility outweighs any damages sustained by

an adjacent landowner.[12/] See generally Restatement (Second) of Torts § 826-28 (2d Ed. 1977). The reasonable use rule tempers such growth and development by standards of utility. As the Supreme Court of Nevada stated in Clark County v. Powers, 96 Nev. 497, 611 P.2d 1072 (Nev. 1980):

> [T]he reasonable use rule allows for the careful consideration of each of these public and private concerns; growth and urbanization are not unduly restricted, but merely tempered with elements of order, planning and reasonableness.

611 P.2d at 1076. See also Butler v. Bruno, 341 A.2d at 740-41.

C. The Reasonable Use Rule Should Be Adopted In Florida Because Its Flexibility Leads To More Equitable Results Than The "Predictability" Of The Strict Civil Law Rule.

The primary benefit offered by advocates of the civil law rule is that its application leads to predictable results. See, e.g., Butler v. Bruno, 341 A.2d at 741. Its advocates assert that a landowner who is governed by this rule will know that he cannot increase or alter the natural flow of surface

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12/ As the Supreme Court of California stated in Keys v. Romley:

> The gravity of harm is its seriousness from an objective viewpoint, while the utility of conduct is its meritoriousness from the same viewpoint. (citation omitted). If the weight is on the side of him who alters the natural water course, then he has acted reasonably and without liability; if the harm to the lower landowner is unreasonably severe, then the economic cost incident to the expulsion of surface waters must be borne by the upper owner whose development caused the damage.

412 P.2d at 537 (emphasis added).

water without liability to adjoining landowners. However, a number of courts nationwide have concluded that the civil law rule does not provide more predictable results than the reasonable use rule. See, e.g., Clark County v. Powers, 611 P.2d at 1076; Butler v. Bruno, 341 A.2d at 741. Rather, because of the numerous judicial exceptions and modifications that have been appended on the civil law rule, it actually does not afford more predictability than the reasonable use rule. See Butler v. Bruno, supra.

Indeed, applying the purportedly predictable civil law rule, the Second District Court of Appeal of Florida ("Second District") reached the opposite result under substantially the same controlling facts in Pearce v. Pearce, 97 So.2d 329, 332-34 (Fla. 2d DCA 1957) than that reached here by the Third District. The Plaintiff in Pearce brought an action against the Defendant for causing surface waters to be diverted and cast upon land owned and leased by the Plaintiff. The controlling facts were that: (a) Plaintiff owned the higher, adjacent property to that owned by the Defendant; (b) Plaintiff's property naturally sloped and drained across his land to the Defendant's; (c) Plaintiff constructed a dike "which, to some extent, affected the flow of water across the Defendant's property . . . ." Id. at 330; and (d) Defendant built dikes or levies to control the flow of water on his property which had been "affected" by Plaintiff, which caused flooding of the Plaintiff's property.

Although governed by the same civil law rule, the Second District in Pearce reached an irreconcilable result from that reached by the Third District. The Second District held that the trial court properly enjoined the lower elevation Defendant from casting the surface water back upon the Plaintiff's higher elevation lands. Contrary to the Third District, the Second District held that: (a) Plaintiff did not lose his servitude merely by construction "which, to some extent, affected the flow of water across the Defendant's property" Id. at 330 (emphasis added); and (b) the lower elevation Defendant could not protect itself from the flow of water by building a dike or levy on his property without liability for causing floods on the higher elevation Plaintiff's property. Id.[13/]

These two cases demonstrate that predictable results are not obtained under the civil law rule because of the modifications and exceptions which courts have grafted upon it. Indeed, the results which are attained may be exactly opposite to what would have been predicted. Moreover, an abstract virtue such as "predictability" should not serve as a judicial sanction for a property owner's unreasonable conduct. See Keys v. Romley, 412 P.2d at 536; Clark County v. Powers, 611 P.2d at 1076. Any litigant in a Florida court should receive a just result based upon the circumstances in his case, regardless of its "predict-

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13/ Under the Third District's logic, this "affect", if proven, may have entitled the lower elevation landowner to invoke the "common enemy" rule in his protection. (App. 3).

ability." Accordingly, Florida should adopt a rule of law that elevates justice and equity over "predictability" -- the reasonable use rule.

D. The Reasonable Use Rule Should Be Adopted In Florida Because It Permits More Equitable Allocation Of The Economic Costs Of Development.

The civil law rule is ill-suited to the complexities of the increasing urbanization and expansion of Florida. See Clark County v. Powers, 611 P.2d at 1076. Development and growth in Florida should be controlled by legitimate societal concerns. The possible impact upon the natural flow of surface water should not dictate our State's growth, regardless of the utility of such growth balanced against the damages it may cause to adjoining landowners. See, e.g., Keys v. Romley, 412 P.2d at 537; Armstrong v. Francis Corp., 120 A.2d at 10.

The reasonable use rule, in contrast, is well-suited to increasing urbanization of Florida and the attendant cost of such expansion. The economic costs which are incident to the expulsion of surface waters as rural and semi-rural areas are transformed into urban and suburban communities should not be borne solely by adjoining landowners. See, e.g., Armstrong v. Francis Corp., 120 A.2d at 10; Butler v. Bruno, 341 A.2d at 740-41. Instead, persons who intend to build should take into account the costs of development to adjacent landowners and the community, including whether construction will alter the natural flow of surface water, prior to implementation of their plans. Id. As the Supreme Court of Nevada stated in Clark County v. Powers:

> [T]he reasonable use rule allows for more equitable allocation of the incidental economic costs, consistent with our concepts of social progress and the common-being than does the natural flow [Civil Law] rule.

Id. Accordingly, the economic costs attendant to the expulsion of surface waters as Florida continues its rapid growth and development further compel the adoption of the reasonable use rule.

E. The Reasonable Use Rule Should Be Adopted Because It Is Consistent With The Florida Legislature's Mandate To Adopt A Building Code.

The civil law rule[14/] as applied by the Third District is inconsistent with Florida Statutes § 553.70 et seq. (1985), which mandates that municipalities adopt a building code and expressly sanctions adoption of the South Florida Building Code. See Fla. Stat. § 553.73(3)(e). The South Florida Building Code governs all construction in South Florida and provides five (5) specific alternatives for the disposal of rainwater and specifies mathematical formulas for a builder to follow to comply with Building Code requirements. Hialeah, Florida, South Florida

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14/ Under Florida Statutes § 2.01 (1985), the common law remains in full force and effect unless otherwise changed by statute. Ripley v. Ewell, 61 So.2d 420, 421 (Fla. 1952). Because the words "common law" in § 2.01 refer to the common law declared by Florida courts, see State v. Egan, 287 So.2d 1, 5-6 (Fla. 1973), Florida common law includes the strict civil law rule -- a landowner cannot build on his property, regardless of his compliance with the applicable building code, if his construction increases or diverts the natural flow of surface water. See, e.g., Lawrence v. Eastern Air Lines, supra.

Building Code § 4611.1 (1985). The Building Code requirements are designed to dispose of rainfall in a normal rain (approximately ½ inch of rain per hour) (T. 225), but not to prevent rainfall from flowing from the Westland property in or after a heavy rainstorm (T. 256). Accordingly, the civil law rule conflicts with § 4611.1 of the Building Code because that rule absolutely prohibits any construction which increases the flow of surface water or causes it to deviate, regardless of compliance. See, e.g., Lawrence v. Eastern Air Lines, supra.

Under § 2.01, Fla. Stat. (1987), the South Florida Building Code prevails over the common law, including the civil law rule, regarding the disposal of surface water if the two conflict. See e.g., Ripley v. Ewell, supra. Therefore, Florida courts must harmonize, if possible, the applicable common law regarding the disposal of surface water and the South Florida Building Code. See, e.g., Law Offices of Harold Silver, P.A. v. Farmers Bank & Trust Co. of Kentucky, 498 So.2d 984, 985 (Fla. 1st DCA 1986). Now, however, the civil law rule and South Florida Building Code conflict and cannot be harmonized. Construction of a building in compliance with the Building Code must, of course, alter the natural flow of surface water which is negligence per se under the civil law rule. See, e.g., New Homes of Pensacola, Inc. v. Mayne, supra. But see deJesus v. Seaboard Coast Line R. Co., 281 So.2d 198, 201 (Fla. 1973) (even violation of statute not negligence per se unless it establishes a duty to take precautions to protect a particular class of persons from a

particular injury or type of injury); Underwriters At LaConcorde v. Airtech Services, Inc., 493 So.2d 428, 431 (Fla. 1986) (Boyd J., concurring in part and dissenting in part) (concept of "negligence per se" based on violations of statutes, ordinances, or rules must be applied carefully").

In stark contrast, compliance[15/] with the South Florida Building Code is evidence of reasonableness under the reasonable use rule which would be considered by the jury in determining whether the landowner can improve his land without liability for necessarily increased or diverted water flow. Cf. Dorsey v. Honda Motor Co. Ltd., 655 F.2d 650, 656 (5th Cir. 1981), cert. denied, 459 U.S. 880, 103 S. Ct. 177, 74 L.Ed. 2d 145 (1982) (applying Florida law); Bruce v. Martin-Marietta Corp., 544 F.2d 442, 446 (10th Cir. 1976) (applying North Carolina law). See generally Restatement (Second) of Torts § 288(c) (2d Ed. 1979) (compliance with legislative enactment does not prevent finding of negligence where reasonable person would take additional action). The reasonable use rule, therefore, is consistent and can be harmonized with the legislatively mandated Building Code, while the civil law rule conflicts with its requirements.

15/ The trial court instructed the jury that any violation of the Building Code, regardless of its impact on the flow of surface water, by Westland was negligent (T. 1215-17). However, any error in such instruction was favorable to the defendant, Machado Buick, and therefore was harmless.

F. The Reasonable Use Rule Should Be Adopted Because It Is Consistent With The Florida Water Resources Act Of 1972.

The civil law rule as applied by the Third District also is inconsistent with the Florida Water Resources Act of 1972 ("Water Resources Act"). See § 373.012 et seq., Fla. Stat. (1987). The Water Resources Act is intended to, among other things, govern the use of surface and ground water consistent with the general welfare of Florida's citizens. See § 373.016 (b) and (h), Fla. Stat. (1987). The State Department of Environmental Regulation has been vested with the power to manage all of the waters of Florida, and has delegated the authority to control disposition of surface water to various water management districts. See § 373.069(2)(e), Fla. Stat. (1987) (delegation to South Florida Water Management District).

The civil law rule and Water Resources Act cannot be harmonized. Contrary to the civil law rule, the Water Resources Act expressly authorizes the "reasonable-beneficial use" of water for a purpose and in a manner which is both "reasonable" and "consistent with the public interest". § 373.019(4), Fla. Stat. (1987). Construing the Water Resources Act, this Court in Village of Tequesta v. Jupiter Inlet Corp., supra, expressly noted that the reasonable use rule governed the consumptive use of subsurface water in Florida. The civil law rule applied by the Third District is wholly inconsistent with the "reasonable-beneficial use" rule which governs the use of subsurface water under the Water Resources Act. Accordingly, uniformity in Florida Law

would be promoted by application of the reasonable use rule to cases involving surface water.

III. THE THIRD DISTRICT ERRED IN HOLDING THAT THE PARTIAL SUMMARY JUDGMENT INCORRECTLY STATED FLORIDA LAW REGARDING THE DISPOSAL OF SURFACE WATER.

A. The Trial Court Properly Ruled That Construction In Compliance With The Building Code Was Not Negligence Per Se Even If It Increased The Flow Of Surface Water Or Made It More Burdensome.

The Third District held that the trial court erred in granting Partial Summary Judgment because it was based upon the reasonable use rule (App. at 3). However, it misperceived the issue before the trial court on the Motion for Partial Summary Judgment. Westland sought summary judgment on the issue of whether Machado Buick was liable for a private nuisance for obstructing the flow of surface water from its land which resulted in flooding (R. 125). Machado Buick responded by arguing that Westland was contributorily negligent even if it built in strict compliance with the South Florida Building Code, but increased the flow of surface water or made it more burdensome (R. 147).[16/] Thus, the issue before the trial court on the

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16/ Machado Buick stated:

> The law in Florida is clear. Defendant [Machado Buick] was not required to accept the flow of surface water that was increased and made more burdensome by the acts of Plaintiff [Westland] . . . any damages suffered by Plaintiff [Westland] are proximately caused by its own negligent actions . . . (Id.)

Motion for Partial Summary Judgment was whether Westland was negligent per se even if it built in compliance with the South Florida Building Code, but altered the flow of surface water.

The trial court properly rejected Machado Buick's argument that, as a matter of law, Westland could not build the Westland Skating Center in compliance with the Building Code if it increased the flow of natural surface water or made it more burdensome -- the civil law rule. See, e.g., Hodge v. Justus, 312 So.2d 248, 249 (Fla. 1st DCA 1975). Instead, it adopted the reasonable use rule and ruled that construction of the Westland Skating Center was not negligence per se (R. 191-92). Rather, Westland had the right to reasonably use its land by constructing a building in accordance with the Building Code -- whether the exercise of that right was reasonable was later subjected to the jury for determination (R. 1213-18). Consequently, the trial court properly held that construction that increased or altered the flow of water which was done in compliance with the Building Code was not negligent per se, but may have been reasonable under the reasonable use rule.

B. The Third District Erroneously Suggested That The Partial Summary Judgment Was Tantamount To A Directed Verdict Regarding The Reasonableness Of Construction.

Contrary to the suggestion by the Third District (App. 3 & n.2), the Partial Summary Judgment is not tantamount to a directed verdict on the issue of reasonableness. The Partial Summary Judgment did not resolve any issue of fact, such as the

reasonableness of construction in compliance with the Building Code, nor make any determination regarding liability (R. 191-92). Instead, it merely chose between the civil law and reasonable use rules and declared that the reasonable use rule would govern the case (id.) and that holding subsequently become part of the jury instructions (T. 1216-17).

Because the Partial Summary Judgment became part of the jury instructions, which supplemented it regarding reasonableness, it cannot be viewed in isolation in determining whether it correctly stated the reasonable use rule. See Westland Dissenting Opinion, at 7-12. Instead, the Partial Summary Judgment and instructions regarding reasonableness must be construed together to determine whether they accurately stated the reasonable use rule under the facts of this case. See, e.g., First National Bank in Orlando v. Roberts, 92 Fla. 18, 109 So. 635, 636 (Fla. 1926). Cf. Busser v. Sabatasso, 143 So.2d 532, 534 (Fla. 3d DCA 1962). Reading the Partial Summary Judgment and jury instructions together, the issue presented to the jury was whether construction in compliance with the South Florida Building Code was reasonable (T. 1213-18). This is the issue to be determined by the jury under the reasonable use rule. See, e.g., Keys v. Romley, 412 P.2d at 536; Enderson v. Kelehan, 32 N.W. at 289. Accordingly, any error in the Partial Summary Judgment, standing alone, was harmless. Cf. Seaboard Airline R. Co. v. Haynes, 47 So.2d 324, 327 (Fla. 1950); Coral Way Shopping Center v. City Stores Co., 216 So.2d 15, 17 (Fla. 3d DCA 1968).

C. The Partial Summary Judgment Correctly Instructed The Jury On The Issue Of The Reasonableness Of Machado Buick's Actions To Protect Itself.

Under the reasonable use rule, both Westland and Machado Buick had the right to act reasonably in the use and enjoyment of their properties without liability to the adjacent landowners. See generally Florida Water Law, supra p. 20, at 595; Restatement (Second) of Torts §§ 822-31, 833 (2d Ed. 1979). Because the actions of Machado Buick were irrelevant under the civil law rule, the Third District ignored the trial court's correct judgment and instruction regarding the right of Machado Buick to protect its property under the reasonable use rule. Although the trial court properly rejected the common enemy rule, see Davis v. Ivey, supra, it correctly noted that the owner of lower elevation land could protect itself from the flow of surface water if it did so reasonably. It marshalled the three circumstances presented by the evidence in support of Machado Buick's reasonable use of its property. (R. 192). The trial court correctly ruled, therefore, that the protective actions taken by Machado Buick may have been reasonable under the circumstances (Id.). The trial court instructed the jury regarding this defense (R. 1216-17). Therefore, the issue of the reasonableness of both Westland's construction in compliance with the Building Code and Machado Buick's actions to protect its lower elevation land were express jury issues (Id.) See Westland Dissenting Opinion, at 8-9.

IV. THE THIRD DISTRICT ERRONEOUSLY HELD THAT JURY INSTRUCTION NUMBER 10 WAS ERRONEOUS BECAUSE IT APPLIED THE REASONABLE USE RULE REGARDING THE DISPOSAL OF SURFACE WATER.

A. The Trial Court Did Not Commit Reversible Error By Instructing The Jury In Accordance With The Reasonable Use Rule Unless Such Error Was "Fundamental".

The Third District erroneously held that the trial court committed reversible error when it instructed the jury that liability was dependent on whether Westland reasonably used its property (App. 2). As noted above, see pps. 24-38, supra, the controlling law in Florida regarding the disposal of surface water should be the reasonable use rule. Machado Buick failed to specifically object to instruction number 10 at the charge conference. See, e.g., Wagner v. Nottingham Associates, 464 So.2d 166, 170 (Fla. 3d DCA 1985); Middelveen v. Sibson Realty, Inc., 417 So.2d 275, 276-77 (Fla. 5th DCA 1982), cert. denied, 424 So. 2d 672 (Fla. 1982). Moreover, it did not request an alternative instruction at the charge conference. See e.g., Miami Coca Cola Bottling Co. v. Mahlo, 45 So.2d 119, 121 (Fla. 1950) (counsel who does not request instruction cannot later take advantage of oversight or omission after adverse verdict); Fla. R. Civ. P., 1.470(b). Therefore, jury instruction number 10 is not subject to challenge unless it was "fundamental error" under the reasonable use rule. See, e.g., Eli Witt Cigar & Tobacco Co. v. Matatics, 55 So.2d 549, 552 (Fla. 1951). A "fundamental error" is one which affected the very essence of the lawsuit, see Coleman v. Allen, 320 So.2d 864, 866 (Fla. 1st DCA 1975), and

deprived Machado Buick of a fair and impartial trial. See, e.g., Frankowitz v. Beck, 257 So.2d 918, 919 (Fla. 3d DCA 1972).

1. The Trial Court Properly Instructed The Jury On The Claims And Defenses Alleged By The Parties That Were Supported By Evidence Presented At Trial.

The jury instructions, read as a whole, accurately instructed the jury on the claims and defenses alleged by the parties. Westland sued Machado Buick for negligence, nuisance, intentional interference with a natural easement, and trespass, respectively (R. 1-8). Machado Buick defended by alleging that Westland's damages were due to its negligent conduct (R. 113-14). Comparative negligence is a defense to the claims alleged by Westland. See Bray v. City of Winter Garden, 40 So.2d 459, 462 (Fla. 1949). See generally Florida Water Law, supra p. 20, at 623-24. Because Westland and Machado Buick only presented proof on these claims, the trial court only needed to instruct the jury on Westland's claims, which it did, and Machado Buick's defense thereto -- comparative negligence (R. 1213-18). See, e.g., Florida Power & Light Co. v. Bridgeman, 133 Fla. 195, 182 So. 911, 921 (Fla. 1938); Wooten v. Collins, 327 So.2d 795, 798 (Fla. 3d DCA 1976).

The "fundamental error" test must be applied by considering the jury instructions taken as a whole, not individually, together with the evidence, verdict form and special interrogatories. See, e.g., Grimm v. Prudence Mut. Cas. Co., 243 So.2d 140, 143 (Fla. 1971); Busser v. Sabatasso, ("Hardly any

charge to the jury would escape error if taken paragraph by paragraph"). Applying this standard, it is clear that instruction number 10 did not deprive Machado Buick of a fair and impartial trial under the reasonable use rule. The trial court instructed the jury on each of Westland's claims against Machado Buick -- negligence, nuisance, and intentional interference with natural easement (T. at 1222, 1218).[17/] It generally instructed the jury on Westland's claim for negligence and Machado Buick's affirmative defense of comparative negligence by giving the Florida standard instruction on negligence[18/] (T. at 1217). See Lynch v. McGovern, 270 So.2d 770, 771 (Fla. 4th DCA 1972) cert. denied 277 So.2d 786 (Fla. 1973) (trial court may use standard jury instruc-

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17/ Page 1217 of the Transcript on Appeal is followed by a page which is misnumbered as 1222. Page 1222 is followed by page 1218. These pages accurately list the jury instructions in the order which they were given although they are misnumbered.

18/ Consistent with its instruction regarding the reasonable duty of care, the trial court permitted Machado Buick to argue any standard of due care to the jury, not merely a reasonable standard (R. 1197, 1200-01). Machado Buick strenuously argued that Petitioners were contributorily negligent if they permitted any water to cross their property line, regardless of whether water had crossed their property line before construction. Thus, Machado Buick argued that Westland's construction should be evaluated under a rule that was even stricter than the civil law rule -- not whether their construction caused the water flow to increase or deviate. (T. 1201). Moreover, it consistently argued the reasonable care standard, using the word "reasonable" five separate times (T. 1104, 1105, 1109 and 1205). The jury clearly was guided by the instructions regarding reasonable due care and negligence and, while it primarily rejected Machado Buick's argument (T. 1217), also found that Westland was ten percent (10%) negligent.

tions where applicable and give other instructions which adequately instruct the jury); Florida Standard Jury Instructions In Civil Cases § 4.1 (1985). In fact, the trial court expressly instructed the jury on Machado Buick's affirmative defense that Westland could not recover if it was negligent (T. 1214). Accordingly, the jury instruction could not have deprived Machado Buick of a fair and impartial trial -- it required the jury to determine the reasonableness of the conduct of both Westland and Machado Buick.[19/] See Staff v. Soreno Hotel Co., 60 So.2d 28, 29 (Fla. 1952) (specific charge on claim for negligence was not erroneous where the jury heard the general charge regarding duty of care).

B. The Jury Instruction Was Not "Fundamentally Erroneous" Because The Jury Could Have Absolved Machado Buick Of Liability If Its Conduct Was Reasonable.

In addition to the instruction regarding negligence and Westland's duty to use reasonable care (T. at 1217), the trial court specifically instructed the jury that Machado Buick was not liable if its conduct to protect its lower land was reasonable under the circumstances. It instructed the jury that Machado Buick was not liable if any of three alternatives were satisfied (T. 1216-17). Thus, regardless of the reasonableness of Westland's use, the jury could have found Machado Buick not liable (T. 1216-17). The evidence was uncontroverted that these alternatives were not satisfied and that more reasonable methods

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19/ Additionally, it instructed the jury that Machado Buick was not liable if its actions to protect its land were reasonable (T. 1216-17). See p. 43, infra.

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were available to Machado Buick to protect its lower land than building a dam (T. 460, 530-32, 1033). Consequently, the jury could not have been misled or confused by the trial court's instructions regarding the reasonable use of property. See Westland Dissenting Opinion, at 7-9.

C. The Verdict Form And Special Interrogatories "Cured" Any Error In The Jury Instructions By Requiring The Jury To Determine Whether Hialeah Skating, Westland, And/Or Machado Buick Had Been Negligent.

Contrary to the Third District's conclusion that the jury instructions were tantamount to a directed verdict for Westland (App. 3 & n.2), the objective facts demonstrate that the jury was neither confused nor misled by the jury instructions. The Verdict Form and Special Interrogatories specifically required it to determine whether Westland, Hialeah Skating and/or Machado Buick had been negligent and, if so, by what percentage. (R. 329-30). The jury obviously believed that the question of the reasonableness of these parties' conduct was a jury question. It answered a Special Interrogatory by finding that Westland was ten percent (10%) negligent (R. 330). If the jury was misled by the instruction and did not believe that the question of reasonableness was before it, it could not have answered the Special Interrogatory by finding that Westland was negligent. Because the jury returned its verdict partially in favor of Machado Buick by finding Westland comparatively negligent, any alleged error in the instruction was harmless. See, e.g., Kline v. Publix Super Markets, Inc., 178 So.2d 739, 740 (2d DCA 1965); Wagner v. McCormick, 153 So.2d 860, 861 (Fla. 2d DCA 1963).

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CONCLUSION

The Supreme Court should resolve the conflict and confusion among Florida appellate courts and join over twenty states nationwide which have adopted the reasonable use rule. The Supreme Court should adopt the reasonable use rule so that a land owner who builds on his upper elevation property in compliance with the law (the applicable Building Code) is not negligent per se merely because the construction may modify the natural flow of surface water. Therefore, the Supreme Court should reverse the Third District holding that the trial court erred by entering Partial Summary Judgment in accordance with the reasonable use rule and instructing the jury accordingly. The Supreme Court should find that the trial court correctly applied the reasonable use rule and reverse the decision of the Third District. Upon so doing, the Supreme Court should reinstate the Final Judgments of the trial court.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was furnished by mail to: PAMELA BECKHAM, ESQ., Carey, Dwyer, Cole, Eckart, Mason & Spring, P.A., Attorneys for Respondent, 2180 S.W. 12th Avenue, P.O. Box 45088, Miami, Florida 33245-0888 this 24 day of October, 1988.

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