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 BRIEF ON
DISCRETIONARY JURISDICTION OF THE SUPREME COURT

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Brief OK
per SJW

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STATEMENT OF THE CASE AND FACTS

The properties known as Gus Machado Buick, Inc. (formerly Seipp Buick) and Westland Skating Center, Inc. were prior to any real estate development, pasture land. In 1969, Mr. Seipp built a car lot on his property. From 1970 to 1979, despite heavy rainfalls, Seipp Buick, Inc., experienced no flooding. The northern portion of the Seipp property was originally below the property to the east of it, and below the street level. The overall level of the property was originally raised above the natural terrain when the car lot was built. From time to time the back lot of the Seipp property had fill added to it, as was economically feasible, to bring the area up to the level of the front 450 feet.

In 1979, the property east of Seipp Buick, which was owned by Mr. Maurice Revitz, was leased to Hialeah Skating Center; the latter then leased the building on the property to Westland. At some point, Mr. Revitz had raised the western and eastern portions of his property so that the water would drain toward the center.

On or about April of 1979, Seipp experienced its first flood; the damages sustained totaled $33,000.00. Shortly after this, Mr. Seipp's attorney met with Mr. Revitz, his attorney, and others to discuss the erection of a wall to halt the water problem. Mr. Revitz was in favor of said construction and agreed to pay half of all costs, as well as to arrange to have contractors come out to the property.

Mr. Revitz did not contact Mr. Seipp again, so Mr. Seipp's attorney advised him to proceed with the construction of the

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wall. Construction was finished in July, 1981; the wall was 2 1/2 to 3 feet below the ground, and rose to a full height of 8 feet; it met all the requirements of the South Florida Building Code.

On September 25, 1981, there was a heavy rainfall. Employees from Westland began sledging holes in the wall to drain the water that was accumulating on the Westland property. After this incident, Mr. Seipp added some fill and drainage pits. On March 3, 1982, Seipp Buick was sold to Gus Machado, who assumed all liabilities.

On September 29, 1981, Westland filed an action for damages and a mandatory injunction against Seipp. Gus Machado was substituted for Seipp.

An order granting partial Summary Judgment with respect to the law governing the case was entered on December 15, 1983; on September 18, 1985, the parties began a seven day jury trial. The jury returned a verdict in favor of Westland and against Gus Machado in the amount of $800,000. It also returned a verdict in favor of Hialeah Skating and against Gus Machado in the amount of $324,000.

On May 19, 1987, the Third District Court of Appeal reversed and remanded the judgment of the Circuit Court. On April 26, 1981, the Third District Court denied Motions for Rehearing and Rehearing En Banc.

SUMMARY OF THE ARGUMENT

Contrary to the assertions made in the initial brief, the instant case does not conflict with Seminole County v. Mertz, 415 So.2d 1286 (Fla. 5th DCA 1982) or Pearce v. Pearce, 97 So.2d 329

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(Fla. 2d DCA 1957). All three decisions are consistent, all apply a modified civil law rule, and none have adopted the reasonable use doctrine. Petitioner's statement that the reasonable use doctrine modifies the civil law rule is blatantly inaccurate. Further, the reasonable use doctrine does not modify the civil law rule, but is a rule of construction in its own right.

The Third District Court of Appeal opinion acknowledges the distinction between both the modified civil law rule and the reasonable use doctrine, and the opinion correctly states 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 men. This position is entirely consistent with the law in Florida today. The Third District Court of Appeal acknowledges that other jurisdictions applying the reasonable use rule, must do an analysis of the benefit of use to the upper elevation landowner against the burden imposed upon the solvent landowner.

In the instant case, petitioners assertions are entirely incorrect, and there is absolutely no basis for this court to accept review of this cause.

ARGUMENT

I. THE SUPREME COURT DOES NOT HAVE JURISDICTION TO REVIEW THE DECISION OF THE THIRD DISTRICT BECAUSE IT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEALS ON THE SAME QUESTION OF LAW.

The discretionary jurisdiction of the Florida Supreme Court may be invoked by a District Court of Appeals decision that expressly and directly conflicts with a decision of another such

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A. The decision of the Third District does not expressly and directly conflict with a rule of law announced by the Fifth District Court of Appeals

In its brief, Westland, The Plaintiff/Petitioner (hereinafter referred to solely as "petitioner") stated there are two rules regarding the disposal of surface water. The first is the "civil law rule"; the second, the "reasonable use doctrine." In explaining this latter doctrine, petitioner equated it with the modified civil law rule; that is, petitioner claims it is one and the same rule. This is an erroneous statement of the law.

In its extreme, the civil law rule acknowledges that the owner of the land on the higher elevation has an easement over the lower elevation land for all water that naturally flows from the higher land. As stated in Libby McNeil & McNeil v. Roberts, 110 So.2d 82 (Fla. 2d DCA 1959) (citing Boynton v. Longley, 19 Nev. 69, 6 P. 437, 438): "water seeks its level and naturally flows from a higher to a lower plane; hence the lower surface, or inferior heritage, is doomed by nature to bear a servitude to the higher surface, or superior heritage, in this: that it must receive the water that naturally falls on and flows from the latter."

Application of this rule in this form has been deemed too strict: "The need to accommodate the strictness of the civil law with the practical necessity for improvement and development of lands has led most jurisdictions following the civil law rule to modify it in various ways." F. Maloney, S. Plager, F. Baldwin, Water Law and Administration: The Florida Experience 202 (1968). See also: Annotation, Modern States of Rules Governing Interference with Drainage of Surface Waters, 93 ALR 3d 1212

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(1979). Thus, many jurisdictions have retained the basic elements of the civil law rule but have "softened" it a bit.

One such jurisdiction is the Colorado Supreme Court; in Hankins v. Borland, 431 P.2d 1007 (Colo. 1969), the Court termed its rule a modified civil law rule and summarized it as follows: natural drainage conditions may be altered by an upper proprietor, provided that the water is not sent down in matter or quantity to do more harm than formerly. In New Homes of Pensacola, Inc. v. Mayne, 169 So.2d 345 (Fla. 1st DCA 1964), the First District Court of Florida expressed an almost identical modified version of the civil law rule:

> 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 a natural course 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.

Florida Courts have uniformly adhered to the more prevalent, or moderate version of the civil law rule. Given the great amount of development and urbanization taking place in Florida, it is only logical that the civil law rule be applied liberally.

Thus, petitioner's statement that the reasonable use doctrine modifies the civil law rule is blantantly incorrect. Petitioner states that "under this modified civil law rule the higher elevation landowner does not lose its rights to the servitude unless the improvement is unreasonable." (Petitioner's Brief, p. 4) As previously pointed out, the modified civil law

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court, or of the Supreme Court, on the same point of law. Florida Constitution Article V §3(b)(3); Florida Rules Appellate Procedure 9.030(a)(2)(A)(iv). The conflict can not be inherent or implied but must be obvious and evident. In Trustees of the Internal Improvement Fund v. Lobean, 127 So.2d 98 (Fla. 1961), the Supreme Court stated that in order to assert conflict jurisdiction, "antagonistic principles of law must have been announced in a case or cases by the lower court based on practically the same facts. The conflict must be obvious and patently reflected in the decisions relied on." (emphasis added).

This requirement was further reiterated in Dodi Publishing Co. v. Editorial American, S.A., 385 So.2d 1369 (Fla. 1980), where the Court stated that, "the issue to be decided from a petition for conflict review is whether there is express and direct conflict in the decision of the District Court before us for review, not whether there is conflict in a prior written opinion which is now cited for authority." See also: Department of Health and Rehabilitative Services, Inc., 498 So.2d 888 (Fla. 1986).

In Niemann v. Niemann, 312 So.2d 733 (Fla. 1975), the Court stated that in determining whether to grant conflict jurisdiction, the Supreme Court must look at the decisions, rather than a conflict in the opinions. See also: Gibson v. Maloney, 231 So.2d 823 (Fla. 1970). Following this reasoning, a dissenting or concurring opinion can not support jurisdiction because they are not the decisions of the District Court. Jenkins v. State, 385 So.2d 1356 (Fla. 1980)

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rule is a liberalized extension of the strict civil law rule; it is a property concept having little to do with reasonableness notions.

Furthermore, the reasonable use doctrine does not modify the civil law rule, but is a rule in its own right. It simply states that a landonwer is privileged to improve his land so long as the improvement is "reasonable." Whether or not it is reasonable is regarded as a question of law and fact for the jury. According to Annot., 93 ALR 3d, at 1212, supra:

> The reasonable use rule was apparently first adopted in New Hampshire. Noting the inconvenience which would arise from adopting extreme rules that a landowner has either no right of drainage or an absolute right, the court in Bassett v. Salisbury Manufacturing Co., (1862) 63 NH 569 (which was apparently primarily concerned with percolating water), said that the sole ground of qualification of the landowner's right of drainage was the similar rights of others, the extent of the qualificaton being determined under the rule of reasonable use, and the right of each landowner being similar and his enjoyment dependent upon the action of the other landowner, so that the rights must be valueless unless exercised with reference to each other.

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 can not 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). As petitioner points out in its brief, the Third

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District Court went on to apply the civil law rule, albeit a modified version of it, to the facts of this case.

An analysis of Seminole County v. Mertz, 415 So.2d 1286 (Fla. 5th DCA), review denied, 424 So.2d 763 (Fla. 1982), indicates that the Fifth District also adhered to the civil law rule, although a modified version of it. First, the Court noted that other Florida Courts have applied in an almost unbroken line of decisions, practically all the elements of the modified civil law rule of surface water. It went on to describe this rule as follows: 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, and that the lower owner is subject to an easement for such flow as the upper owner is allowed to cast upon him. Id. at 1289. This is classic civil law language; the reasonable use rule would not have mentioned easements, but rather, would have involved an analysis of the benefit - burden on each party. The Court in Mertz thereafter applied the civil law rule to the facts of the case.

In essence, there is no obvious or direct conflict between the Third and Fifth District; both of these jurisdictions applied the civil law rule, albeit a modified version of it, and thus are clearly and without question in harmony on the issue of interference with the flow of surface waters.

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B. The decision of the Third District does not expressly and directly conflict with a rule of law announced by the Second District Court of Appeals

The Second District in Pearce v. Pearce, 97 so.2d 329 (Fla. 2d DCA 1957) is completely consistent with the Third District: both districts applied the civil law rule. In Pearce, the Plaintiff brought an action against the Defendant for closing certain natural drains and causing surface waters to be diverted and cast upon lands owned and leased by the plaintiff. The court ruled in favor of the upper owner and maintained that the upper owner has a right to improve his land, and the lower owner may not obstruct the natural flow of surface water; this basically is the essence of the civil law rule - that the higher elevation landowner has an easement over the lower elevation landowner. This is also the same rule applied by the Third District in the present case.

The difference in results does not indicate a conflict between the districts; rather, it indicates a difference in the underlying facts. In the Second District decision, the court affirmed the lower court's application of the civil law rule. In the present case, the Third District reversed and remanded the lower courts decision; that is, the court is saying that the lower court should have applied the civil law rule - not that either the plaintiff or defendant should win. Thus, it is an error to say that there is a conflict between the two districts because the plaintiff prevailed in the Second District but not in the Third.

Both of these districts articulated and applied the civil law rule to the facts of their respective cases. There is

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absolutely no conflict between them.

II. THE SUPREME COURT SHOULD NOT ENTERTAIN THE CASE ON THE MERITS BECAUSE THERE IS NO QUESTION OF EXCEPTIONAL IMPORTANCE

The Supreme Court should not deem this an issue of exceptional importance. The Third District did not regard it as sufficiently important to certify it as such. Furthermore, the law with regards to the flow of surface water is quite clear. There are two prevalent rules: The civil law rule and the reasonable use doctrine. Florida follows the former. Just about any source that one reads -- case law, treatises, legal encyclopedias -- will indicate that this is so. The several Florida district courts of appeal have consistently and harmoniously applied this rule. Thus, any confusion which might arise is the result of a misinterpretation of the law.

CONCLUSION

As a result of the foregoing arguments, the respondent respectfully maintains that the Supreme Court does not have certiorari jurisdiction; there is no express and direct conflict, nor is there a question of exceptional importance at issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the foregoing was mailed this 1st day of July, 1988, to: STEVEN M. GOLDSMITH, ESQ., ALAN T. DIMOND, ESQ., Greenberg, Traurig, et al., 1221 Brickell Avenue, Miami, Florida 33131.

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