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

PLAINTIFFS', PETITIONERS' REPLY BRIEF

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ARGUMENT

I. 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.

A. Machado Buick Acquiesces By Its Silence To Five Of The Six Arguments Advanced By Westland Which Support Adoption Of The Reasonable Use Rule.

Westland makes six separate arguments that support adoption of the reasonable use rule to govern the disposal of surface water in Florida. See Plaintiffs', Petitioners' Initial Brief, at 26-38 ("Westland Initial Brief"). However, Machado Buick fails even to address, let alone refute, five of them. Its failure to even mention five of Westland's six separate reasons is not surprising -- Machado Buick cannot rebut the compelling policy reasons for its adoption. Westland respectfully submits that these compelling policy reasons mandate adoption of the reasonable use rule in Florida, thereby joining twenty-two other states nationwide. See Westland Initial Brief, at 24-37.

Instead, Machado Buick argues that the Supreme Court should continue to apply the strict civil law rule because it is the governing rule in Florida and still remains the majority rule nationwide. Defendants', Respondents' Answer Brief, at 24, 26 ("Machado Buick Answer Brief"). Machado Buick asserts, moreover, that the strict civil law rule should be the controlling Florida law because its predictability will lead to uniformity of decision. These three reasons alone, Machado Buick contends, justify affirmance of the Third District's application of the civil law rule and its rejection of the reasonable use rule.

1. The Strict Civil Law Rule Is Not The Governing Rule In Florida.

Contrary to Machado Buick's assertion, the strict civil law rule does not govern uniformly the disposal of surface water in Florida. Although the Third District in this case stated that "Florida follows the civil law rule regarding surface water", Gus

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Machado Buick, Inc. v. Westland Skating Center, Inc., 523 So.2d 596, 597 (Fla. 3d DCA 1987); (App. 2), the Fifth District Court of Appeal has stated, in irreconcilable conflict, that Florida courts apply the civil law rule modified by reasonableness. See Seminole County v. Mertz, 415 So.2d 1286, 1289 (Fla. 5th DCA), cert. denied, 424 So.2d 763 (Fla. 1982) (emphasis added). The Supreme Court has not considered the disposal of surface water in over thirty years, see Lawrence v. Eastern Air Lines, 81 So.2d 632, 634 (Fla. 1955), and never has determined 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. Accordingly, the Supreme Court's 1956 application of the strict civil law rule and the conflicting Florida appellate application since then does not support continued adherence to the rule. See Westland Initial Brief, at 26-38.

2. The Strict Civil Law Rule Is Not The Majority Rule Nationwide.

Not surprisingly, Machado Buick fails to cite any authority for its statement that the strict civil law rule is the majority rule nationwide. Over twenty states across the country already have adopted a "pure" reasonable use rule, see Westland Initial Brief, at 23, while eleven states still subscribe to some form of a common enemy rule of surface water. See generally 60 N.D. L.Rev. 740, 743 & n.19 (1984). Moreover, many of the remaining states have adopted various modifications to the "strict" civil law rule regarding the disposal of surface water. See, e.g., Armstrong v. Francis Corp., 128 A.2d 4, 9 (N.J. 1955). Thus, the strict civil law rule as applied by the Third District is, in fact, a distinct minority nationwide. Each of the reasons it has been rejected in the various states also support the adoption by Florida of the reasonable use rule. See Westland Initial Brief, at 26-38.

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3. Application Of The Civil Law Rule Does Not Lead To More Predictable, Uniform Equitable Results Than Does The Reasonable Use Rule.

The sole argument which Westland makes, which Machado Buick attempts to refute, regards the civil law rule's alleged "predictability" and "uniformity." See Machado Buick Answer Brief, at 32-33. It reasons that application of the strict civil law rule is more "predictable" and, thus, will result in more "uniform" decisions. See id. However, Machado Buick does not address the reasons that numerous courts nationwide have concluded that the civil law rule actually does not provide more predictable results than the reasonable use rule. See, e.g., Clark County v. Powers, 611 P.2d 1072, 1076 (Nev. 1980). These courts reason that the civil law rule as applied does not afford more predictability than the reasonable use rule because of the numerous modifications that have been appended to it. See Butler v. Bruno, 341 A.2d 735, 741 (R.I. 1975). Certainly, Florida courts have not reached "predictable" and "uniform" decisions under the civil law rule. Compare Gus Machado Buick, supra, with Pearce v. Pearce, 97 So.2d 329, 332-34 (Fla. 2d DCA 1957). Therefore, the hypothetical "predictability" of the strict civil law rule, as a matter of fact, does not support its continued application.

Moreover, even if the civil law rule is more predictable, an abstract premise such as "predictability" cannot justify the judicial sanction of a property owner's unreasonable conduct. See, e.g., Keys v. Romley, 412 P.2d 529, 536 (Cal. 1966). Clearly, any Florida litigant should receive a just result based upon the facts in his case, regardless of its "predictability." Clark County v. Powers, supra, 611 P.2d at 1076. Certainly, it is more important to society that our courts dispense justice and equity than render a "predictable" but unjust result. Contrary to Machado Buick's conclusory assertion, therefore, Florida should adopt a rule of law that promotes justice and equity over "predictability" -- the reasonable use rule.

B. The Supreme Court Should Not Adopt The South Florida Building Code To Govern The Disposal Of Surface Water.

1. Compliance With The South Florida Building Code's Minimum Statutory Standard Does Not Preclude A Finding That The Disposal Of Surface Water Was Unreasonable.

Machado Buick asserts that the Supreme Court should adopt the South Florida Building Code, standing alone, as governing the disposal of surface water, if the Court does not follow the strict civil law rule. However, Machado Buick ignores the uniform body of law which holds that compliance with a legislative enactment does not prevent a finding of negligence where a reasonable person would take additional action. See Restatement (Second) of Torts, § 280(c) (2d Ed. 1979). In fact, Machado Buick inconsistently concedes that

> "any 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."

Machado Buick Answer Brief, at 18. Consequently, a landowner's compliance with the Building Code is merely evidence of due care -- reasonableness -- and does not mandate a finding that compliance is not negligent. See Westland Initial Brief, at 35-36.

2. The Reasonable Use Rule Is Consistent With The Water Resource Act of 1972 And The "Water Policy" Of The State Of Florida.

The reasonable use rule is consistent with the existing, comprehensive Florida legislative expression regarding surface water. In 1972, the Florida Legislature recognized that historic rules governing water use, management and allocation were inconsistent with the growing demands of modern Florida society. §§ 373 et seq., Fla. Stat. (1987). It abolished archaic common law distinctions between surface and ground waters and statutorily redefined such waters to recognize that such waters are not capable of physical or legal separation. See §§ 373.019(8), (9) and (10), Fla. Stat. (1987). See also F. Maloney, R. Ausness, and Morris, A Model Water Code, 81, 88-90 (1972). It expressly declared its policy:

(b) to promote the conservation, development, and proper utilization of surface and ground water.

§ 373.016, Fla. Stat. (1987) (emphasis added).

Adoption of the South Florida Building Code as the sole possible test, as urged by Machado Buick, would be, in part, a reversion back to the law before Florida enacted the Water Resources Act of 1972 and joined many states in reasonable water use management and regulation.[1/] The Florida Administrative Code expressly sets forth Florida water policy involving "surface water management" and mandates that the State of Florida Department of Environmental Regulation ("DER") consider whether the proposed use of surface water or its drainage, diversion, impoundment or discharge is a "reasonable beneficial use". See Fla. Admin. Code Rule 17-40.070(1), (2)(a)(vii) and (b), (1987). Accordingly, although this case is not governed by the Water Resources Act of 1972, adoption of the South Florida Building Code as the sole possible test governing the disposal of surface water would violate that clear expression of legislative policy of Florida since 1972 -- to allow all property owners the reasonable beneficial use of all waters of Florida and to preclude one owner from using or abusing the resource to the detriment of another user.

II. WESTLAND CONSISTENTLY ARGUED THAT THE UPPER ELEVATION LANDOWNER HAS THE RIGHT TO REASONABLY IMPROVE HIS LAND BY CONSTRUCTION IN COMPLIANCE WITH THE BUILDING CODE.

A. The Reasonable Use Rule Supplements The Civil Law Rule After The Landowner Uses His Land.

Machado Buick erroneously argues that Westland "invited error" in the Partial Summary Judgment and jury instructions by asserting a "patchwork quilt of

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1/ As Westland noted in its Initial Brief, see Westland Initial Brief, at 37, adoption of the strict civil law also would be inconsistent with this expression of Florida legislative authority.

inconsistent theories." Machado Buick Answer Brief, at 11. This argument clearly illuminates Machado Buick's fundamental misconception of the law governing the disposal of surface water. The civil law rule primarily involves the natural flow of surface water. See generally F. Maloney, S. Plager R. Ausness, B. Canter, Florida Water Law, 590-92 (1980) ("Florida Water Law"). The upper elevation landowner has a servitude on the lower land for the discharge of naturally flowing surface water. See, e.g., New Homes of Pensacola, Inc. v. Mayne, 169 So.2d 345, 347 (Fla. 1st DCA 1964).

Thus, the first part of the civil law rule deals with the natural flow of surface water before any alteration or modification thereof by the landowner's use of his land. Therefore, it is not inconsistent with the reasonable use rule emphasis on the landowner's use of his land. The tension between the civil law and reasonable use rules only exists with the second part of the civil law rule. That second part involves the higher elevation landowner's use of his own land. The civil rule provides that the natural flow of surface water "cannot be increased or made more burdensome" by a higher elevation landowner's use. Id.

Westland argued that the second part of the civil law rule -- an upper elevation landowner's use of his land and consequent impact, if any, on the natural flow of surface water -- should be inapplicable in Florida. Instead, it argued that the second part of the civil law rule should be supplemented by the reasonable use rule, which, as its name implies, deals with the landowner's use of his land.[2/] Before "use" where the higher elevation landowner has a servitude on the lower land for the discharge of naturally

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2/ Machado Buick argues that Westland did not name the reasonable use rule in the trial court. See Machado Buick Answer Brief, at 15. Although this assertion is superficially correct, neither party mentioned any controlling rule of law by its shorthand name, whether the "civil law", "common enemy", or "reasonable use" rules, in the Partial Summary Judgment or Jury Instructions. Instead, each stated its preferred rule of law, rather than use a shorthand name.

flowing surface water the civil law rule and reasonable use rule are not inconsistent.

Under the reasonable use rule, after any construction, alteration or modification -- "use" -- the upper elevation landowner still has a servitude if he acts reasonably and without negligence in effecting the natural flow of surface water. See, e.g., Molder v. Tague, 186 N.W. 2d 884, 888-89 (S.D. 1971). Thus, Westland contends that the reasonable use rule replaces the second part of the civil law rule as stated in New Homes, supra. See generally Florida Water Law supra, p. 8 at 594-96.

B. The Natural Flow Of Surface Water Before Use Is A Factor To Be Considered In Determining The Reasonableness Of Such Use.

The issue of the reasonableness of the landowner's use normally is a question of fact to be determined in each case by considering relevant circumstances argued by the parties. See, e.g., Anderson v. Kelehan, 32 N.W.2d 286, 289 (Minn. 1948). Certainly, the existing natural flow of surface water before construction or "use" is a relevant factor to be considered under the reasonable use rule. The trial court held that Westland had the right to use its land by constructing a building in accordance with the Building Code -- whether the exercise of that right was reasonable under the facts or defeated its existing servitude was given to the jury for determination (T. 1213-18). Accordingly, the trial court did not commit reversible error by integrating the civil law and reasonable use rules so that the former governed the natural flow of surface water, while the latter governed the use of land and, if applicable, any attendant alteration of the natural flow.

C. Machado Buick "Invited Error" By Failing To Specifically Object To The Jury Instructions Or Submit Alternatives.

Contrary to Machado Buick's contention, it, not Westland, invited error by its failure to specifically object to the jury instructions or offer any alternatives. Instead, it merely stated "[w]e object to giving number 10" and "... do not believe that it

fully states the law." (p. 1133) This conclusory objection is insufficient to preserve the alleged error in the instructions unless it was a "fundamental error" (i.e., an incorrect reliance on the reasonable use rule). See, e.g., Middelveen v. Sibson Realty, Inc., 417 So.2d 275, 276-77 (Fla. 5th DCA), cert. denied, 424 So.2d 672 (Fla. 1982).

Despite its expressed belief, Machado Buick did not even attempt to "fully state the law" for the trial court. The instructions, considered as a whole, were not fundamentally erroneous. See Westland Initial Brief, at 43-47. Nevertheless, assuming the reasonable use rule is the law of Florida, any error under the reasonable use rule as now asserted by Machado Buick could have been cured by the insertion of a single word in Jury Instruction No. 10 -- "reasonably". Machado Buick cannot now take advantage of an alleged error which readily could have been "cured" simply by specifically objecting and offering an alternative to the instruction based on the reasonable use rule. See, e.g., Miami Coca-Cola Bottling Co. v. Mahlo, 45 So.2d 119, 121 (Fla. 1950); Fla. Civ. P., 1.470(b). Machado Buick wanted to try this case under an erroneous rule of law -- it cannot now impute its error to the trial court to constitute fundamental error.

III. THE TRIAL COURT PROPERLY RULED AND INSTRUCTED THE JURY THAT COMPLIANCE WITH THE BUILDING CODE, INCLUDING ITS "DESIGN" AND "PERFORMANCE" CRITERIA, COULD BE REASONABLE UNDER THE REASONABLE USE RULE.

A. The Jury Necessarily Found That The Alleged "Performance" Criteria Of The Code Was Applicable Only To Rainfall In The Volume Provided For By The Code.

Machado Buick argues that the trial court must have ignored the alleged "performance" criteria of the Code because Westland could not have prevailed if it had been applicable. See Machado Buick Answer Brief, at 34. It argues that the Code contains both "design" criteria for the disposition of rainwater, see South Florida Building Code § 4611.1 (1985), and "performance" criteria, which it contends imposed an obligation upon Westland to prevent diffused surface water from flowing onto its lower

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elevation property, regardless of either the natural flow prior to construction or the volume of rainfall. See Machado Buick Answer Brief at 17-18, 34-37. It reasons that this alleged "performance" criteria is a rule of strict of liability so that Westland could not prevail, under any circumstances, once any water crossed its property line after construction.

The trial court did not delineate between the alleged "design" and "performance" criteria contained in the Code, nor did it emphasize the former and ignore the latter. Rather, it permitted the attorneys for both sides to read the applicable Code sections to the jury so that they were familiar with its requirements (T. 283-84, 820-23). Accordingly, the statements in the Partial Summary Judgment and Jury Instruction regarding "compli[ance] with the applicable building Code" must be construed as referring to the entire Code -- both the alleged "design" and "performance" criteria (R. 191; T. 1216).

In fact, the trial court and jury considered the alleged "performance" criteria. Westland offered three witnesses, Earl C. Crooks, Assistant Director of the Department of Water and Sewers, Stuart Cohen, the architect who designed The Westland Skating Center, and Robert Jerome Filer, a licensed architect, respectively, who each testified that the specific alternative requirements and mathematical formulas for the disposal of rainwater are only for the disposition of rain in a volume provided for by the Code (T. 256, 285-86, 443).[3/] A landowner did not have any obligation, let alone an absolute obligation, to control rainwater which fell in a heavier volume than the volume provided for by the Code (T. 443). Accordingly, the jury's finding from the

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3/ For example, Earl C. Crooks testified regarding the Hialeah Building Department's contemporaneous construction regarding the alleged "performance" criteria. He testified that a landowner satisfies the Code, including the alleged "performance" criteria, if he complies with its specific alternative requirements and mathematical formulas for the disposal of rainwater (T. 285).

uncontroverted evidence that Westland complied with the Code and acted reasonably in a normal rainfall -- the only rainfall to which the alleged "performance" criteria applied -- is not even erroneous, let alone clearly erroneous.

B. The Trial Court Correctly Rejected Machado Buick's Unreasonable Construction Of The Alleged "Performance" Criteria.

Machado Buick did not introduce any evidence to rebut Westland's evidence regarding compliance with the Code in a normal rainfall. Instead, it simply argued that Westland had an absolute obligation to prevent any rainwater from crossing onto Machado Buick's land -- even if the volume of rainwater was substantially higher than that expressly provided for in the Code. This construction of the Code violates all principles of statutory construction and frustrates the spirit and intent behind the Code. See, e.g., Rinker Materials Corp. v. North Miami, 286 So.2d 552, 553 (Fla. 1973). Moreover, this construction is contrary to common sense and leads to an absurd result.[4/] See, e.g., Inman v. Miami, 197 So.2d 50, 52 (Fla. 3d DCA 1967). Finally, such construction of the Code urged by Machado Buick is directly contrary to its contemporaneous construction and "plain meaning". See, e.g., Green v. Stuckey's of Fanning Springs, 99 So.2d 867, 868 (Fla. 1957). Any error in its argument, however, rests solely with Machado Buick and cannot be imputed to the trial court.

C. The Trial Court Properly Instructed The Jury Regarding Machado Buick's Right To Reasonably Use Its Lower Elevation Property.

Machado Buick argues that the trial court ignored its right to improve its

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4/ Section 4611.1 specifically states that rainwater shall be disposed of "in such manner as herein provided; failure to do so is a nuisance which shall be corrected by "properly disposing of same in accordance with the provisions of this Code." Code § 4611.1(a). Obviously, if the Code imposed an absolute obligation to prevent rainwater from flowing from higher to adjoining lower elevation property, it would not require the landowner to correct the nuisance by disposing of the rainwater in accordance with the Code.

property. See Machado Buick Answer Brief, at 22. It ignores the specific instruction given the jury that Machado Buick was not liable if its conduct to protect its lower land was reasonable under the circumstances and it satisfied any of three alternatives (T. 1216-17). Westland presented uncontroverted evidence that the three alternatives were not satisfied and that more reasonable methods were available to Machado Buick to protect its lower land. (T. 460, 530-32, 1033). In fact, Machado Buick ignored these three alternatives and built a dam simply because it was the cheapest way to stop the downward flow of water (T. 1033). Accordingly, the trial court properly instructed the jury and its finding that Machado Buick's use of its property was not reasonable is not clearly erroneous.

D. The Trial Court Properly Instructed the Jury That Machado Buick's Right To Protect Its Lower Elevation Land Was Governed By Reason And Not Solely By Compliance With The Code.

Machado Buick argues that it could not be held liable because its "dam" fully complied with the Code. This argument ignores the uniform body of law which holds that compliance with a legislative enactment does not prevent a finding of negligence where a reasonable person would take additional action. See generally Restatement (Second) of Torts, § 280(c) (2d Ed. 1979). The specific effect of this construction regarding Code compliance would be to effectively revive the "common enemy rule", which even Machado Buick concedes has been uniformly rejected by Florida courts. See, e.g., Davis v. Ivey, 92 Fla. 387, 112 So. 264, 271-72 (Fla. 1927). Accordingly, Machado Buick's alleged compliance with the Code in building its dam did not alone render such construction reasonable.

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IV. MACHADO BUICK FAILED TO PRESENT ANY EVIDENCE REGARDING COMPETING EQUITIES BECAUSE IT ERRONEOUSLY BELIEVED THE CASE SHOULD BE GOVERNED BY THE STRICT CIVIL RULE OF LAW.

Machado Buick argues that the trial court committed reversible error when Machado Buick presented evidence in reliance on the wrong rule of law. However, Machado Buick failed to offer any evidence regarding the "reasonableness" of either parties' "use" (construction). See Machado Buick Answer Brief, at 15. Machado Buick cannot argue that the trial court failed to permit it to introduce any such evidence. Rather, Machado Buick failed to introduce such evidence because it erroneously argued the liability tests of the strict civil law rule and alleged strict "performance" criteria of the Code.

In stark contrast, Westland did present evidence regarding the reasonableness of: (a) Westland's construction; and (b) Machado Buick's attempt to protect its property. Westland introduced several witnesses who testified regarding its reasonable attempts to construct the Westland Skating Center in compliance with the Code, including its specific alternatives and mathematical analysis of the disposal of rainwater (T. 258, 285-286, 443, 494). Machado Buick presented no evidence in response that construction in compliance with the Code was not reasonable. Rather, it only attempted (but failed) to prove that Westland did not comply with the Code. Because evidence of reasonableness was totally ignored by Machado Buick, only the issue on which there was evidence regarding Westland's use of its property was presented to the jury: whether Westland complied with the Code. Cf. Florida Power & Light Co. v. Bringben, 133 Fla. 195, 182 So. 911, 921 (Fla. 1938); Wooten v. Collins, 327 So.2d 795, 798 (Fla. 3d DCA 1976). Accordingly, the trial court did not ignore the evidence that was presented by the parties and the jury properly determined the case based on the evidence presented.

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 reverse the Third District holding that the trial court erred by: (1) entering Partial Summary Judgment in accordance with the reasonable use rule; and (2) instructing the jury accordingly. The Supreme Court should find that the trial court correctly applied the reasonable use rule here. Upon so doing, the Supreme Court should reinstate the Final Judgments of the trial court.

Respectfully submitted,

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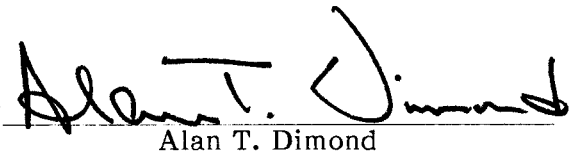
By: 
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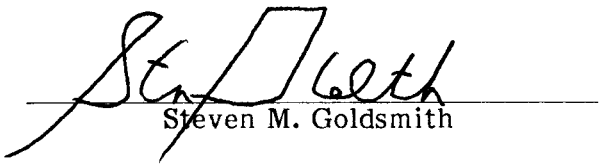
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