IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,143

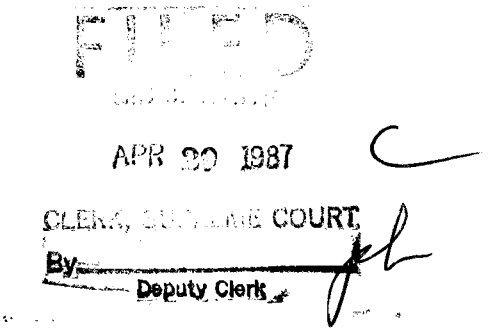
MARILYN CASBY,

Petitioner,

v.

WARREN DOUGLAS FLINT and
RITA FLINT, his wife,

Respondents.
_____/



ANSWER BRIEF OF RESPONDENTS

JAY B. GREEN, P.A.
Second Floor, Advocate Building
315 Southeast Seventh Street
Fort Lauderdale, Florida 33301
Telephone: (305) 523-1900

Counsel for Respondents

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INTRODUCTION

Plaintiff/Petitioner, MARILYN CASBY, will be referred to as she stands before this Court, as she stood before the Trial Court, and as CASBY. Defendants/Respondents WARREN DOUGLAS FLINT and RITA FLINT will be referred to as they stand before this Court and as they stood before the Trial Court and as FLINT.

"R" refers to the record on appeal.

SUMMARY OF ARGUMENT

This is the answer brief of Respondents, Warren and Rita Flint. On July 24, 1984 the Petitioner, Marilyn Casby, a guest in Respondents' home, fell over a change in floor level located between the entrance way of Respondents' premises and the living room. Mrs. Casby filed suit, and the trial court gave the Petitioner four opportunities to state a cause of action before dismissing the case with prejudice. (R 1-2, 4-6, 9-11, 15-18, 24)

Count I of the Third Amended Complaint alleges that the difference in floor level, combined with an excessive number of persons in the living room area, constituted a dangerous condition on Respondents' premises. Count II alleges that the excessive number of persons constituted a dangerous condition. The Petitioner argues that the present action is not barred by Schoen v. Gilbert, 436 So.2d 75 (Fla. 1983), since the Third Amended Complaint alleges more than just a change in floor levels. Respondents Flint respond as follows:

Count I of the Third Amended Complaint does not state a cause of action under Florida law in that it cannot be distinguished from Schoen v. Gilbert. In both Schoen and the present case, the accident occurred in a private home. In both cases, the step down was located between the entrance way and the living room. The

Supreme Court in Schoen clearly held that such a change in floor levels is not a dangerous condition which requires a warning. While the Supreme Court did imply that the physical circumstances accompanying a step down may transform it into a hazard, Respondents submit that these circumstances must be in the nature of a trap to avoid the Schoen rule. In the present case the presence of guests in the living room area could not as a matter of law divert the Petitioner's attention away from the change in floor levels which was located directly in front of her. Put another way, the mere presence of people in the living room could not transform a non-negligent condition into a negligent one.

Count II of the Third Amended Complaint simply restates Count I in reverse, i.e., it alleges that the number of people in the living room was itself a hazard which prevented the Petitioner from appreciating the danger created by the change in floor levels. These are the same allegations that are contained in Count I, and accordingly this Count is barred by Schoen v. Gilbert. Even if Count II is taken to allege that the number of people in the living room, by itself, constituted a hazard, the Petitioner has not cited any law which would support this argument.

The bottom line is that the case is simply not distinguishable from Schoen v. Gilbert, and therefore

Respondents respectfully ask this Court to affirm the dismissal.

Petitioner urges reconsideration of Schoen, and urges that it is inconsistent with prior Florida case law; Respondents will show that there is no merit to this claim. On the contrary, the well-established rule of stare decisis calls for adherence to the holding in Schoen. In addition, the case law cited by Petitioner in support of her argument is unrelated to the issues in the present case.

ARGUMENT I

THE RULINGS OF THE TRIAL COURT AND THE FOURTH DISTRICT ARE CORRECT. THE PRESENT CASE IS NOT LEGALLY DISTINGUISHABLE FROM SCHOEN V. GILBERT; THE STRONG SIMILARITIES OF FACTS BETWEEN THE TWO CASES REQUIRES THAT THE JUDGMENT OF THE LOWER COURTS BE AFFIRMED.

Respondents' Motion to Dismiss Petitioner's Third Amended Complaint was granted by the Trial Court. In an opinion written by Chief Justice Hersey, the Fourth District relied on Schoen v. Gilbert, 436 So.2d 75 (Fla. 1983) and affirmed the lower Court's decision. The attempt by Petitioner to distinguish the present case from Schoen was rejected; this appeal ensued. A question was also certified to the Florida Supreme Court.

The issue to be resolved by this Court is whether the difference in floor levels and the crowding within Respondents' home is sufficient to distinguish this case from Schoen.

Petitioner cites the holding in Schoen as standing for the proposition "that a difference in floor levels is sufficiently so common that, standing alone, it does not constitute an inherently dangerous condition". (Petitioner's brief, page 6). Petitioner further states that Schoen "does not foreclose a claim based on a difference in floor levels when that difference is accompanied by something more". (Petitioner's brief, page 8).

Respondents agree with this statement of the law; they suggest, however, that Petitioner is incorrect in her attempt to categorize her case as falling within the class of cases distinguishable from Schoen.

In her brief, Petitioner quotes the following language from Schoen:

> The law in Florida is well settled that a difference in floor levels does not of itself constitute failure to use due care for the safety of a person invited to the premises and there is no duty to issue warning of such condition when it is obvious and not inherently dangerous. (Petitioner's brief, page 6 - 7; emphasis added in Petitioner's brief)

Petitioner subsequently attempts to distinguish the present matter from Schoen by stating:

> Casby's Complaint does not allege that Flint's home was dangerous merely because it was built with a difference in floor levels. Casby alleged that the large numbers of people in the immediate vicinity of the step down combined with the unknown change in elevation created a hazardous condition. The large number of people both hid the step and focused Casby's attention up and away from the floor. These circumstances distinguish this case from Schoen. (Petitioner's brief, page 8-9).

Petitioner's interpretation of Schoen demonstrates a misunderstanding as to the meaning of the case. Following the language in Schoen cited by Petitioner, the Florida Supreme Court continued:

> Petitioner argues that because of the poor lighting the step was not obvious and was therefore rendered inherently dangerous. We cannot agree with such reasoning. The amount of interior lighting cannot transform a difference in

> floor levels into an inherently dangerous condition. That type of construction is common and no one entering a home can assume that the floors of all rooms in the same story have the same level, blindly travel on the presumption, disregard his own safety, stumble, fall, and recover.

Schoen v Gilbert, 436 So. 2d at 76, citing Hoag v. Moeller, 82 So.2d 138, 139 (Fla. 1985).

Petitioner completely overlooks the fact that Schoen did not involve an action predicated exclusively on differences in floor levels within a building. In Schoen, an additional factor was involved: dim lighting for the area in question. The above quoted language clearly indicates that the Schoen Court was concerned with more than a mere disparity in floor levels; it was involved with a difference in floor level and dim lighting.

While Petitioner has apparently failed to take cognizance of this item, the opinion by the Fourth District places the situation in its proper perspective. In affirming the decision of the trial court, the Fourth District noted that "[i]n Schoen, the difference in floor levels was obscured because of dim lighting; here, it was obscured by people. Finding no legal distinction, we affirm on the authority of Schoen ..." (Petitioner's brief, A. 3).

Petitioner fails either to recognize or acknowledge that the Schoen court was confronted with "something more" than a simple difference in floor levels. As noted in the Fourth District opinion, there is little reason to make a

distinction between visibility which is limited by darkness and visibility which is limited by the presence of people in a room. It therefore becomes apparent that the "something more" which is necessary to take a given case beyond the holding of Schoen is substantially greater than the circumstances involved in the present matter.

In attempting to distinguish this matter from Schoen, Petitioner cites numerous Florida cases. Quoting from Kupperman v. Levine, 462 So.2d 90 (Fla. 4th DCA 1985), Petitioner provides the following judicial language:

> Sub Judice, Appellants have alleged more than a change in floor levels and dim lighting ... Therefore, we hold that Appellants have alleged sufficient facts to distinguish this case from the facts presented on summary judgment in Schoen. (Petitioner's brief, page 7).

The judicial language deleted from the middle of the above quotation is, however, highly significant. The "something more" which was alleged by Petitioner in Kupperman was "an uncommon mode of construction - a change of floor level in the middle of a room - and a choice of furniture designed to create the illusion of a level floor". Kupperman v. Levine, 462 So.2d at 91.

In Kupperman v. Levine, 462 So.2d 90, the Fourth District noted the "inherently dangerous and non-obvious condition" described below:

> A dining table around which the associated chairs all appeared to be of the same overall height, but which in reality were not due to a change in floor grade. Such condition was caused by a combination of factors including floor grade change, poor

> lighting, chairs with chair backs and seats of even height, some of which had longer legs to accommodate the change in floor grade, part way around the table, and all of which presented an optical illusion, thereby creating a latently dangerous condition. Id at 91.

Kupperman, therefore, provides certain distinct and unique features. There is a method of construction which is "uncommon" and "non-obvious"; there is also an "optical illusion" effect which has been intentionally created by the host family. After noting the language in Schoen regarding the failure of "dim light" to transform a difference in floor levels into an inherently dangerous condition, the Kupperman court specifically distinguished itself from that case by virtue of the above-identified factors.

Petitioner also cites Northwest Florida Crippled Children's Association v. Harigel, 479 So.2d 831 (Fla. 1st DCA 1985) as supporting her attempt to distinguish this case from Schoen. Again, however, the facts in Harigel are substantially different from those of Schoen or the present matter. In Harigel, a shopper was injured when she stepped off a platform while "browsing" in a store. The First District observed that "the elevation of the display rack (is such) that a customer's eye is naturally focused up and away from the approaching edge and the extension of the rack beyond that edge ..." Northwest Florida Crippled Children's Association v. Harigel, 479 So.2d at 833. The Harigel Court further

stated that the language of Schoen "clearly leaves room for a showing of accompanying circumstances which, together with a change in floor level, constitute a negligent condition". Id at 833.

In Krivanek v. Pasternack, 490 So.2d 252 (Fla. 2d DCA 1986) the injured party did not notice a difference in floor levels which was concealed by a solid door. Her failure to observe was due to the action of an agent, who opened the door for her. In addition, his spoken greeting diverted her attention away from the hazard. The Second District distinguished this case from Schoen; the Court apparently believed that the act of opening the door and verbally distracting the Plaintiff produced that intangible "something more" which was necessary to make the case distinguishable.

There will obviously be circumstances and situations in which a given fact pattern is significantly different from the one depicted in Schoen. In Kupperman v. Levine, 462 So.2d 90, there was an uncommon and non-obvious situation which had been intentionally selected for the purpose of creating a visual illusion. In Northwest Florida Crippled Children's Association v. Harigel, 479 So.2d 831, there was an active distraction by the (store) owner which diverted attention away from a dangerous condition. Those cases provide the "something more" that is necessary to go beyond the holding in Schoen; the present case, however, does not.

In Hoag v. Moeller, 82 So.2d 138, the Court described difference in floor levels as being a "common" type of construction. Similar language as to "common knowledge" regarding uneven floor levels is found in Matson v. Tip Top Grocery Co., Inc., 9 So.2d 366 (Fla. 1942). And, in Luby v. Carnival Cruise Lines, Inc., 633 F.Supp. 40 (S.D. Fla. 1986), a Federal Court applying Florida law noted that the presence of a ledge behind a shower curtain "was, or should have been, obvious to (Plaintiff) by the ordinary use of her senses". Id at 42. Citing Schoen, the Court held that "a drawn shower curtain does not transform a (concealed) ledge into an inherently dangerous condition". Carnival Cruise Lines, Inc., 633 F.Supp. at 42.

As previously noted, both Hoag v. Moeller, 82 So.2d 138, and Matson v. Tip Top Grocer Co., Inc., 9 So.2d 366, address the issue of "common knowledge" involved in interpreting the liability of the respective Defendants to the injured Plaintiffs in each case. In Jahn v. Tierra Verde City, Inc., 166 So.2d 768 (Fla. 2d DCA 1964), the Appellant was injured in a slip-and-fall while unsuccessfully negotiating a step leading into a sunken living room. In affirming a Summary Judgment for Appellee, the Second District Court noted that it was "a matter of common knowledge that the design of a sunken living room necessitates different levels". Id at 768.

It is readily apparent that Petitioner's case does not fall outside of the holding in Schoen. In the present case, the difference in floor levels was accompanied by other individuals; in Schoen, the difference in floor levels was accompanied by dim lighting. While there are no clearly enunciated guidelines as to the scope and extent of that holding, it is nevertheless clear that the cases which have been distinguished from Schoen (and therefore beyond its holding) have involved substantial factual differences. In the present case, Petitioner cannot accurately make any such claim.

Petitioner also seeks refuge in Ainsworth v. Intercontinental Hotels Corporation, 467 So.2d 386 (Fla. 3d DCA 1985) and Kolosky v. Winn Dixie Stores, Inc., 472 So.2d 891 (Fla. 4th DCA 1985). Neither case is relevant or applicable.

Count I purportedly emphasizes the negligence inherent in the condition of the floor levels; Count II purportedly shifts the emphasis of the alleged negligence onto the overcrowding permitted by Respondents. In either case, Petitioner is attempting to allege that the combination of the crowding and uneven floor levels combined to produce a result which constituted actionable negligence.

In Ainsworth, however, the difference in floor levels was not a pivotal issue in the case. As noted by the Third District:

> We do not find Schoen v. Gilbert, supra applicable in this commercial setting. While there was change in elevation in the instant case, that was not the claimed negligence. The Defendant's negligence was the installation and maintenance of the threshhold which was, in and of itself, inherently dangerous. This fact would be true no matter where this particular threshold was installed.

Ainsworth v. Intercontinental Hotels Corporation, 467 So.2d at 387.

Installation and maintenance were the focus of the lawsuit; the viability of the cause of action did not relate to the significance of differing floor levels.

In Kolosky v.Winn Dixie Stores, Inc., 472 So.2d 891, Petitioner is venturing far afield in an effort to find support for her argument. In Kolosky, an injury in a supermarket was caused by several children running through a store. Mrs. Kolosky sued Winn Dixie alleging negligence in failing to maintain its premises in a safe condition, specifically in permitting three children to run unrestrained through the store. There are no similarities between the two cases. The alleged negligence of the Respondents in the present matter "in allowing guests to assemble in the vicinity of the step down and hide it" (Petitioner's brief, page 10) has nothing in common with the fact pattern in Kolosky.

In sum, it can be seen that there are irresistible factual similarities between the present case and Schoen. Those cases which have been distinguished from Schoen have been so distinguished by virtue of the significantly

differing fact patterns presented by them. In the matter now before this Court, however, there is no realistic basis for differentiating this case from Schoen; therefore, the holding in that case should dictate the result in the present matter.

ARGUMENT II

THERE IS NEITHER NEED NOR JUSTIFICATION TO RECONSIDER OR OVERRULE THE HOLDING IN SCHOEN V. GILBERT AS IT IS ENTIRELY CONSISTENT WITH FLORIDA CASE LAW AND RECOGNIZED PRINCIPLES OF STARE DECISIS AND JUDICIAL RESPONSIBILITY.

Petitioner's second argument is an invitation for this Court to revisit its recent decision in Schoen. This invitation should be declined.

The doctrine of stare decisis is a tradition of Anglo-American jurisprudence. It is defined as the policy of courts to stand by precedent and not to disturb settled points of law. Black's Law Dictionary 1261 (rev. 5th ed. 1979). The purpose of the rule, as stated in State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1976), is "to preserve harmony and stability and predictability in the law." Id. at 52. Such harmony and stability are hardly served by overturning the Schoen case, which was handed down in 1983. This case is good law, in that the Court recognizes earlier decisions which had led to the decision in Schoen. In Jahn v. Tierra Verde City, 166 So.2d 768 (2nd DCA 1964), the Plaintiff tripped over a step leading to a sunken living room. The trial court entered summary judgment for the Defendant which was affirmed by the Second District. The Court stated:

> The fact situation is not unusual. It is a matter of common knowledge that the design of a sunken living room necessitates different levels... Id. at 768.

In General Development Corp. v. Doles, 309 So.2d 596, (2d DCA 1975), the Plaintiff fell while entering the sunken living room from the dining area. The jury returned a verdict in favor of the Plaintiff which was reversed on appeal. The Second District relied upon the "strikingly similar" case of Jahn v. Tierra Verde City, Inc., 166 So.2d 768, to state "the circumstances were not such as to place the Defendant under a duty to warn." Doles, 309 So.2d at 597.

Schoen therefore is not an aberration; it is a clear progression in the line of cases dealing with differing floor levels. The Courts have consistently held that such a difference is not an inherently dangerous condition, and that a homeowner has no duty to warn of such condition as a matter of law. Petitioner's contention that Schoen is a "departure from simultaneously developing concepts of comparative negligence which this Court carefully delineated in other contexts" (Petitioner's brief page 12) completely misses the mark. It is the "context" of the cases cited by Petitioner that sets each one apart from Schoen and renders their persuasiveness in this appeal hardly compelling. A review of the cases which Petitioner cites as being out of line with Schoen reveals that they are inapposite. None present a compelling reason for a revisit to the Schoen holding. Further the concept of comparative negligence has no application here, as discussion of liability and the apportionment of fault is

irrelevant unless a duty can first be shown to exist. Absent a duty to warn, no liability can attach.

The first case cited by Petitioner in urging this Court to reconsider Schoen is Post v. Lunney, 261 So.2d 146, (Fla. 1972). The Plaintiff in that case fell on a piece of transparent vinyl placed over an Oriental rug while the Plaintiff was on a tour of Mrs. Marjorie Meriweather Post's home with the Palm Beach Garden Club. The issue on appeal was the status of the Plaintiff as invitee or licensee. The Supreme Court held that she was an invitee, using the "invitation test" of the Second Restatement of Torts §332:

> 1) An invitee is either a public invitee or a business visitor.
> 2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
> 3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealing with the possession of the land.

Post v. Lunney, 261 So.2d at 148.

This test is wholly irrelevant to the issue on this appeal. The status of Petitioner is not in issue; it is whether or not a duty exists on the part of the Respondents to warn. The Post case also does not involve a difference in floor levels, and as such seems clearly distinguishable.

The second case cited by Petitioner is Wood v. Camp, 284 So.2d 691 (Fla. 1973). This case concerns a father who brought an action against a landowner for the death of his child who died when a bomb shelter located on the property exploded. The issue on appeal was the standard of care to be exercised toward the "social guest". The Court eliminated the distinction between commercial visitors and social guests on the premises, applying to both groups the single standard of reasonable care under the circumstances. Petitioner has again missed the point by citing this case. The issue here is not what standard to apply to Casby, but whether or not Respondents had a duty to warn Casby of the differing floor levels.

Petitioner next cites the cases of Kuehner v. Green, 436 So.2d 78 (Fla. 1983), and Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977). Kuehner concerns a Plaintiff who was injured in a karate sparring match. The issue on appeal was whether express assumption of the risk was a viable defense to negligence actions spawned from contact sports. The Court held that it was. Blackburn was a consolidated appeal of three different cases in order for the Court to determine the effect of the Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) decision on the common law doctrine of assumption of the risk. The Court held that "the affirmative defense of implied assumption of risk is merged into the defense of contributory negligence, and the principles of comparative negligence enunciated in

Hoffman v. Jones shall apply in all cases where such defense is asserted." Blackburn v. Dorta, 348 So.2d at 293. How these cases relate to the issue of this appeal is unclear. There is no need for discussion of defenses to a negligence action when the essential elements of negligence; duty, breach, causation and damages; have not been satisfied. In this appeal, it is the duty element that is not present; therefore, assumption of the risk and comparative negligence are beside the point.

The next case cited is Insurance Co. of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984). The Plaintiff there was injured in a jeep accident. The accident was not his fault, yet he was not wearing an available and functional seat belt. This case came to the Supreme Court on the issue of whether Florida Courts should consider seat belt evidence as bearing on comparative negligence or mitigation of damages. The Court held that non-use of a seat belt may or may not amount to a failure to use reasonable care; whether it does depends on the facts of each case. There is no relevance, however, in citing this case in the present appeal, as the case deals with comparative negligence and mitgation of damages, neither of which is an issue here.

Ashcroft v. Calder Race Course, Inc., 492 So.2d 1309 (Fla. 1986), is next cited by the Petitioner as a holding inconsistent with Schoen. Ashcroft was a jockey at Calder Race Course who was paralyzed when he fell from his horse

as it veered across the race course toward an exit gap. He sued Calder alleging the placement of the gap was negligent. The Plaintiff got a $10,000,000 verdict despite the jury's finding he "had assumed the risk of danger of which he complained". Ashcroft v. Calder Race Course, Inc., 492 So.2d at 1310. The trial judge granted Calder's motion for remittitur, which was declined by Ashcroft and the case was set for a new trial. Appeal was taken from the trial judge's granting the Motion for Remittitur. This Court quashed the decision below and remanded with instructions to reinstate the jury verdicts.

The analogy between Ashcroft and the appeal at issue is strained at best. The situation in which Ashcroft found himself is nothing like that of the Petitioner. As Ashcroft held "... the owner or occupier of land has a duty to exercise reasonable care for the protection of invitees ..." Id. at 1311. Respondents do not dispute this proposition, but the holding in Schoen states that one in the Respondents' position does not have a duty as a matter of law to warn of differing floor levels, as they are not an inherently dangerous condition. Ashcroft is simply not persuasive in this context.

The Petitioner next cites Auburn Machine Works Co., Inc. v. Jones, 366 So.2d 1167 (Fla. 1979), a case in which a construction worker sues the manufacturer of a trench-digging machine after his leg was injured by the apparatus. This is a products liability action against a

manufacturer, and is distinguishable from the instant appeal on those grounds alone. The issue on appeal there was whether to apply the "open and obvious hazard" doctrine so as to preclude liability on the part of the manufacturer, a question the Court answered in the negative. The difference between a trench-digging machine and a difference in floor levels is so great as to render Auburn non-persuasive in this context. In addition, the floor levels differential is not a hazard if the holding in Schoen is followed.

In citing Taylor v Tolbert Enterprises, 439 So.2d 991 (Fla. 1st DCA 1983) and Bennett v. Mattison, 382 So.2d 873 (Fla. 2nd DCA 1980), Petitioner misses the point yet again. Both cases involve slip and falls where water was on the ground for a sufficient length of time to have conceivably put the owners on notice of such a dangerous condition. The problem with using these case to urge overturning Schoen is that Schoen specifically states that a difference in floor levels is not a dangerous condition.

Petitioner has cited absolutely no compelling reason or persuasive authority for its assertion that Schoen should be overturned. The principles of stare decisis and judicial responsibility mandate that the holding in Schoen should not be disturbed.

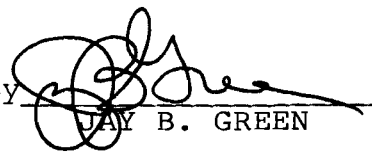
CONCLUSION

For all of the reasons expressed in the preceding pages, Respondents respectfully request that this Court affirm the judgment of the Fourth District Court of Appeal.

CERTIFICATION

I HEREBY CERTIFY that a copy of the foregoing was forwarded this 27 day of April, 1987 to: Robert M. Sussman, Esquire, Suite 500, 200 S.E. First Street, Miami, Florida 33130 and Cooper, Wolfe & Bolotin, P.A., 700 Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130.

JAY B. GREEN, P.A.
Counsel for Respondents
Suite 200
315 S.E. 7th Street
Fort Lauderdale, Florida 33301
(305) 523-1900

By 
JAY B. GREEN