IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,143

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CLERK, SUPREME COURT
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MARILYN CASBY,

Petitioner,

v.

WARREN DOUGLAS FLINT and
RITA FLINT, his wife,

Respondents.

BRIEF OF PETITIONER

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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, as they stood before the trial court and as FLINT.

"R" refers to the record on appeal. "A" refers to the appendix attached to this brief. Emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

CASBY appealed to the Fourth District from orders which dismissed her third amended complaint. (R. 24, 25).

CASBY fell at a party in FLINT's house. There was a difference in floor level between the entranceway and the living room. FLINT had many more people in that area than it could safely accommodate. Therefore CASBY did not realize the change in the floor level until she fell. (R. 15-18).

CASBY sued FLINT. She alleged that FLINT maintained two dangerous conditions in their premises: a difference in floor level between the entrance and the living room, accompanied by an excessive number of people which hid the difference in elevation. (R. 15-18). The complaint contained two counts which alleged in the alternative that the dangerous condition was either the obscured difference in floor level (R. 15-17) or the excessive number of people (R. 17-18).

FLINT moved to dismiss the complaint on the ground that a difference in floor level alone did not constitute a dangerous condition on the premises. (R. 19-20), citing Schoen v. Gilbert, 436 So.2d 75 (Fla. 1983). The trial court granted the motion. (R. 24, 25). CASBY appealed. (R. 26, 28).

The Fourth District affirmed. It noted that several cases had found factors which distinguished Schoen. But the court held that there was no legal distinction between the dim lighting which obscured the view in Schoen and the mass of people which obscured the view here. (A. 3). It certified to this Court the

question of whether the facts of this case gave rise to a duty to warn.

> Where plaintiff slips, falls, and is injured because of a difference in floor levels, is an allegation that the difference was obscured either by (1) other social guests, or (2) by an excessive number of other social guests sufficient as an allegation of an inherently dangerous condition giving rise to a duty to warn, thus being distinguishable from Schoen v. Gilbert, 436 So.2d 75 (Fla. 1983)?

(A. 3).

SUMMARY OF ARGUMENT

The trial court erred in dismissing CASBY's complaint. Count I sufficiently alleged that a difference in floor level, combined with an excessive number of persons who disguised the difference, constituted a dangerous condition on the premises. Count II sufficiently alleged that the excessive nubmer of persons on the premises constituted a dangerous condition. The complaint did not allege merely a difference in floor levels and therefore the claim is not barred by Schoen v. Gilbert, 436 So.2d 75 (Fla. 1983).

If the Court finds Schoen undistinguishable, it should revisit its holding in Schoen. That case is inconsistent with the analysis used by this Court in all other areas in determining an injured person's responsibility for encountering obvious dangers. An obvious danger does not bar recovery as a matter of law in a simple negligence case or a products liability case. An obvious danger should bar recovery as a matter of law only where a plaintiff knowingly and voluntarily assumes the specific risk.

There is no legal distinction between the duty of reasonable care owed to an invitee injured by a condition of the premises and the duty of reasonable care to a person injured by another's negligence which is not a condition of the premises. Nor is there a legal distinction between comparative negligence in facing a danger in the premises and comparative negligence in encountering some other open danger which is not a part of someone's premises. The duty of reasonable care is the same in all

these situations - it is for the jury to determine whether the plaintiff and defendant each used such care under the circumstances. There is no justification for finding that the conduct which would create a jury question in one case will be determined as a matter of law in another, simply because the latter involved someone's home. Schoen should be reconsidered and overruled.

ARGUMENT

THIS CASE IS DISTINGUISHABLE FROM SCHOEN V. GILBERT. THE TRIAL COURT ERRED IN DISMISSING CASBY'S COMPLAINT WHICH ALLEGED THAT BOTH A DIFFERENCE IN FLOOR LEVELS AND AN EXCESSIVE NUMBER OR PEOPLE COMBINED TO CREATE A DANGEROUS CONDITIONS ON FLINT'S PREMISES.

The trial court erred in dismissing this complaint. CASBY alleged sufficient facts to distinguish her accident from the one described in Schoen v. Gilbert, 436 So.2d 75 (Fla. 1983).[1/] She alleged in count I that there was a dangerous condition which arose from the difference in floor levels, accompanied by an excessive number of people in the house. In count II, she alleged that a dangerous condition was created by the excessive number of people in the house who obscured the difference in elevation. Whether the dangerous condition is viewed as the difference in floor levels or the excessive number of people, FLINT was responsible for that condition on the premises.

In Schoen, this Court held that a difference in floor levels is sufficiently so common that, standing alone, it does not constitute an inherently dangerous condition.

> 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 con-

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1/ As the Fourth District noted at the outset of its opinion (A. 1), on review of an order dismissing a complaint the court is confined to the four corners of the complaint and must accept all allegations in it as true. Connolly v. Sebeco, Inc., 89 So.2d 482 (Fla. 1956); Geer v. Bennett, 237 SO.2d 311 (Fla. 4th DCA 1979).

dition when it is obvious and not inherently dangerous." [citations omitted].

436 So.2d at 76.

The Fourth District had distinguished Schoen in Kupperman v. Levine, 462 So.2d 90 (Fla. 4th DCA 1985). The Fourth District should have applied that decision here because it demonstrates why Schoen does not preclude all claims based on a change in floor levels. The plaintiff in Kupperman alleged that a hazardous condition was created by a change in elevation in the middle of the room accompanied by a furniture arrangement designed to create the illusion that the floors were level. 462 So.2d at 91. The Fourth District held that those allegations distinguished the case from Schoen.

> 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.

462 So.2d at 91. It reversed the order dismissing the complaint.

Kupperman is not the only decision which contains similar facts and is distinguishable from Schoen. In Northwest Florida Crippled Children's Ass'n v. Harigel, 479 So.2d 831 (Fla. 1st DCA 1985), the defendant's store was constructed with a platform about six inches high along one wall. The defendant hung clothing for sale from a pipe attached to this wall. One end of the pipe extended several feet beyond the end of the platform. The plaintiff stepped off the platform while examining the clothing and was injured. The defendant argued that Schoen mandated a di-

rected verdict in its favor. The First District disagreed. It acknowledged that a difference in floor levels does not constitute a dangerous condition per se. However it held that the issue was whether the step down _under the circumstances_ constituted a hidden danger. This issue was properly decided by a jury.

> [T]here was an obvious issue as to whether the surrounding conditions of the step down--the elevation of the display rack so that a customer's eye is naturally focused up and aware from the approaching edge--were sufficient to transform a normally non-negligent condition into a negligent one.
>
> * * *
>
> The Association argues that its position is mandated by _Schoen v. Gilbert_, 436 So.2d 75 (Fla. 1983). However, that case held only 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." _Schoen_ at 76 (emphasis supplied). This clearly leaves room for a showing of accompanying circumstances which, together with the change in floor level, constitute a negligent condition.

_Id_. at 832-33 (emphasis by court).

The same is true here. The issue is not whether the step down by itself was a hazardous condition. Rather, the issue is whether CASBY alleged accompanying circumstances which, together with the change in floor levels, could constitute a dangerous condition. _Schoen_ does not foreclose a claim based on a difference in floor levels when that difference is accompanied by something more. This case, like _Kupperman_, is distinguishable from _Schoen_. 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 as alleged in count I distinguish this case from Schoen. The trial court erred in dismissing CASBY's complaint.

In the alternative, CASBY alleged in count II that the unreasonable number of people in the house who congregated between the entrance and living room obscuring the difference in floor levels constituted a dangerous condition. Under this negligence theory, Schoen is also inapplicable. See, e.g., Ainsworth v. Continental Hotels Corp., 467 So.2d 386 (Fla. 3d DCA 1985)(Schoen inapplicable where alleged negligence was installation and maintenance of inherently dangerous threshold, not change in floor elevation); Kolosky v. Winn Dixie Stores, Inc., 472 So.2d 891 (Fla. 4th DCA 1985). See generally Jackson v. Frederick's Motor Inn, 418 A.2d 168 (Me. 1980)(affirming verdict for plaintiff who proved defendant was negligent in allowing premises to be overcrowded and in location of chair); Willis v. Byrd, 158 S.E.2d 458 (Ga.Ct.App. 1967)(complaint against building owner alleging that plaintiff tripped and fell on ramp on sidewalk which was partially obscured by crowd of people stated cause of action).

FLINT created a dangerous condition by allowing more people into their house that it could safely accommodate, and in permitting the guests to congregate around the step down between the

two areas. FLINT is responsible for creating that dangerous condition, for failing to warn CASBY of the danger or otherwise correct the problem.

In Kolosky, the plaintiff was knocked down by children running unsupervised through the store aisles. Winn Dixie argued it was entitled to a directed verdict. The Fourth District disagreed. It analogized the case before it to slip and fall cases, stating:

> Both involve dangerous conditions on store premises; the former, children running unsupervised through the aisles of a supermarket and the latter, an object or substance on the floor. The same potential for harm exists in both situations: that a business invitee's contact with the dangerous condition will result in injury.

Kolosky, supra, 472 So.2d at 893.

Here, the dangerous condition was an excessive number of people congregating between the entrance and living room of FLINT's home which obscured the difference in floor levels, similar to a slippery or sticky substance on the floor or children running wild in the aisles. Just as the Fourth District found that Winn Dixie was negligent in allowing children to create a danger to plaintiff by running through the store aisles, it should also find that FLINT was negligent in allowing guests to assemble in the vicinity of the step down and hide it from CASBY's view. The trial court erred in dismissing count II of CASBY's complaint.

II. IF SCHOEN V. GILBERT MEANS THAT A STEP-DOWN OBSCURED BY DIM LIGHTING, OVERCROWDING OR SIMILAR MATTERS DOES NOT GIVE RISE TO LIABILITY, THIS COURT SHOULD RECONSIDER ITS DECISION AND OVERRULE SCHOEN.

If this Court determines that this case is not distinguishable from Schoen, CASBY respectfully requests this Court to reconsider the scope of its ruling in Schoen. Although it may be logical to attribute knowledge of an obvious step down, it is unreasonable to reach the same conclusion for a step down which is obscured. And it is not logical to distinguish liability for alleged open dangers in a premises liability case from alleged open dangers in other kinds of actions.

Schoen is a departure from this Court's decisions in several other areas. First, it departs from this Court's other decisions on premises liability. Beginning in 1972 with the decision in Post v. Lunney, 261 So.2d 146 (Fla. 1972), this Court has moved toward a more liberal view of landowner liability and has emphasized that issues such as the plaintiff's knowledge of a condition are matters to be evaluated by a jury in light of all the circumstances. E.g., Wood v. Camp, 284 So.2d 691, 695 (Fla. 1973) (in determining "reasonable care in the circumstances", numerous factors must be considered by jury such as presence of injured person to be expected by owner, person's purpose for being on premises and location at time of injury).[2/]

[2/] These arguments are presented only in the context of a landowner's liability to an invitee. CASBY does not claim that "reasonable care under the circumstances" is a standard which should (footnote continued)

More importantly, Schoen was a departure from simultaneously developing concepts of comparative negligence which this Court carefully delineated in other contexts. Beginning with Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977), this Court evolved standards for reviewing conduct of a plaintiff faced with an obvious danger which emphasize jury determination of whether the plaintiff has used reasonable care under the circumstances. Compare Ins. Co. of N. America v. Pasakarnis, 451 So.2d 447, 451-52 (Fla. 1984) (reviewing development of assumption of risk/comparative negligence doctrines). Assumption of the risk has been abolished in all but the most limited cases, whether the situation concerns mere negligence, premises liability or products liability. See Kuehner v. Green, 436 So.2d 78 (Fla. 1983)(negligence in contact sport; jury verdict affirmed which found that plaintiff knew of danger and appreciated possibility of injury and, with reasonable opportunity to avoid it, voluntarily and deliberately exposed himself to the danger);[3/] Ashcroft v. Calder Race Course, Inc., 492 So.2d 1309 (Fla. 1986) (premises liability); Auburn Machine Works Co. v. Jones, 366 So.2d 1167 (Fla. 1979)(products liability).[4/] See also Taylor v. Tolbert Enterprises, Inc., 439 So.2d 991 (Fla. 1st DCA 1983); Bennett v. Mattison, 382 So.2d 873 (Fla.

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apply to a person with any other status. See Wood v. Camp.

3/ Kuehner was decided the same day as Schoen. Neither opinion referred to the other.

4/ CASBY's position here is essentially an expansion of Judge Pearson's dissent in theThird District's decision in Schoen, 404 So.2d at 129-30.

1st DCA 1980) (whether tenant had superior knowledge of condition in common area was for jury).

In Kuehner, this Court affirmed a jury's determination on express assumption of risk where the plaintiff was injured while participating in a karate exercise. This Court specifically stated that the trier of fact should make such a determination.

> It is the jury's function to determine whether a participant voluntarily relinquished a right, or, in terms of the Blackburn decision, "actually consented" to confront certain dangers. In so doing several threshold questions must be answered. First, the jury must decide whether the plaintiff subjectively [emphasis by court] appreciated the risk giving rise to the injury. [citations omitted]. . . . If it is found that the plaintiff recognized the risk and proceeded to participate in the face of such danger the defendant can properly raise the defense of express assumption of risk. . . .
>
> If the plaintiff is found not to have subjectively appreciated the risk, the trier of fact must determine, after reviewing all the evidence, whether this plaintiff should [emphasis by court] have reasonably [emphasis by court] anticipated the risk involved. [citation omitted]. If it is found that a reasonable man would not [emphasis by court] have anticipated this risk, the "unsuspecting plaintiff" cannot be said to have consented to such danger and he therefore should be allowed to recover in full.

436 So.2d at 80.

Schoen is at odds with these other decisions of this Court concerning the type of conduct which will bar a plaintiff from recovery. There is no reason why a jury should decide whether a participant in a karate match has assumed the risk of injury while the judge should decide as a matter of law whether a visi-

tor to a home has assumed the risk of falling on a step-down in the dark. Schoen places homeowners in a special class and provides protection for them which is not provided to other landowners or to manufacturers or to businesspersons. There is no legal justification for such a distinction. The homeowner has an equal opportunity to correct dangerous conditions or to warn of their existence. And the visitor is at least as innocent a victim as the karate participant.

The fact that a reasonable person is aware generally that homes may have step downs does not mean that the invitee to a particular home knows that it has a step down and knows its location. This is especially true where the evidence shows conditions such as dim lighting or overcrowding which may deceive the invitee and preclude him from obtaining knowledge of the danger equal to that of the homeowner.

This Court should find that to the extent Schoen purports to apply to a home with dim lighting, overcrowding or a similar fact which obscures a step down, it should be clarified to hold that an invitee is chargeable with knowledge of the danger only of an unobscured step down. This Court should make the analysis of a plaintiff's conduct in a premises liability case in a home consistent with the analysis of a plaintiff's conduct in other circumstances as outlined in Auburn, Kuehner and Blackburn.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to reverse the order dismissing the complaint.

Respectfully submitted,

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