

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,143

MARILYN CASBY,

Petitioner,

v.

WARREN DOUGLAS FLINT and  
RITA FLINT, his wife,

Respondents.

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REPLY BRIEF OF PETITIONER

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## ARGUMENT

- I. 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 OF PEOPLE COMBINED TO CREATE A DANGEROUS CONDITION ON FLINT'S PREMISES.

FLINT claims that Schoen is not distinguishable from this case because both here and in Schoen some factor combined with the difference in floor levels. But Schoen v. Gilbert, 436 So.2d 75 (Fla. 1983) is not a magic word whose invocation automatically bars a suit involving a difference in elevation. Schoen merely states that a difference in elevation, by itself, does not constitute a failure to use due care giving rise to a duty to warn when it is obvious and not inherently dangerous. It acknowledges that a difference in elevation may give rise to a duty to warn when it is accompanied by "something more." CASBY did not allege that the step down alone was a dangerous condition. The dangerous condition consisted of a step down accompanied by a large number of people who obscured it. These allegations are sufficient under Schoen to preclude dismissal of the complaint.

Krivanek v. Pasternack, 490 So.2d 252 (Fla. 2d DCA 1986), reinforces this conclusion. In Krivanek a step was initially hidden by a door. When the door was opened, the plaintiff did not see the step because her attention was diverted from floor level by a "Good morning" from an election official. The court found Schoen inapplicable to these circumstances and sustained the jury verdict in favor of the plaintiff.

FLINT claims there is no distinction because there was dim lighting in Schoen just as there was an excessive number of people here. CASBY has fully addressed this point in her initial brief.<sup>1/</sup>

CASBY had also alleged that the dangerous condition was the excessive number and location of people in FLINT's house. FLINT contends that since this overcrowding occurred in conjunction with the step down, count II is merely a restatement of count I and is therefore barred by Schoen. FLINT is mistaken.

Schoen does not apply to count II because the claimed negligence is not based on the difference in elevation. Ainsworth v. Continental Hotels Corp., 467 So.2d 386 (Fla. 3d DCA 1985). FLINT attempts to distinguish Ainsworth, stating that there the difference in floor levels was not a "pivotal issue". FLINT misses the point. It was not a pivotal issue in Ainsworth because the negligence alleged was not the construction and maintenance of a step down. The same is true here. Count II of CASBY's complaint does not allege that FLINT was negligent in the construction and maintenance of a step down. Count II alleges

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<sup>1/</sup> Nor do the cases cited in FLINT's brief at 11 dictate a contrary result. Hoag v. Moeller, 82 So.2d 138 (Fla. 1955); Matson v. Tip Top Grocery Co., Inc., 9 So.2d 366 (Fla. 1942); Luby v. Carnival Cruise Lines, Inc., 633 F.Supp. 40 (S.D.Fla. 1986); Jahn v. Tierra Verde City, Inc., 166 So.2d 768 (Fla. 2d DCA 1964). They do not deal with accompanying circumstances created by the defendant which obscured the difference in elevation or diverted the plaintiffs from using their ordinary senses to discover the difference in elevation. They merely stand for the proposition that a difference in elevation, by itself, is not a dangerous condition giving rise to a duty to warn.

FLINT negligently permitted an excessive number of people into their home and allowed them to congregate in the area of the step down. Ainsworth clearly holds that Schoen is inapplicable when the claimed negligence is not the difference in elevation.

The FLINTS owed CASBY a duty of due care. They breached that duty by allowing more people into their house than it could safely accomodate and in permitting an excessive number of people to gather in a location where they hid the step down from CASBY's view. CASBY was injured as a result. Schoen is distinguishable and the complaint should not have been dismissed.

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.

CASBY also respectfully requested this Court to reconsider the scope of its ruling in Schoen if it found that Schoen barred this suit because Schoen could not be reconciled with this Court's decisions in analogous cases. FLINT argues in response that the general principal of stare decisis should preclude such reconsideration. FLINT also argues that Schoen is not a departure from previous decisions concerning different floor levels. But FLINT never actually addresses the point of this issue: whether Schoen comports with this Court's other relatively recent decisions in the landowner liability area, or with its decisions regarding comparative negligence and assumption of risk. FLINT cannot address that point because FLINT cannot offer any justification for this distinction between homeowner liability for step-

downs and the liability of any other defendant in any other type of circumstance where there is a possibility that the plaintiff may be aware of the danger.

In their brief at 17-21, the FLINTS attempt to factually distinguish the cases cited in CASBY's initial brief at 11-13. But CASBY never claimed that those cases involved the same facts. She argued that Schoen was a departure from the reasoning and concepts embodied in those cases. As a result of Schoen, a different standard applies to premises liability step down cases than to premises liability cases not involving step downs and to non-premises liability cases.

Schoen is an aberration which distorts the otherwise harmonious lines of case law involving comparative negligence and assumption of risk in other settings. See cases cited in CASBY's initial brief at 12. The type of conduct which will bar a plaintiff from recovery in other situations is a jury question. There is no reason to place owners of houses with step downs in a different class than other homeowners, landowners, manufacturers or businesspersons. The homeowner with a step down has an equal opportunity to correct the dangerous condition or to warn of its existence. Moreover, the guest who falls as the result of an unknown step obscured in some manner is at least as innocent as the karate participant in Kuehner v. Green, 436 So.2d 78 (Fla. 1983), the rider in Ashcroft v. Calder Race Course, Inc., 492 So.2d 1309 (Fla. 1986), or the worker in Auburn Mach. Works v. Jones, 366 So.2d 1167 (Fla. 1979).

To the extent Schoen applies to a difference in floor levels obscured by dim lighting, overcrowding or similar circumstance, it should be clarified to hold that an invitee is only chargeable with knowledge of the danger of an unobscured step down. This Court should analyze a plaintiff's conduct in a premises case involving an obscured step down consistently with a plaintiff's conduct in other situations as set forth in Kuehner, Auburn Mach. Works and Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977).



CONCLUSION

For the foregoing reasons, and the reasons stated in the initial brief, Petitioner respectfully requests this Court to reverse the order dismissing the complaint.

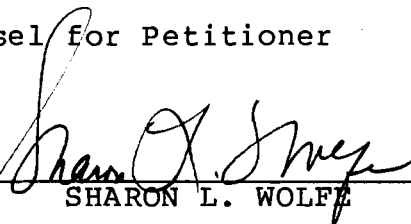
Respectfully submitted,

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CERTIFICATE OF SERVICE

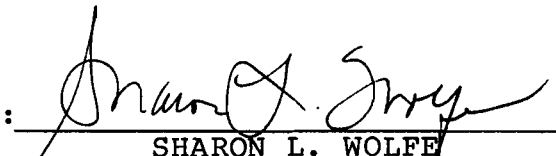
I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 18th day of May, 1987 to: Jay B. Green, Esq., 315 S.E. 7th Street, Second Floor, The Advocate Building, Fort Lauderdale, FL 33301

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