File 2-7-90

IN THE SUPREME COURT OF FLORIDA

NOV 27 1989

CLERK, SUPREME COURT
By _____ Deputy Clerk

PHILIP MARTINELLO, as parent and next friend of CHRISTIAN MARTINELLO, and PHILIP MARTINELLO, individually,

Petitioners,

vs.

Case No: 74,496

B & P USA, INC., a Florida corporation,

Respondent.

_____/

PETITIONERS' INITIAL BRIEF

In the District Court of Appeal
of the Fourth District of Florida

DCA Case No: 87-1897

On Appeal from Circuit Court,
15th Judicial Circut, West Palm
Beach, Palm Beach County, Florida.

Case No: 85-4214 CA (L) H

ALEX T. BARAK, ESQUIRE
Attorney for Petitioners
First Nationwide Building
633 N. E. 167th Street
Suite 517
N. Miami Beach, FL 33162
(305) 652-8488 Dade
(305) 462-3998 Broward

TABLE OF CONTENTS

TABLE OF CASES AND CITATIONS

OTHER CITATIONS

PAGES

STATEMENT OF THE ISSUES ON APPEAL

I. WHETHER REVERSIBLE ERROR WAS COMMITTED WHEN THE TRIAL COURT FAILED TO GIVE FLORIDA STANDARD JURY INSTRUCTION 3.2d, REQUIRING A NEW TRIAL.

II. WHETHERDIRECTED VERDICTS SHOULD HAVE BEEN GRANTED TO PLAINTIFFS/ PETITIONERS ON THE ISSUES OF THE AFFIRMATIVE DEFENSE OF COMPARATIVE NEGLIGENCE OF THE MINOR PLAINTIFF AND ON LIABILITY.

STATEMENT OF THE CASE AND FACTS

Preliminary Statement

The Record of Appeal consists of two volumes from the trial court containing pleadings, motions, orders, memoranda of law, exhibits, plus five volumes of the trial transcript. Reference to said items shall be made by the letter "R" followed by the page number.

Statement of the Facts

On February 17, 1985, the minor Plaintiff/Petitioner, CHRISTIAN MARTINELLO was playing in a tree by his own house with a friend named Johnny Lauffer, when the latter decided he wanted a toy gun like the former had found at a construction site, and both decided to go to said site (R167, 254-5, 256). The toy "gun" was a plastic pipe (R 179).

On said date, the minor Petitioner was 10 years old (R 169) and told his friend that he didn't believe the two would get hurt if they would go to the construction site (R 256).

The minor Petitioner testified that he went to said site to get "tools, toy guns, and stuff" (R 167).

The construction site consisted of three single family homes in the process of original construction by the Defendant on S.W. 10th Street, Boca Raton, Palm Beach County, Florida (R 168, 392, 396, 410).

Joseph Levy, a supervisor for Defendant/Respondent testified that a home construction project should be fenced in and the site at issue was not fenced in (R 160). He further testified that the purpose of the fences is to prevent people from getting hurt, to keep children

out of the construction site, and to keep out looters (R 160). Ladders were supposed to be put away over night and he occassionally found ladders not put way (R 161). He identified the ladder on the photograph marked as Plaintiff's Exhibit l-B and admitted it was built by the Defendant and that he has seen it up against the house as depicted in the picture (R 161).

The Joint Pre-Trial Stipulation of the parties (R 410) states as follows :

> It is claimed that on February 17, 1985 that the Defendant was negligent, pursuant to the "attractive nuisance" doctrine, in the maintenance of the construction site at this house in that there was a ladder which was allowed to remain at the side of the house, thereby enticing minors to climb up to the roof of said house. It is further claimed that on that date the minor Plaintiff climbed up to the top of the roof of said house and fell off the roof of the said house, sustaining permanent injuries to his hand (emphasis added).

When the two boys were exploring the three houses at the construction site, they both exclaimed how "cool" it was to be there (R 257, 259).

They went up a ladder leaning up against the third house (R 168-9, 185, 258). There was a lot of wood all around and the roof was on a slant (R 168-9).

While at the construction site, there were no conversations by the two boys about the fact that they shouldn't have been there (R 260).

CHRISTIAN MARTINELLO did not realize he and his friend would get hurt climbing the ladder at a construction site, onto a roof (R 185, 186, 187).

When climbing off the roof, CHRISTIAN MARTINELLO, did not realize that there was a possibility of getting hurt because he believed it looked safe (R 188).

While attempting to descend from the roof of the third house, CHRISTIAN MARTINELLO, slipped and fell and tried to brake his fall by grabbing what turned out to be a rough concrete surface (R 72, 168-9). The result was that his hands were shreaded (R 59), his hands were bleeding profusely (R 113) and were grotesque-looking (R 116).

DANIEL MAN, M.D., a board-certified plastic and reconstructive surgeon, a specialist in hand surgery, (R 513) was called in to Boca Raton Community Hospital emergency room on February 17, 1985 to examine the minor Plaintiff, CHRISTIAN MARTINELLO (R 445).

On the right hand, there were multiple cuts over the index and middle fingers and some over the small finger. There were cuts down to the tendon sheath (R 446). On the left hand there were lacerations to the base of the left index finger and to the middle finger and to the mid-palm. Also, there was a 60% tearing of a tendon sheath (R 446, 534). Surgery was performed (R 448).

CHRISTIAN MARTINELLO was left with scarring over the left palm and the mentioned cord-like scar by the left index finger (R 514, 516) and scars to the right hand (R 518). There was sensitivity and tenderness in the left-hand, which was quite substantially weaker that the right hand (R 515, 523).

The minor Plaintiff identified a photograph depicting the condition of the ladder on the date of the accident (R 173-4).

The Complaint in this cause sets out a claim pursuant to the attractive nuisance doctrine when it claims, inter alia, the following:

1. That the Defendant permitted an open and exposed standing ladder to remain, after business hours, at a new house construction site.

2. That the Defendant allowed children of immature age and discretion to frequent said property.

3. That the Defendant knew or should have known that the standing ladder at the side of a house under construction would be attractive to children, who because of their immature age and discretion would be lured and tempted to climb said ladder to the roof of said house.

4. That Defendant knew that said house so situated would be attractive to children.

5. That the minor Plaintiff, immature and wholly ignorant of the dangers lurking on the roof of said house was lured to climb up the ladder (R 378-380).

The Defendant/Respondent stipulated that the claim in this cause is Defendant's negligence "pursuant to the 'attractive nuisance' doctrine" (R 140).

At trial, Petitioners' counsel, in his opening statement said "After you hear the testimony and the judge's charge about attractive nuisance...." (R 46). Counsel again referred to said charge arguing for the admission of certain photographs (R 92-3).

The Court on numerous occasions stated it would not give the attractive nuisance charge (R 203-4, 279-280, 285, 314).

Instead, the Court repeatedly referred to the need for the general negligence charges, focusing in on the issues the negligence of a minor, i.e., comparative negligence (R 34, 94, 203-4, 274-5, 278, 285, 287, 294, 297, 298, 303, 313, 314). The Court did, in fact, give general negligence jury charges (R 364, 372) and failed to give the Petitioners' requested standard jury charge on attractive nuisance, Number 3.2d.

Petitioners' counsel expressly and repeatedly urged the trial court to give the standard charge on attractive nuisance:

> The Court:. ..let me have Plaintiffs' charges which your want for me to charge.. .
>
> Mr. Simring: Attractive nuisance, Your Honor, which is a very integral part **of** this case.. ...

(R282)

> Mr. Simring: They have an attractive nuisance doctrine which the jury has to be educated on and which I have to argue to them in my summation explaining what the doctrine is, explaining what the law is and explaining what the reservations of the doctrine are.

(R 283)

> There are certain wording in the document (jury charge on attractive nuisance) which is mandatory that the jury hear and that I argue.
>
> ....The jury has to understand the law...
>
> .....Now, how can the jury be made to know that? I can't tell them this is the law unless it is charged to the jury.

(R 284)

...but I request the attractive nuisance doctrine (jury charge) which is part of our Complaint and part of our case to go to the jury because of these other elements that the jury has to consider.

The jury cannot consider those elements unless the charge goes to them.

(R 284-5)

Mr. Simring: I would like to argue with the force of the law behind me and that is the law.

Your Honor,...but you are taking away from the jury the law.

Judge, I would like to say this is the law....

Judge, I would like to say this is the law.

(R 286)

Petitioners' counsel submitted to the Court the case of Ridgewood v. Boswell, 189 So.2d 88 (Fla. 2nd DCA 1966), for the holding that the attractive nuisance charge must be given to the jury (R 304).

Petitioners' counsel further argued:

But we have a claim of attractive nuisance and that should go to the jury

(R 304)

Even...had he admitted being guilty of an attractive nuisance, I would still want the charge to go to the jury so the jury understands the nature of an attractive nuisance and that is why a law is in existence.

(R 305)

This jury could easily say.. .the guy was guilty as hell but the kid shouldn't have been there.

Under the charge of attractive nuisance and by argument to them, I can try to have them realize what this law is.

> The law was made for children and that is the entire case we have. It is made for children, ...

(R 306)

> I think the Plaintiff is entitled to the entire jury charge with regard to attractive nuisance.. ..

> Why are we hiding this statute from the jury ...

(R 311-12)

In his closing statement, Petitioners' counsel did not and could not refer to the standard jury instruction on attractive nuisance and argue how the facts of the case fitted into the elements contained in said charge.

On the first day of trial, counsel for Respondent stated he was admitting negligence but not liability, that is, the first two elements of negligence, duty and breach of duty; he further stated he would be contesting comparative negligence and damages (R 12).

On the second day of trial, prior to the Petitioners putting on their case, counsel for Petitioners brought up the point that in an attractive nuisance case, there can be no comparative negligence and that the Defendant can't submit to the jury the question of the comparative negligence of a minor (R 29, 32). He further argued that the attractive nuisance case is not just another negligence case (R32) and that the specific jury charge on attractive nuisance takes away or encompasses comparative negligence of the minor (R 33). The specific charge 3.2d was submitted to the Court (R 732) and denied, with the Court writing "Denied, covered in 4.4".

The Court denied the Petitioners' Motion to Strike the Defendant's defense of comparative negligence (R 33-4).

Later during trial counsel, for Petitioners expressed an uncertainty as to whether or not defense counsel admitted negligence of having created an attractive nuisance (R 273-4).

Petitioners moved for a directed verdict on the claim of attractive nuisance (R 275) which the Court granted in part and denied in part, leaving open the issue of comparative negligence and damages (R 275-6).

Petitioners further moved for a directed verdict on the Defendant's affirmative defense of comparative negligence of the minor CHRISTIAN MARTINELLO, although it was not properly worded but the intent was clear ---worded as a Motion to Strike the Affirmative Defense of Comparative Negligence of the father (R 277). Actually, the request for a directed verdict on the affirmative defense of comparative negligence of the father was made earlier (R 276) and denied (R 277).

The basis stated for the Motion for Directed Verdict on the affirmative defense of comparative negligence of the minor is that the case law on attractive nuisance eliminates comparative negligence (R 277).

The Court denied said Motion (R 278).

Again, defense counsel denied admitting to the attractive nuisance doctrine (R 279).

The jury returned with a verdict which found the Defendant negligent to the extent of 20% and the minor Plaintiff negligent to the extent of 80%, thus reducing the damages awarded from **$10,000.00** to

$2,000.00 (R 278-9). The jury also found no comparative negligence as to the father PHILIP MARTINELLO and awarded him no damages (R 768-9).

The Petitioners timely filed post-trial Motions for New Trial, Motion for Judgment in accordance with Plaintiffs' Previous Motion for Directed Verdict on Attractive Nuisance, and Motion for Judgment in accordance with Plaintiffs' Motion for Directed Verdict Striking Affirmative Defense of Comparative Negligence of the minor Plaintiff (R 770-778).

The trial court denied all of Plaintiffs' post-trial motions on June 10, 1987 ((R 781).

The Fourth District Court of Appeal granted a new trial to the father PHILIP MARTINELLO, and affirmed (1) the trial court's refusal to give the attractive nuisance jury charge, (2) the failure to grant a directed verdict to the Plaintiffs on attractive nuisance liability, and (3) the failure to grant a directed verdict against the Defendant on its defense of comparative negligence of the child.

PAGE(S) MISSING

SUMMARY OF THE ARGUMENT

This was an "attractive nuisance" claim from the outset and through trial and the Petitioners had an absolute right to have the jury instructed on the law applicable to their case.

The trial court erred in giving a standard jury charge on the negligence of the minor, Plaintiff, and this error seriously prejudiced the minor's claim. All of the caselaw supports the Petitioners' rights to have had Florida Standard Jury Instruction 3.2d charged to the jurors.

Any apparent negligence **of** the minor in an attractive nuisance case is presented in 3.2d in a manner totally different than in a standard charge or negligence of a minor.

Attractive nuisance claim is an all or nothing claim and no defense of comparative negligence is available. Respondent's admission of "negligence" could not convert an attractive nuisance claim into one of general negligence.

Because defense counsel at trial conceded that he would only be contesting comparative negligence and damages, it was a matter of law for the Court to decide whether or not comparative negligence was an issue in an attractive nuisance claim -- which is the issue defense counsel stipulated to in the Joint Pre-Trial Stipulation as being the issue of the lawsuit.

Since the caselaw and the comments to the attractive nuisance charge hold that comparative negligence is not a defense, then the trial court should have granted Directed Verdicts to the Petitioners

on the affirmative defense of the comparative negligence of the minor and on liability.

ARGUMENT

POINT I

REVERSIBLE ERROR WAS COMMITTED WHEN THE TRIAL COURT FAILED TO GIVE FLORIDA STANDARD JURY INSTRUCTION 3.2d, THUS REQUIRING A NEW TRIAL.

The sole basis of the claimed liability in this case is that the Defendant maintained an "attractive nuisance". Generally speaking, the attractive nuisance doctrine states that one who maintains on premises a condition that might reasonable be expected to attract minors of a tender age, and that is dangerous to children by reason of their inability to appreciate the peril, must use reasonable due care to protect said children against the danger involved. 41 Fla. Jur 2d, "Premises Liability", 945.

Whether or not the Defendant admitted negligence, or left open an issue of comparative negligence of the minor or admitted it was guilty of "attractive nuisance", the Plaintiffs insisted that the jury was entitled to Standard Florida Jury Instruction 3.2d.

Contrary to the Fourth District's opinion in this case, the attractive nuisance is absolutely applicable. The evidence submitted in this cause was sufficient to trigger the right to have the attractive nuisance doctrine charged to the jury. Ridgwood Grove v. Dowell, 189 So.2d 199 (Fla. 2d DCA 1966). There was sufficient evidence to prove an attractive nuisance. Atlantic Peninsular Holding Co. v. Oenbrink, 133 Fla. 325, 182 So.2d 812 (disapproved on other grounds); Larnel Builders, Inc., v. Martin, 110 So.2d 649 (Fla. 1959); Fouraker

v. Mullis, 120 So.2d 808 (Fla. 1st DCA 1960).

The failure to give a requested jury instruction is considered reversible error where the complaining party establishes that the requested instruction accurately states the applicable laws; the facts in the case support giving the instruciton; and the instruction was necessary to allow the jury to properly resolve all issues in the case. Alderman v. Wysong & Miles Co., 486 So.2d 673, 677 (Fla. 1st DCA 1986); Davis v. Charter Mortgage Company, 385 So.2d 1173, 1174 (Fla. 4th DCA 1980)

Instructions to the jury must be based on the law applicable and the facts proved. Bradley v. Guy, 438 So.2d 854 (Fla. 5th DCA 1983); 55 Florida Jur.2d, "Trial", 8138.

The right to a jury instruction arises when there is any evidence to support it. Goodman v. Becker, 430 So.2d 560, 561 n.2 (Fla. 3rd DCA 1983); Corbett v. Dade County Board of Public Instructions, 372 So.2d 971 (Fla. 3rd DCA 1979), Cert. denied, 383 So.2d 1192 (Fla. 1980).

Certainly, the record is replete with evidence to support an "attractive nuisance" charge.

"If evidence adduced at trial creates an issue, litigants have the right to have the trial court instruct the jury on the law applicable to that issue." Tilley v. Broward Hospital District, 458 So.2d 817 (Fla. 4th DCA 1984); Goodman v. Becker, supra; Ruiz v. Cold Storage, 306 So.2d 153, 154 (Fla. 2nd DCA 1975).

Petitioners had the right to have the trial court instruct the jury

of the issues of "attractive nuisance", which was before the Court via the Joint Pre-Trial Stipulation, by trial testimony and evidence and by defense counsel's admission of negligence.

The MARTINELLOS deserved the proper instructions on the attractive nuisance doctrine so that the jurors could understand the theory of recovery on which the Plaintiffs proceeded.

A house under construction may be an attractive nuisance and give rise to an action for recovery under the attractive nuisance doctrine. Atlantic Peninsula Holding Co. v. Oenbrink, supra. Larnel Builders, Inc. v. Martin, supra. 41 Fla. Jur.2d, "Premises Liability", 556.

Construction tools, material or anything else necessary to the construciton of a building that may be considered inherently dangerous to children, may constitute a part of an attractive nuisance. Fouraker v. Mullis, supra. 41 Fla. Jur.2d, Id.

The piling of lumber or other construction materials on premises may constitute an attractive nuisance or give rise to liability. 41 Fla. Jur. 2d, Id.

Based upon the foregoing law, the facts of the instant case were sufficient to have the Court give the jury charge on the attractive nuisance doctrine.

In Dukes v. Pinder, 211 So.2d 575 (Fla. 3rd DCA 1968), cert. denied, 219 So. 2d 700 (Fla. 1968) the Defendant on appeal contended that the evidence did not establish the existence of an attractive nuisance and that the Court erred in refusing to instruct the jury on general principles of negligence law.

The Third DCA affirmed the lower Court's findings and decisions, stating that the attractive nuisance issue was properly submitted to the jury to find that the Defendant has maintained an attractive nuisance.

The Third DCA further held that the lower Court did not err in refusing the instruct on general principles **of** negligence, such as duty, breach of duty, proximate cause and comparative negligence, stating:

> these principles are not applicable where the sole basis of the claimed liability of the defendant is that the defendant maintained **an** attractive nuisance.

In the case at bar, defense counsel improperly suggested to the Court to instruct on general negligence law principles to the exclusion of the attractive nuisance doctrine, WHICH WAS THE SOLE BASIS OF THE CLAIMED LIABILITY, and the Court refused to properly submit the issue of attractive nuisance to the jury.

Dukes v. Pinder, mandates a new trial as the Plaintiffs were severely prejudiced by the giving of improper jury instructions -- general negligence and the exclusion of the proper one,-- on attractive nuisance.

A mere reference and reliance upon the STANDARD FLORIDA JURY INSTRUCTIONS at the time of trial would have led the trial judge to give the requested charge.

The issues contained in standard charge **3.2** of attractive nuisance must be charged to the jury. See comments on Florida Standard Jury Charge 3.2d.

Said Comment on 3.2d states as follows:

> Since Plaintiff must, in effect, negate contributory (comparative) negligence in order to prevail on this doctrine, contributory (comparative) negligence is not a defense. Larnel Builders, Inc. v. Martin. 110 So.2d 649 (Fla. 1959)

This comment is contained in the Florida Standard Jury Instructions in effect in January, 1987 in the instant action.

If the jury had the benefit of Jury Instruction 3.2d, they would have been advised as follows:

a. Was the subject house under construction in an area that defendant knew or had reason to know that children were likely to trepass?

b. Was the situation created by the Defendant one that can cause an unreasonable risk of death or serious harm to children who because of their age were not likely to discover the condition or realize the risk involved in meddling with it or in coming within the area made dangerous by it?

c. Whether the Defendant knew or had reason to know of the risk to such children?

d. Whether the minor because of his age did not discover or realize the risk involved in meddling with it.

There was sufficient testimony elicited during the trial concerning these elements. The construction site was in a residential neighborhood; it was not fenced in which would keep children out and prevent them from injury; a ladder of Defendant was allowed to remain next to the house under construction; and ten-year-old minor Plaintiff and his friend both testified that they were unaware of any danger, felt safe and did not believe they could get hurt. Johnny Lauffer

testified that they had gone there to search for toy guns, and that at the construction sites, they felt "cool" (R 254-5, 257, 259).

If the Defendant's admission at trial of "negligence" negated the necessity of having the jurors decide elements A, B, & C supra, then the final element of 3.2d should have been presented to them as the issue to determine, after the Court defined the whole law to them.

In the instance case, the jury needed to be charged with the attractive nuisance doctrine charges, 3.2d, because that was the theory of recovery pleaded, stipulated to as the issue, and the theory to which Defendants admitted it owed a duty and breached said duty. Perhaps only the last element of 3.2d needed to be determined by the jurors. But the trial court prevented this and gave an entirely different jury instruction that of standard negligence, in violation of Larnel Builders v. Martin, supra, and Dukes v. Pinder, supra.

The last element of the attractive nuisance jury charge, encompasses what may be considered "comparative negligence," but is phrased much differently:

> Whether (claimant child) because of his age did not discover the condition or realize the risk involved in meddling with it or in coming within the area made dangerous by it.

The trial court charged Florida Standard Jury Instruction 4.4, negligence of a child to allow Respondent its comparative negligence affirmative defense; however, 4.4 does not contain the protective language of the last element of 3.2d. 4.4 states:

> Reasonable care of the part of the child is that degree of care which a reasonably careful hild of the same age, mental capacity, intelligence, training, and experience would be under like circumstances.

Standard charge 4.4 obviously does not contain the crucial question whether the minor realized the risk involved in meddling with the attractive nuisance. The trial testimony clearly supported a finding that the minor did not realize the risk (R 185, 186, 187, 188, 254-5, 257, 259).

The attractive nuisance doctrine provides for an entirely different vehicle in which to obtain liability in comparison to a standard negligence claim. Florida law provides for separate and distinct jury instructions, 3.2d for an attractive nuisance case. Dukes v. Pinder, supra, and Larnel Builders v. Martin, supra.

An attractive nuisance claim is an all or nothing situation and no separate defenses of comparative negligence is available to a Defendant in such a case. Larnel Builders v. Martin, supra; Dukes v. Pinder, supra; comments to standard jury charge 3.2d; dissenting opinion, Martinello v. B & P, Inc., 545 So.2d 956 (Fla. 4th DCA 1989).

As Judge Anstead stated in his dissent in the Fourth Distict's opinion, Martinello v. B & P USA, Inc., supra, attractive nuisance was the liability theory pleaded and appellants attempted to prove it at trial:

> General negligence charges are not applicable to an attractive nuisance claim. Dukes v. Pinder, 211 So.2d 575 (Fla. 3rd DCA 1968), cert. denied, 219 So.2d 700 (Fla. 1968). So long as attractive nuisance is part of the law of Florida, Plaintiffs are entitled to utilize it and courts are required to define it to

> juries.. ..attractive nuisance is an all or nothing situation. If a jury decides the Defendant did maintain an attractive nuisance and that the child did not appreciate the danger, then the child is entitled to all of his damages. Similarly, the child is not entitled to any recovery if he is found by the jury to have known and appreciated the risk. No separate defense of comparative negligence is available to a defendant in an attractive nuisance case.

Id. at 958.

The gist of Respondent's arguments and the majority opinion in the Fourth District is that attractive nuisance is not a separate theory of liability. There is no caselaw supporting this position.

In fact, the Florida Standard Jury Instructions and the undisputed caselaw cited herein all support the need for the separate jury instructions for attractive nuisance.

An apple is an apple and and orange is an orange.

Attractive nuisance liability and general negligence liability are both fruit, but the former is an apple and the latter is an orange. Each theory of liability has its own set of jury instructions.

Respondent has repeatedly cited the case of Green Springs, Inc. v. Calvera, 239 So.2d 264 (Fla. 1970) for the proposition that "if the attractive nuisance doctrine is not needed to support a duty of care, the case should proceed under an ordinary negligence theory." Further argued by Respondent is that Green Springs, "states the controlling law in the present situation." A close analysis of Green Springs, is needed in order to point out how Appellee has misunderstood said case. In Green Springs, the involved minor was an invitee in a completed

residential home in which a concrete planter fell on her and killed her. Since the child was not a trespasser, there was no right to assert the attractive nuisance theory of recovery. The Fourth District also misconstrued the meaning and holding of Green Springs.

In the instant case, CHRISTIAN MARTINELLO was a trespasser and not an invitee at a construction site of incomplete single-family homes. As such, the attractive nuisance doctrine was the only theory of recovery, the only one pled by his counsel, and the theory stipulated to as the claim by defense counsel.

In Nunnally v. Miami Herald Publishing Co., 266 So.2d 76 (Fla. 3rd DCA 1972), the Third District commented upon the Green Springs case, by stating that the attractive nuisance doctrine there was held inapplicable because the injured child was not a trespasser.

The jury instructions in the instant case did not comply with the facts applicable to it, as minor CHRISTIAN MARTINELLO, was a trespassor and the verdict form was equally defective because it did not contain the question of the final element of charge 3.2d which was, in reality, the only question left for the jury to determine regarding CHRISTIAN MARTINELLO's attractive nuisance claim.

In short, the trial court committed reversible error in failing to give said charge and Appellee's and the Fourth District's arguments supporting the trial court's decisions are without substance and legal merit. This merits a new trial.

Additionally, the amount of damages awarded by the jury was tainted by the failure to allow the MARTINELLOS to proceed with the

force of the law behind them, and therefore, if a new trial is ordered, the MARTINELLOS seek one on damages as well.

POINT II

THE TRIAL COURT SHOULD HAVE GRANTED A DIRECTED VERDICT TO PETITIONERS ON THE RESPONDENT'S AFFIRMATIVE DEFENSE OF COMPARATIVE NEGLIGENCE OF THE MINOR, AND A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED ON LIABILITY TO THE PETITIONERS, AND POST-TRIAL MOTIONS FOR JUDGMENT IN ACCORDANCE WITH THE PRIOR MOTIONS FOR DIRECTED VERDICT SHOULD HAVE BEEN GRANTED.

On the first day of trial, defense counsel stated he was admitting negligence and not liability and would be contesting comparative negligence and damages (R 12).

If this is combined with the stipulated issue of the case the Defendant's alleged negligence pursuant to the attractive nuisance doctrine-- then it was strictly a matter of law whether or not comparative negligence was at issue in an attractive nuisance claim.

Defense counsel could only have admitted to the issue of the subject claim and not to allegations of standard negligence. By admitting negligence, defense counsel could not have admitted to a theory of recovery which was not being pursued by the Plaintiffs.

As a matter of law, comparative negligence was not a proper issue to be considered in an attractive nuisance case; see comments on Florida Standard Jury Charge 3.2d; Larnel Builders, Inc. v. Martin, supra; Dukes v. Pinder, supra; 41 Fla. Jur. 2d "Premises Liability," §58; 16 ALR 3d 58, §3(c); dissenting opinion, Martinello v. B & P USA, supra.

A Directed Verdict to the Petitioners should have been granted on Defendant's affirmative defense of comparative negligence of the minor, and a Directed Verdict on Liability with reference to the minor's claim should have been granted at trial, and Judgment thereon should have been granted at the post-trial motions and in the Fourth District.

Accordingly, the MARTINELLOS seek a judgment for the minor Plaintiff/Petitioner's claim and a new trial on damages because the damage award was tainted by the failure to allow them to proceed to the jurors with the full force of the attractive nuisance law behind them.

CONCLUSION

Based upon the foregoing authorities and legal argument, the Petitioners seek the following relief:

1. A judgment for the minor Plaintiff/Petitioner, CHRISTIAN MARTINELLO, by and through his parent and next friend, PHILIP MARTINELLO, against Respondent, B & P **USA,** INC., and a new trial on damages for the minor. (The Fourth District already ordered a New Trial for the father's derivative claim).

2. Alternatively, a new trial on liability & damages of the minor, CHRISTIAN MARTINELLO.

Respectfully submitted,

ALEX T. BARAK, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Initial Brief of the Petitioners was mailed this 23rd day of November, 1989 to Angela C. Flowers, Esquire, DANIELS & HICKS, P.A., Suite 2400, New World Tower, 100 N. Biscayne Boulevard, Miami, Florida 33132; and Anderson, Moss, Russo, & Cohen, P.A., Suite 2500, New World Tower, 100 N. Biscayne Boulevard, Miami, Florida 33132.

ALEX T. BARAK, ESQUIRE
Attorney for Petitioners
First Nationwide Bank Building
633 N.E. 167th Street
Suite 517
North Miami Beach, FL 33162
(305) 652-8488 Dade
(305) 462-3998 Broward
FBN: 327697