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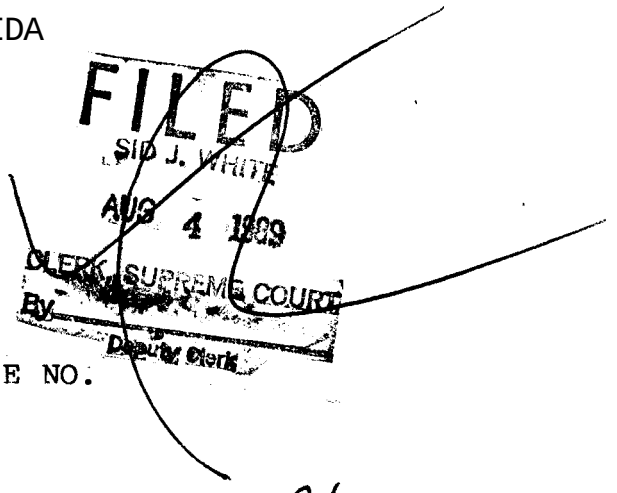
SUPREME COURT OF FLORIDA



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' BRIEF

ON JURISDICTION OF THE SUPREME COURT

In the District Court of Appeals of the Fourth District of Florida

DCA Case No. **87-1897**

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SUMMARY OF THE ARGUMENT

The Fourth District's opinion is in express and direct conflict with Dukes v. Pinder, 211 So.2d 575 (Fla. 3d DCA 1968), cert. denied, 219 So.2d 700 (Fla. 1968) and the case upon which the Fourth District relied upon in its holding, Greensprinqs v. Calvera, 239 So.2d 264 (Fla. 1970) does not support its ruling.

The Fourth District misconstrued Greensprinqs v. Calvera and additionally the opinion conflicts with Florida case law on the attractive nuisance doctrine and jury instructions thereon. Said Florida case law is from the Florida Supreme Court and the Second, Third, and Fourth District Courts of Appeal.

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ARGUMENT

Petitioner, PHILIP MARTINELLO, as parent and next friend of CHRISTIAN MARTINELLO, a minor, Petitions the Supreme Court of Florida for discretionary review of the Fourth District Court of Appeal decision and opinion of June 28, 1989 which expressly and directly conflicts with a decision of the Third District Court of Appeal and the discussion of the legal basis for said opinion reveals conflicts with Florida Supreme Court decisions, as well as other Third District decisions, Fourth District decisions, and Second District decisions.

The Fourth District Court of Appeal's opinion states within its four corners that it acknowledges that its decision conflicts with Dukes v. Pinder, 211 So.2d 575 (Fla. 3d DCA 1968), cert.denied. 219 So.2d 700 (Fla. 1968).

Additionally, the authority upon which the Fourth District based its decision -- Greensprings, Inc. v. Calvera, 239 So.2d 264 (Fla. 1970) does not support its decision and it is respectfully submitted that the Fourth District misconstrued Greensprings. Furthermore, there is no Florida case law which supports the Fourth District decision.

In the first paragraph, on Page 3 of its opinion, the Fourth District holds that the attractive nuisance doctrine is inapplicable where the defendant admits there is a duty and admits negligence because the status of the minor in the premises is no longer a relevant issue and that there would be no reason to instruct the jurors on principles of law (presumably attractive nuisance) that are not applicable to an invitee.

Based upon the aforementioned statement which is erroneously premised upon considering the minor Plaintiff an invitee, the Fourth District concluded:

> Where, as here, the doctrine of attractive nuisance is inapplicable principles of ordinary negligence, including comparative negligence apply.

The erroneous, unsupported and conflicting rule of law or holding in the first paragraph of page 3 of the Fourth District's decision apparently is based upon an extrapolation from Greensprings v. Calvera, supra.

As an analysis of Greensprings will reveal, said holding has no support from Greensprings.

Greensprings held that the attractive nuissance doctrine was not applicable because the deceased minor was an invitee and not a trespasser. Nowhere in the Greensprings opinion is there a holding regarding the right of a Defendant to convert an attractive nuisance claim into general principles of negligence. Nowhere in said opinion is there a discussion of the situation of where a Defendant admits to all but one element of the attractive nuisance doctrine, that the Court can give a standard jury charge on comparative negligence.

Greensprings v. Calvera was succintly summarized in Nunnally v. Miami Herald Publishing Co., 266 So.2d 76 (Fla. 3d 1972), wherein it was stated that the attractive nuisance doctrine was inapplicable where the injured child was not a trespasser and that the rules of ordinary negligence were applicable.

To the extent that Respondent and the Fourth District have

relied upon Greensprings, said reliance is in direct and express conflict with the Dukes v Pinder case, the only Florida case construing the narrow issue of whether a Defendant is entitled to standard jury charges on general principles of negligence, when the case is one of attractive nuisance.

Dukes v. Pinder, supra, stands for the proposition that attractive nuisance case, the attractive nuisance jury instructions must be charged to the jury and that the general negligence charges are not applicable.

Minor Plaintiff CHRISTIAN MARTINELLO was an obvious trespasser on the house under construction by Respondent B & P USA, INC. He was most definitely not an invitee. There is no reference anywhere in the record that he was an invitee. Therefore, Greensprings, supra, does not support the Fourth District's opinion.

The Fourth District's opinion also conflicts with Larnel Builders v. Martin, 110 So.2d **649** (Fla. 1959) regarding the inapplicability of contributory (comparative) negligence in an attractive nuisance case. Larnel Builders is cited in the comments to Florida Standard Jury Instruction 3.2d.

The Fourth District's opinion also conflicts with Idzi v. Hobbs, 186 So.2d (Fla. 1966), wherein it was held that it is a quesion for the jury to determine whether the minor was aware or appreciative of the dangers of a fire condition. This tracts the language of the final element in standard jury charge 3.2d on attractive nuisance.

In short, the decision in the case sub judice conflicts w th the cited cases dealing with the right of a party proceeding under the attractive nuisance to have the appropriate 3.2d jury instructions. At a minimum, the Petitioners were entitled to have the jury determine the issue contained in the last element of the attractive nuisance jury charge, which 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 attractive nuisance doctrine provides for an entirely different vehicle in which to obtain liability in comparison to a standard negligence claim. Florid 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; comment to standard jury charge 3.2d.

The Fourth District's opinion also conflicts with well settled Florida general law regarding the right to have jury instructions where there is any evidence to support it. Goodman v. Becker, 430 So.2d 560, 561 n.2 (Fla. 3d DCA 1983); Corbett v. Dade County Board of Public Instruction, 372 So.2d 971 (Fla. 3d DCA 1979), cert. denied, 383 So.2d 1192 (Fla. 1980). When evidence adduced at trial creates a particular issue, the claimants

have a right to instruct the jury on the law applicable to that particular 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 (Fl. 2d DCA 1975).

In the instant 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 Respondents 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 in violation of Larnel Builders v. Martin, supra, and Dukes v. Pinder, supra. The Fourth District erroneously stated that the attractive nuisance was not applicable because the entire records reveals that this was and is an attractive nuisance claim.

The Honorable Supreme Court should grant a review on the merits because there is statewide significance in clarifying the right of Plaintiffs proceeding on an attractive nuisance claim at trial.

If this area of the law is not clarified and the Fourth District's opinion is cited for support, defendants in attractive nuisance case will do the same as Respondent B & P USA, INC. did here -- admit negligence (duty and breach of duty), but not admit liability and claim that the only issue is the comparative negligence of the minor under standard principles of negligence. If left unreviewed, the Fourth District's opinion will allow defen-

dants to convert Plaintiff's attractive nuisance cases into standard negligence claims and allow juries to find minors comparatively negligent to a very high percentage after general principles of negligence are instructed to them as opposed to the standard attractive nuisance charges, which are based on a completely different theory and in which there is an all or nothing recovery.

WHEREFORE, for the foregoing reasons, the Petitioners respectfully request that the Supreme Court grant jurisdiction and a review on the merits and Petitioners further request oral argument on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was mailed by U.S. Mail, this 3rd day of August 1989 to Angela C. Flowers, Esq., Daniels and Hicks, P.A., Suite 2400, 100 N. Biscayne Boulevard, Miami, Florida 33132-2513 and to Anderson, Moss, Russo and Cohen, P.A., Suite 2500, 100 N. Biscayne Boulevard, Miami, Florida 33132, attorneys for Respondent.

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