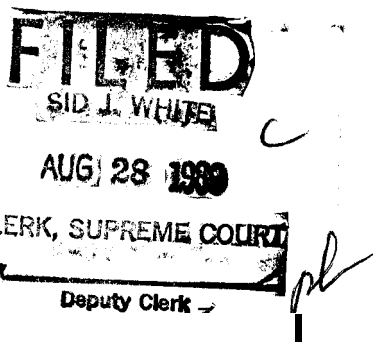
SUPREME COURT OF FLORIDA

NO. 74,496




PHILIP MARTINELLO, etc., et al.,

Petitioners,

vs.

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

Respondent.

**RESPONDENT'S JURISDICTIONAL BRIEF**

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## TABLE OF AUTHORITIES





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## STATEMENT OF THE CASE AND FACTS

Petitioner seeks express direct conflict review of the Fourth District's decision in Martinello v. B & P USA, Inc., 545 So.2d 956 (Fla. 4th DCA 1989). Plaintiff appealed from a final judgment following a jury verdict finding plaintiff's child eighty percent (80%) negligent. The child, age 10, was injured in a fall from the roof of a house under construction. The plaintiff alleged that the defendant maintained an 'attractive nuisance' and was negligent by permitting a ladder to remain standing against the side of the house. Prior to trial, the defendant conceded negligence, admitting that it owed a duty to the child which was breached. The trial court accordingly narrowed the issues to damages and comparative negligence which were submitted to the jury. The Fourth District Court of Appeal affirmed the application of ordinary negligence principles to this case.

## SUMMARY OF ARGUMENT

In the present case the Fourth District held that the attractive nuisance doctrine is not applicable where the defendant admits there is a duty and admits negligence because the status of the child is no longer a relevant issue and, therefore, principles of ordinary negligence, including comparative negligence, apply. There is neither express nor direct conflict between the Fourth District's decision and any other Florida case.



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## ARGUMENT

The trial court's failure to give the attractive nuisance instruction could not have been harmful because the jury found the child knew and appreciated the risk of climbing onto the roof of a house. Had the court been called upon to determine whether this 10-year-old boy understood the risk of climbing up the ladder onto the roof, it would have found as the jury did. By instructing the jury on ordinary negligence principles, including comparative negligence, the result was more favorable to plaintiff than had attractive nuisance been instructed upon and the child been completely barred from recovery.

Contrary to petitioner's assertion, the Fourth District's decision below in Martinello v. B & P USA, Inc., 545 So.2d 956 (Fla. 4th DCA 1989), does not find express or direct conflict with Dukes v. Pinder, 211 So.2d 575 (Fla. 3d DCA), cert. denied, 219 So.2d 700 (Fla. 1968), but merely acknowledges that to the extent Dukes may not indicate that principles of ordinary negligence apply where the doctrine of attractive nuisance is inapplicable, there may be conflict. There can be no conflict, however, because Dukes was decided before comparative negligence law was adopted and therefore has no application. The view of attractive nuisance as an all or nothing proposition has been wiped out by adoption of comparative negligence. See Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).

No attractive nuisance case since Hoffman v. Jones has declared contributory negligence to be an absolute bar to a



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plaintiff's recovery. It surely would be a perversion of the comparative negligence doctrine to hold that it applies to everyone in the state of Florida except trespassing children.[1/] The Fourth District has preserved the purity of the doctrine and fortunately no other court has held the contrary. Accordingly, respondent respectfully submits that the petition should be denied.

Moreover, none of the other cases cited by petitioner as creating conflict do so. Larnel Builders v. Martin, 110 So.2d 649 (Fla. 1959), merely holds that the jury need not be instructed separately on contributory negligence in an attractive nuisance case because the concept of contributory negligence is encompassed within the elements of attractive nuisance. This holding likewise has no application to the instant case since it was decided before comparative negligence law was adopted.

Nor does Idzi v. Hobbs, 186 So.2d 20 (Fla. 1966), which is mentioned for the first time ever in Petitioner's Jurisdictional Brief, create a point of conflict. The trial court proceedings were in complete conformity with Idzi, which holds that it is a question for the jury whether a child fully appreciates a dangerous condition.

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1/ Children under six, of course, are conclusively presumped to be incapable of contributory negligence. Swindell v. Hellkamp, 242 So.2d 708 (Fla. 1970); Metropolitan Dade County v. Dillon, 305 So.2d 36 (Fla. 3d DCA 1974), cert. denied, 317 So.2d 442 (Fla. 1975).



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## CONCLUSION

WHEREFORE, Respondent respectfully requests that this Honorable Court deny the petition.

Respectfully submitted,

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By Angela C. Flowers
ANGELA C. FLOWERS

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Jurisdictional Brief was mailed this 24th day of August, 1989 to:

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