0/a 2-7-90

SUPREME COURT OF FLORIDA

NO. 74,496

PHILIP MARTINELLO, etc., et al.,

Petitioners,

vs.

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

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

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. Plaintiff alleged that defendant maintained an attractive nuisance and was negligent by permitting a ladder to remain standing against the side of the house. [R. 379-80]. Defendant answered asserting affirmatively that the injuries and damages, if any, were the result of the sole negligence of the child, his father, or third persons. [R. 382-83].

The child was playing in a tree in his yard with a friend on the afternoon of February 17, 1985, a Sunday, when they decided to travel several blocks to a construction site to look for discarded plastic pipe. [R. 166-68, 179, 2541. The child possessed such a piece of pipe, which he utilized as a toy gun in play, and his friend wanted one also. [R. 167, 179, 254]. Both boys knew they were not allowed to visit construction sites because they were dangerous and discussed this fact before heading out. [R. 102, 147-51, 180-81, 255-57]. Nonetheless, they concluded that they would not get hurt if they went for a few minutes. [R. 186, 2561.

The construction site consisted of three partially finished single-family homes. [R. 159, 168]. The boys visited each house. At the first, they put a ladder up against the house and climbed to the roof.[1/] [R. 168, 182, 2571. After looking around, they left and went to the second house. [R. 168, 258].

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Again, they put up a ladder and climbed to the roof. [R. 168, 182-83]. At the third house, a ladder was already leaning against the left side of the house and they climbed it to the roof. [R. 168, 185-86, 187, 258]. Both boys sat down on the edge of the roof on the back side of the house. [R. 168, 187-88]. His friend jumped down and the child started to get up, but slipped and fell off the roof tearing his hands as he tried to break his fall by catching a rough surfaced ledge. [R. 169].

The parties stipulated that the issues of law and fact for determination were:

> A. The negligence, if any, of the Defendant.
> B. The negligence, if any, of the Plaintiff.
> C. The minor Plaintiff's damages, if any.
> D. Plaintiff, PHILIP MARTINELLO's, damages, if any.

[R. 411].[2/] The parties also stipulated to the facts as follows:

> It is claimed that on February 17, 1985 that the Defendant was negligent, pursuant to the "attractive nuisance" doctrine . . . . The Defendant has denied negligence and has affirmatively claimed that the minor Plaintiff was the sole cause of his injuries and damage . . . .

[R. 410].

Prior to trial, defendant conceded negligence, admitting

1/ The child's father had also warned him about the danger of ladders and had specifically instructed him not to use a ladder unless he was there to supervise. [T. 152-53, 181-82].

2/ Plaintiff's repeated assertions throughout his brief that defendant stipulated to attractive nuisance as the controlling theory of the case is misleading and completely mischaracterizes the Joint Pretrial Stipulation.

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that it owed a duty to the child which was breached. [R. 121. The trial court accordingly narrowed the issues to damages and comparative negligence. [R. 13]. At the close of all the evidence, plaintiff moved for a directed verdict against defendant on the claim of attractive nuisance based solely on defendant's concession of negligence. [R. 275]. The trial court denied the motion except to the extent that it had previously ruled that the jury would be instructed as a matter of law that defendant owed a duty of care to plaintiff which it breached. [R. 274-761. The trial court also denied plaintiff's motion for directed verdict on comparative negligence. [R. 276-78].

The trial court instructed the jury that defendant had admitted negligence and was guilty of negligence. [R. 363]. On the defense, the jury was instructed to determine whether the child or the father was negligent and, if so, whether their negligence contributed to the injury or damages complained of. [R. 363]. Negligence of a child was defined as the failure to exercise that degree of care which a reasonably careful child of the same age, mental capacity, intelligence, training and experience would use under like circumstances. [R. 3651. The jury returned the verdict finding the child eighty percent (80%) negligent. [R. 373-74].

The Fourth District Court of Appeal affirmed the application of ordinary negligence principles to the case.

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SUMMARY OF THE ARGUMENT

Attractive nuisance has never been a separate cause of action which a plaintiff can elect to pursue to the exclusion of general negligence law. The need for application of attractive nuisance principles was eliminated from this case by defendant admitting negligence. There remained, however, for trial the issue of the child's negligence. Upon the jury finding the child negligent, comparative negligence principles were applied, rather than the all-or-nothing contributory negligence rule of attractive nuisance. Nothing in defendant's concession on negligence or the application of comparative negligence principles necessitated a directed verdict for plaintiff or reversal for a new trial.

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN DENYING PLAINTIFF'S REQUESTED JURY INSTRUCTION ON ATTRACTIVE NUISANCE WHERE DEFENDANT *ADMITTED* NEGLIGENCE.

The Fourth District correctly 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. Martinello v. B & P USA, Inc., 545 So.2d 956, 967 (Fla. 4th DCA 1989).

Plaintiff's claim that attractive nuisance is a separate basis for liability incorrectly characterizes attractive nuisance

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as a separate cause of action. See Restatement of Torts (Second) 5339 comment b (basis for attractive nuisance rule is ordinary negligence): Am.Jur.2d New Topic Series Comparative Negligence 534 (1977) ("attractive nuisance is but a phase of the law of negligence"): W. Prosser, Trespassing Children, Calif. L. Rev. 427, 432 (1959) ("child trespasser law is merely ordinary negligence law"). Contrary to plaintiff's assertions, Dukes v. Pinder, 211 So.2d 575 (Fla. 3d DCA), cert. denied, 219 So.2d 700 (Fla. 1968), does not establish attractive nuisance as a separate theory of liability.[3/] Dukes holds that where a jury question is presented regarding the existence of an attractive nuisance, the trial court should not instruct the jury on both attractive nuisance and general principles of negligence law. 211 So.2d at 576.

The attractive nuisance doctrine is a legal fiction designed to protect trespassing children. Normally, a trespasser cannot recover for the landlowner's ordinary negligence. Crutchfield v. Adams, 152 So.2d 808,811 (Fla. 1st DCA), cert. denied, 155 So.2d 693 (Fla. 1963). The law's concern for children prompted the legal fiction that the trespass was excused because of the attractive nature of defendant's premises. Id. at 812. Having excused the trespass, the property owner was then required to exercise ordinary care. Cf. Prosser, The Law of Torts §59, pp. 399-403 (5th ed. 1984). Given the nature of its origin, it

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3/ To the extent that Dukes could be construed to indicate otherwise, it should be overruled.

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follows that the doctrine serves no purpose and has no application whenever the defendant concedes a duty of ordinary care.

Florida's standard jury instructions call for the attractive nuisance instruction to be given when status or duty is in issue. If the attractive nuisance doctrine is not needed to support a duty of care, the case should proceed under ordinary principles of negligence. Green Springs, Inc. v. Calvera, 239 So.2d 264, 265 (Fla. 1970); Lister v. Campbell, 371 So.2d 133, 134 n. 1 (Fla. 1st DCA), cert. denied, 378 So.2d 346 (Fla. 1979); Crutchfield, 152 So.2d at 810, 812.

Simply stated, status was not an issue in the underlying action, nor was duty. Defendant conceded that it owed a duty of due care to the child and that such duty was breached. [R. 121. This admission had the effect of establishing the child's status as that of an invitee. As this Court stated in Green Springs, Inc. v. Calvera, where invitee status exists "one has only to read our Standard Jury Instruction 3.2.d and 3.5.h [the attractive nuisance instructions] to perceive how inapposite they would be when the time comes to charge a jury . . . ." 239 So.2d at 265.

Accordingly, the trial court instructed the jury that defendant was negligent as a matter of law and marked yes on the verdict form following the question "Was there negligence on the part of the Defendant, B & P, USA, Inc., which was a legal cause of damages to the Plaintiffs?'' Next, the trial court instructed the jury to determine whether the child was comparatively negli-

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gent. There is no reasonable possibility that the jury was misled by the court's instructions or that any prejudice resulted to plaintiff.

As for the comparative negligence instruction, this was entirely proper, since, as plaintiff admits [Petitioners' Initial Brief at 19, 22], the issue of the child's conduct remained to be determined by the jury. Plaintiff's suggestion that the trial court should have instructed the jury on the last element of the attractive nuisance charge because it is worded more favorably to the child is absurd. As this Court has clearly stated, when judging whether a child's conduct is to be characterized as contributory negligence the child must conform to the standard of conduct "that is to be expected from one of a like age, intelligence and experience.'' Larnel Builders, Inc. v. Martin, 110 So.2d 649, 650 (Fla. 1959) (attractive nuisance case). This is precisely the standard on which the jury was instructed in the instant case.[4/] See McGregor V. Marini, 256 So.2d 542, 543 (Fla. 4th DCA 1972) (standard the same whether child's conduct characterized as negligence or contributory negligence).

Nor is the rule that a jury should not be instructed on both attractive nuisance and contributory negligence of any significance in this case. Such rule is based upon the fact that

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4/ Florida Standard Jury Instruction 4.4 reads: "Reasonable care on the part of a child is that degree of care which a reasonably careful child of the same age, mental capacity, intelligence, training, and experience would use under like circumstances."

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attractive nuisance encompasses the concept of contributory negligence, thus making a separate instruction unnecessary. See Larnel Builders, Inc., 110 So.2d at 650. In an attractive nuisance case, the burden is on plaintiff to prove the child's absence of negligence and if the burden is not met, there can be no recovery. Lister, 371 So.2d at 135-36. Thus, the attractive nuisance doctrine does not excuse children from their negligence, but is an outright bar to their recovery if they are negligent.[5/]

After Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) and Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977), there is no legitimate place in Florida law for application of contributory negligence under the attractive nuisance doctrine. See Am.Jur.2d, New Topic Series Comparative Negligence, §34 (1977) ("Since the law of attractive nuisance is but a phase of the law of negligence, it necessarily follows that in a jurisdiction where the comparative negligence doctrine is applicable, the comparative negligence statute applies to an action involving an attractive nuisance where the plaintiff child is guilty of contributory negligence."). It surely would be a perversion of the compara-

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5/ The trial court's refusal 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. 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. Thus, plaintiff was, if anything, benefitted by the action proceeding under ordinary negligence principles and the comparative negligence charge being given.

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tive negligence doctrine to hold that it applies to everyone in the state of Florida except trespassing children.

Even if this Court should find that the jury should have been given some form of the attractive nuisance charge (which is steadfastly denied by defendant), based on the jury's negligence finding, judgment must be entered for defendant pursuant to existing attractive nuisance doctrine. Such result, of necessity, requires this Court to address the continued viability of the attractive nuisance rule following Hoffman v. Jones. If comparative negligence is incorporated into attractive nuisance, as it must be, then the proper result was reached in this case.

Finally, there is no basis for plaintiff's request for a new trial on damages. Plaintiff never objected to the damages award in the trial court either by moving for an additur or raising damages as an issue in its motion for new trial. Plaintiff's damage award of $10,000 is supported by the evidence and any error concerning the attractive nuisance doctrine does not require a new trial on damages.

II. THE TRIAL COURT WAS CORRECT IN DENYING PLAINTIFF'S MOTIONS FOR DIRECTED VERDICT.

Defendant's concession on negligence did not entitle plaintiff, ipso facto, to a directed verdict on his attractive nuisance claim. Plaintiff brought a premises liability action and alleged that defendant owed the child a duty based on the attractive nuisance doctrine. Defendant did not stipulate that the only issue for trial was attractive nuisance. By admitting

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negligence, defendant merely removed the duty issue from the case. There remained the issue of the child's negligence, which would have to be resolved by the jury even if attractive nuisance was the only issue before the court. Consequently, a directed verdict for plaintiff on liability would have been plain error.

Likewise, plaintiff's motion for directed verdict on comparative negligence was based entirely upon the premise that this case should have gone to the jury on attractive nuisance charges.[6/] Plaintiff does not contend that there was no evidence of the child's negligence, as he cannot, because there was ample competent evidence to support the jury's finding of comparative negligence. The trial testimony revealed that the child went to the construction site despite the fact that his parents had told him not to. [R. **102**, 147-51, **1801**. He understood that construction sites are considered dangerous and in fact discussed this concept with his friend before they headed out. [R. 183-86]. Upon arriving at the site, he climbed a ladder, even though he knew it could be dangerous and that he was not to use one except under the supervision of his father. [R. **1821**. In light **of** these facts, the issue was properly presented to the jury.

6/ See the discussion supra at 7-8 regarding the inappropriateness of charging a jury on both attractive nusiance and contributory negligence.

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CONCLUSION

Based on the foregoing authorities and legal analysis, B & P USA, Inc. respectfully requests that this Court affirm the final judgment in all respects.

Respectfully submitted,

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