O/a 2-7-90

IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

Case No.: 74,496

vs.

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

Respondent.

PETITIUNERS' REPLY 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 Circuit, West Palm Ueach, Palm Beach County, Florida.

Case No.: 85-4214 CA (L) H

ALEX T. BARAK, ESQUIRE
Attorney for Petitioners
First Nationwide Bank Building
633 N.E. 167th Street
Suite 517
N. Miami Beach, FL. 33162
(305) 652-8488 Dade
(305) 462-3998 Broward
FBN 327637

TABLE OF CONTENTS

TABLE OF CASES AND CITATIONS..... ii

ADDITIONAL FACTS IN REBUTTAL.....1

REBUTTAL ARGUHENT I .....

REBUTTAL ARGUHENT II 13

CONCLUSION..... 15

CERTIFICATE OF SERVICE 15

TABLE OF CASES AND CITATIONS

CASES

Bradley v. Guy
438 So.2d 854 (Fla. 5th DCA 1983).....6

Corbett v. Dade County Board of Public Instruction,
372 So.2d 971 (Fla. 3rd DCA 1979) cert. denied,
383 So.2d 1192 (Fla. 1980).....6

Dukes v. Pinder,
211 So.2d 575 (Fla.3d DCA 1968), cert. denied,
123 So.2d 700 (Fla. 1968).....1,3,4,5,8,10,14

Goodman v. Becker,
430 So.2d 560 (Fla. 3d DCA 1983).....6

Green Springs v. Calvera,
239 So.2d 264 (Fla. 1970).....4,10,11,12

Idzi v. Hobbs,
186 So.2d 20 (Fla. 1966).....6

Larnel Builders v. Martin,
110 So.2d 649 (Fla. 1953).....1,3,4,5,8,14

Lister v. Campbell,
371 So.2d 133 (Fla. 1st DCA 1979), cert. denied,
378 So.2d 34G (Fla. 1979).....6

Nartinello v. B & P USA, Inc,
545 So.2d 956 (Fla. 4th DCA 1389).....4,12,14

Ruiz v. Cold Storage,
306 So.2d 153 (Fla. 2d DCA 1975).....6

OTHER CITATIONS

16 ALR 3d 58 "Attractive Nuisance," Section 3(c).....14

41 Fla. Jur. 2nd, "Premises Liability, ■ Section 45, 56, 58.....14

Florida Standard Jury Charges 3.2d, 4.4,
an comments thereon..,.....1,2,3,4,5,6,7,8,14

ADDITIONAL FACTS IN REBUTTAL TO RESPONDENT'S ANSWER BRIEF

Defense counsel stated that the jury instructions of attractive nuisance state there is no defense of contributory negligence (R308), and urged the Court to give 3.2d (R312), as opposed to the Court's attempted special instruction (R 309-10), if it were inclined to instruct on attractive nuisance .

In closing, defense counsel argued that he was not admitting that his client was attracting young children onto the construction site (R338) and claimed the real negligence of the case belonged to the minor in going where he was not allowed (R351).

In their Motions for New Trial, the Respondents claimed that the credibility of their case was diluted as the result of not having the attractive nuisance jury charges (R775), and the entire flavor of the trial was based upon this doctrine (R772), and that only this doctrine could afford them a fair trial (R776). A new trial was demanded. (R770-777).

REBUTTAL TO RESPONDENT'S SUMMARY OF ARGUMENT

The law cited in Respondent's brief does not support the holding of the Fourth District in the instant case. Respondent has tailed to rebut the caselaw ot Dukes v. Pinder, 211 So.2d 575 (Fla. 3d DCA 1968), cert. denied, 219 So.2d 700 (Fla. 1968); Larnel Builders, Inc. v. Martin. 110 So.2d 649 (Fla. 1959); and the Florida Standard Jury Instruction, 3.2d, and comments thereon. The

holding in the Fourth District is without supporting law.

If the Respondents were not entitled at trial to a Directed Verdict on liability, then the trial court should have chanelled the claim of the alleged negligence of the minor into the final element of the attractive nuisance doctrine, contained in 3.2d of the Florida Standard Jury Instructions.

The attractive nuisance doctrine has a different set of jury instructions than a standard negligence case and these were not charged to the jury and Petitioners' trial counsel was precluded from explaining and arguing the attractive nuisance doctrine to the jurors.

Petitioners' entire claim was tainted and prejudiced by giving of an improper set of jury instructions because the apparent issue of the minor's realization of the risks involved in coming into the area of the dangerous construction site and meddling with it was never given to the jurors and counsel could not argue in closing with the force of the law.

REBUTTAL ARGUMENT I

The Respondent's trial admission of negligence, or that there was a duty to the Plaintiffs which was breached (R12), could constitute a partial admission, if not a full one, of liability, but it could not convert the case from an attractive nuisance claim into one of ordinary negligence.

Even though Respondent made the admission of breach of duty,

a reference to the duties alleged in the Complaint and the cause of action mentioned in the Joint Pre-Trial Stipulation --attractive nuisance--- must be made.

Whatever the laws concerning possible remaining issues of the applicable attractive nuisance doctrine were, they had to be tried and decided by the jurors, if the Respondent's admission did not entitle to Petitioners to a direct verdict on liability because the framed issues to be tried, as stated by opposing counsel, were "comparative negligence and damages" (R13).

If no directed verdict was authorized because there remained the issue of the so-called negligence of the child, it had to be chanelled to the theory of law pleaded --attractive nuisance-- and that channel involves the last element of attractive nuisance contained in Florida Standard Jury Instructions 3.2d:

> 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.

Therefore, it was prejudicial to the Plaintiffs at trial to have had presented to the jurors ordinary negligence charges which were not applicable. **Dukes** v. Finder, supra; Larnel Builders v.Martin, supra; Florida Standard Jury Instructions, 3.2d and comments thereon.

Attractive nuisance was the vehicle the Petitioners were attempting to use and prove, and Respondent's admission could not convert the case into one of ordinary negligence principles.

Respondent has not and cannot cite a single case wherein the theory of recovery pleaded was attractive nuisance, there was evidence of the same, and the trial court refused to give appropiate attractive nuisance jury charges.

No matter what defendant's admission amounted to, whether total liability or partial liability, the MARTINELLOS were entitled to have the law applicable to their case instructed to the jurors.

The minor, CHRISTIAN MARTINELLO was an obvious trespasser at the construction site. Only by asserting attractive nuisance, did B & P USA, Inc. concede negligence. This concession admitted that the minor would be treated as an invitee because the attractive nuisance doctrine makes that conversion. Once the doctrine is employed, only strained logic could support the use of ordinary negligence issues in violation of Dukes v. Pinder, supra; Larnel Builders v. Martin, supra; Florida Standard Jury Instructions, supra.

There is no law to support the Fourth District's decision in Martinello v. B & P USA, Inc., 545 So.2d 956 (Fla. 4th DCA 1989).

When Respondent argues that ardinary negligence applied because attractive nuisance was no longer applicable, there must have been some support from a legal source. There was and is none. The Fourth District in Martinello, supra, misconstrued Green Springs v. Calvera, 239, So2d. 264 (Fla.1970) in its entirety.

There is no law to support the holdings that ordinary negligncе principles applied to CHRISTIAN MARTINELLO, a trespasser

on a construction site who pleaded an attractive nuisance claim. Nowhere in the record is there any facts to support that he was an invitee in fact. He only became an invitee by the use of the legal doctrine of attractive nuisance. Once this doctrine was employed, it was reversible error to apply ordinary negligence principles.

Respondent has not and cannot cite a single Florida case to support its position that once there was an admission of negligence to this attractive nuisance claim and left for determination was the negligence of the minor, that the case can proceed an ordinary negligence principles, as opposed to the last element of Florida Standard Jury Instruction 3.2d.

Respondent has failed to rebut the clear dictates of the comments to 3.2d, Larnel Builders v. Martin, supra, and Dukes v. Pinder, supra.

Also, glaring is Respondent's complete failure to address the issue of prejudice to the Plaintiffs below, as they were unable to argue with the force of the law of the attractive nuisance doctrine at closing and explain its history and rationale.

Respondent never argued at trial that this was not an attractive nuisance case. In fact, defense counsel made reference to the standard charge on attractive nuisance and urged that the trial court give the entire instruction, rather than a portion thereof (R308), if the court would be inclined to instruct on the attractive nuisance doctrine.

Respondent has failed to address the essential issue that jury

instructions must he hased and given on the law applicable, facts proved, and where there is evidence to support a particular charge. Bradley v. Guy, 438 So.2d 854 (Fla.5th DCA 1983); Goodman v. Becker,430 So.2d 560 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); Ruiz v. Cold Storage, 306 So.2d 153 (Fla. 2nd DCA 1975).

Facts which may constitute an attractive nuisance entitle a Plaintiff to have the attractive nuisance liability determined by the jury. Whether a child realized the risk involved with meddling with an attractive nuisance is an issue for a jury to dertermine, even if the child has been instructed about the condition and the danger thereof. Idzi v. Hobbs, 186 So. 2d 2o (Fla. 1966); Lister v. Campbell, 371 So. 2d 133 (Fla. 1st DCA 1979), cert. denied, 378 So 2d 346 (Fla. 1979). Here, in the instant action there was sufficient evidence that the minor did not realize the risk (R 185, 186, 187, 188, 254-5, 257, 259).

Respondent cannot argue, by any stretch of the imagination, that the specific issue of the child's appreciation and realization of the risk involved in meddling with the construction site was covered in the given instructions, which included Florida Standard Jury Instruction 4.4, negligence of a minor. Pages 19 and 20 of the Petitioners' Initial Brief on the Merits sets forth the actual language.

Not only was the minor entitled to have this issue submitted

to the jurors, his trial counsel was also entitled to argue in closing the public policy, purpose, rationale, and history of the attractive nuisance doctrine in order to convince the jurors of the viability of the claim and to point out that the jurors had to follow the law even if they disagreed with the doctrine.

Stripped of their right to have the proper and specific issues submitted to the jurors, the Martinellos were laid bare in closing argument withuut the protection afforded by the doctrine. The Respondent in closing was successfully able to attack the credibility of the minors claim who was trespassing in a dangerous construction site:

> ...the real negligence in this case ... is the negligence of Christian going to that construction site when he fully knew he wasn't allowed to be there.
> (R351)

> ...when you look at the comparative negligence and put down a breakdown and responsibility for the acts...
> (R353)

These two excerpts clearly show an argument of ordinary negligence, and not the issue of realization of risk involved, as is covered in 3.2d of the Florida Standard Jury Instructions. The jury could have easily believed that the minor should nut have been there, and but could have found that the ten-year old did not realize the risk involved and would then have given him a full recovery.

Because the flavor of the case was changed into an all-out

assault on the minor's negligence, the damages award to the minor was tainted. Common sense and logic dictated that the child was where he did not belong and counsel for the child could not argue that there is a special law designed to protect children and give them a recovery where an adult would have no viable cause of action.

Attractive nuisance cases require attractive nuisance jury instructions a5 are provided in Florida Standard Jury Instructions, 3.2d.

Standard negligence cases require standard or ordinary negligence jury charges.

There are various forms of negligence, including ordinary negligence, attractive nuisance, res ipsa loquitur, and professional malpractice. Each has certain unique jury instructions which triggers counsel's right to make certain arguments and explanations during closing.

In Dukes v. Pinder, supra, involving an attractive nuisance claim, attractive nuisance charges were correctly given and the Third District upheld the trial court's decision not to charge with ordinary negligence instructions.

The comments to Florida Standard Jury Instruction 3.2d clearly contain the appropiate instructions for an attractive nuisance case, supported by Larnel Builders, Inc. v. Martin, 110 So.2d 649 (Fla. 1959).

Martinello, the instant case, presents a classic attractive

nuisance case, fit for a law school torts textbook. It was a construction site of single-family homes (R 168,392,396,410), which was not fenced in as it should have been. (R 160). The Respondent's representative testified that the purpose of the fences, inter alia, is to keep out children (R160). We further stated that the ladder in a photograph (Exhibit 1-B) was built by the Respondent and was at times left upright against the homes, although they were supposed to be put away (R161). Two boys, including the minor Petitioner, climbed up the ladder onto the roof of one house (R 168-9, 186, 187, 188).

The Joint Pre-Trial Stipulation (R410), states, inter alia, that " ...the Defendant was negligent, pursuant to the 'attractive nuisance' doctrine ... enticing minors to climb up to the roof of said house" (R120).

The Respondent did not claim in its affirmative defenses or in the Joint Pre-Trial Stipulation that it objected to the attractive nuisance doctrine or that it was inapplicable.

Accordingly, when the Respondent, on the first day of trial admitted negligence, that is, duty and breach of duty (R12), it could only be to the elements of attractive nuisance which was the only theory of recovery pleaded. The admissions could not convert the Petitioners' case into one of standard negligence.

Therefore, attractive nuisance was the type of claim which should have been submitted to the jurors and counsel would then have been entitled to explain and argue this law in closing. The

fact that the Respondent may have admitted to some of the elements of attractive nuisance dos not authorize the Court to charge on a theory not pleaded or attempted to prove --standard negligence. Dukes v. Pinder. supra.

During trial, the Petitioners attempted to further prove attractive nuisance with some additional photographs, and the Court did not want further evidence of the claimed issue after the respondent's admission of the breach of duty to the minor (R12).

Opposing counsel only argued against the use of attractive nuisance jury instructions because standard negligence instructions would and did change the entire flavor of the case.

Respondent would like to bury the countless references to the attractive nuisance claim in the record (R32, 33, 46, 72, 92, 93, 160, 161, 168, 169, 173, 174, 179, 185, 186, 187, 188, 203, 204, 254,255, 256, 257, 258, 259, 260, 273, 274, 275, 273, 280, 282, 283, 284, 285, 286, 304, 305, 311, 312, 314, 332, 396, 410, 732) and hope that this court will ignore their presence. This is because ordinary priciples of negligence are more favorable to a defendant, when the facts of a case are that a child trespasser climbed onto a roof of a house under construction and fell.

That is why the Respondent has continued to cite Green Springs v. Calvera, supra, which has some language --although taken completely out of context -- favorable to it's position.

In Green Springs v. Calvera, supra, it was a standard negligence case. A minor, a guest at a residential home, was

killed when an item fell on the minor's head. The trial court and the appellate courts correctly held that atractive nuisance was inapplicable.

A close analysis of Green Springs reveals the complete inappicability to the instant action. There, the deceased minor was an invitee at a completed residential home. Here, CHRISTIAN MARTINELLO was a trespasser at a construction site. There was no was evidence to support an attractive nuisance claim in Green Springs because the child was an invitee in fact and was not lured to a dangerous location which the owner knew or should have known would be attractive to children.

This Honorable Court should lay to rest the attempted application of Green Springs to the case sub judice.

Respondent describes as "absurd" (p.7 of its brief) the argument that at least the last element of the attractive nuisance charge should have been instructed to the jury, without justifying how that particular element, the realization of the risk involved in meddling with the attractive nuisance, was covered elsewhere in the instructions.

Respondent argues that since the jury found the minor 80%at fault, it found that the minor knew and appreciated the risk of climbing onto the roof of a house, and that the minor benefitted from proceeding under ordinary negligence principles. This argument is fundamentally flawed because the proper legal issues were not presented for determination and counsel for the minor

could not argue at closing with the force of the law. It is unsound logic that a finding Lased upon erroneous applications of the law justifies the giving of the incorrect instructions.

A jury could have easily found that the minor did not appreciate the risk involved and would have given him a full recovery, at a much higher figure than $10,000.00, if the proper flavor of the attractive nuisance doctrine were given. A jury could consider that the minor did not belong on the roof (negligence), but find that he did not realize and appreciate the risk (R185, 186, 187, 188) and give him a verdict.

The Complaint, Joint Pre-Trial Stipulation and evidence forced the Defendant to admit at trial that it owed a duty to the minor which it breached. This converted the minor into a invitee via the attractive nuisance doctrine *so* that he could recover, even though he was a trespasser. Respondent, incredibly would have this court believe that once a defendant is forced to or concedes certain elements of on attractive nuisance claim, that the remainder of the case should proceed on ordinary negligence principles. Green Springs v. Calvera, supra, does not stand for this proposition, nor is there only law in support thereof cited in the Fourth District's decision, Martinello v. B & P USA, Inc., supra.

Florida law is completely to the contrary.

Respondent apparently urges this court to adopt comparative negligence to attractive nuisance cases. This would greatly prejudice injured children's rights. As the law is now, it is an

all or nothing situation wherein the key issue is whether the child realized the risk involved in meddling with the dangerous condition. Based upon the elements contained in 3.2d of the jury charges, there appears to be in the law a forgiving of children's wrongdoing in going to a dangerous site, if there is a finding of lack of realization of the risk, because children often do not appreciate risks and dangers as adults do and we wish to protect children. Applying ordinary principles of negligence will almost always result in a defense verdict or comparative negligence of the minor in a very high percentage.

Nor is there any merit to Respondent's argument that any error concerning the attractive nuisance doctrine does not require a new trial on damages and that the Petitioners never objected to the damages award.

Petitioners' post-trial motions (R770-778) specifically addressed the issue that the creidbility of their case was diluted, that the failure to give the proper jury instructions prejudiced and tainted their case, that only the doctrine could afford them a fair trial. Implied in that is that a new trial would include one on damages as well. The briefs in the Fourth District asked for a new trial on damages, as does the pending appeal.

REBUTTAL ARGUMENT II

It was defense counsel who at trial stated he was contesting only comparative negligence and damages (R12).

If he had stated he was contesting whether the minor realized the risk involving with meddling with the dangerous condition, then there would have been an appropriate jury instruction, 3.2d, applicable.

However, the statement of defense counsel must be taken in light of the caselaw that "comparative negligence' is not to be considered in an attractive nuisance case. See comments an Florida Standard Jury Instruction, 3.2d; Larnel Builders Inc. v. Martin, supra; Dukes v. Pinder, supra; 41 Fla. Jur.2d "Premises Liability," section 58; 16 ALR 3d 58, section 3(c); dissenting opinion, Martinello v. B & P USA, supra.

CONCLUSION

Based upon the foregoing law, legal analysis, and rebuttal of Respondent's arguments, the Petitioners respectfully request a reverse of the Fourth District's holding on the attractive nuissance issues and the relief requested in the initial brief on the merits.

Respectfully submitted,

ALEX T. BARAK, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Respondent's Reply Brief was mailed this 5th day of January 1990 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
N. Miami Beach, FL. 33162
(305) 652-8488 Dade
(305) 462-3998 Broward
FBN 327697