OA 11-6-87

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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 70,054

WALT DISNEY WORLD CO., a Delaware corporation; COLUMBIA CASUALTY COMPANY; and LLOYDS OF LONDON,

Petitioners,

vs.

MARIETTA GOODE, as personal representative of the Estate of JOEL GOODE,

Respondent.

_______________________________________/

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF THE POSITION OF THE RESPONDENT

THE ACADEMY OF FLORIDA TRIAL LAWYERS

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I. STATEMENT OF THE CASE AND OF THE FACTS

The Academy of Florida Trial Lawyers adopts the statement of the case and of the facts of respondent.

II. ISSUES ADDRESSED BY AMICUS CURIAE THE ACADEMY OF FLORIDA TRIAL LAWYERS

As amicus curiae, the Academy will address the two issues raised by petitioners which do not require detailed reference to the Record on Appeal, i.e., the nature of Disney World's duty and whether the damages should be deemed legally excessive. We respectfully state these two issues as follows:

A. WHETHER AN AMUSEMENT PARK OWES A DUTY TO USE REASONABLE CARE IN THE OPERATION OF ITS PARK TO AVOID PREVENTABLE AND FORESEEABLE DROWNING DEATHS OF CHILDREN BUSINESS INVITEES ON ITS PREMISES

B. WHETHER THE DAMAGES AWARDED BY THE JURY AND APPROVED BY THE TRIAL COURT AND BY THE DISTRICT COURT OF APPEAL SHOULD NOW BE DEEMED EXCESSIVE AS A MATTER OF LAW

III. SUMMARY OF THE ARGUMENT

ISSUE A: Walt Disney World's ultimate position on this appeal is that it did not have a duty to use ordinary, reasonable care to prevent a four-year-old business invitee from drowning in a water hazard on its premises. The argument is based upon sophistry (a careful manipulation of the cases dealing with the attractive nuisance doctrine, which applies to trespassing, rather than invited, children) and upon unjustified cries of alarm (the notion that by being required to use reasonable care, Disney World somehow suffers "absolute liability"). But it is not based upon fairness; nor is it based upon the existing law. Under the well-established law of Florida, Disney World owed Joel Goode a duty to exercise reasonable care for his safety; and if Disney World failed to use reasonable care to prevent a young child such as Joel from drowning in a hazard on its commercial premises, then under the law, Disney World may be liable. The case was submitted to the

jury on established principles of negligence law; it was approved by the district court of appeal on that basis; and we respectfully submit that the Court would be extremely ill-advised to fashion a new rule of immunity permitting operators of amusement parks to use less than reasonable care for the safety of children business invitees.

ISSUE B: The damages awarded by the jury and approved by the trial court and by the district court of appeal were substantial, but were not legally excessive. This Court has historically recognized that the parents' grief and suffering on the death of a child is a very significant type of compensable loss and one which will support a substantial verdict; the appellate courts of Florida and other states have approved similar verdicts for the wrongful death of a child; and this Court has recently once again reaffirmed the paramount role of the jury in fixing such noneconomic damages. The verdict should not now be deemed excessive as a matter of law.

IV. ARGUMENT

A. The Court Should Reject Walt Disney World's Argument That It Did Not Have A Duty To Use Ordinary, Reasonable Care For Joel Goode's Safety

Disney World argues that it has no duty whatsoever to prevent the millions of children who are business invitees on its premises each year from drowning in its moat. Under Disney World's version of the Allen[1] rule, it could simply remove the existing fence altogether and **still** avoid all responsibility for the deaths of children drowning in the moat. To support such an irresponsible position, Disney World has manipulated the holdings of the attractive nuisance cases, which raise the standard of care owed by a landowner to trespassing children, but which limit application of the doctrine in drowning cases where there is no unusual danger in the body of water. The trouble with Disney World's argument is that Joel Goode was not a trespassing neighborhood child who

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[1] Allen v. William P. McDonald Corp., 42 So.2d 706 (Fla.1949).

ventured onto vacant land with a borrow pit — he was instead a business invitee at an amusement park. Accordingly, Disney World owed him a duty of reasonable care under the circumstances — even if it meant taking reasonable steps to prevent him from drowning in the moat.[2]

Perhaps the best illustration of this point is Adler v. Copeland, 105 So.2d 594 (Fla. 3d DCA 1958), an action for the drowning death of a five-year-old girl in a neighbor's backyard swimming pool. The pool in Adler was fenced, but on the day of the accident one of the two gates was left unlocked. The issue on appeal was whether the homeowner, who was aware of the presence of the child in the backyard, was guilty of any actionable negligence. The court first pointed out that the swimming pool was not a trap, and accordingly the plaintiff could not rely on the doctrine of attractive nuisance. 105 So.2d at 595-96. The court's analysis did not stop at that point, however:

> "Lacking the application of the attractive nuisance doctrine, which is an exception to the rule of nonliability to infant trespassers, the plaintiff must rest her case on **the relationship created between the landowner and the deceased child with the consequent duties that flow therefrom.**" 105 So.2d at 596 (emphasis added).

The court went on to determine that the Adler child was not a trespasser, nor was she an invitee (such as Joel Goode), but rather she was a licensee. Notwithstanding the lower duty owed to a licensee than to an invitee, the court held that a jury question was presented as to the owner's duty to prevent the child from drowning in the fenced pool:

> "The degree of care should be commensurate with the attendant facts and circumstances, and in this instance, one

---

[2] While some of the attractive nuisance cases do not expressly articulate the child's status on the premises, it is a given that the child was trespassing -- for if the child is an invitee, then the plaintiff need not rely at all on the attractive nuisance theory in order to recover. Crutchfield v. Adams, 152 So.2d 808 (Fla. 1st DCA), cert. denied, 155 So.2d 693 (Fla.1963). See also Maldonado v. Jack M. Berry Grove Corp., 322 So.2d 608 (Fla. 2d DCA 1975); Prosser, The Law of Torts, §59, at 366-67 (4th Ed. 1971).

of those facts was the tender years of the deceased child. It is a jury question whether the duty has been violated." Id.

Thus, Adler, which was cited with approval by this Court in Concrete Constr., Inc. of Lake Worth v. Petterson, 216 So. 2d 221 (Fla.1968), holds that: (1) if the attractive nuisance doctrine does not apply, then the court must still look to the common law duties that flow from the parties' respective statuses; (2) even if a body of water does **not** constitute a trap, the owner may nevertheless be found liable for a drowning death where he breached his **particular** duty under the circumstances; and (3) when the particular duty is that owed to a licensee such as the Adler child (or to an invitee such as Joel Goode), then the failure to take appropriate measures to prevent the child's access to the water (e.g., by fencing the water or by locking the gates) may be considered by the jury in determining whether the duty has been breached. The rule that a landowner may be required to take reasonable steps to prevent an **invited** child from drowning in no way conflicts with the Allen rule that there is generally no duty to prevent a **trespassing** child's access to water that does not constitute a trap.

The Adler court recognized that, in determining the specific duty owed to a licensee under the circumstances (and therefore a fortiori to an invitee), "consideration must be given to the immaturity of the deceased . . . ." 105 So.2d at 596. Indeed, this Court has long recognized that the owner of a commercial premises is charged with a special responsibility for the safety of young children who are invited onto the premises. Burdines, Inc. v. McConnell, 1 So.2d 462 (Fla.1941). In McConnell, the Court upheld a verdict based upon the defendant store's negligence in failing to prevent a three and a half-year-old child from gaining access to the moving parts of an escalator. Significantly, the Court found it unnecessary to analyze the case in terms of attractive nuisance, and had the following to say with respect to Burdine's duty to use reasonable care under the circumstances:

> "The plaintiff's status according to the pleadings was that of an invitee. As such the defendant owed a duty to exercise a reasonable degree of care not to injure him.
>
> "Circumstances alter the application of the rule to cases. What is reasonable care to one class of invitees might fall short as to another. **Those who invite children, who have not arrived at the age of discretion, to go upon their premises are required to exercise a relatively higher degree of care for their safety than to adults. That degree of care is commensurate with the attending facts and circumstances of each case.**
>
> "The law imposes such duty. It is a jury question whether the duty has been violated." 1 So.2d at 463 (emphasis added; citations omitted).

This heightened responsibility for the safety of children of tender years was superimposed on Disney World's pre-existing general obligation to use reasonable care for the safety of all of its patrons. See, e.g., Ashcroft v. Calder Race Course, Inc., 492 So.2d 1309, 1312 (Fla.1986); Mosqueda v. Paramount Enterprises, Inc., 111 So.2d 63, 65 (Fla. 3d DCA), cert. denied, 115 So.2d 415 (Fla.1959) ("there is imposed upon such operators [of amusements] a higher degree of diligence than is required of stores, banks and other places of business").

Apparently recognizing the inherent weakness of its position, Disney World resorts heavily to an in terroram argument that the Fifth District has created "absolute liability" for all landowners with water on their property — as if the requirement that a commercial enterprise use reasonable care for the safety of a four-year-old business invitee somehow constitutes "absolute liability." To the contrary, by applying the standard of reasonable care under the circumstances in this case, the Fifth District did not change the law one whit: the rule continues to be that, with regard to trespassing children, landowners only owe the minimal duty of care.

The ingenuity of Disney World's argument is that it would exclude the attractive nuisance doctrine as a remedy (because the moat is purportedly "not a trap") and at the same time make its own independent duty to exercise reasonable care for Joel's safety

vanish into thin air. Such reasoning is as illogical as it is offensive. Disney World owed Joel as a business invitee a duty of reasonable care under the circumstances; the jury found that under the particular facts of this case Disney World breached that duty so as to proximately contribute to Joel's death; and no amount of sophistry should allow Disney World to escape responsibility for the consequences of its own negligence.

B. The Damages Awarded by The Jury Are Not So Inordinately Large As Obviously To Exceed The Maximum Limit Of A Reasonable Range Within Which The Jury May Properly Operate

This Court recently had occasion to revisit the respective roles of juries and courts in fixing tort damages in Ashcroft v. Calder Race Course, 492 So. 2d 1309 (Fla.1986):

> "In tort cases damages are to be measured by the jury's discretion. The court should never declare a verdict excessive merely because it is above the amount which the court itself considers the jury should have allowed. The verdict should not be disturbed unless it is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." 492 So.2d at 1314, quoting Bould v. Touchette, 349 So.2d 1181, 1184-85 (Fla.1977).

The issue, then, is whether the jury's verdict in the present case can be said as a matter of law to be so inordinately large as obviously to exceed the maximum limit of the reasonable **range** for verdicts for the wrongful death of a minor child.

The permissible range of this type of verdict will be expected to increase over time with inflation. Cf. Bould v. Touchette, 349 So.2d 1181, 85-86 (Fla.1977). Moreover, this Court has historically recognized that the parents' mental pain and suffering on the death of a young child is an overwhelming loss which typically results in severe, permanent distress and which will justify a substantial verdict for damages. Winner v. Sharp, 43 So.2d 634, 636-37 (Fla.1949). In another context, the Court recently reaffirmed the value and significance of the parent/child relationship:

> "Every child's smile, every bond of love and affection, every reason for parental pride in a child's achievements, every contribution by the child to the welfare and well-being of the

> family and parents, is to remain with the mother and father." Fassoulas v. Ramey, 450 So.2d 822, 824 (Fla.1984), quoting Rieck v. Medical Protective Co., 64 Wis.2d 514, 518, 219 N.W. 2d 242, 244-45 (1974).

In Fassoulas (which concerned the measure of damages in a "wrongful birth" suit), the Court specifically approved the opinion of the Third District Court of Appeal, where the court stated:

> "The prevailing law in this area, as stated above, reflects some of the most fundamental values of our culture which has long honored the institution of the family and cherished the inestimable worth of children. We believe deeply as a people that our children represent the destiny of the country, our best hope for the future, and a treasure beyond compare . . . ." Ramey v. Fassoulas, 414 So.2d 198, 201 (Fla. 3d DCA 1982), affirmed, 450 So.2d 822 (Fla.1984).

We respectfully submit that the jury's verdict to compensate Mr. and Mrs. Goode for the loss of such a treasure need not be measured against other verdicts approved on appeal in order to conclude that it was within the permissible range; however, even a rough comparison of other representative verdicts approved on appeal clearly demonstrates that the verdict in the present case cannot be said to exceed the maximum limit of the appropriate range:

Case	**Damages**	**CPI**[3]	**Damages in 1986 Dollars**
Compania Dominicana de Aviacion v. Knapp, 251 So.2d 18 (Fla. 3d DCA), cert. denied, 256 So.2d 6 (Fla.1971)	$1.8 million for pain and suffering of parents of a 15 year old boy	1971 = 121.3	$4,873,207
Kirk v. Ford Motor Company, 383 N.W. 2d 193 (Mich. App. 1985),	$3.0 million for loss of society of 19 year old son and brother	1985 = 322.2	$3,057,728

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[3] Consumer Price Index for all items, all urban consumers, according to Bureau of Labor Statistics (1967 = 100; 1986 = 328.4).

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Case	Damages	CPI	Damages in 1986 Dollars
MacCuish v. Volkswagonwerk A.G., 494 N.E. 2d 390 (Mass. App. Ct.) rev. denied, 497 N.E. 2d 1096 (Mass. 1986)	$3.0 million for loss of service and society to parents of 15 year old girl	1986 = 328.4	$3,000,000
Gulf States Utilities Co. v. Reed, 659 S.W. 2d 849 (Tex. App. 14th Dist. 1983)	$1.0 million to mother (only) for loss of society and mental anguish due to death of 13 year old son	1983 = 298.4	$1,100,536 (one parent)
Metropolitan Dade County v. Dillon, 305 So.2d 36 (Fla. 3d DCA 1974), cert. denied, 317 So.2d 442 (Fla.1975)	$500,000 to mother and $400,000 to father for pain and suffering due to death of a 6 year old child	1974 =161.2	$1,833,500
Corbett v. Seaboard Coastline R. Co., 375 So.2d 34 (Fla. 3d DCA 1979), cert. denied, 383 So.2d 1202 (Fla.1980)	$1.0 million for pain and suffering of parents of a teenaged girl	1979 = 217.4	$1,510,580

The verdict in the present case, while substantial, clearly falls within the reasonable range for similar death verdicts. Were this Court to deem the verdict excessive as a matter of law, then the holdings in Bould, Ashcroft and myriad other Florida decisions would instantly be questioned; this Court would soon be inundated with challenges to routine decisions on the basis of "conflict" due to the amount of damages awarded; and the Court would in all probability find itself establishing the "maximum limit of the reasonable range" for verdicts in a wide variety of personal injury and wrongful death actions, which would effectively require evaluating the damages de novo in each case. The Academy respectfully submits that the jury, the trial judge and the district court of appeal performed their respective functions appropriately in

assessing the damages in this case, and that the verdict should not now be deemed legally excessive.

V. CONCLUSION

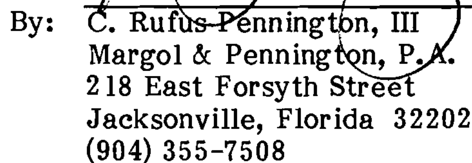
For the foregoing reasons, amicus curiae The Academy of Florida Trial Lawyers respectfully submits that the decision of the District Court of Appeal, Fifth District, should be affirmed.

VI. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to John L. O'Donnell, Jr., Esquire, of DeWolf, Ward & Morris, P.A., 1475 Hartford Building, 200 East Robinson Street, Orlando, Florida, 32801; Joel D. Eaton, Esquire, of Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., 800 City National Bank Building, 25 West Flagler Street, Miami, Florida, 33130; and to Philip Freidin, Esquire, of Freidin & Hirsh, P.A., 44 West Flagler Street, Suite 2500, Miami, Florida, 33130, by U.S. Mail this 2d day of September, 1987.

Respectfully submitted,

THE ACADEMY OF FLORIDA TRIAL LAWYERS



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