IN THE SUPREME COURT
OF THE STATE OF FLORIDA

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

Petitioners/Appellants,

vs. **CASE NO. 70,054**

MARIETTA GOODE, as Personal
Representative of the Estate
of **JOEL GOODE,** on behalf of
MARIETTA GOODE, individually,
and **HARRY GOODE,** individually,

Respondents/Appellees.
_____/

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

PETITIONERS' BRIEF ON JURISDICTION

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Issue:

DOES THE FIFTH DISTRICT'S DECISION REQUIRING PROPERTY OWNERS TO PREVENT ACCESS TO WATER BY AN UNSUPERVISED CHILD AND APPROVING DAMAGES OF TWO MILLION DOLLARS FOR THE CHILD'S DEATH CONFLICT WITH EARLIER DECISIONS HOLDING THAT OWNERS ARE NOT LIABLE FOR DROWNINGS WHERE THERE IS NO UNUSUAL ELEMENT OF DANGER IN THE WATER, AND HOLDING THAT A JUDGMENT OF $1.56 MILLION FOR A CHILD'S DEATH IS EXCESSIVE?

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STATEMENT OF THE CASE AND FACTS

The Fifth District imposed liability on Walt Disney World Co. for failing to prevent access to water by a four year old who was not being supervised by his mother. In doing so, the Fifth District rejected the established rule that liability exists only when the waterway presents a trap. The decision makes property owners absolutely liable for drownings.

Joel Goode drowned sometime after 11:00 p.m. on August 11, 1977. There was no indication of how or why he entered the water. The waterway meanders through a park setting of lawns, trees and flowers between the end of Main Street and the castle, varying in depth from four to five feet, with no significant current. The water is plainly visible, and Mrs. Goode knew of it, having ridden the boats on the water the day before the accident [T.T. Vol. VIII, 130; Vol. IX, 172-173].

The water is completely separated from walkways. In those areas with lawns and landscaping between the water and walk, the fences next to the walk are 31 inches from ground to top rail [T.T. Vol. III, 155]. Where the water is adjacent to a walk, the fence is 36 inches; and on the bridges, 40 inches [T.T. Vol. III, 152-153].

When Joel was last seen, he was playing near the ice cream parlor on a lawn completely encircled by a walk and fence. [T.T. Vol. IX, 174]. Mrs. Goode had watched Joel climb this fence, but did not stop him, even though she admitted knowing he was not supposed to cross the fences. [T.T. Vol. IX, 183].

The area where Joel's body was found [App. 1] was five feet out from a relatively flat bank, on the same side of the water as the ice cream parlor [T.T. Vol. IV, 33]. There was no evidence that Joel, who could not swim, entered the water anywhere else.[1] For Joel to get from where he was last seen to where he was found, he had to cross two fences.

The Honorable Claude R. Edwards originally entered a final summary judgment for Disney because there was no evidence that the area's condition caused the child's death, but the evidence did establish that Mrs. Goode's negligence was the sole known cause of the accident. That judgment was reversed because the Fifth District believed the jury could reasonably infer a causal relationship between:

> having a fence too short to prevent physical access to the moat by small children and the drowning death of Joel Goode. [Emphasis added.]

Goode v. Walt Disney World Co., 425 So.2d 1151, 1156 (Fla. 5th DCA 1982), rev. den., 436 So.2d 101 (Fla.1983)(Boyd, Overton, McDonald, JJ., dissenting). On remand the first jury was unable to reach a verdict.

At the second trial, Plaintiff stipulated she would introduce no evidence it was difficult to get out of the water [T.T. Vol IV, 9; Dis. Op. 3].[2] While Plaintiff's expert

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[1] Plaintiff has disclaimed any inference that Joel entered the water from the opposite bank, 75 to 100 feet away [T.T. Vol. X, 80-81]; or from the bank on the other side of the overhanging patio [Dis. Op., 3, n. 3].

[2] The stipulation was entered to prevent introduction of a video tape showing five and seven year olds getting out of the water [T.T. Vol. III, 204-223].

testified that the water was unreasonably dangerous because if a child slipped on a wet, steep slope, he could slide into the water [T.T. Vol. VII, 157], he conceded that the slope of the bank was irrelevant in the area where Joel was found [Id., 160].

Plaintiff admonished the jury that they would decide, "What do we feel about protecting children," [T.T. Vol. X, 79]; that:

> If I built a swimming pool in my neighborhood and I put up...a two-foot fence.... They would do more than throw me out of the neighborhood.... Would anyone do that, except this corporation which figures they can do what they want? [Id., 90-91].

and urged the jury "to reflect your feelings in a verdict" [Id., 101], concluding that a large verdict was necessary because "a statement needs to be made" about the "callous" conduct [Id., 101, 95].

The jury returned a verdict finding Disney and Mrs. Goode each 50% at fault and assessing damages of $1 million for each parent's mental anguish. A judgment was entered against Disney for $1.5 million.

Disney appealed, alleging error in the application of the law; admission of expert testimony; refusal to instruct on foreseeability, and failure to grant a new trial because of Plaintiff's argument and the excessive damages.

The Fifth District affirmed, addressing only the issues of duty and damages, and held the owner's duty to be "to keep [children] from falling into the water" [Op., 4; 5], refusing to follow the precedents from this Court and other districts

that the owner is not liable unless the waterway has an unusual element of danger [Op., 3-4].

A dissent by Judge Cobb, the author of Goode I, concluded:

> The majority opinion herein has rejected all established Florida precedent in regard to premises liability for the drowning of minors; is in direct conflict with Allen, Hendershot, and other Florida case law; and renders all owners of property with bodies of water thereon potentially liable on a case-by-case basis dependent upon sympathetic jury reactions. [Dis. Op., 4]

A motion for rehearing was denied January 14, 1987, and the notice invoking this Court's discretionary jurisdiction to review conflict was filed February 11, 1987.

SUMMARY OF ARGUMENT

The decision of the Fifth District conflicts with the well-established rule that owners are not liable for drownings unless the water constitutes a trap. The Fifth District's new rule is that owners have a duty to prevent access to the water. This rule not only conflicts with established law, but also makes owners absolutely liable for injuries.

The Fifth District mistakenly rejected the precedents because all but one dealt with attractive nuisances. Contrary to this Court's decisions that attraction makes children invitees, the Fifth District ruled that those cases deal only with the duty owed to infant trespassers.

Finally, the Fifth District's approval of a judgment of $1.5 million directly conflicts with the recent decision of the Third District reversing a judgment for $1.56 million dollars as clearly excessive for the death of a minor child.

I. THE FIFTH DISTRICT'S REQUIREMENT THAT PROPERTY OWNERS PREVENT ACCESS TO WATER DIRECTLY CONFLICTS WITH THE DUTY ESTABLISHED BY ALLEN.

The only jury question concerning any breach of duty identified by the Fifth District was whether a higher fence "would have effectively prevented children of Joel Goode's age from climbing over it" [Op. 5].[3] That question is properly for the jury only if there is a legal duty to build a fence high enough to prevent children climbing it and gaining access to water. A duty to prevent access to water has never been imposed on property owners and has been rejected by two other districts. The Fifth District's decision equating reasonable care to an absolute duty to prevent drownings by preventing access to water, establishes a new rule making property owners liable for drownings regardless of the nature of the water.

This new legal duty directly conflicts with the one established in Allen v. William P. McDonald Corp., 42 So.2d 706 (Fla. 1949) [Emphasis added.]:

> The rule supported by the decided weight of authority is that the owner of artificial lakes... and other pools, streams and bodies of water are [sic] not guilty of actionable negligence on account of drownings therein unless they constitute a trap or raft or unless there is some unusual element of danger...not existent in ponds generally.

The Allen rule had been uniformly followed until this case.[4]

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[3] The Plaintiff's own experiment showed a four year old climbing the Fifth District's suggested fence. [T.T. Vol. V, 166].

[4] Newby v. West Palm Bch. Water Co., 47 So.2d 527 (Fla. 1950); Lomas v. West Palm Bch. Water Co., 57 So.2d 881 (Fla. 1952); Switzer v. Dye, 177 So.2d 539 (Fla. 1st DCA 1957); Banks v. Mason, 132 So.2d 219 (Fla. 2d DCA 1961); Hendershot v. Kapok Tree Inn, Inc., 203 So.2d 628 (Fla. 2d DCA 1967); Ansin v. Thurston, 98 So.2d 87 (Fla. 3d DCA 1957); Kinya v. Lifter, Inc., 489 So.2d 92 (Fla. 3d DCA 1986).

Most recently, the rule was reaffirmed in Kinya v. Lifter, Inc. 489 So.2d 92 (Fla. 3d DCA), rev. den., 496 So.2d 142 (Fla. 1986), where an unsupervised infant drowned in an artificial lake at the apartment complex where he lived.[5] Relying on the decisions rejected by the Fifth District, the Third District ruled that the facts would not support liability because they did not "reveal the existence of a trap or unusual hidden danger."

The setting of the artificial pond in Hendershot v. Kapok Tree Inn, Inc., 203 So.2d 628 (Fla. 2d DCA 1967) is strikingly similar to this case, but the Second District's decision is diametrically opposed. The Second District affirmed the prejudicial dismissal of the complaint in Hendershot because there was no "unnatural, unusual element of danger" to the water, even though there was no fence of any kind for a space of eighteen feet, and the water's depth dropped abruptly from six inches to four feet.

The issue of a duty to prevent access to water by children has been specifically considered by the Second and Third Districts which have refused to impose such a duty. In Banks v. Mason, 132 So.2d 219, 220 (Fla. 2d DCA), cert. den., 136 So.2d 348 (Fla. 1961), the Second District held that the failure to erect a fence that "would have prevented...children ...being near [the] pool" failed to create a cause of action for the drowning of a three year old, even where the owner

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[5] Tenants are invitees in an apartment complex. See, e.g., Grenier v. Central Bank and Trust Co., 391 So.2d 704 (Fla. 3d DCA 1981).

knew children were playing in the vicinity of the pool, because there was no unusual danger in the pool itself.

In Perotta v. Tri-State Ins. Co., 317 So.2d 104 (Fla. 3d DCA 1975), cert. den., 330 So.2d 20 (Fla. 1976), the Third District rejected an injured rescuer's claim that the property owner should have prevented an infant invitee's access to the water. Rather, the court held that the sole responsibility for the accident was on the parents who, knowing of the water, failed to supervise the child.[6]

The Fifth District refused to follow Allen, claiming the rule applied only to attractive nuisance cases, and therefore, only to trespassing children [Op. 4]. This Court has never so limited Allen, which is graphically demonstrated by the Kinya decision applying the rule to a business invitee.

Moreover, the Fifth District's characterization of attractive nuisance cases as trespasser cases is directly contrary to this Court's holding in Concrete Constr., Inc. v. Petterson, 216 So.2d 221, 222 (Fla. 1968): "The child who enters upon another's property in response to a special attraction is classified as an implied invitee...." [Emphasis added]. Thus, once the attraction is established, attractive nuisance cases are invitee cases, governed by the same duty as other invitee cases, and are authoritative where the issue is whether the premises are unreasonably dangerous. See, Cassel v. Price,

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[6] In Walters v. Greenglade Villas Homeowners Assoc., Inc., 399 So.2d 538 (Fla. 3d DCA 1981), the Third District again rejected the claim that the owner had a duty to prevent access to a canal adjacent to the property.

396 So.2d 258, 264 (Fla. 1st DCA), rev. den., 407 So.2d 1102 (Fla. 1981).

The wealth of precedents governing liability in cases such as this makes the Fifth District's analogy to cases of defective sidewalks and deceptive roads [Op. 2] completely inappropriate and unnecessary, displaying the Fifth District's misapprehension of the law in this area.

Neither Kinya nor any other decision has found a jury question in even the total absence of a fence. All the prior cases focus instead on whether some unusual feature of the water makes it unreasonably dangerous. By contrast, the Fifth District did not even suggest the existence of any evidence the waterway was unreasonably dangerous in this case.

The Fifth District's decision requires public and private owners of parks to guarantee that a child cannot gain access to water, unreasonably shifting the primary obligation for the supervision of children from parents to the owners. In attempting to change the duty imposed on owners by Allen, the Fifth District has exceeded its authority, and the decision ought to be reviewed. Hoffman v. Jones, 280 So.2d 431, 433-434 (Fla. 1973).

II. THE DECISION APPROVING DAMAGES OF TWO MILLION DOLLARS FOLLOWING AN IMPROPER ARGUMENT CONFLICTS WITH HARBOR INS. CO. v. MILLER.

Plaintiff's jury argument calling for a large award by the jury to "reflect their feelings" and "make a statement" about "callous corporate conduct" in effect demanded punishment, though no claim for punitive damages had been

made. In response, the jury awarded $2 million dollars for the parents' mental anguish. The Fifth District's decision, without comment on the jury argument, makes the damage award the highest ever approved in Florida for the parents' mental anguish following a child's death.[7]

In Harbor Ins. Co. v. Miller, 487 So.2d 46 (Fla. 3d DCA), rev. den., 496 So.2d 143 (Fla. 1986), the Third District held a judgment of $1.56 million for a child's death so excessive as to demonstrate that the defendant had been denied a fair trial. That court approvingly cited Johnson v. United States, 780 F.2d 902 (11th Cir. 1986), rejecting as excessive an award of $1 million to each parent under Florida law. In Miller, the child was 13 years old; in Johnson, 21 months old. In this case, the total damage award was identical to that in Johnson and the judgment nearly identical to that in Miller.

The Fifth District is now opposed to the Third District and the Eleventh Circuit in defining the boundary of the reasonable range within which the jury may properly operate. It is unreasonable to have different boundaries on the jury's discretion to award damages depending upon the district in which the trial occurs. This Court should exercise its discretion and resolve this conflict.

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[7] In Toyota Motor Co., Ltd. v. Moll, 438 So. 2d 192 (Fla. 4th DCA 1983) an award of $2 million was affirmed for the death of three sisters in a fiery automobile crash. The reported decision does not reflect either that one of the girls was an adult for which no recovery was allowed, or that the award included the father's mental anguish, as well as the mother's.

CONCLUSION

Because the Fifth District's decision expressly and directly conflicts with decisions of this Court and other districts on the questions of the duty of the owners of waterways to children and the permissible range of damage awards for the death of minor children, this Court has jurisdiction pursuant to Fla. Const., Art. V, §3(b)(3).

The Court should exercise its discretion to review this case because if unreviewed the Fifth District's decision will impose upon property owners throughout the state a new duty to prevent children access to water, making the owners absolutely liable for drownings regardless of the nature of the waterway.

Respectfully submitted,

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and

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to JOEL D. EATON, ESQ., 25 West Flagler Street, Suite 1201, Miami, Florida 33130 and PHILIP FREIDIN, ESQ., 44 West Flagler Street, Suite 2500, Miami, Florida 33130 this 20th day of February, 1987.

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