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IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,054

WALT DISNEY WORLD CO.,
etc., et al.,

Petitioners,

vs.

MARIETTA GOODE, etc.,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FIFTH DISTRICT

RESPONDENT'S BRIEF ON JURISDICTION

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I. STATEMENT OF THE CASE AND FACTS

Disney World's statement of the case and facts is constructed almost entirely from the "record proper" and the dissenting opinion below, rather than the face of the decision sought to be reviewed--and it is therefore clearly improper in nearly every respect:

> This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explain in the text above, we are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here. . . .

Reaves v. State, 485 So.2d 829, 830 n. 3 (Fla. 1986). As a result, Disney World's statement of the case and facts should be disregarded here.

Disney World has also badly misrepresented the principal holding of the decision sought to be reviewed. The district court did not even arguably hold that all property owners have an absolute duty to prevent all children from gaining access to all potential drowning hazards, as Disney World repeatedly contends. The district court held simply that, because Joel Goode was indisputably a "business invitee", Disney World owed him the ordinary duty of "reasonable care under the circumstances"; that it was the jury's function to determine whether that duty was breached; that the evidence was sufficient to support the jury's finding that Disney World breached that duty in several respects; and that the decisions relied upon by Disney World below (and asserted in support of "conflict" here) did not require a contrary conclusion--because they dealt with children who were trespassers, and who were therefore owed a considerably less rigorous duty of care than the duty owed to business invitees. For the remaining procedural and factual background to the jurisdictional issues presented here, we simply refer the Court to the face of the decision sought to be reviewed.

II. SUMMARY OF THE ARGUMENT

ISSUE A: The decision sought to be reviewed is not in express and direct conflict with *Allen v. William P. McDonald Corp.*, 42 So.2d 706 (Fla. 1949), or any of the other

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decisions relied upon which merely follow and apply it. Joel Goode was a business invitee, owed the ordinary duty of "reasonable care under the circumstances" at the outset. *Allen* and its progeny state the general rule concerning the more limited duties owed to trespassers and licensees where drowning hazards are involved, and they explain the "attractive nuisance" exception to the general rules--which, if proven, elevates the duty owed to the ordinary duty of "reasonable care". Because Joel was neither a trespasser nor a licensee, but was owed the ordinary duty of "reasonable care" at the outset, there was no need whatsoever for him to prove an "attractive nuisance" elevating a lesser duty of care, and *Allen* and its progeny are therefore neither apposite to the issue presented here nor in conflict with the district court's decision.

ISSUE B: The decision sought to be reviewed is also not in express and direct conflict with *Harbor Insurance Co. v. Miller*, 487 So.2d 46 (Fla. 3rd DCA), *review denied*, 496 So.2d 143 (Fla. 1986), in which the court ordered a new trial because of improper conduct of plaintiff's counsel, and utilized generous pain and suffering awards of $2,500,000.00 to the parents of a wrongfully killed child as evidence that the improper conduct prejudiced the defendant. In the decision sought to be reviewed, there is no mention of any improper conduct by plaintiff's counsel, and the pain and suffering awards were $500,000.00 *less* than the awards in *Harbor Insurance*. The district court's determination that the $2,000,000.00 awarded to Mr. and Mrs. Goode was not excessive as a matter of law therefore does not even arguably conflict with *Harbor Insurance*.

III. ARGUMENT

A. THE DECISION SOUGHT TO BE REVIEWED IS NOT IN EXPRESS AND DIRECT CONFLICT WITH *ALLEN V. WILLIAM P. McDONALD CORP.*, 42 SO.2D 706 (FLA. 1949), OR ANY OF THE ADDITIONAL DECISIONS COLLECTED HERE WHICH FOLLOW AND APPLY *ALLEN*.

Disney World claims that the decision sought to be reviewed is in express and direct conflict with *Allen v. William P. McDonald Corp.*, *supra*, and several additional cases which follow and apply *Allen*. In our judgment, the contention derives from a complete misunderstanding of rather fundamental principles of the law of "premises liability" in

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this State. As a result, and in effect, Disney World has asked this Court to compare and find conflict between apples and oranges. The point can best be explained, we think, by first briefly reminding the Court of the fundamental principles of the law of "premises liability"--principles which it has already thoroughly settled.

The duty owed by a property owner does not depend upon the nature or condition of the property; it depends upon the "status" of the person injured by the condition on the property. Business invitees and social guests are owed the ordinary duty of "reasonable care under the circumstances"; licensees are owed a lesser duty--to avoid wilful and wanton harm and to warn of latent defects known to the property owner; and trespassers are owed only a *de minimus* duty--to avoid wilful and wanton harm.[1/] There is a well-settled exception to these general rules, known as the "attractive nuisance" doctrine. When a *trespassing* child (who would ordinarily be owed only the *de minimus* duty to avoid wilful and wanton harm) is lured onto the property and is injured by an unsafe condition on the property, the property owner's duty is *elevated* to the duty ordinarily owed only to business invitees and social guests--the ordinary duty of "reasonable care".[2/]

The "attractive nuisance" doctrine is available not only to elevate the duty owed to a trespassing child, but also to elevate the limited duty owed to a licensee. *See Crutchfield v. Adams*, 152 So.2d 808 (Fla. 1st DCA), *cert. denied*, 155 So.2d 693 (Fla. 1963). And, as a simple matter of common sense, if the child's status is that of an invitee on the property to begin with, he is owed the ordinary duty of "reasonable care" at the outset--and there is no need whatsoever for him to resort to an exception to the rules governing the duty owed to children in a lesser status in order to *elevate* the property owner's duty to him to the level of the duty already owed him:

[1/] *See McNulty v. Hurley*, 97 So.2d 185 (Fla. 1957); *Post v. Lunney*, 261 So.2d 146 (Fla. 1972); *Wood v. Camp*, 284 So.2d 691 (Fla. 1973); 41 Fla. Jur.2d, *Premises Liability*, §§4-44 (and decisions cited therein).

[2/] *See Stark v. Holtzclaw*, 90 Fla. 207, 105 So. 330 (1925); *May v. Simmons*, 104 Fla. 707, 140 So. 780 (1932); *Cockerham v. R. E. Vaughan, Inc.*, 82 So.2d 890 (1955); *Concrete Construction, Inc. of Lake Worth v. Petterson*, 216 So.2d 221 (Fla. 1968); 41 Fla. Jur.2d, *Premises Liability*, §§45-58 (and decisons cited therein).

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> . . . the child killed in this case was not a trespasser, so there is no need to search for a doctrine separate from the rules of ordinary negligence law [like the "attractive nuisance" doctrine] to support a duty of care toward her. . . .

Green Springs, Inc. v. Calvera, 239 So.2d 264, 265 (Fla. 1970).[3/]

The foregoing principles are *thoroughly* settled, and the background which they provide clearly must be taken into account in evaluating Disney World's claim of "conflict", to which we now turn.[4/] Disney World's claim of conflict with *Allen* and its progeny is clearly without merit, because *Allen* does not even remotely address the question presented in this case (where the child was owed the ordinary duty of "reasonable care" at the outset, because of his status as a business invitee); it addresses the "attractive nuisance" *exception* to the general rules governing the limited duties owed to children occupying the quite *different* status of trespasser or licensee--and it defines the elements of the "attractive nuisance" doctrine in the specific context presented here (the drowning of a child in an artificial drowning hazard) as follows:

[3/] *Accord, Crutchfield v. Adams, supra* at 812 ("If he occupied that status [of invitee], the liability of the defendants can be established without invoking the attractive nuisance doctrine."). *See Adler v. Copeland*, 105 So.2d 594 (Fla. 3rd DCA 1958) (licensee-child need not resort to "attractive nuisance" doctrine where child not a trespasser, and facts demonstrate breach of duty owed to licensee).

[4/] Disney World's offhand claim of conflict with *Concrete Construction, supra*, represents nothing more than its total lack of understanding of the fundamental principles of law underlying the issue presented here. According to Disney World, *Concrete Construction* holds that, where an attractive nuisance is proven, the child's status is elevated to that of an invitee and the duty owed by the defendant is therefore elevated to the duty owed to an invitee as well. That, of course, is exactly what the district court observed below, and exactly what we have said above. Disney World then goes on to argue: "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." (Petitioners' brief, p. 7). It is certainly true that "once the attraction is established, attractive nuisance cases are *invitee* cases, governed by the same duty as other invitee cases"--but it clearly does not follow, as Disney World appears to contend, that the limited duties governing cases in which an attractive nuisance is *not* proven are authoritative in cases in which the plaintiff is already an invitee owed the ordinary duty of "reasonable care", and in which the plaintiff therefore need not resort to the "attractive nuisance" doctrine to become an invitee entitled to that duty. Disney World has once again confused apples with oranges here--and *Concrete Construction* does not even arguably conflict with the decision sought to be reviewed. With that digression behind us, we return to Disney World's principal claim of conflict.

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> The only point for determination is whether or not an artificial lake or pond may be, under the facts stated, amenable to the *attractive nuisance doctrine.*
>
> The rule supported by the decided weight of authority is that the owner of artificial lakes, fish ponds, mill ponds, gin ponds and other pools, streams and bodies of water are not guilty of actionable negligence on account of drownings therein unless they are constructed so as to constitute a trap or raft or unless there is some unusual element of danger lurking about them not existent in ponds generally . . . .
>
> We think the allegations of the declaration bring this case within the exception to the general rule. A spoil bank of white sand adjacent to an artificial lake or pond is an unusual element of danger and will render it more attractive than the ordinary pond. . . .
>
> . . . [T]o leave white sand banks along the edge of an artificial pond or lake to entice children to play on them creates an unusual element of danger that subjects them to the *attractive nuisance doctrine.* . . .

Allen, supra at 706-07 (emphasis supplied).[5/]

In other words, this Court held that, on the facts alleged in the complaint in *Allen* the defendant's pond was an "attractive nuisance"--and that the defendant therefore owed the child the ordinary duty of "reasonable care", notwithstanding that the child was not initially an invitee on the property. In the decision sought to be reviewed, the district court held that Joel Goode was a business invitee at the outset, already owed the duty of "reasonable care"; that he therefore need not resort to the *exception* to the general rules governing the duties owed to children occupying the altogether different status of trespasser or licensee to *elevate* the duty owed him to that of "reasonable care"; and that the limited duties owed to trespassers and licensees set forth in *Allen* (where no "attractive nuisance" is proven) were therefore irrelevant to the instant case.

5/ The bulk of the remaining decisions relied upon for conflict simply follow and apply *Allen*, and none of them involve children who were business invitees, so they need not be addressed separately here. Those decisions are: *Newby v. West Palm Beach Water Co.*, 47 So.2d 527 (Fla. 1950); *Lomas v. West Palm Beach 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. 2nd DCA), *cert. denied*, 136 So.2d 348 (Fla. 1961); *Hendershot v. Kapok Tree Inn, Inc.*, 203 So.2d 628 (Fla. 2nd DCA 1967); *Ansin v. Thurston*, 98 So.2d 87 (Fla. 3rd DCA 1957), *cert. denied*, 378 So.2d 242 (Fla. 1979). The decisions relied upon for conflict which do not simply follow and apply *Allen* will be separately addressed *infra*.

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There is clearly no express and direct conflict between that perfectly proper holding, and the thoroughly inapposite line of cases relied upon for conflict here.

Three of the decisions relied upon for conflict here require brief, separate responses, because they do not merely apply *Allen.* In *Walters v. Greenglade Villas Homeowner's Ass'n., Inc.*, 399 So.2d 538 (Fla. 3rd DCA 1981), the question was whether a developer or homeowners' association had a duty to prevent access to a canal not on any property under their control, but on property adjacent to their property which was *owned by someone else.* In addition, the child who drowned in *Walters* was not a business invitee. In the instant case, of course, Disney World owned the moat in which its business invitee drowned, and the moat was an essential part of the attraction for which the invitee paid the price of admission. *Walters* is therefore clearly beside the point here.

Perotta v. Tri-State Insurance Co., 317 So.2d 104 (Fla. 3rd DCA 1975), *cert. denied*, 330 So.2d 20 (Fla. 1976), also involves a quite different question than the one presented here--whether a homeowner's failure to barricade a swimming pool during a party was the proximate cause of an injury to an *adult* who jumped into the pool to rescue a child who had fallen into it. The court recognized that the homeowner owed a duty of "reasonable care" because the adult was a social guest (which is perfectly consistent with the primary holding of the decision sought to be reviewed here), but held that the negligence of the child's parents was an unforeseeable intervening cause of the adult's injury, relieving the homeowner of its negligent contribution to the injury. In the instant case, the district court held (by reference to its prior decison in the case) that there was abundant evidence from which the jury could properly determine that Mrs. Goode's negligence was foreseeable, and that it could therefore have properly concluded that her negligence was not an unforeseeable intervening cause sufficient to relieve Disney World from liability for its negligent contribution to the injury. The two decisions are therefore perfectly harmonious, and not even arguably in conflict.

Finally, *Kinya v. Lifter, Inc.*, 489 So.2d 92 (Fla. 3rd DCA), *review denied*, 496 So.2d

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142 (Fla. 1986), also presents no conflict here. In the first place, the jury in *Kinya* found the defendant not negligent, and no issue was raised on appeal concerning the status of the child or the nature of the duty owed by the defendant. The court's resort to the *Allen* rule at the close of its opinion was therefore merely a gratuitous dictum, not a holding which can create any express and direct conflict here. More importantly, the child in *Kinya* was not an invitee; he was a licensee, so the *Allen* rule of non-liability was appropriately applied in the absence of an unusual element of danger which would have converted the lake into an "attractive nuisance". Disney World has attempted to elevate the child's status in *Kinya* to that of an invitee by asserting that "[t]enants are invitees in an apartment complex" (petitioners' brief, p. 6 n. 5), but this contention is simply not correct. Tenants are invitees only in *some* areas of an apartment complex--areas "in which the landlord impliedly reserves a portion of the premises, such as entrances, halls, stairways, porches, walks, or other approaches, for the common use of all of the tenants". *Cavezzi v. Cooper*, 47 So.2d 860, 861 (Fla. 1950).

Tenants are not invitees in *all* areas of an apartment complex, however; in areas of an apartment complex which are not impliedly reserved to tenants for their *use* in going to and coming from their apartments, tenants occupy the legal status of mere licensees. *Cavezzi v. Cooper, supra.*[6/] The lake in *Kinya* was clearly not an area reserved to tenants for their use in going to and coming from their apartments, so the child who drowned in *Kinya* was therefore merely a licensee with respect to the hazard which claimed his life, and he was not owed the ordinary duty of "reasonable care" as a result. In contrast, Joel Goode was a business invitee, owed the duty of "reasonable care" at the outset--so the gratuitous dictum in *Kinya* clearly provides no express and direct conflict

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6/ In the decision relied upon by Disney World to support its contention that tenants are invitees, the plaintiff-tenant was injured when she slipped and fell in a puddle in a *parking garage* reserved for the tenant's use. *Grenier v. Central Bank & Trust Co.*, 391 So.2d 704 (Fla. 3rd DCA 1981). The plaintiff was clearly an invitee on the facts in *Grenier*, but *Grenier* does not hold that tenants are invitees *everywhere* in an apartment complex. *Grenier* also cannot fairly be read in that manner, else it would be contrary to this Court's conclusion in *Cavezzi* that tenants can be either invitees or licensees, depending upon the area of the apartment complex in which they are injured.

sufficient to support this Court's conflict jurisdiction.

In short and in sum, because Joel Goode was a business invitee, he was owed the ordinary duty of "reasonable care" from the moment he purchased his ticket and passed through the turnstiles onto Disney World's premises. The rules governing the duties owed to trespassers and licensees were therefore absolutely irrelevant to the case, and there was no need whatsoever for us to prove that Disney World's moat was an "attractive nuisance" which would elevate the duty owed to Joel to that of the duty already owed him because of his status as a business invitee. The decision sought to be reviewed is absolutely correct in that respect, and it is clearly not in conflict with *Allen* or any of the other decisions relied upon for conflict here, because none of the plaintiffs in those cases were invitees on the defendants' premises (except to the extent that their status was elevated to that of an invitee by the existence of the "attractive nuisance" which we did not need to prove in this case).

Most respectfully, Disney World's insistence that it can place an alluring, unlit, unnecessarily deep, and (for all practical purposes) unfenced drowning hazard in the middle of its amusement park with impunity, and that it owes its four year-old business invitees no more than the duty to avoid *intentionally* (wilfully or wantonly) drowning them, is preposterous by any measure of civilized society--and its contention that *Allen* and its progeny compel such a conclusion is clearly without merit.

B. THE DECISION SOUGHT TO BE REVIEWED IS NOT IN EXPRESS AND DIRECT CONFLICT WITH *HARBOR INSURANCE CO. V. MILLER*, 487 SO.2D 46 (FLA. 3RD DCA), *REVIEW DENIED*, 496 SO.2D 143 (FLA. 1986).

Disney World next contends that *Harbor Insurance Co. v. Miller, supra*, is in express and direct conflict with the district court's determination below that the pain and suffering awards of $1,000,000.00 each to Mr. and Mrs. Goode were not "excessive" as a matter of law.[7/] There are at least two things wrong with this contention. In the first place,

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[7/] Disney World also contends indirectly that the decision sought to be reviewed is in conflict with *Johnson v. United States*, 780 F.2d 902 (11th Cir. 1986). The contention is irrelevant, of course, because this Court does not have jurisdiction to review conflicts

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Disney World has been considerably less than candid with the Court in disclosing only that "the Third District held a judgment of $1.56 million for a child's death . . . excessive" (petitioners' brief, p. 9). It is true that the *judgment* ultimately entered in that case was $1,560,000.00, but that is because the defendant was an excess insurance carrier, and the defendant's excess insurance coverage began at $1,000,000.00. The *verdict* in *Harbor Insurance* reflected pain and suffering awards in the amount of $1,500,000.00 to the mother, and $1,000,000.00 to the father--and $60,000.00 was awarded to the child's estate. The relevant figure for purposes of comparision here is clearly the $2,500,000.00 awarded for the parents' pain and suffering in *Harbor Insurance*, not the reduced amount of the judgment ultimately entered against the defendant. Now that we have straightened out the facts, it should be perfectly clear that the district court's determination below that $2,000,000.00 in pain and suffering awards was not excessive as a matter of law simply cannot be in express and direct conflict with another court's determination that *$2,500,000.00* in pain and suffering awards is excessive.

More importantly, the *Harbor Insurance* Court did not hold that pain and suffering awards totalling $2,500,000.00 would be excessive as a matter of law in every case. It ordered a new trial in that case because of improper conduct by plaintiff's counsel (and

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between a Florida district court and a federal appellate court. In any event, although the *Johnson* Court did declare "excessive" a $2,000,000.00 pain and suffering award for the parents of a wrongfully killed child, it did so only because it was "unable to find any reported case in Florida with an award this high" (780 F.2d at 908)--and it suggested that the trial court could undertake to do more research on remand and make a better record to justify its award by comparison to other verdicts, if it could. The Eleventh Circuit clearly did not do its homework. Sixteen years ago (when the dollar was worth perhaps three times more than it is worth today), the Third District upheld an award of $1,800,000.00 for the pain and suffering of the parents of a 15-year old boy. *Compania Dominicana de Aviacion v. Knapp*, 251 So.2d 18 (Fla. 3rd DCA), *cert. denied*, 256 So.2d 6 (Fla. 1971). Eight years ago, when the dollar was worth at least twice what it is worth today, the Third District upheld an award of $1,000,000.00 for the pain and suffering of the parents of a teenage girl. *Corbett v. Seaboard Coast Line Railroad Co.*, 375 So.2d 4 (Fla. 3rd DCA 1979), *cert. denied*, 383 So.2d 1202 (Fla. 1980). In short and in sum, the *Johnson* Court was simply wrong in concluding that there were no Florida decisions which would support $2,000,000.00 (in today's dollars) in pain and suffering awards to the parents of a wrongfully killed child. In any event, this Court's more recent decision in *Ashcroft v. Calder Race Course, Inc.*, 492 So.2d 1309 (Fla. 1986), clearly validates the district court's analysis of the "excessiveness" issue in this case, and just as clearly demonstrates that the *Johnson* Court's analysis of Florida law was incorrect.

an excess of emotion in presentation of the evidence), and it utilized the size of the verdict merely as evidence that the improper conduct prejudiced the defendant. Although Disney World has argued here (improperly, upon the "record proper", and without revealing that it made no objections whatsoever to the comments of which it now complains) that plaintiff's counsel engaged in the same type of improper conduct in this case, the district court *rejected* that contention below and did not even deem it worthy enough to deserve mention in its opinion. This Court can look no further than the face of the decision sought to be reviewed here, of course, so it must therefore assume that the type of improper conduct which provoked the reversal in *Harbor Insurance* did not occur in this case. As a result, and for the additional reason noted above, there is clearly no conflict between *Harbor Insurance* and the decision sought to be reviewed.

IV. CONCLUSION

It is respectfully submitted that the decision sought to be reviewed is not in express and direct conflict with any of the decisions asserted for conflict here, and that review should therefore be denied.

V. CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 16th day of March, 1987, to: John L. O'Donnell, Jr., of DeWolf, Ward & Morris, P.A., 1475 Hartford Building, 200 East Robinson Street, Orlando, Fla. 32801, Attorneys for Petitioners.

Respectfully submitted,

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