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 THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other

STATEMENT OF THE CASE AND FACTS

The Fifth District's decision 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. Walt Disney World v. Goode, 501 So.2d 622 (Fla. 5th DCA 1986).

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. Id. at 623. 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 [T.T. Vol. IX, 109]. 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 waterway 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 <u>too short to prevent physical access</u> to the moat by small children and the drowning death of Joel Goode. [Emphasis added.]

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

At the second trial, Plaintiff stipulated she would intro-

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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 [501 So.2d at 628].

duce no evidence it was difficult to get out of the water [T.T. Vol. IV, 9; 501 So.2d at 628].[2] While Plaintiff's expert testified that the area 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 not steep 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

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[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; 501 So.2d at 628].

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" [501 So.2d at 625], 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 [Id. at 624-625], which would make it different from water bodies generally.

This Court accepted jurisdiction to review the case on June 25, 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 drownings.

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.

There was no evidence of any circumstances from which a jury could reasonably infer that any of the allegedly negligent conditions was a cause-in-fact of Joel's drowning, or that the drowning was foreseeable as a probable consequence of the

condition of the property. The known circumstances establish that the lack of supervision and Joel's own actions were legal causes of the drowning. Because these actions were not set in motion by of Defendant, they are an independent, intervening cause.

The admission of "expert testimony" that a non-swimmer child falling into water over his head would have difficulty was reversible error because it is nothing more than common sense which does not require expert explanation. Moreover, the engineer offering the opinion had no professional training or experience in assessing the safety of artificial waterways in similar settings.

The standard jury instructions do not cover the issue of foreseeability as an element of a defendant's liability for negligence. The trial judge erroneously rejected Defendant's requested jury instruction on the issue precisely because it was not covered by the standard instructions.

Plaintiff's final argument in this case called for punitive action by the jury to "make a statement" about "callous corporate conduct" in spite of the fact that no punitive damages were sought. Such arguments are fundamentally wrong.

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" [501 So.2d at 625].[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.

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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].

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

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.

In Howard v. Atlantic Coast Line R.R. Co., 231 F.2d 592, 594-595 (5th Cir. 1956), the court, applying Florida law, observed:

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[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 1965); 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), cert. den., 101 So.2d 808 (Fla. 1958); Kinya v. Lifter, Inc., 489 So.2d 92 (Fla. 3d DCA 1986).

[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).

> In the drowning cases, there has invariably been required, for liability, a type of approach to the body of water in question different from and more dangerous than the approaches to most natural bodies of water.

Denying liability for a fall into a vertical-sided pool in Howard, the court stated:

> It can hardly be argued that steep banks are not found in natural bodies of water.....Id. at 594.

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 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]

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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.

These decisions, along with those by this Court in Newby v. West Palm Bch. Water Co., 47 So.2d 527 (Fla. 1950) and Lomas v. West Palm Bch. Water Co., 57 So.2d 881 (Fla. 1952) finding no liability even in the absence of fences, establish that there is no duty to erect a fence when the waterway is not an unnatural trap. Because there is no duty to fence a waterway that is not a trap, having a fence of one height rather than another is not negligence. See, Groh v. Hasencamp, 407 So.2d 949, 952 (Fla. 3d DCA) 1981, rev. den., 415 So.2d 1360 (Fla. 1982).

The Fifth District refused to follow Allen, claiming the rule applied only to attractive nuisance cases, and therefore, only to trespassing children [501 So.2d at 624]. 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 it is shown that the condition is attractive to children, 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, 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 [501 So.2d at 623] completely inappropriate and unnecessary, displaying the Fifth District's misapprehension of the law in this area. There was no evidence of any disrepair or deceptive condition of the premises in this case.

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.

Of course, the Plaintiff's expert did testify over objection that the area was unreasonably dangerous [T.T. Vol. VII, 156]. The only basis for his opinion was his speculation that if a child crossed the fence; if he were on the steeper slope; if the grass were wet; and if the child slipped, then the child could slide down the bank into the water [T.T. Vol. VII, 157]. Even the expert, however, admitted that this analysis was irrelevant to the area where the boy was found because the slope of the bank was flat there [T.T. Vol. VII, 160].

This testimony is not sufficient to sustain the verdict, though, for neither this testimony nor any other evidence establishes the essential element of liability--an unusual condition different from that found in nature. As the court in Howard

noted:

> There was nothing about the approach ... in this case which would cause one to slip or fall into [the water] <u>any more than one would fall into any natural body of water</u>. [Emphasis supplied] 231 F.2d at 595.

The complete lack of evidence that the water in any way constituted a trap is magnified by Plaintiff's stipulation that no evidence would be introduced that there was any difficulty in getting out of the water [T.T. Vol. IV, 9].

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. This new standard makes property owners insurers of the safety of children on their premises. If the standard of care is, as the Fifth District suggests, "to prevent" children from being injured, then the mere fact of injury to a child with nothing more will impose liability on a property owner, regardless of fault.

The Fifth District's decision imposing absolute liability on landowners for injury to children is contrary to the fundamental principle of fault and ought to be reversed.

II. THERE IS NO EVIDENCE THAT THE PREMISES WERE THE PROXIMATE CAUSE OF JOEL'S DEATH.

In this case, there is no evidence of where Joel entered the water; how he entered the water, or why he entered the water. Not only is there no direct evidence, but there is no circumstantial evidence. Mrs. Goode's theory is that Joel crossed the

shortest fence and slipped into the water [T.T. Vol. X, 80-81], but theories are not sufficient to support a jury verdict. The plaintiff must show that the death more likely than not resulted from an unreasonably dangerous condition of the premises in order to establish a jury question on proximate cause. Gooding v. University Hospital Building, Inc., 445 So.2d 1015, 1021 (Fla. 1984).

In Florida, proof of causation requires proof of two elements: causation-in-fact and foreseeability. See generally, Stahl v. Metropolitan Dade County, 438 So.2d 14 (Fla. 3d DCA 1983); Department of Transportation v. Anglin, 502 So.2d 896 (Fla. 1987). There was no evidence to support a jury verdict on either of these elements.

A. Causation-in-Fact

Mrs. Goode alleged three unreasonably dangerous conditions: (1) a 31 inch fence; (2) a bank with a steep slope, and (3) slippery, angled sides under the water [R.1200, ¶14].

There is no evidence to support an inference that the 31 inch height of the fence caused Joel's death. In the area where his body was found , there is also a 36 inch fence around the old dock [T.T. Vol. III, 153, App. 1]. There is no evidence making it more likely than not that he climbed the 31 inch fence and there is no evidence that a higher fence would have prevented the accident. In fact, Plaintiff's own evidence of a fence climbing experiment demonstrated that a four year old (Joel's age) could

climb a fence with a 42 inch "stepping distance"--nearly twice the "stepping distance" of the 31 inch fence. Mrs. Goode never claimed that the 36 inch fence was "too short."

Additionally, there is no evidence that the height of the fence caused Joel's entry into the water. The uncontradicted evidence that the sheriff and medical examiner walked along all the banks surrounding the water without falling in [T.T. Vol. III, 169, 192; Vol. V, 189] established that a person can cross the fence without entering the water in "natural, direct and continuous sequence." See, Stahl, 438 So.2d at 17. Consequently, the fence was not a cause in fact of the drowning.

The established facts also demonstrate that the slopes of the banks were not a cause in fact of the drowning. Not only did the sheriff and others walk the banks without difficulty, but Plaintiff's own expert admitted that the relatively flat slope of the bank was irrelevant in the area where Joel was found [T.T. Vol. VII, 160].

The stipulation that there would be no evidence that it was difficult to get out of the water refutes the claim that the underwater slopes caused the drowning. There was no evidence of any circumstances implicating the sloped sides of the waterway in Joel's entry into the water and no evidence that sloped, rather than vertical, sides made the drowning more likely.

Mrs. Goode provided no evidence of any circumstances to establish the underlying chain of facts necessary to support a jury's inference that the death more likely than not resulted

from an unreasonably dangerous condition of the premises. Gooding, 445 So.2d at 1020.

Only speculation, undoubtedly colored by sympathy, can support the jury's ultimate inference in this case that Joel crossed the fence because it was "too short" and in "natural, direct, and continuous sequence" accidently fell into the water and because of the condition of the land drowned. Such speculation is insufficient to support a jury verdict. Voelker v. Combined Ins. Co., 73 So.2d 403 (Fla. 1954).

B. Foreseeability

Even if a defendant's negligence is a cause-in-fact of injury, the defendant is not liable unless the injury is a foreseeable consequence of the negligence. Pope v. Pinkerton-Hays Lumber Co., 120 So.2d 227 (Fla. 1st DCA 1960), cert. den., 127 So.2d 441 (Fla. 1961); Department of Transportation v. Anglin, 502 So.2d 896 (Fla. 1987). See generally, Stahl, 438 So.2d at 19-21.

In Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520, 522 (Fla. 1980), the Court discussed foreseeability in terms of "whether the harm that occurred was within the scope of the danger attributable to the defendant's negligent conduct," and set out three tests: (1) legislative edict; (2) actual knowledge by a particular defendant of the likelihood of harm from a particular act, and (3) the classic test:

> Finally, there is the type of harm that has

> so frequently resulted from the same type of negligence that "in the field of human experience" the same type of result may be expected again.

In this case only the third test is relevant because there is no legislative enactment and no evidence that the same type of harm had occurred in the past from the circumstances involved here. See, Cassel v. Price, 396 So.2d 258, 265 (Fla. 1st. DCA), rev. den., 407 So.2d 1102 (Fla. 1981).

Foreseeable consequences are not "what might possibly occur." As the Court noted in Stark v. Holtzclaw, 90 Fla. 207, 105 So. 330,332 (1925):

> "It has been well said that 'if men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then ... will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things.'...."

The evidence in this case does not support an inference that the drowning was a probable consequence of the condition of the premises.

The waterway in this case is accessible only when the park is open, with people in the vicinity, distinguishing it from neighborhood pools and isolated ponds and ditches where there usually are no people around the water. While the evidence establishes that the fences, like most fences, can be climbed, there is no evidence that they do not effectively stop accidental

entry into the water and the area surrounding it; a person has to make a purposeful effort to climb the fence and go down to the water.

The condition of the premises here existed for nearly six years before this accident. In that time "millions of children pass[ed] through each year." Goode I, 425 So.2d at 1156. Yet, there was no evidence of any type of injury in or near the water to give notice of the likelihood of future injury; and no evidence that any separated child had ever been hurt. Goode II, 501 So.2d at 625. As the court said in Cassel, 396 So.2d at 265, denying liability of a landowner for the death of a child:

> To impose upon the landowner the duty to anticipate and guard against the consequences of [this incident], particularly in the absence of actual notice or knowledge of injuries produced by the same circumstances on the owner's premises in the past, would impose an unreasonable and prohibitively burdensome duty upon the owner which we find no justification in the law to impose. (Emphasis supplied.)

It cannot reasonably be said in this case that "in the field of human experience" this type of harm has frequently resulted from these circumstances.

C. Intervening Cause

Mrs. Goode knew of the water, not only because of its visibility, but also because she had been on it in a boat [T.T. Vol. IX, 172-173]. She also watched Joel climb the fence, but

did not stop him, even though she knew he was not supposed to be on the other side [T.T. Vol. IX, 183]. At some point, Joel was not being supervised; left his mother's side around 11:00 p.m.; climbed two fences, and went down to the water. The existence of the water simply provided the occasion for these independent acts, none of which was set in motion by any conduct of Defendant, and which were the sole legal cause of drowning established by the evidence. Department of Transp. v. Anglin, 502 So.2d 896 (Fla. 1987); Pope v. Cruise Boat Co., 380 So.2d 1151 (Fla. 3d DCA 1980).

The lack of parental supervision in Alves v. Adler Built Indus., Inc., 366 So.2d 802 (Fla. 3d DCA), cert. den., 378 So.2d 342 (Fla. 1979), was held to be the sole proximate cause of the drowning death of a two-year-old playing on a sand pile adjacent to a lake next to her home. On at least five occasions employees of the landowner found the child playing by the water unsupervised. In spite of the owner's actual knowledge that the child was playing near the water and was not being supervised by her parents, the court affirmed summary judgment for the landowner.

Similarly, in Perrotta, 317 So.2d at 105, the court affirmed summary judgment for the property owner because the parents' failure to control and supervise the child around the pool "constituted an active and efficient intervening cause."

Because of Joel's age, his youthful acts cannot be legal "negligence." Nevertheless, these acts can be the cause of an injury. While a child is not liable for his acts, neither can

those acts impose liability on another. As the Court said in Newby, 47 So.2d at 528:

> The [law] may protect one against another's negligence, but it does not presume to protect him against his fault, bad luck, improvidence or misfortune.

In this case, the Fifth District's decision that the question of proximate cause was for the jury was wrong.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING EXPERT TESTIMONY.

Courtland Collier testified as an expert, over objection [T.T. Vol. VII, 155], that in his opinion the premises were unreasonably dangerous because if a child who could not swim slipped and fell into water over his head he would have difficulty. This, of course, is obvious to anyone with common sense. No expert testimony was necessary to convey these conclusions to the jury. Expert testimony on such facts within the ordinary understanding of the jury ought never to be admitted. Johnson v. State, 393 So.2d 1069 (Fla. 1980); Florida Power Corp. v. Barron, 481 So.2d 1309 (Fla. 2d DCA 1986).

The hazard of permitting such unnecessary testimony is clearly expressed in the dissenting opinion in Buchman v. Seaboard Coastline R.R. Co., 381 So.2d 229, 231 (Fla. 1980):

> [T]he practical effect of permitting an expert to testify is to advise the jury that this is a person whose opinion is worth considering. Therefore, allowing an expert to testify on matters of common knowledge creates the very real possibility that the jurors will be unduly influenced by the opinion of one whose advice was not needed by them to reach an intelligent conclusion.

Additionally, Collier was not qualified as an expert in the matters about which he testified. There is nothing to suggest that he had ever done any studies on the relative safety of similar areas. There was no evidence of any background or expertise in the construction of artificial waterways, other than that he had been generally involved in projects involving water. There was no evidence of any particular training that Collier had in safety. While he served as chairman of the committee that formulated Gainesville's swimming pool ordinance [T.T. Vol. VII, 134], there is no evidence of whether that committee did anything more than review other ordinances. The particulars that were elicited consisted of his prior testimony as an expert in a falling boulder case and in structural collapses [T.T. Vol. VII, 147-148].

A person offered as an expert must have some expertise in the field involved. Sea Fresh Frozen Products, Inc. v. Abdin, 411 So.2d 218 (Fla. 5th DCA), rev. den., 419 So.2d 1195 (Fla. 1982); Husky Industries, Inc. v. Black, 434 So.2d 988, 992 (Fla. 4th DCA 1983).

In this case, Collier had no training or experience in the design or safety of artificial waterways, and it was an abuse of discretion for the trial court to allow his testimony.

IV. IT WAS ERROR TO REFUSE TO INSTRUCT THE JURY ON FORESEEABILITY.

There is no question that foreseeability was an issue between the parties, but the trial judge refused to instruct the

jury on foreseeability.

The reason the trial court would not give an instruction on foreseeability is that it is not contained in the standard jury instructions. [T.T. Vol. X, 74-75]. As the Court has said in adopting the standard jury instructions, the responsibility is on the trial court in the first instance to determine what instructions are necessary and to instruct the jury appropriately. In re Standard Jury Instructions, 198 So.2d 319 (Fla. 1967).

This is not a case where the requested instruction is otherwise covered by the standard jury instructions. The general instructions on causation, Fla. Std. Jury Instr. 5.1(a), covers only causation-in-fact; 5.1(b) covers only the substantial factor exception. The court in Stahl v. Metropolitan Dade County, 438 So.2d at 18 noted the shortcomings of the standard instructions, stating:

> The "proximate cause" element of a negligence action embraces more, however, than the aforesaid "but for" causation-in-fact test as modified by the "substantial factor" exception. Id. at 19. [Emphasis supplied.]

There is no standard jury instruction on foreseeability. Foreseeability is only mentioned in connection with the foreseeability of an intervening cause in the standard instructions, and then only in the alternative. S.J.I. 5.1(c). That instruction is insufficient to cover the issue of foreseeability as it relates in the first instance to the liability of the defendant for negligence.

It is possible for a jury to consider a negligence case

under all the standard instructions on causation, and never consider whether the injury was a foreseeable consequence of the defendant's actions.

The requested instruction on foreseeablity, which was in writing and a copy of which is attached in the appendix [App. 2] to this Brief, was rejected only because there was no standard instruction. The trial court observed that the instruction was an accurate statement of the law [T.T. Vol. X, 75], and there was no argument from Plaintiff that the instruction was inaccurate. The Defendant had even agreed to using an alternative instruction on foreseeability which the Plaintiff had prepared in an effort to have the jury instructed on this important issue. [T.T. Vol. X, 71].

Once the trial court decided to submit the issues of negligence and foreseeability to the jury, the refusal to instruct the jury on forseeablity was reversible error.

V. THE PLAINTIFF'S FINAL ARGUMENT IN THIS CASE IMPROPERLY CALLED FOR PUNITIVE ACTION AGAINST THE DEFENDANT.

In final argument Plaintiff set out to incite the jury to take action against the Defendant:

> If I built a swimming pool in my neighborhood and I put up a fence, a two-foot fence, they would throw me out of the neighborhood; they would dump me right out of the neighborhood; they would throw me right out of the neighborhood.... 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? [T.T. Vol. X, 90-91].

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> This is callous.... [T.T. Vol. X, 95].
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> ...and I am suggesting for each of them $2,000,000 each, for $4,000,000 and I am suggesting that because a statement needs to be made. You need to say to them and you need to reflect your feelings in a verdict.... It's a statement by you to them and to your community that you value or you understand the pain. You understand the greatness of the pain. And in your understanding, you express your understanding of how terrible this is and how important it is to guard children from drowning hazards, how important it is to you all, instead of putting a stamp of approval like Mr. Martin did and Mr. Klug and Mr. Cullity and Mr. Rogers did on this ridiculously dangerous condition. [T.T. Vol. X, 101-102].

The Defendant objected to the argument upon its conclusion and before the jury deliberated, but did not move for a mistrial. [T.T. Vol. X, 103-108].

In addition to these comments, the argument was liberally flavored with the Plaintiff's contention that the defense was attempting to "insult the intelligence" of the jury. [T.T. Vol. X, pp. 82, 86, 88, 96, 97 (x2)].

These arguments are wrong, and parties who prevail following such arguments should not be allowed to keep the fruits borne of prejudicial remarks.

In Erie Insurance Company v. Bushy, 394 So.2d 228 (Fla. 5th DCA 1981) the court reversed a jury verdict following an argument that the jury should "send a message" to the defendant "that they are going to have to pay a penalty" for their conduct because the

court could not tell whether part of the damages awarded was "punitive" and the product of counsel's wrongful request for punitive damages.

Although the Plaintiff did not use the word "penalty" the effect of this argument was unmistakably the same. Even the trial court, in discussing the objection, noted the punitive nature of the argument. [T.T. Vol. X, 106].

Nearly every phase of the final argument has been condemned in appellate opinions. The innumerable comments about the defense being an "insult to your intelligence" are not only a slur on opposing counsel and the opposing party, but are also an expression of the plaintiff's attorney's personal belief about the justness of the cause and believability of witnesses. See, Metropolitan Dade County v. Dillon, 305 So.2d 36 (Fla. 3d DCA 1974), cert. den., 317 So.2d 442 (Fla. 1975); Schreier v. Parker, 415 So.2d 794 (Fla. 3d DCA 1982); Miami Coin-O-Wash, Inc. v. McGough, 195 So.2d 227 (Fla. 3d DCA 1967); Jackson v. State, 421 So.2d 15 (Fla. 3d DCA 1982); Hillson v. Deeson, 383 So.2d 732 (Fla. 3d DCA 1980).

The arguments that the jury would be deciding "what do we feel about protecting children" [T.T. Vol. X, 79]; that they should "visualize what Harry thinks about" [T.T. Vol. X, 100], and "you need to reflect your feelings in a verdict" [T.T. Vol. X, 101] are in defiance of the law that the jury is to decide the case without "prejudice, sympathy or any other sentiment." S.J.I. 7.1.

No motion for mistrial was made. As the court said in Schreier v. Parker, 415 So.2d 794, 795 (Fla. 3d DCA 1982):

> Arguments in derogation of [the code of professional responsibility] will not be condoned in this court, nor should they be condoned by the trial court; even absent objection. [Emphasis in original.]

This case was tried prior to Ed Ricke and Sons, Inc. v. Green, 468 So.2d 908 (Fla. 1985), when the only remedy for the Defendant was to try the case a third time, if a motion for mistrial had been granted. That would be an incredible waste of resources since the case had been already fully tried twice. The new procedures announced in Ed Ricke and Sons, Inc., make eminently good sense and contribute to judicial economy. It is unfortunate that they were not available at the time of the trial in this case.

In Ed Ricke and Sons, Inc., the Court reiterated that a motion for mistrial must be made in order to preserve the issue for appellate review. The Court also, however, repeated that that rule did not apply to arguments which constituted fundamental error. In this case, the argument so far surpassed the bounds of propriety, in ways that have previously been condemned by the appellate courts, that the argument constituted fundamental error and warrants a new trial.

VI. 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 unrea-

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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.

sonable to have different boundaries on the jury's discretion to award damages depending upon the district in which the trial occurs.

A review of the circumstances surrounding verdicts in wrongful death actions involving minor children strongly suggests that the verdict in this case is outside the range of reasonableness. Bould v. Touchette, 349 So.2d 1181 (Fla. 1977).

There is no precise guideline to be used in determining excessive verdicts. A number of factors, though, have traditionally entered into review of damage awards in cases involving the death of a child. Among these are the age of the child; the age of the parent; evidence of medical treatment of the parents for depression and stress following the loss; the elements of damage recoverable in addition to pain and suffering of the parents, and finally, any undue influence on the jury suggesting improper motivation in the award of damages. Florida Dairies Co. v. Rogers, 119 Fla. 451, 161 So. 85, 88 (Fla. 1935); Gresham v. Courson, 177 So.2d 33, 39 (Fla. 1st DCA 1965). But see, Corbett v. Seaboard Coastline R.R. Co., 375 So.2d 34 (Fla. 3d DCA 1979), cert. den., 383 So.2d 1202 (Fla. 1980).

In Baptist Memorial Hospital, Inc. v. Bell, 384 So.2d 145 (Fla. 1980) the Supreme Court held that the trial court did not abuse its discretion in overturning a jury verdict for $450,000 in a case involving the death of the plaintiff's minor daughter (age undisclosed) who died over a period of nine days after she was negligently injected in the spine with a toxic drug.

In Gross Builders, Inc. v. Powell, 441 So.2d 1142 (Fla. 2d DCA 1983) the jury returned a verdict in the amount of $150,000 for each parent upon a finding that the defendant was negligently responsible for the drowning death of their three year old son in a swimming pool.

In Gresham v. Courson, 177 So.2d 33 (Fla. 1st DCA 1965), the court held a $100,000 damage award for the pain and suffering of parents in the death of an eleven month old child excessive.

Larger verdicts which have been affirmed have involved a number of elements not present in this case. In Compania Dominicana v. Knapp, 251 So.2d 18 (Fla. 3d DCA 1971), cert. den., 256 So.2d 6 (Fla. 1971), the court affirmed an award of $1,800,000 for the death of a fifteen year old son. In that case the plaintiffs had two sons killed in the same accident. The son whose death was involved on the appeal was a graduate of junior high school; he was working at his father's paint and body shop for no pay; was a good student, and the parents required medication for depression for a substantial time following the death. The boy's father saw his son killed and the mother was talking with him on the phone at the time he was killed. The court does not say whether there was any consideration of loss of services, or if the verdict was limited solely to pain and suffering. It is reasonable to infer from the discussion of the age, school record and work history of the deceased son, that some award for loss of services was included. That element is not present in our case.

In Metropolitan Dade County v. Dillon, 305 So.2d 36 (Fla. 3d DCA 1974), cert. den., 317 So.2d 42 (Fla. 1975), a total award of $900,000 for the death of a six year old daughter was affirmed. In that case the parents were 27 years old, approximately half the age of Plaintiffs in this case. That factor alone is very significant since the award for pain and suffering is made for the entire life of the survivors. Additionally, in Dillon there was evidence that the mother was undergoing psychiatric care for depression.

Finally, even if the improper arguments are not themselves reversible error, they were nonetheless inflammatory and prejudicial and substantial enough to warrant a new trial in light of the extremely high damage award. It is impossible to say that no part of the damage here was punitive, to "send a message," or that the award was not an improper expression of the jury's "feelings." Cf. Erie Ins. Co., supra.

There is no doubt that the loss of a young child is a tragic event. Undoubtedly, no amount of money could ever compensate parents for that loss. But that does not mean that any amount of money is reasonable.

In this case the parents have continued with their lives. [T.T. Vol. IX, 152]. There is no evidence that either Harry or Marietta have required any particular medical or psychiatric care as a result of this incident.

A comparison with other cases demonstrates that the damage award of $1,000,000 each was excessive.

CONCLUSION

Because the premises in this case were not a trap and were not unreasonably dangerous, there was no negligence on the part of Walt Disney World Co. Moreover, the only known circumstances surrounding the drowning establish the independent acts of the child and his mother as the sole legal cause of the child's death.

For these reasons, the decision of the Fifth District ought to be reversed with instructions to reverse the judgment and order judgment for Defendants.

Alternatively, Defendants are entitled to a new trial because of the improper admission of expert testimony; the failure to instruct the jury on foreseeability; the improper final argument, and the excessive damage award.

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 July, 1987.

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