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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

**RESPONDENT'S BRIEF ON THE MERITS**

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## I.
## STATEMENT OF THE CASE

We are unable to accept Disney's brief sketch of the procedural background of the case, for two reasons: it is incomplete, and it contains some assertions which are simply wrong. To the extent that it is incomplete, we will supplement it as necessary in the various argument sections of the brief. To the extent that it is wrong, we will explain our disagreement with it here. We apologize at the outset for the length of this brief--but Disney's inadequate statement of the case, its failure to acknowledge the facts, and its "everything but the kitchen sink" approach to argument has left us little choice.

Disney's opening paragraph, in our judgment, badly misrepresents the principal holding of the decision under review. 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 insists. The district court held simply that, because Joel Goode was indisputably a "business invitee", Disney 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 breached that duty in several respects; and that the decisions relied upon by the dissenting judge below (and asserted by Disney in support of its position 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.

While the propriety of that legal conclusion is the subject of Issue A, we think it will be helpful to the Court if we briefly explain the procedural background leading up to it--all of which, incidentally and unfortunately, was overlooked by the dissenting judge below when he concluded that Joel was a "trespassing minor". 501 So.2d at 627. We point out first that Disney *stipulated* in the pre-trial stipulation to Joel's "status" on its property at the time of his death, as follows: "Defendants stipulate that decedent, Joel Goode, was a business invitee" (R. 1505). With that stipulated "status" as a given, Disney moved for a directed verdict on the several counts of the Third Amended Complaint (R. 1198) at the

close of the plaintiff's case. Its first motion was directed to a count of the Complaint which was alternative to the primary, general negligence count--which asserted in essence that, if Joel was a trespasser, Disney's moat was nevertheless an "attractive nuisance", elevating Disney's duty and entitling the plaintiff to recover for simple negligence (R. 941). The plaintiff responded that this count was moot in view of Disney's stipulation that Joel was a business invitee, and Disney did not dispute the trial court's observation that "[i]t's clear that he is a business invitee" (R. 941). The trial court therefore granted Disney's motion for directed verdict on the attractive nuisance count (R. 942).[1/]

Disney thereafter moved for a directed verdict on the general negligence count, relying upon *Allen v. William P. McDonald Corp.*, 42 So.2d 706 (Fla. 1949), and its progeny, and arguing what it has reargued here--that the duty of "reasonable care" which it owed to Joel as a business invitee was limited to the creation of the type of "trap" qualifying as an attractive nuisance under *Allen* (R. 943-48). The trial court observed that the decisions which Disney was arguing were attractive nuisance cases; Disney conceded that one of them involved a trespassing child, but it argued that a plaintiff's status made no difference (R. 945-48). Having already announced the plaintiff's position that Joel's stipulated status as a business invitee rendered the attractive nuisance count moot (R. 941), the plaintiff responded simply that there was also evidence in the record from which the jury could find that Disney's drowning hazard was precisely the kind of "trap" defined as an attractive nuisance in *Allen* (R. 953). The trial court agreed with this observation; it announced that "it's obvious that this is a question for the Jury in this case"; and it reserved ruling on the motion (R. 954).

After Disney had rested its case, its motion for directed verdict on the general negligence count was renewed, and ruling was once again reserved (R. 1024). At the

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[1/] Disney *never* asserted at trial (nor, for that matter, did it assert in the district court) that Joel was a trespasser. Neither has it made such an assertion here, nor could it have--in view of its stipulation to the contrary. We are simply at a loss to explain the dissenting judge's conclusion that Joel was a "trespassing minor", and we submit that the Court can properly disregard that conclusion as irrelevant here.

charge conference which followed (R. 1024-33), Disney did *not* object to the standard negligence instructions, and the jury was therefore ultimately instructed that Disney owed Joel a duty to exercise reasonable care as a matter of law; that the issue against Disney was whether it was negligent; and that negligence was the failure to use reasonable care (which was thereafter defined in standard terms) (R. 1103-05). Not only did Disney consent to these instructions, it also did *not* request a jury instruction defining its duty in the more limited terms it purported to find in *Allen*.

Following rendition of the jury's verdict, and after being reminded that it had concluded at trial that the evidence was sufficient to prove even the type of attractive nuisance upon which Disney insisted, the trial court finally denied Disney's motion for directed verdict on the general negligence count, announcing in part as follows (R. 1133-34):

> And, I think to have a five-foot pond when a two-foot pond would do, and have millions of people and thousands of their quote, unquote, "lost children" over a period of a year, puts this in a different category from your average, artificial body of water.

We will explain the significance of all of this in our argument under Issue A.

One other area of disagreement requires explanation here. Apparently heartened by the dissenting judge's (erroneous) observation below that the plaintiff stipulated away all the evidence which might have proven the existence of an attractive nuisance, Disney asserts here that "Plaintiff stipulated she would introduce no evidence it was difficult to get out of the water" (petitioners' brief, pp. 2-3). This assertion is false. At trial, Disney announced its intention to present a videotape demonstrating the ease with which two girls--both dressed in wet suits, one five and the other seven years old--exited its moat (R. 293-94). The ostensible purpose of this evidence was to rebut the anticipated testimony of the plaintiff's expert, that *he* had difficulty exiting the moat. A lengthy discussion followed (R. 294-319). Ultimately, an agreement was reached--that the plaintiff could present the testimony of a Disney employee who had testified on deposition that the diver who retrieved Joel's body had difficulty exiting the moat and had to be helped out; that the plaintiff could argue from this testimony and the reasonable inferences to be drawn from the physical configuration and slipperiness of the moat that it would have been

impossible for a four-year-old child to exit the moat; that the plaintiff would not present the testimony of her adult expert, that it was difficult for *him* to exit the moat; and that Disney would not play the videotape prepared to rebut the expert (R. 319-26).[2/]

Thereafter, during the plaintiff's expert's testimony, Disney objected that the stipulation had been violated--and the plaintiff disagreed (R. 695-96). Following an extended discussion (R. 696-701), the parties once again reached an agreement--that, to the extent that the expert's testimony concerning the difficulty of exiting the moat (for various reasons) might have been understood by the jury as referring to the expert's (rather than Joel's) ability to exit the moat, the inference could be cured by a question and answer to which Disney agreed (and ultimately asked) as follows (R. 703):

> Q. All right, sir. Professor Collier, when you stated that a person would have difficulty or could not get out of the moat, were you limiting your answer to a child who could not swim to the edge and who was a height shorter than the depth of the water?
>
> A. Yes, sir.

Clearly, we did not stipulate that we "would introduce no evidence it was difficult to get out of the water", as Disney has contended here. Just as clearly, the agreement was that we would not introduce evidence that it was difficult for the *plaintiff's expert* to exit the moat, but that evidence of the difficulty which a four-year-old child would have exiting the moat could be both admitted and argued to the jury. Both Disney and the dissenting judge below are just as clearly in error in contending to the contrary. And with those disagreements behind us, we turn to the facts supporting the jury's verdict--nearly all of which Disney has simply ignored.

## II.
## STATEMENT OF THE FACTS

We consider Disney's highly abbreviated sketch of the facts to be woefully inade-

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[2/] Disney, incidentally, ultimately elicited the testimony of the diver himself, who testified that during post-accident tests of his ability to exit the moat, he lost his balance several times on the slippery slopes and had to grab the "lip" of the moat to avoid falling in the water (R. 964-68).

quate here, for two reasons. First, the "law of the case" doctrine is implicated by at least one of the six issues presented by Disney; and in order to demonstrate the applicability of that doctrine here, it is necessary for us to demonstrate that the material facts at trial were essentially the same as those before the district court in the prior appeal.[3/] To make that demonstration, elaboration is required. Second, Disney has challenged (on several grounds) the sufficiency of the evidence to support the jury's verdict. Because of that challenge, it is axiomatic that we are entitled to have the evidence viewed in a light most favorable to the verdict, with all conflicts resolved and all reasonable inferences drawn in our favor.[4/] Disney's sketch of the facts (to the extent that it has bothered to state the facts at all) does not state the evidence in the proper light, and we are therefore required to elaborate for this additional reason. For ease of comprehension, we will tell the sad story in its entirety, from beginning to end, notwithstanding that we may repeat a handful of Disney's initial facts in the process.

On August 10 and 11, 1977, Mrs. Marietta Goode, her two children (Joel, age 4; Jeffrey, age 9), her sister (Sue Keyes), and her sister's two children (Gordon, age 10; Joanne, age 13), all residents of Illinois, visited Disney World together (R. 853-57, 867-70, 903-08, 913-18). The group agreed to meet at the end of the second day at Borden's Ice Cream Parlour, which is located at the north end of Main Street, immediately prior to Main Street's termination at the central "hub" of the Magic Kingdom (R. 858, 870, 920). The group met as planned, shortly before the 11:30 p.m. Main Street "Electric Light Parade", at a time when crowds were forming for the parade (R. 408-09, 858-63, 873-76, 920-25). Mrs. Goode and her sister sat at one of several umbrella-covered tables outside Borden's with some other adults (R. 870-76, 920-25). The four children played with an

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3/ For the convenience of the Court, we have included in the appendix to this brief a copy of the district court's decision in the prior appeal. *Goode v. Walt Disney World Co.*, 425 So.2d 1151 (Fla. 5th DCA 1982), *review denied*, 436 So.2d 101 (Fla. 1983).

4/ *See Kolosky v. Winn Dixie Stores, Inc.*, 472 So.2d 891 (Fla. 4th DCA 1985), *review denied*, 482 So.2d 350 (Fla. 1986); *Marks v. Delcastillo*, 386 So.2d 1259 (Fla. 3rd DCA 1980), *review denied*, 397 So.2d 778 (Fla. 1981); 3 Fla. Jur.2d, *Appellate Review*, §§343-45 (and numerous decisions cited therein).

"invisible" dog on a stiff leash (a toy purchased from Disney) in a grassy area immediately north of the table where their mothers sat; the area was fully enclosed by a short rail fence, and Mrs. Goode had an unobstructed view of the children only a few feet away (R. 847-51, 858-63, 873-76, 920-25). To enter this area, the four children, including Joel, had climbed over the fence (R. 859-60, 920-25, 930). Other people had climbed the fence as well, and were congregating in the grassy area to view the parade (R. 874, 925).

The grassy area was formed on the south by a short fence separating it from the umbrella-covered tables, and on the remaining three sides by a short fence which separated it from paved walkways; the short fence which enclosed the area on the north side served as a fence for the south side of a curved, paved walkway; another short fence bordered the north side of that walkway (see photos at R. 1554-84). Beyond that second fence were two additional grassy areas (separated by a concrete patio) which sloped steeply down to a water-filled moat which surrounded the "hub" area; no fence was provided at the edge of the moat itself (*Id.*; R. 371, 426, 652, 713). The grassy areas and the moat were populated by ducks and birds, which attracted children and which children often chased (R. 372-73, 425-28, 447). The grassy areas and the moat were also only indirectly and dimly lit, and were therefore relatively dark (R. 344, 499, 624-25, 962, 971-72, 1017-18). The moat itself was constructed with a concrete bottom and sides and was approximately five feet deep; its sides sloped sharply to the bottom and were slippery from an accumulation of algae (R. 345-47, 486, 497-98, 576, 636-41, 717).

At some point, Jeffrey and Gordon left the fenced-in area, approached their mothers, and asked them for some money for a souvenir or ice cream; 13-year-old Joanne remained with Joel in the fenced-in area (R. 845-52, 873-76, 920-25). Mrs. Goode found Jeffrey's money in her purse; however, she noticed that her wallet was missing, became scared, and began taking everything out of her purse to find it (R. 921-22). At about the same time, Joanne looked away from Joel to talk to the adults at the table briefly (T. 858-63). Moments later, when Mrs. Goode and Joanne looked back to where Joel had been playing, Joel was gone (R. 858-63, 921-22). According to Joanne, she looked away from

Joel no more than 15 seconds (R. 863). No one saw Joel leave the fenced-in area.

Mrs. Goode and Mrs. Keyes thereafter began searching for Joel, and ultimately involved Disney's personnel in the search (R. 922-25). A diver was finally put into the moat, and Joel's body was found approximately four feet from the south edge of the moat in five feet of water, only a short distance (and two short fences) from where he had last been seen playing with his cousin (R. 340-44, 828, 960-71). An autopsy found no evidence of foul play, and established the cause of death as drowning (R. 268-85).[5/] According to expert testimony (based upon the autopsy report), the four-year-old boy was alive, healthy, and conscious when he entered the water; he struggled and gasped for air underwater; and he drowned (R. 331-37). The Orange County detective and medical examiner who investigated the scene found "sliding" marks in the algae covering the sloped sides of the moat in two places, and algae matching that on the side of the moat was found on Joel's tennis shoes (R. 251-59, 276-78, 286).

It was the plaintiff's position below that Disney was negligent in the following respects: (1) failing to provide barrier fences of adequate height to prevent access by small children to the otherwise unprotected moat; (2) designing and constructing the land areas adjacent to the moat with an unreasonably steep slope, creating a rolling/falling hazard to small children; (3) designing and constructing the slippery sides of the moat at unreasonably steep angles, preventing small children who inadvertently fell into the moat from climbing out of it; (4) designing and constructing the moat to contain water of an unreasonable depth, constituting a drowning hazard to small children; and (5) failing to provide an adequate warning to parents of the potential danger (*see generally* R. 1034-58, 1090-1102, 1200-01). The jury found that Disney was a negligent cause of Joel's death for one or more of the acts or omissions set forth above, and Disney contends here that the evidence was insufficient to support that finding.

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[5/] Disney also stipulated on the record that the cause of Joel's death was drowning, and that it would not argue that Joel fell out of a tree or that he was the victim of foul play (R. 1489 [side 2], 1504).

In our estimation, the extensive evidence in the record overwhelmingly refutes Disney's contention. As noted previously, the only barriers to Joel's access to the moat were two short fences. (In actuality, only one fence protected the moat, since climbing the fence enclosing the grassy area would have placed Joel in a perfectly proper place--the paved walkway--and there was only one fence between the walkway and the moat.) Disney's fences were initially designed by Wilson Martin, a Disney artist who admitted he knew nothing about safety and acknowledged that the moat would be dangerous to a four-year-old if he were allowed access to it (R. 756-61, 777-79). He acknowledged that the fences ultimately erected to separate the walkway from the grassy slopes to the moat were only approximately 31 inches high, with a 24-inch "stepping distance" between the bottom and top horizontal rails; that their purpose was merely "crowd control"--a "keep-off-the-grass type of fence"; and that they were not meant to provide a barrier to the moat (R. 777-800).

Mr. Martin also acknowledged that Disney's standards required a fence with a minimum 36-inch stepping distance anywhere there was an interface with a water hazard; that the 24-inch crowd control fence was not authorized anywhere there was an interface with a water hazard; that the 24-inch crowd control fence was neither a safe barrier to the moat nor up to safety standards for a place that charged admission to the public; and that he would never have approved, nor did he approve, the shorter fence which was ultimately built (R. 777-804). In short, Disney's own "fence designer" testifed that the short fences ultimately provided by Disney as the only final barriers to the moat were completely inadequate for that function.

If that were not enough, Disney's own director of operations testified that children could scale the short fences (R. 431). One of Disney's former managers of safety also testified that the fences were designed for crowd control, not to prevent access to the moat; that he knew children could get over the short fences; and that he knew the short fences were inadequate as barriers to the moat when he saw them during their construction (R. 990-92). A former Disney "safety representative" testified that the minimum

acceptable height for a barrier fence at water's edge is 42 inches (R. 489-90, 495). A former manager of Disney's safety department conceded that children could climb the fences and that it was Disney's policy to prohibit persons from the grassy areas surrounding the moat (R. 516-17). Disney's manager of custodial care admitted that he had seen children in the grassy area next to the moat, and that it was Disney's policy to order people out of that area whenever they were seen there (R. 501-03). Disney's manager of Main Street also conceded that he had seen children in the grassy areas (R. 414). And one of Disney's security hosts conceded that the area was quite dangerous, and that children should have been kept out of it (R. 509-10). There is, in addition, expert opinion testimony in the record to the effect that the fences in use were totally inadequate to prevent four-year-old children from gaining access to the moat (R. 679-82).

The easy accessibility of the moat to small children was also proven by a demonstration conducted by one of the plaintiff's experts, who assembled 23 children of various ages and presented them with a scale mock-up of Disney's crowd control fence. Without coaching, eight of the nine three-year-olds, all ten of the four-year-olds, both of the five-year-olds, and all three of the six-year-olds readily climbed the fence without difficulty, in an average time of 4.6 seconds (R. 469-74). Nine of the four-year-olds were also presented with a 42-inch fence (R. 475-77). Although Disney has highlighted the fact here that one of these four-year-olds was able to scale this higher fence, the fact of the matter is that eight of the nine four-year-olds could *not* climb the fence--and the one child that was able to do so had great difficulty, and took more than a minute to complete the task (R. 476-77).

Once over the single short fence separating the walkway from the moat, a small child next encounters several grass-covered slopes which descend to the moat, some of which are quite steep (R. 426, 652, 679-82, 713). There is expert opinion testimony in the record that the slopes descending to the moat are entirely too steep to be safely negotiated by small children, and that they could conceivably cause a child who lost his balance to slide into the moat (R. 679-82). Once the edge of the moat is reached, a small child

who attempts to enter the moat, or who has accidentally fallen into the moat, simply has no chance of survival unless he can swim. The sides of the moat slope sharply to the bottom at a 30° angle, and are covered with slippery algae--creating a nearly frictionless slide; for the same reason that the sides of the moat make entry very easy, exiting from the moat would be extremely difficult for a small child (R. 251-52, 346-47, 466, 516, 636-47, 679-82, 694-95, 703, 717). As a matter of fact, the diver who ultimately recovered Joel's body needed assistance to exit the moat because of its design (R. 346-47).

Kenneth Klug--who was Disney's chief of civil engineering design at the relevant time, although he had no engineering degree and had only one year of college--testified that he designed the moat (R. 704-10). According to Mr. Klug, the sides of the moat were sloped steeply simply because it cost less to do it that way, and he conceded that he gave no consideration to the safety of the moat for children, because children were not supposed to be in it (R. 718-19, 722-23, 736-37). Mr. Klug acknowledged, however, that the sides of the moat could have been designed with shelves or steps (which he had placed elsewhere in the moat to allow the planting of reeds) to facilitate egress, at substantially the same cost (R. 733-36). Mr. Klug also acknowledged that, if he had been told that children might gain access to the moat, he would have designed the moat so that children would not be trapped in it (R. 733). There is also expert opinion testimony in the record from a professional civil engineer that the entire moat could easily have been designed with the type of shelves around the edge designed for the placement of the reeds, for no additional cost (R. 642-45). It is also safe to say that Disney's only defense to the design of its moat was that children were not supposed to be in it.

The record also reflects that the moat was being used by Disney's "swan boats", which required a depth of no more than two to three feet in which to operate comfortably (R. 647-51). Mr. Klug's supervisor (who approved the plans for the moat, and who thought Mr. Klug was a civil engineer) himself conceded that the moat needed to be no deeper than three feet, and confessed his surprise that the moat was built to a depth of five feet (R. 757-76). He also conceded that the unnecessary depth of the water created a dangerous

condition for a four-year-old, if he were allowed access to it (R. 777-79). It is undisputed on the record that the depth of the similar moat at Disney's California attraction, Disneyland, was between one and one-half and three feet (R. 800-01, 840-42). There is, in addition, expert opinion testimony that the excessive depth of the moat was both unnecessary and unsafe (R. 679-82). In sum, there is abundant evidence in the record from which a jury could properly find that Disney breached the duty it owed to Joel to exercise reasonable care for his safety in a number of different ways.

The foreseeability of Joel's tragic drowning under precisely the circumstances in which it occurred is also amply supported by the record. According to numerous witnesses, it was common for children and parents to become separated in the Magic Kingdom (R. 349-403, 430-31, 504). In fact, Disney maintained a "Lost Children Center" in the Kingdom, and had established elaborate procedures for reuniting separated children and parents (R. 349-99). According to statistics supplied by Disney, 11,420 "lost children" were reported to the Lost Children Center during 1977 alone, or an average of over 31 children per day (R. 399). This figure, large as it is, obviously does not include the numerous additional separations which must have occurred, but which were not reported to the Lost Children Center because the parent and child were ultimately reunited by their own efforts shortly after the separation.

During the busier summer months (such as August), as many as 100 lost children are reported to Disney during a typical day (R. 357, 367, 372, 401, 403). In the ten-day period preceding Joel's drowning alone, more than 120 children of ages five and under were reported to the Lost Children Center (R. 390-92). Given the combination of this evidence, the evidence of crowds and commotion because of the parade, the evidence of easy accessibility to the poorly lit moat, and the evidence that once in the moat it was impossible for a small child to get out of the moat, the jury of reasonable persons impaneled to determine the facts in this case found that Disney was a negligent cause of Joel's drowning. We will address Disney's challenge to that perfectly sensible verdict in the argument which follows.

## III.
## SUMMARY OF ARGUMENT

The need to devote 11 pages to restating the case and supplying the facts omitted by Disney has left us with only 39 pages for argument on the six full-blown issues which Disney has argued here. We will need every one of those pages to supply several relevant areas of procedural background also omitted by Disney, and to respond thoroughly on the merits. In short, if we are not to exceed the page limits of the rules, we simply have no space available to abbreviate everything here which we need to say in the 39 pages which follow. In addition, because we must argue six issues in 39 pages, our arguments will be little more than summaries themselves. We therefore respectfully request the Court's indulgence in allowing us to devote the handful of pages which we might have used here (merely to repeat ourselves), to argument upon the merits of this important case.

## IV.
## ARGUMENT

### A. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING DISNEY'S MOTION FOR DIRECTED VERDICT ON THE ASSERTED GROUND THAT THE EVIDENCE WAS INSUFFICIENT TO PRESENT A JURY QUESTION ON THE ISSUE OF NEGLIGENCE.

Disney first contends that it is entitled to judgment *as a matter of law* because the alluring, unlit, inescapable, and (for all practical purposes) unfenced drowning hazard which it maintains in the middle of its amusement park--to which it charges admission, and which is frequented daily (and nightly) by thousands of small children who cannot swim, and who are known to become frequently separated from their parents and to chase birds and ducks in and near the hazard--is no different than other artificial bodies of water in which *trespassing* children have been accidentally drowned and landowners have been found unaccountable. In our judgment, to state the contention is to answer it, because the law of Florida simply cannot be that perverse--either to its own citizenry or to the millions of tourists, like the Goode family, who are encouraged to visit Florida every year. Certainly, they deserve better protection from the law of Florida than that.

The law of Florida is not that perverse, of course, and the decisions upon which

Disney relies, both for conflict and on the merits, come nowhere close to supporting its position. In our judgment, Disney's position derives from a complete misunderstanding of rather fundamental principles of the law of "premises liability" in this State. As a result, and in effect, Disney 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".[6/] 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.[7/] 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 attracted 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

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6/ *See Ashcroft v. Calder Race Course, Inc.*, 492 So.2d 1309, 1311 (Fla. 1986) ("The owner or occupier of land has a duty to exercise reasonable care for the protection of invitees."); *Wood v. Camp*, 284 So.2d 691 (Fla. 1973); Restatement (Second) of Torts, §343-343B; 41 Fla. Jur.2d, *Premises Liability*, §§4-28 (and decisions cited therein).

Because Disney operates an "amusement park" catering to millions of children, the "circumstances" require that it be exceptionally careful in discharging its duty. *See Rainbow Enterprises, Inc. v. Thompson*, 81 So.2d 208 (Fla. 1955); *Wells v. Palm Beach Kennel Club*, 160 Fla. 502, 35 So.2d 720 (1948); *Brightwell v. Beem*, 90 So.2d 320 (Fla. 1949); *Burdines, Inc. v. McConnell*, 146 Fla. 512, 1 So.2d 462 (1941).

It should also be remembered that, because of his tender age, Joel was incapable of negligence as a matter of law. *Swindell v. Hellkamp*, 242 So.2d 708 (Fla. 1971); *Goode v. Walt Disney World Co.*, 425 So.2d 1151 (Fla. 5th DCA 1982), *review denied*, 436 So.2d 101 (Fla. 1983). The "care" which Disney exercised for Joel's safety must therefore be judged in light of the fact that he was incapable as a matter of law of exercising any care for his own safety.

7/ *See McNulty v. Hurley*, 97 So.2d 185 (Fla. 1957); *Post v. Lunney*, 261 So.2d 146 (Fla. 1972); *Wood v. Camp, supra*; Restatement (Second) of Torts, §§333, 342; 41 Fla. Jur.2d, *Premises Liability*, §§29-44 (and decisions cited therein).

to business invitees and social guests--the ordinary duty of "reasonable care".[8/]

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:

> . . . 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).[9/]

The foregoing principles are *thoroughly* settled, and the background which they provide clearly must be taken into account in evaluating Disney's claim of "conflict" (and its concomitant claim of error), to which we now turn.[10/] Disney's claim of conflict with

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[8/] *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); *Starling v. Saha*, 451 So.2d 516 (Fla. 5th DCA) (en banc), *review denied*, 458 So.2d 273 (Fla. 1984); Restatement (Second) of Torts, §339; 41 Fla. Jur.2d, *Premises Liability*, §§45-58 (and decisons cited therein).

[9/] *Accord, Crutchfield v. Adams*, 152 So.2d 808, 812 (Fla. 1st DCA), *cert. denied*, 155 So.2d 693 (Fla. 1963) ("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).

[10/] Disney's offhand claim of conflict with *Concrete Construction, supra*, deserves no more than a footnote, because it represents nothing more than its lack of understanding of the fundamental principles of law underlying the issue presented here. According to Disney, *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 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. 9). 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 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

*Allen v. William P. McDonald Corp.*, 42 So.2d 706 (Fla. 1949), 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 stipulated and undeniable 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:

> 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).[11/]

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therefore need not resort to the attractive nuisance doctrine to become an invitee entitled to that duty. Disney 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's principal contention.

11/ The bulk of the remaining decisions relied upon for conflict (and error) 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); *Howard v. Atlantic Coast Line R. R. Co.*, 231 F.2d 592 (5th Cir. 1956). The decisions relied upon for conflict which do not simply follow and apply *Allen* will be separately addressed *infra*.

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 was a business invitee at the outset, already owed the duty of "reasonable care" (which, if breached, was actionable); 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.[12/] 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 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

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12/ This *is* what the district court held, as we noted at the outset of our statement of the case. It clearly did *not* hold, as Disney contends, that all property owners have an absolute duty to prevent access to drowning hazards, actionable without a showing of fault.

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 his negligent contribution to the injury. In the instant case, the district court held 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 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 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 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. 7 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.*[13/] 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 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 sufficient to support this Court's conflict jurisdiction.

In any event, any ambiguity which may have been lurking in *Kinya's* gratuitous dictum was effectively banished by a more recent decision of the Third District, in which it squarely held that the owner of an artificial drowning hazard (a swimming pool at a condominium complex) owed a "duty to exercise ordinary or reasonable care" to the minor *invitee* who drowned in it. *Machin v. Royale Green Condominium Ass'n*, 507 So.2d 646, 648 (Fla. 3rd DCA 1987). There was no mention of *Kinya* in this decision, of course, and no mention of any of the *trespasser* cases upon which Disney has staked its position here. Most respectfully, Disney'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. No court in the modern history of this society has ever reached such a preposterous conclusion, and Disney's contention that *Allen* and its progeny compel such a conclusion is clearly without merit.

Unlike the decisions inappropriately relied upon by Disney, the Court need not decide the nature of the duty owed in this case. Because it was *stipulated* that Joel was a busi-

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13/ In the decision relied upon by Disney 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.

ness invitee, he was owed a duty of "reasonable care under the circumstances as" a matter of law (as the jury was instructed, without objection). Once that is recognized here, the question of whether Disney's unprotected moat was "unreasonably dangerous" under the circumstances is clearly a *factual* question, not a question of law which this Court is free to decide itself. There can be no debate about that because this Court recently reiterated the thoroughly settled rule that "it is 'peculiarly a jury function to determine what precautions are reasonably required in the exercise of a particular duty of due care'". *Orlando Executive Park, Inc. v. Robbins*, 433 So.2d 491, 492 (Fla. 1983).[14/]

Given the nature of the duty of care which Disney owed to Joel, the only relevant question here is whether the record contains *any* competent evidence from which a jury could conclude that a reasonably prudent amusement park operator would have (1) prevented small children from gaining access to the moat with a taller fence, or (2) designed shallower slopes approaching the moat, or (3) designed the moat with shallow shelves along the edge so that small children would not slide immediately into water over their head, or (4) designed the moat so that it was no deeper than it had to be for its function, so that small children could stand up in it, or (5) provided a warning of the danger presented by the moat to the parents of the small children who might be victimized by it. If there is *any* competent evidence in the record from which a jury could reach any one of these conclusions, of course, then this Court is simply prohibited from interfering with the jury's finding of negligence in this case.[15/]

Although Disney insists that no jury of reasonable persons could have found it negligent on the facts in this case, we think it is as plain as the nose on Mickey Mouse's face that most reasonable persons would have been hard put to find Disney non-negligent on the

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[14/] *Accord, Weis-Patterson Lumber Co. v. King*, 131 Fla. 342, 177 So. 313 (1937); *Ten Associates v. McCutchen*, 398 So.2d 860 (Fla. 3rd DCA), *review denied*, 411 So.2d 384 (Fla. 1981); *Holley v. Mt. Zion Terrace Apts., Inc.*, 382 So.2d 98 (Fla. 3rd DCA 1980); *English v. Florida State Board of Regents*, 403 So.2d 439 (Fla. 2nd DCA 1981); *Acme Electric, Inc. v. Travis*, 218 So.2d 788 (Fla. 1st DCA 1969), *cert. denied*, 225 So.2d 917 (Fla. 1969).

[15/] *See Helman v. Seaboard Coast Line Railroad Co.*, 349 So.2d 1187 (Fla. 1977); *Welfare v. Seaboard Coast Line Railroad Co.*, 373 So.2d 886 (Fla. 1979).

facts in this case. Space does not permit a recapitulation of the evidence of negligence here; it is set out in detail at pages 7-11, *supra*, however, and a fair reading of it will convince the Court that the district court properly held that a jury question was presented on the issue of whether Disney breached the duty of reasonable care which it indisputably owed to Joel. Extended debate upon the point should also be unnecessary since Disney does not really deny the evidence of its negligence, if its duty was "reasonable care"; it argues only that its duty was limited by *Allen* to that owed to trespassing children, and we have already demonstrated the error of that contention.

One loose end remains to be tied--whether, in the event that Disney is correct that we were required to prove an "attractive nuisance" of the type required by *Allen*, the plaintiff's judgment should nevertheless be affirmed. We remind the Court that Disney affirmatively sought and obtained the dismissal of the plaintiff's attractive nuisance count; that the trial court thereafter ruled that the evidence *was* sufficient to submit even an *Allen* issue to the jury; and that Disney thereafter consented to ordinary "reasonable care" instructions, rather than requesting a different definition of its duty patterned upon *Allen*. While that concession and waiver should clearly prevent Disney from complaining of the jury's finding of negligence here, we will assume *arguendo* that it is entitled to complain about anything it wants, because the ultimate result must be the same. The result must be the same because, even if *Allen* were controlling here, the evidence clearly presented a jury question on the issue of attractive nuisance.

In *Allen*, this Court held that the "attractive nuisance" exception to the general trespasser rule was implicated by the mere existence of a pile of white sand at the edge of an artificial lake (42 So.2d at 707):

> . . . [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. It is common knowledge that some ponds are so constructed that a child may easily slide down the spoil banks into water as much ten feet deep with nothing but gravity to retard its potential journey to eternity. Children of tender years are not expected to sense such dangers.

The Third District followed suit in *Ansin v. Thurston*, 98 So.2d 87 (Fla. 3rd DCA 1957),

*cert. denied*, 101 So.2d 808 (Fla. 1958), holding that an attractive nuisance was proven by evidence that the defendant's lake was surrounded by graded white sand banks, a sudden drop-off into deep water over a child's head, and a makeshift raft floating in the lake. In addition, *see Starling v. Saha*, 451 So.2d 516 (Fla. 5th DCA) (en banc), *review denied*, 458 So.2d 273 (Fla. 1984).

In the instant case, Joel was certainly "enticed" into Disney's amusement park by a nationally televised advertising campaign, long before he ever paid for his ticket at the front gate (R. 915-16). He was also almost certainly enticed over the short fences by the ducks and birds which populated the grassy area separating the fences from the moat. And (if he did not fall at that point) he was also almost certainly enticed into the moat itself, either by the promise of splashing in the water (as he had that morning in the "baby pool" at his motel--R. 857), or by Disney's swan boats (in which he had safely ridden on an earlier occasion--R. 886, 919-20). Once allured, of course, he encountered steeply sloping banks; no barrier at the edge of the moat; steeply sloping, algae-covered, nearly frictionless slides for sides; a nearly immediate drop-off to unnecessarily deep water which was well over his head; and (like the fate of an ant caught in a doodlebug pit) a near impossibility of escaping the trap once he was in it. If the mere existence of a pile of white sand is sufficient to implicate the attractive nuisance doctrine, as this Court held in *Allen*, then the facts in this case clearly present perhaps the most attractive nuisance ever litigated--which is probably why the law of Florida classified Joel as a business invitee, and imposed the ordinary duty of "reasonable care" upon Disney in the first place. For all of these reasons, this issue is without merit.

**B. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING DISNEY'S MOTION FOR DIRECTED VERDICT ON THE ASSERTED GROUND THAT THE EVIDENCE WAS INSUFFICIENT TO PRESENT A JURY QUESTION ON THE ISSUE OF PROXIMATE CAUSATION.**

Disney next contends that it is entitled to judgment as a matter of law because the evidence was insufficient to create a jury question on the issue of proximate causation. If the Court has a sense of deja vu, it is because this issue has already been disposed of in a

prior appeal, in which the district court reversed a summary judgment bottomed upon an identical contention, and held that a jury question was presented on the issue. This Court thereafter denied review, finding no conflict of decisions sufficient to support its jurisdiction. *Goode v. Walt Disney World Co.*, 425 So.2d 1151 (Fla. 5th DCA 1982), *review denied*, 436 So.2d 101 (Fla. 1983). In our judgment, that prior decision forecloses the issue reraised here, and precluded the district court from reversing the trial court for simply following its mandate and submitting the issue to the jury at trial.

We reach that conclusion because the "law of the case" doctrine requires it:

> The general rule as to the law of the case applies with regard to questions as to the sufficiency of the evidence; and where the case comes up for review a second time and the evidence is substantially the same, the former decision is conclusive. *Thus, a ruling that the evidence on a particlar issue was sufficient to go to the jury is conclusive on a second appeal*, where the evidence at the second trial was substantially the same as that offered at the first. . . .

*Myers v. Atlantic Coast Line Railroad Co.*, 112 So.2d 263, 267 n. 7 (Fla. 1959).

Rather than belabor the point, we simply refer the Court to a recent opinion from the competent pen of Judge Pearson, in which the doctrine was applied (in circumstances nearly indistinguishable from the instant case) to preclude a change of mind by one panel reviewing the conclusion of another panel which had reversed a summary judgment in a prior appeal--and in which the justification for the doctrine is thoroughly and convincingly explained: *Wallace v. P. L. Dodge Memorial Hospital*, 399 So.2d 114 (Fla. 3rd DCA 1981). Although the evidence presented at trial in this case was not *exactly* the same as the evidence previously before the district court (primarily because the plaintiff was prevented from introducing some of it by some very restrictive evidentiary rulings), the *material* evidence was clearly *substantially the same* as the material evidence which the court found dispositive in its prior decision. That can be ascertained simply by comparing the face of the prior decision with our statement of the facts here. And because the material facts are substantially the same, we respectfully submit that both *Myers* and *Wallace* require this Court to skip to the next issue on appeal. Of course, we will address the merits briefly nevertheless.

The central issue in the prior appeal was whether, in the absence of direct evidence or eyewitness testimony concerning exactly how Joel gained access to the moat, the circumstantial evidence was sufficient to support a reasonable inference that Disney's negligence was a legal cause of Joel's death. The district court held that it was:

> We believe there is a reasonable inference available to the jury that a causal relationship exists between the negligence (admitted for summary judgment argument) of the defendant in having a fence too short to prevent physicial access to the moat by small children and the drowning death of Joel Goode. Disney World has conceded that it is foreseeable that small children frequently become separated from their parents and that they have been known to climb its short fences and gain access to the grassy area bordering the moat. Access to the edge of the moat is access to the moat itself. A four-year-old boy cannot be guilty of contributory negligence so as to constitute an efficient intervening cause precluding Disney World's liability. Nor can the mother's negligent supervision, admitted arguendo by appellant, serve as an efficient, intervening cause shielding Disney World from liability since her negligent supervision, similar to that of thousands of other parents which occurs annually at the Magic Kingdom, was foreseen by Disney World. Indeed, the evidence below was that at the Kingdom's Lost Children Center there were 11,420 "lost children" reported in 1977. If an intervening cause is foreseeable, it cannot insulate a defendant from all liability. *Rupp v. Bryant*, 417 So.2d 658 (Fla. 1982).
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> It was not necessary for the plaintiff below to *exclude* the existence of other reasonable inferences of non-negligent causation in order to avert entry of a summary judgment. As pointed out in *Voelker*, 73 So.2d at 406:
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> > . . . if the circumstances established by the evidence be susceptible of a reasonable inference or inferences which would authorize recovery and are also capable of an equally reasonable inference, or inferences, contra, a jury question is presented.
>
> The summary judgment entered by the trial court is reversed and this cause is remanded for trial.

*Goode v. Walt Disney World Co.*, 425 So.2d 1151, 1156 (Fla. 5th DCA 1982), *review denied*, 436 So.2d 101 (Fla. 1983).[16/]

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16/ For similar conclusions on analogous facts, in which the courts relied upon and followed the *Goode* decision, *see Machin v. Royale Green Condominium Ass'n*, 507 So.2d 646 (Fla. 3rd DCA 1987); *Loranger v. State of Florida, Department of Transportation*, 448 So.2d 1036 (Fla. 4th DCA 1983); *Leahy v. School Board of Hernando County*, 450 So.2d 883 (Fla. 5th DCA 1984); *Collins v. School Board of Broward County*, 471 So.2d 560 (Fla. 4th DCA 1985), *mandamus dismissed*, 491 So.2d 280 (Fla. 1986).

Because that conclusion is clearly the "law of the case", we are reluctant to argue the point or parse the evidence at length again.[17/] Instead, we simply refer the Court to the numerous decisions which hold that the absence of direct evidence of the precise sequence of events leading up to an injury does not prevent a jury from drawing a reasonable inference that the capacity for injury created by the defendant's conduct caused the injury which ultimately occured.[18/]

We also continue to insist that Disney has badly missed the point here, as it did in the initial appeal. We were not required to prove *how* Joel gained access to Disney's drowning hazard. All that we were required to prove was a single reasonable inference--that Disney's negligence was a *cause* (the inference) of his drowning. We also think that

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[17/] We do feel constrained, however, to respond here briefly to one of Disney's factual contentions--its contention that its failure to protect its moat with a fence taller than 24 inches could not be a cause of Joel's drowning because the evidence proved that one four-year-old could climb even a 42-inch fence. In view of the evidence recited in our statement of the case and facts, this contention should strain the credulity of the Court. The plaintiff's videotaped "demonstration" of climbing ability proves two things--both favorable to the plaintiff's case. First, because it proves that almost 90% of the four-year-olds tested could *not* climb a 42-inch fence, it proves that a 42-inch fence would *probably* have prevented Joel from gaining access to the moat. Second, it proves that even if Joel were the exception to the rule, it would have taken him a considerable struggle in excess of a full minute to scale the higher fence--an undertaking which would have been detected and prevented by his 13-year-old cousin, whose lapse of attention to his activities did not exceed 15 seconds.

[18/] *See, e. g., Shepherd v. Finer Foods, Inc.*, 165 So.2d 750 (Fla. 1964) (although the record contained no evidence of the origin of the fire causing the plaintiff's damages, the jury could reasonably infer from the circumstances that the defendant's negligence caused the fire); *Tucker Brothers, Inc. v. Menard*, 90 So.2d 908 (Fla. 1956) (although the record contained no evidence that badly burned child had even been on the defendant's premises, the jury could properly infer from the circumstances that the child's burns were caused by a "bed of red-hot coals" on the defendant's premises); *Adler v. Copeland*, 105 So.2d 594, 595 (Fla. 3rd DCA 1958) (although there were no eyewitnesses to a child's drowning, and "[n]o evidence was offered to explain how the fatal drowning occurred", a jury could properly infer from the circumstances that the defendant's conduct was a cause of the child's drowning); *Marks v. Delcastillo*, 386 So.2d 1259, 1262 (Fla. 3rd DCA 1980), *review denied*, 397 So.2d 778 (Fla. 1981) (although it was "impossible to pinpoint the precise sequence of events which occurred on that day", the jury was entitled to infer from the circumstances "that the immense capacity for harm presented by [the defendant's conduct] came into fruition and that three persons who were very near were killed as a result"--and that the defendant's conduct was therefore a proximate cause of the deaths).

*See*, in addition, *Voelker v. Combined Insurance Co. of America*, 73 So.2d 403 (Fla. 1954); *Byers v. Gunn*, 81 So.2d 723 (Fla. 1955); *Majeske v. Palm Beach Kennel Club*, 117 So.2d 531 (Fla. 2nd DCA 1959), *cert. denied*, 122 So.2d 408 (Fla. 1960); *Busbee v. Quarrier*, 172 So.2d 17 (Fla. 1st DCA), *cert. denied*, 177 So.2d 474 (Fla. 1965).

single inference is perfectly reasonable on the direct evidence in this case. In fact, we think that inference is one of only two reasonable inferences of causation which suggest themselves in this case, which brings us to the most telling point of Disney's entire argument--its insistence that Mrs. Goode's negligence was the *only* cause of Joel's death.

According to Disney--and notwithstanding that there is no direct evidence of *how* Joel gained access to the moat--Mrs. Goode was the only legal cause of Joel's drowning because, rather than supervising him with reasonable care and protecting him from harm's way, she negligently allowed him access to the moat. Put another way, according to Disney, Mrs. Goode's negligent failure to supervise her child (a fact proven by the direct evidence) was the cause (an inference) of Joel's access to the moat and subsequent drowning (facts proven by the direct evidence). There is no impermissible "inference upon inference" in this conclusion, of course, because only a single inference is required.[19/]

The noteworthy point about Disney's argument concerning Mrs. Goode's negligent contribution to Joel's death is, of course, that it is no different than the argument we have made with respect to Disney's negligent contribution to his death. In point of fact, both Mrs. Goode and Disney were negligent in precisely the same way; each allowed Joel access to the drowning hazard (Mrs. Goode, by losing sight of him in the vicinity of the moat; Disney, by failing to prevent his access to the moat once he was unsupervised). If Disney is correct that a proper inference of causation can be drawn from the circumstantial evidence with respect to Mrs. Goode's negligent contribution to Joel's death, then it follows as the night the day that the identical inference can properly be drawn with respect to Disney's identical negligent contribution to Joel's death.

Because both Mrs. Goode and Disney were negligent in precisely the same way, the only other *consistent* conclusions available on the evidence in this case are that neither

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19/ Disney has abandoned the lengthy argument which it made below upon the much-maligned and badly misunderstood "inference upon inference" rule. If that argument should inappropriately reappear at a time when we have no opportunity to respond, the Court will find a convincing demonstration of the inapplicability of that so-called "rule" to this case in *Cora Pub, Inc. v. Continental Causalty Co.*, 619 F.2d 482 (5th Cir. 1980).

Mrs. Goode nor Disney were negligent causes of Joel's death. (Believe it or not, that is what Disney argued to the jury: "It's nobody's fault." [R. 1080].) We think that is an impossibility in this case, however, because four-year-old boys do not drown within shouting distance of thousands of people in an amusement park in the absence of someone's negligence. Certainly, Joel cannot be the only negligent cause of his death, because he was incapable of exercising reasonable care for his own safety as a matter of law. The duty to exercise care for his safety rested only upon Disney and Mrs. Goode in this case, and because both of those duties were clearly breached in precisely the same way in this case, the only logical inferences of causation which are available in this case are the inferences which were ultimately drawn by the jury--that both Disney World and Mrs. Goode were negligent causes of Joel's death. And because both Mrs. Goode and Disney were negligent in the same way in this case, Disney's insistence that Mrs. Goode's negligence was a cause of Joel's death is necessarily a concession that its negligence was also a cause of Joel's death.

In short, on the facts in this case, the issue of legal causation was a *classic* issue of disputed fact requiring resolution by a finder-of-fact, and "because [as this Court has previously held in an indistinguishable context] there was some competent evidence that [the defendant] was negligent . . . the jury was concomitantly imbued with the function of deciding whether such negligence was a proximate cause of the injury". *Helman v. Seaboard Coast Line Railroad Co.*, 349 So.2d 1187, 1190 (Fla. 1977); *Welfare v. Seaboard Coast Line Railroad Co.*, 373 So.2d 886, 889 (Fla. 1979).

Disney also challenges the district court's prior holding that the foreseeability of Joel's drowning presented a jury question, arguing once again that Joel's drowning was unforeseeable *as a matter of law*. (Curiously, although Disney has generated a substantial amount of smoke on this sub-issue in this Court, it never once argued to the jury below that Joel's drowning was unforeseeable as a matter of fact [see R. 1069-89].) Resolution of the issue depends, as Disney has conceded, upon whether the harm which occurred in this case "is the type of harm that has so frequently resulted from the same type of negli-

gence that 'in the field of human experience' the same type of result may be expected again." *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So.2d 520, 522 (Fla. 1980), quoting *Pinkerton-Hayes Lumber Co. v. Pope*, 127 So.2d 441 (Fla. 1961).[20/]

To be blunt, we think it is a *certainty* "in the field of human experience" that four-year-old children who are negligently allowed unsupervised access to water over their heads "may be expected" to drown--especially where the water hazard is alluring to the child, and where it is constructed in such a way that egress from it is impossible. *See Machin v. Royale Green Condominium Ass'n*, 507 So.2d 646 (Fla. 3rd DCA 1987).[21/] A drowning under the circumstances presented in this case is not merely "possible" (in the sense that it will happen so infrequently that in the field of human experience it is unlikely to happen again); it is, without question, "natural and probable" (in the sense that it should be anticipated by a prudent person as likely to happen). We think that follows as a matter of common sense, but we need not rely on the common sense of the human experience alone, because, in our estimation, Disney's own employees conceded the foreseeability of Joel's drowning under the circumstances of this case, when they conceded that parent-child separations were common; that small children could easily scale the short fence provided as the only barrier to the moat; that small children did scale the small fence and had been seen in the grassy areas bordering the moat; that once in the moat it was impos-

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[20/] It is also settled that the issue of "foreseeability", like the larger issue of proximate causation itself, is ordinarily a question for the jury in a negligence case--not a question which can be decided as a matter of law: "If reasonable men might differ, the determination of foreseeability should rest with the jury." *Vining v. Avis Rent-A-Car Systems, Inc.*, 354 So.2d 54, 56 (Fla. 1977). *Accord, Hendeles v. Sanford Auto Auction, Inc.*, 364 So.2d 467 (Fla. 1978); *Schwartz v. American Home Assurance Co.*, 360 So.2d 383 (Fla. 1978); *Gibson v. Avis-Rent-A-Car System, Inc., supra.*

[21/] *See, in addition, Allen v. William P. McDonald Corp.*, 42 So.2d 706 (Fla. 1949); *Samson v. O'Hara*, 239 So.2d 151 (Fla. 2nd DCA 1970); *Ansin v. Thurston*, 98 So.2d 87 (Fla. 3rd DCA 1957), *cert. denied*, 101 So.2d 808 (Fla. 1958); *Larnel Builders v. Martin*, 105 So.2d 580 (Fla. 3rd DCA 1958), *cert. discharged*, 110 So.2d 649 (Fla. 1959); *Adler v. Copeland*, 105 So.2d 594 (Fla. 3rd DCA 1958). *Cf. Pickett v. City of Jacksonville*, 155 Fla. 439, 20 So.2d 484 (1945); *Smith v Jung*, 241 So.2d 874 (Fla. 3rd DCA 1970), *cert. denied*, 245 So.2d 870 (Fla. 1971). *See* the numerous decisions collected in Annotation, *Child's Drowning—Landowner's Liability*, 8 ALR2d 1254 (1949) (and later case service); Annotation, *Swimming Facility—Adequate Fencing*, 87 ALR3d 886 (1978).

sible for a small child to get out of it; and that the moat itself was dangerous. Given these admissions, the foreseeability of Joel's drowning under the circumstances of this case could properly be recognized as a matter of law. At the very least, reasonable men could differ on the proposition, and the issue was therefore properly submitted to the jury.

Disney contends nevertheless that Joel's drowning was not foreseeable because "there was no evidence of any type of injury in or near the water to give notice of the likelihood of future injury" (petitioners' brief, p. 16). Put another way, it is apparently Disney's contention that proof of a prior similar incident involving its moat was necessary to create a jury question on the issue of foreseeability. This, of course, is precisely the argument which this Court *rejected* in the leading decision on the point: *Pinkerton-Hayes Lumber Co. v. Pope, supra*, in which it made clear that foreseeability depends upon "the field of human experience", not the more limited perspective of the defendant's prior experience with the particular hazard involved.[22/] The argument was also recently rejected by this Court in *Stevens v. Jefferson*, 436 So.2d 33, 35 (Fla. 1983), in which it held as follows: "If the harm that occurs is within the *scope of danger* created by the defendant's negligent conduct, then such harm is a reasonably foreseeable consequence of the negligence." Certainly, Joel's drowning was within the "scope of danger" created by Disney's alluring, unlit, inescapable, and (for all practical purposes) unfenced drowning hazard. Joel's drowning was therefore probably a reasonably foreseeable consequence of Disney's negligence as a matter of law on the facts in this case (which may explain why Disney World did not even bother to argue the issue to the jury).[23/] In short and in sum,

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[22/] That is also made clear in *Gibson v. Avis Rent-A-Car System, Inc., supra*, where this Court listed three methods of demonstrating foreseeability--the third being the one in issue here, and the second being a prior similar incident known to the defendant. If the third meant no more the second, there would have been no need to state it at all. *See Paterson v. Deeb*, 472 So.2d 1210 (Fla. 1st DCA 1985), *review denied*, 484 So.2d 8, 9 (Fla. 1986).

[23/] It is also settled, of course, that foreseeability does not depend upon prediction of the precise sequence of events or the precise nature of the injury; "all that is necessary in order for liability to arise is that the tortfeasor be able to foresee that *some* injury will likely result in *some* manner as a consequence of his negligent acts." *Crislip v. Holland*, 401 So.2d 1115, 1117 (Fla. 4th DCA 1981), *review denied*, 411 So.2d 380 (Fla. 1981). *Ac-*

the legal issue reargued by Disney here has long been resolved against it by the law, and the factual issue reargued by Disney here clearly belonged to the jury in this case. The trial court therefore did not commit error in simply complying with the district court's prior mandate by declining to enter judgment in Disney's favor on the ground that Joel's drowning was unforeseeable as a matter of law.

Disney also insists again that Mrs. Goode's negligence was the *only* negligent cause of Joel's death. If, as we have previously argued, there was sufficient evidence from which the jury could properly find that Disney's negligence was a contributing cause of Joel's drowning, then it is simply impossible that Mrs. Goode's negligence was the *sole* proximate cause of that drowning. Put another way, because Joel's drowning could have been prevented either by proper supervision on the part of Mrs. Goode or by the exercise of reasonable care on the part of Disney, the negligence of both *combined* on the facts in this case to cause Joel's drowning. The negligent acts of Disney and Mrs. Goode were simply "concurring causes"--or, at worst, Mrs. Goode's negligence was a foreseeable "intervening cause". In neither event is Disney's negligent contribution to Joel's death legally excused.[24/]

We see no need to distinguish *Perotta v. Tri-State Insurance Co.*, 317 So.2d 104 (Fla. 3rd DCA 1975), *cert. denied*, 330 So.2d 20 (Fla. 1976), or *Alves v. Adler Built Industries, Inc.*, 366 So.2d 802 (Fla. 3rd DCA), *cert. denied*, 378 So.2d 242 (Fla. 1979)--since a simple reading of those cases by the Court itself will demonstrate their inappropriateness to the instant case. Suffice it to say that, at the very least, a jury question exists concerning

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*cord, Bennett M. Lifter, Inc. v. Varnado*, 480 So.2d 1336 (Fla. 3rd DCA 1985), *review dismissed*, 484 So.2d 7 (Fla. 1986); *Paterson v. Deeb, supra*; *Leahy v. School Board of Hernando County*, 450 So.2d 883 (Fla. 5th DCA 1984).

[24/] *See Helman v. Seaboard Coast Line Railroad Co.*, 349 So.2d 1187 (Fla. 1977) (where evidence of defendant's negligence exists and jury has found that defendant's negligence was a cause of plaintiff's injury, appellate court cannot find plaintiff's negligence to be *sole* cause of injury); *Welfare v. Seaboard Coast Line Railroad Co.*, 373 So.2d 886 (Fla. 1979) (same); *De La Concha v. Pinero*, 104 So.2d 25 (Fla. 1958); *Stevens v. Jefferson*, 436 So.2d 33 (Fla. 1983); *Lynch v. Tennyson*, 443 So.2d 1017 (Fla. 5th DCA 1983); *Pittman v. Volusia County*, 380 So.2d 1192 (Fla. 5th DCA 1980); *Robbins v. Department of Natural Resources*, 468 So.2d 1041 (Fla. 1st DCA 1985); *Homan v. County of Dade*, 248 So.2d 235 (Fla. 3rd DCA 1971); Fla. Std. Jury Instns. (Civ.) 5.1b and 5.1c.

whether Mrs. Goode's conduct was foreseeable, and it therefore cannot be held here as a matter of law (as it was on the totally dissimilar facts in *Perotta*) that her conduct constituted "an active and efficient intervening cause" sufficient to relieve Disney of its own negligent contribution to Joel's drowning. Suffice it to say, in addition, that the child who drowned in *Alves* was not a "business invitee", but a trespasser; the defendant in *Alves* had repeatedly returned the trespassing child to her parents; and the parents in *Alves* had repeatedly failed to supervise the child. Although we question the correctness of the ground upon which *Alves* was decided, even if the decision is perfectly correct, the facts in *Alves* are so far removed from the facts in this case that it simply has no relevance here.

Finally, we completely disagree with Disney's half-hearted contention that its negligently designed drowning hazard "simply provided the occasion" for Mrs. Goode's negligence, thereby rendering it unaccountable (petitioners' brief, p. 17). Whatever validity that concept may retain now that "the key to proximate cause is foreseeability",[25/] it clearly has no application to the instant case. It has no application because there was nothing "remote" about Disney's drowning hazard. The hazard was as direct and active a cause of Joel's drowning as one can imagine. *See Machin v. Royale Green Condominium Ass'n*, 507 So.2d 646 (Fla. 3rd DCA 1987); *Starling v. Saha*, 451 So.2d 516 (Fla. 5th DCA) (en banc), *review denied*, 458 So.2d 273 (Fla. 1984). Neither was Disney's drowning hazard a mere "condition" upon which Mrs. Goode's negligence operated to bring about Joel's drowning. Both negligent acts were independent and direct on the facts in this case; both negligent acts *combined* to produce the tragic result in this case; and Disney is simply fishing without bait in contending that the inexcusably dangerous drowning hazard which it maintained in the middle of its crowded amusement park, with knowledge that small children routinely became separated from their parents in crowds and in the dark, was merely a "remote condition" or "occasion" which requires that *all* the blame for Joel's

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[25/] *Rupp v. Bryant*, 417 So.2d 658, 668 (Fla. 1982). *See* Prosser & Keeton, *The Law of Torts*, §42, p. 278 (5th Ed. 1984).

drowning be placed solely upon his momentarily distracted mother.

For all of the foregoing reasons, we respectfully submit that the district court correctly held in the prior appeal that the issue of proximate causation belonged to the jury in this case, and that Disney's impermissible reargument of the issue here should be rejected once again (if it is reached at all). The trial court clearly did not commit reversible error in submitting the issue of proximate causation to the jury on the garden-variety facts in this case.

### C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE EXPERT OPINION TESTIMONY OF THE PLAINTIFF'S EXPERT CIVIL ENGINEER.

Disney next contends that the trial court abused its discretion in permitting the plaintiff's expert civil engineer, Courtland Collier, to give opinion testimony concerning the unreasonably dangerous nature of Disney's design of the moat, surrounding areas, and fences in issue. The ruling was, as Disney has conceded, a discretionary ruling--reviewable here only for an abuse of discretion.[26/] It is also settled that "discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion". *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1980).

Before we reach the merits of Disney's potshot at the trial court's discretionary ruling, a brief bit of background is in order. We remind the Court that the moat and its approaching slopes were designed by a man who (although not an engineer) represented his occupation on the record as "civil engineering design"; who had been employed as a "civil engineering designer" by Disney; who had been Disney's "Chief of Engineering" at the time relevant here; and who testified that the moat and its approaches were designed "in terms of civil engineering" (R. 704-10). The fences were designed by the civil engineering

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[26/] *See Buchman v. Seaboard Coast Line Railroad Co.*, 381 So.2d 299 (Fla. 1980); *Jones v. State*, 440 So.2d 570 (Fla. 1983). This Court has even gone so far as to say that "[t]he decision of the trial court [as to whether to admit expert testimony] is *conclusive* unless erroneous or founded upon error in law." *Huff v. State*, 495 So.2d 145, 148 (Fla. 1986).

designer's superior, a "consultant in planning theme parks, planning an[d] architectural design", who was Disney's "project designer" at the time relevant here; this individual also approved the plans for the moat and its approaching slopes (R. 756-59, 776, 791).

These people, of course, were not laymen--nor did Disney ever make the silly contention at trial which it has made indirectly here, that the designs of the moat, its approaches, and its fencing were something that could have been done properly by laymen. In fact, Disney went out of its way at trial to demonstrate that the various design plans placed in evidence had been "approved" by an independent firm of consulting engineers (R. 994-99), and it argued to the jury in closing argument as follows (R. 1086):

> Now, those plans were ultimately issued by engineers who have a professional license status, and that was the Wheeler & Gray stamp that was shown you on those plans for the moat just to show you that they were issued by people that were professional engineers and had a license. . . .

It was to counter this purposefully created aura of engineering expertise that Mr. Collier's testimony was offered by the plaintiff. Mr. Collier had a bachelor's degree and a master's degree in civil engineering (a discipline involving the "design and the construction of roads, canals, buildings, facilities that are used by people")--and he had been a Professor of Civil Engineering at the University of Florida for 24 years (R. 633-34). He had also been involved in the engineering design of numerous facilities containing bodies of water (R. 634-35). No objection was lodged to the bulk of his testimony, in which he analyzed the designs of the moat, its approaches, and the fences; explained their deficiencies; and explained the safer alternatives available to Disney's designers, alternatives which would not have compromised the function or the cost of the designs (R. 636-54). Plaintiff's counsel then asked Mr. Collier if, in light of his expertise, he had an opinion as to whether Disney's design of the area in issue was unreasonably dangerous (R. 654). Disney objected to admission of this opinion testimony on only two grounds, the two grounds reasserted here--that Mr. Collier was not qualified as an expert on the subject of safety, nor was the subject a matter beyond the common understanding of a lay jury upon which an expert might be of some assistance to it (R. 654, 678). The trial court initially sustained the

objection (R. 654).

During the proffer which followed, Mr. Collier testified that "safety is paramount in the training of a civil engineer"; that the discipline of civil engineering serves three basic purposes--to ensure that designs are functional, safe, and economical; that those three factors are integral to the subject he had been teaching for 24 years, and integral to the subject of his 35-year career in design of civil engineering works; that he had been engaged to investigate water-related accidents on a number of occasions; that he had served in formulating legislation having to do with the protection of people from bodies of water; that he was Chairman of the Swimming-Pool Ordinance Committee for the City of Gainesville; that he had qualified as an expert in court 60 to 75 times; that the instant case was only one of a number of accident-prone situations that he had been asked to look into over the years; and that the area in which his opinion was sought "falls exactly in my line of expertise" (R. 656-62). On cross-examination, Disney adduced an additional 13 pages of testimony concerning Mr. Collier's specific experience with numerous projects involving bodies of water and fences, and specific cases in which he had previously qualified as an expert (R. 662-75). The trial court thereafter changed its mind, and allowed Mr. Collier's opinion into evidence (R. 675-78).

We invite the Court to read Mr. Collier's opinion and his explanation for it (R. 678-82).[27/] It will find that the opinion and its explanation are little more than a summary of his prior testimony on the reasonableness of Disney's design, all of which was already in evidence without objection. It will also find that the opinion and explanation were fully informed by his 35-year expertise as a civil engineer. It will find, in short, that Mr. Collier simply redesigned the area for the jury as it should have been designed in the first place--without compromising form, function, or cost--and in a manner which would have

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27/ Disney has condensed Mr. Collier's lengthy opinion into the following one-line caricature: ". . . 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" (petitioners' brief, p. 18). This purported paraphrase is not a paraphrase at all, however, and it is not even a very good *reductio ad absurdum*. A reading of Mr. Collier's opinion will demonstrate that Disney's characterization is a total fabrication.

been safe for the millions of small children who passed by it and played near it every year.

Disney's contention that this expert civil engineer was not qualified to give an expert opinion concerning the reasonableness of the design of its own "civil engineers" is plainly frivolous. Mr. Collier was, in fact, far more qualified than any of the "experts" who actually designed the drowning hazard and its approaches. Disney's contention that the subject matter of Mr. Collier's testimony was not beyond the common understanding of laymen is also frivolous.[28/] Laymen did not design the drowning hazard which claimed Joel's life, nor could they legally have done so--for reasons which Disney itself made clear when it emphasized that all of the plans for the hazard bore a rubber-stamp of approval by a firm of registered professional engineers. At the very least, reasonable persons could differ upon Mr. Collier's qualifications and the complexity of the subject involved, and the trial court therefore clearly did not "abuse its discretion" in allowing his expert engineering opinion concerning Disney's engineering design.[29/]

Finally, we remind the Court that Disney's own "project designer" conceded that the moat would be dangerous if a four-year-old child were allowed access to it--and that the short "crowd control" fence which was its only barrier was not safe, that it was not up to standards for a place that charges admission, and that it should have been a minimum of 36 inches in height (R. 777-89, 792-94). Put another way, the expert opinion testimony of which Disney complains here was in evidence without objection in essentially the same form from the mouth of its own "project designer". It is settled, of course, that the erroneous admission of expert testimony is perfectly harmless where the same evidence is in

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[28/] Disney World's reliance upon *Sea Fresh Frozen Products, Inc. v. Abdin*, 411 So.2d 218 (Fla. 5th DCA 1982), *review denied*, 419 So.2d 1195 (Fla. 1982), is, of course, badly misplaced. Mr. Collier's opinion went *far* beyond his off-hand mention of the fact that algae-covered concrete is slippery--a fact, incidentally, which appears over and over again in the record from numerous lay witnesses.

[29/] *See Buchman v. Seaboard Coast Line Railroad Co., supra; Schwartz v. M. J. M. Corp.*, 368 So.2d 91 (Fla. 3rd DCA 1979); *School Board of Broward County v. Surette*, 394 So.2d 147 (Fla. 4th DCA), *review dismissed*, 399 So.2d 1146 (Fla. 1981); *Gifford v. Galaxie Homes of Tampa, Inc.*, 223 So.2d 108 (Fla. 2nd DCA), *cert. denied*, 229 So.2d 869 (Fla. 1969); *Millar v. Tropical Gables Corp.*, 99 So.2d 589 (Fla. 3rd DCA 1958).

the record without objection from other witnesses.[30] Therefore, even if this Court should conclude that the trial court abused its discretion in allowing Mr. Collier to give his opinion concerning the design of Disney's less expert engineers, that error must be viewed as harmless here. For all of these reasons, this issue is without merit.

D. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DECLINING TO GIVE A SPECIAL JURY INSTRUCTION ON THE SUB-ISSUE OF FORESEEABILITY.

Disney next takes another potshot at Florida's standard jury instructions, contending that "the trial judge refused to instruct the jury on foreseeability" (petitioners' brief, pp. 19-20). As the Court might expect at this point, that is not exactly what happened. In fact, the jury *was* instructed on the issue of foreseeability below. It was, and is, and always has been Disney's position in this litigation that it was not reasonably foreseeable to it that a mother would allow her small child to become separated from her and wander unsupervised into its poorly-protected moat.[31] Precisely because this was Disney's position (and because Mrs. Goode's comparative negligence was in issue), the trial court gave all three standard jury instructions on causation--Fla. Std. Jury Instns. (Civ.) 5.1a, 5.1b, and the following instruction, 5.1c:

> *Negligence may also be a cause of loss, injury, or damage even though it operates in combination with the act of another,* some natural cause or some other cause occurring after the negligence occurs *if* such other cause itself [was] reasonably foreseeable and the negligence contributes substantially to producing such loss, injury, or damage, *or the resulting loss, injury or damage was a reasonably foreseeable consequence of the negligence and the negligence contributes substantially to producing it.*

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[30] *See Guy v. Kight*, 431 So.2d 653 (Fla. 5th DCA), *review denied*, 440 So.2d 352 (Fla. 1983); *School Board of Broward County v. Surette, supra; Seaboard Coast Line Railroad Co. v. Hill*, 250 So.2d 311 (Fla. 4th DCA 1971), *cert. discharged*, 270 So.2d 359 (Fla. 1973); *Delta Rent-A-Car, Inc. v. Rihl*, 218 So.2d 469 (Fla. 4th DCA), *cert. denied*,, 225 So.2d 535 (Fla. 1969); *Myers v. Korbly*, 103 So.2d 215 (Fla. 2nd DCA 1958).

[31] In actuality, the position has only been asserted at the appellate level (on two separate occasions). As we have already noted, and notwithstanding that the trial court encouraged Disney to argue unforeseeability to the jury (as we shall explain *infra*), Disney never once argued to the jury that Joel's drowning was not a foreseeable consequence of its negligence. Given the absence of any argument on this issue below, and to be frank, we question Disney's sincerity in raising this issue here.

(R. 1106; emphasis supplied). The emphasized portions of this instruction unquestionably covered *precisely* the issue upon which Disney now insists the trial court refused to instruct the jury below.[32/]

What Disney actually asked the trial court to do below was to *elaborate* upon the word "foreseeable" by defining it for the jury as follows:

> For negligence to be a legal cause of injury, some injury must be a foreseeable consequence of the negligence.
>
> Foreseeable consequences are those which a reasonably careful person would anticipate as likely to result from an act and which happened [sic] so frequently in the course of human experience that they may be expected to happen again.

The plaintiff objected to particularizing the charge in this fashion, and stated that the issue of foreseeability was "covered by the standard charges" (and it clearly was, as we have just demonstrated) (R. 1027-28). The plaintiff also objected that Disney's proposed charge was incomplete, and urged that if a non-standard foreseeability charge were to be given it should elaborate further so that the jury was not left with the misimpression that foreseeability depended upon a prior similar incident at Disney World.

The plaintiff's proposed elaboration (R. 1438)--which the plaintiff made clear was not being offered except in the event the trial court agreed to give Disney's non-standard

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32/ It is simply irrelevant that this instruction is normally referred to as an "intervening cause" instruction, and that there is no similar language concerning foreseeability in 5.1a or 5.1b--because the instruction (which does not contain the words "intervening cause") was given below, and it precisely covers the issue of foreseeability in this case. Disney's argument concerning the absence of language from 5.1a and 5.1b on the sub-issue of foreseeability might provoke an interesting debate in a case where 5.1c was not given, but this is clearly not such a case. It is apodictic, of course, that the propriety of the instructions given below must be judged as a whole--and as long as the issue upon which Disney desired instruction was included somewhere in the charge, its precise location is, in our judgment, irrelevant.

In any event, Comment 2 to the standard causation instructions fully validates the trial court's reasoning. It "recommends that the jury not be charged that the damage must be such as would have appeared 'probable' to the actor" (which is essentially the same thing as recommending against a "foreseeability" instruction). And Comment 3 points out that 5.1c is intended for double duty, covering all cases in which another actor is involved (as Mrs. Goode clearly was in this case), whether the other's negligence was foreseeable or unforeseeable. It would therefore appear that the Committee on Standard Jury Instructions would have no quarrel whatsoever with the manner in which the jury was instructed in this case.

instruction (R. 1027-28)--was a far fairer statement of the law; Disney agreed that the plaintiff's instruction was a fairer statement of the law, and it agreed that it could be given after the first sentence of its proposed instruction--but it did not offer the instruction independently, nor did it request the trial court to give it (nor does it complain of its omission here) (R. 1027-32). The trial court thereafter ruled that Disney could argue the gist of its proposed foreseeability instruction to the jury, but it declined to give the instruction on the ground that the standard jury instructions sufficiently covered the issue (R. 1030-31). We think this ruling is sustainable here on both of the grounds to which the plaintiff objected to the proposed instruction below.

First, as Disney's own counsel recognized, the proposed instruction was misleading and incomplete.[33/] It is settled, of course, that, whether entitled to an instruction or not, a proposed instruction which is incomplete or misleading, and which does not properly state the law as a result, is properly refused.[34/] More importantly, the "elaboration" contemplated by Disney's proposed instruction contravened the spirit of the Florida Standard Jury Instructions. As the General Note on Use, Florida Standard Jury Instructions in Civil Cases, pp. xviii-xxi, takes some pains to make clear, charges are supposed to be brief and *general*, and elaborations and particulars are to be supplied by argument of counsel. This, of course, is essentially what the trial court did in the instant case when it submitted the issue of foreseeability to the jury in general terms, allowed argument upon the issue as Disney saw fit, and declined to "assemble all the expressions in legal language" on the sub-issue of foreseeability in order to "dazzle the jury" with further complication.[35/] *Id.*

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[33/] Although this was not the ground upon which the trial court declined to give the proposed instruction, it can nevertheless be advanced properly here under the settled "right for the wrong reason" rule. *See Escarra v. Winn Dixie Stores, Inc.*, 131 So.2d 483 (Fla. 1961); *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla. 1979); 3 Fla. Jur.2d, *Appellate Review*, §296 (and numerous decisions cited therein).

[34/] *See Redwing Carriers, Inc. v. Urton*, 207 So.2d 273 (Fla. 1968); *Holman Livestock Co. v. Louisville & N. R. Co.*, 81 Fla. 194, 87 So. 750 (1921); *Schlesser v. Levinson*, 406 So.2d 1265 (Fla. 4th DCA 1981); *J. A. Cantor Associates, Inc. v. Brenner*, 363 So.2d 204 (Fla. 3rd DCA 1978).

[35/] While we are on the subject of generality versus specifics, we should also note that

This "guiding principle" of the standard instructions has been heartily endorsed by the appellate courts, and it is well settled that it is not erroneous to refuse to elaborate specifically upon general charges which adequately cover the subject, and that specific matters of the type upon which Disney sought instruction in this case are for argument of counsel, not instruction to the jury.[36/] The trial court therefore did not commit reversible error in allowing Disney to argue the gist of its proposed instruction to the jury instead of instructing the jury with the incomplete definition of "foreseeable" which Disney proposed, or the lengthy and complicated (and more accurate) definition to which Disney ultimately agreed (but never requested).

Finally (and perhaps even more importantly), as we alerted the Court at the outset of our argument on this issue, the issue is a sham on the record in this case. Notwithstanding its insistence that foreseeability was a critical issue which deserved lengthy elaboration in the jury instructions, and notwithstanding that the trial court told Disney that it should argue the issue to the jury in lieu of an instruction, Disney never once argued to the jury that Joel's drowning was not a foreseeable consequence of its negligence or that Mrs. Goode's negligence was not foreseeable; neither the word nor the concept were ever mentioned (R. 1069-89).[37/] An error is harmless, of course, unless it

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even if the language of 5.1c did not embrace a foreseeability argument on the issue of Disney's negligence *vel non*, Disney was still entitled to argue the specifics of its position on foreseeability under the general negligence instructions. That is, Disney was free to argue that reasonably careful person exercise care to guard against injury only when the possibility of injury is reasonably foreseeable to them, and that it was therefore not negligent in this case because Joel's drowning was not reasonably foreseeable.

[36/] *Florida East Coast Railway Co. v. McKinney*, 227 So.2d 99 (Fla. 1st DCA 1969), *cert. denied*, 237 So.2d 176 (Fla. 1970). *See Bertolotti v. State*, 476 So.2d 130, 132 (Fla. 1985) ("Appellant's proposed jury instruction is subsumed in the standard jury instruction . . . . Refusing the requested instruction was not error."); *State v. Freeman*, 380 So.2d 1288 (Fla. 1980) (same). *See*, in addition, *Saucer v. City of West Palm Beach*, 155 Fla. 659, 21 So.2d 452 (1945); *Jennings v. City of Winter Park*, 250 So.2d 900 (Fla. 4th DCA 1971); *Davis v. Lewis*, 331 So.2d 320 (Fla. 1st DCA 1976), *cert. denied*, 348 So.2d 946 (Fla. 1977); *Publix Supermarkets, Inc. v. Banks*, 287 So.2d 388 (Fla. 1st DCA 1973); *Florida East Coast Railway Co. v. Lawler*, 151 So.2d 852 (Fla. 3rd DCA 1963).

[37/] The reason for this should be obvious. Disney's own employees all but conceded the foreseeability of the tragic incident, and the jury's credulity would have been badly strained by any argument to the contrary. While we are on this point, we should note that Disney responded to this argument in the district court in a most peculiar way. It argued

causes a "miscarriage of justice". Section 59.041, Fla. Stat. (1985).[38/] And any error which the trial court may have committed by its refusal to elaborate upon the issue of foreseeability in this case was therefore clearly harmless, because it is simply impossible that Disney was prejudiced in any way by the lack of an elaborative instruction upon an issue which it totally abandoned in its closing argument to the jury. For all of these reasons, this issue is without merit.

E. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING DISNEY'S MOTION FOR NEW TRIAL ON THE ASSERTED GROUND THAT PORTIONS OF PLAINTIFF'S COUNSEL'S CLOSING ARGUMENT WERE IMPROPER AND PREJUDICIAL.

Disney next contends that plaintiff's counsel's closing argument was improper in numerous respects. It also contends that it "objected" to the alleged improprieties. Once again, as the Court might have expected, that is not exactly what happened. In fact, Disney did not make a single objection during closing argument to anything which plaintiff's counsel said. Its so-called "objection" was made outside the presence of the jury, in the trial court's chambers, after plaintiff's counsel had completed his initial argument--and it was not an "objection" at all. What Disney's counsel said in the trial court's chambers was that he found some of plaintiff's counsel's arguments "improper" (the word "objection" was never uttered); that *he did not want a mistrial* and was not moving for a mistrial; that he only wanted to ensure that the same kind of argument was not repeated in rebuttal; and that if it were, he would move for a mistrial then (R. 1059-64). (No motion for mistrial was made during the rebuttal argument.) Because Disney neither

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that it could justifiably forego argument on the foreseeability issue for fear that the plaintiff would devastate it in rebuttal, by arguing that foreseeability wasn't an issue since the judge would give no instruction upon it. If the same argument is raised here, we would point out simply that such a reply would have been totally improper, given the trial court's express recognition of the issue, its instruction upon it, and its authorization to Disney to argue it as strenuously as it liked.

38/ In addition, of course, before an error can be considered *prejudicial*, there must be a reasonable likelihood that the result would have been different if the error had not been committed. In our judgment, the probability that Disney could ever convince a jury that Joel's drowning was not "foreseeable" is so close to zero (which is probably why Disney, in a fit of good sense, made no such argument in the first place) that no error affecting the issue of foreseeability in this case could ever be conscientiously considered prejudicial.

objected, nor moved for a mistrial, nor asked for any other relief--but, instead, affirmatively represented that it did not want a mistrial--there is no ruling in the record which this Court could conceivably reverse.[39/]

The absence of any ruling by the trial court implicates a settled rule of appellate review--in the absence of a contemporaneous objection to improper argument of counsel, a new trial is unwarranted unless the argument amounts to *fundamental error*. *White Construction Co., Inc. v. DuPont*, 455 So.2d 1026 (Fla. 1984); *Tyus v. Apalachicola Northern Railroad Co.*, 130 So.2d 580 (Fla. 1961). In the context presented here, no fundamental errors occur in a closing argument unless the improprieties are so egregious that "neither rebuke nor retraction may entirely destroy their sinister influence". *Baggett v. Davis*, 124 Fla. 701, 169 So. 372, 379 (1936). *Accord, Shaffer v. Ward*, 12 FLW 1132 (Fla. 5th DCA Apr. 30, 1987); *Brumage v. Plummer*, 502 So.2d 966 (Fla. 3rd DCA 1987). Clearly, no *fundamental error* appears in the handful of (as we shall point out *infra*, perfectly proper) statements selected by Disney for its hyperbolic complaint here--and this issue has just as clearly been waived.[40/]

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[39/] It is the general rule, of course, that a *ruling* of some sort is a prerequisite to appellate review of a purported error, because a "trial court can hardly be held in error for a ruling which it did not make". *LeRetilley v. Harris*, 354 So.2d 1213, 1214 (Fla. 4th DCA), *cert. denied*, 359 So.2d 1216 (Fla. 1978), quoting *Coffman v. Kelly*, 256 So.2d 79, 80 (Fla. 1st DCA 1972). *Accord, Richardson v. State*, 437 So.2d 1091 (Fla. 1983); *Schreidell v. Shoter*, 500 So.2d 228 (Fla. 3rd DCA 1987); *Palmer v. Thomas*, 284 So.2d 709 (Fla. 1st DCA 1973). Of course, the ruling obtained post-trial, in response to the motion for new trial, was too little and too late. *See* decisions cited in fn. 40, *supra*.

[40/] The Court will find a thoughtful and thorough discussion of this point in the Second District's recent decision in *Wasden v. Seaboard Coast Line Railroad Co.*, 474 So.2d 825 (Fla. 2nd DCA 1985), *review denied*, 484 So.2d 9 (Fla. 1986), to which we refer the Court in lieu of further argument. *See*, in addition, *Sears, Roebuck & Co. v. Jackson*, 433 So.2d 1319 (Fla. 3rd DCA 1983); *Honda Motor Co., Ltd. v. Marcus*, 440 So.2d 373 (Fla. 3rd DCA 1983), *review dismissed*, 447 So.2d 886 (Fla. 1984); *Nelson v. Reliance Insurance Co.*, 368 So.2d 361 (Fla. 4th DCA 1978); *Murray-Ohio Mfg. Co. v. Patterson*, 385 So.2d 1035 (Fla. 5th DCA 1980).

This long-settled waiver rule was not changed, as Disney suggests, by this Court's recent decision in *Ed Ricke & Sons v. Green*, 468 So.2d 908, 910 (Fla. 1985); although this Court did hold that a trial court could reserve ruling on a contemporaneous motion for mistrial in an appropriate circumstance, it reiterated the general rule:

> We refuse to change the general procedure that must be followed in order for a party to preserve a motion for a mistrial

Although the issue has been waived, we would be remiss if we did not address the merits of Disney's argument briefly, because Disney has badly missed the point of plaintiff's counsel's closing argument here. Disney's primary complaint appears to be that plaintiff's counsel asked the jury to "make a statement" and "express its feeling" in several respects by its verdict. Disney says this type of argument is improper, because it asks a jury to *punish* the defendant.[41/] We disagree. The "statement" which plaintiff's counsel sought from the jury was not a statement of punishment, but a statement of *deterrence*. We remind the Court that a jury serves as the "conscience of the community". *See Beckwith v. State*, 386 So.2d 836 (Fla. 1st DCA), *review denied*, 392 So.2d 1379 (Fla. 1980). And it is the function of that community conscience in a negligence case to determine whether the defendant's conduct was reasonable or unreasonable under prevailing community standards. *See* the decisions cited at page 19, *supra*.

We also remind the Court that the tort system, and the negligence actions which it authorizes, serve more than the mere purpose of compensation; they are also clearly designed to deter future acts of negligence by setting an appropriate standard of care according to prevailing community standards:

> The "prophylactic" factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of

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> for appellate review. Unless the improper argument constitutes a fundamental error, a motion for a mistrial must be made "at the time the improper comment was made."

41/ As support for its argument, Disney relies upon *Erie Insurance Co. v. Bushy*, 394 So.2d 228, 229 (Fla. 5th DCA 1981), in which the court disapproved the following argument:

> . . . "I want you to send a message to Erie, Pennsylvania, that you can't defend a case by coming down here and just subtly hinting that we don't owe it and it must have been something else. Send a message to those people and let them know that they are going to have to pay a penalty."

Disney has seized upon the words "send a message" as support for its position. The court did not disapprove of those words, however; it disapproved of the nature of the message which counsel sought--the disguised request for punitive damages in the impermissible request for a *penalty*. *See Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517 (Fla. 3rd DCA 1985), *review denied*, 492 So.2d 1331 (Fla. 1986).

> the wrongdoer. When the decisions of the courts become known and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.

Prosser & Keeton, *The Law of Torts*, p. 25 (5th Ed. 1984). Fairly read, the "statement" which plaintiff's counsel asked the jury to make in this case was in pursuit of this legitimate end, not in pursuit of a "penalty" in the form of punitive damages.[42/]

Plaintiff's counsel was simply asking the jury to tell Disney by the verdict that its unprotected moat was unreasonably dangerous according to community standards--and that the hazard had to be corrected so that no other children, momentarily separated from their distracted mothers in the dark and during the commotion of a crowded parade, would ever drown in it. In our judgment, that is perfectly permissible argument. If it is not, then the Court might as well declare the law of torts a nullity, and command that Disney can do whatever it wants without accountability for the injuries and death which it may cause in pursuit of economic gain. In any event, even if the argument sought "retribution" in the form of an economic "penalty", it is settled that such an argument can be cured by instruction, and that it is therefore not "fundamental error". *See Brumage v. Plummer*, 502 So.2d 966 (Fla. 3rd DCA 1987); *DeAlmeida v. Graham*, 12 FLW 1658 (Fla. 4th DCA 1987).

We also disagree with Disney's contention that it is improper to argue to a jury that a defendant's conduct is "callous", or to argue that a particular position taken by a defendant is an "insult to the intelligence" of the jury. Closing argument is, after all, *argument*. If, as in this case, callous indifference to a readily foreseeable danger of death is proven, then calling the defendant's conduct "callous" is fair argument on the evidence.

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[42/] Disney may respond, as it did below, that the purpose of a punitive damage award, in part, is also "deterrence". We concede the point in advance. But just because both a negligence finding and a punitive damage award serve the same purpose of "deterrence" does not mean that "deterrence" is not a proper subject for jury argument. Punitive damage awards serve an additional purpose--*punishment* in the form of an economic penalty; and it is *that* purpose upon which argument is prohibited when punitive damages are not in issue, not mere "deterrence".

*See Tate v. Gray*, 292 So.2d 618 (Fla. 2nd DCA 1974) (characterizing party's conduct as "criminal" not improper); *Brumage v. Plummer*, 502 So.2d 966 (Fla. 3rd DCA 1987) (characterizing negligence as "gross" not improper). And if, as in this case, a defendant takes the wholly indefensible position that the drowning of an innocent four-year-old boy within shouting distance of thousands of people in the middle of the world's finest amusement park is "nobody's fault", we think that an argument that the defendant's position should insult the intelligence of the jury is a perfectly fair response. *See Hartford Accident & Indemnity Co. v. Ocha*, 472 So.2d 1338, 1343 (Fla. 4th DCA), *review dismissed*, 478 So.2d 54 (Fla. 1985) ("Counsel are, of course, entitled to point out . . . the lack of reasonableness or rationality in an approach.").

Finally, we disagree that the arguments isolated for complaint after-the-fact here violate the Code of Professional Responsibility. It is true that personal opinions of counsel are prohibited in closing argument, but it is also true that argument upon the evidence and the issues is not:

> In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> . . .
>
> assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; *but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.*

Disciplinary Rule 7-106(C)(4), Code of Professional Responsibility (emphasis supplied).

Disney has not identified any expressions of "personal opinion" in its shotgun attack upon plaintiff's counsel's argument; all that it has identified is argument, upon counsel's analysis of the evidence and common sense, for various positions and conclusions concerning the justness of the cause, the credibility of the witnesses, and the culpability of the defendant. The argument was therefore not improper. *See Mills v. State*, 12 FLW 218 (Fla. May 5, 1987); *Wasden v. Seaboard Coast Line Railroad Co., supra.*[43/] Neither was

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43/ For an example of the type of "personal opinion" prohibited by DR7-106, *see Miami Coin-O-Wash, Inc. v. McGough*, 195 So.2d 227 (Fla. 3rd DCA 1967).

any statement complained of here the type of "highly prejudicial and inflammatory" remark considered beyond the bounds of permissible "emotional and heated debate".[44/] For both of these reasons--that the issue was waived and that counsel's garden-variety closing argument was perfectly proper--this issue is without merit.

F. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING DISNEY'S MOTION FOR NEW TRIAL ON THE ASSERTED GROUND THAT THE JURY'S AWARD OF DAMAGES WAS EXCESSIVE.

Finally, Disney contends that the $1,000,000.00 awarded to each of Joel's parents for the past and future pain and suffering caused by the loss of their four-year-old child is "excessive" as a matter of law.[45/] We believe the evidence which is of record, and the applicable law, fully supports the jury's award. First, however, a brief bit of legal background is in order. We begin in 1972, when the Third District certified a case to this Court because it determined that there was no present formula establishing the outer limits of a jury's discretion in awarding future intangible damages. This Court held that it was unnecessary to devise a formula:

> Quite obviously some speculation enters into most personal injury actions, but the yardstick does not exist which can measure future humiliation, pain and suffering of the injured with sufficient certainty to divest a jury of exercising its *sound* discretion to determine the damage award based upon the evidence and the merits of each case under consideration.

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[44/] *See Good Samaritan Hospital Ass'n, Inc. v. Saylor*, 495 So.2d 782 (Fla. 4th DCA 1986); *Metropolitan Dade County v. Dillon*, 305 So.2d 36, 40 (Fla. 3rd DCA 1974), *cert. denied*, 317 So.2d 442 (Fla. 1975); *Honda Motor Co., Ltd. v. Marcus, supra; Decks, Inc. v. Nunez*, 299 So.2d 165 (Fla. 2nd DCA 1974), *cert. denied*, 308 So.2d 112 (Fla. 1975); *Daniels v. Weiss*, 385 So.2d 661 (Fla. 3rd DCA 1980); *Thundereal Corp. v. Sterling*, 368 So.2d 923 (Fla. 1st DCA), *cert. denied*, 378 So.2d 350 (Fla. 1979).

[45/] The first problem we have with the argument is that the testimony of two of the plaintiff's "before and after" damage witnesses was presented by videotape deposition; the depositions were not transcribed by the court reporter; and the depositions are not in the record in any other form (see R. 902). In the absence of a complete record of the factual evidence upon which the jury based its awards, we do not believe this Court is in any position to declare the awards either unsupported by the evidence or excessive. *See Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla. 1979); *Haist v. Scarp*, 366 So.2d 402 (Fla. 1978).

*Seaboard Coast Line Railroad Co. v. McKelvey*, 270 So.2d 705, 706 (Fla. 1972).[46/]

The *McKelvey* principle was elaborated upon in *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977), in which this Court attempted to formulate an objective standard by which to judge the excessiveness of a jury verdict. The standard adopted by the Court is perhaps no more objective than the foundations upon which it is built, but it is nevertheless controlling here:

> Where recovery is sought for a personal tort . . . we cannot apply fixed rules to a given set of facts and say that a verdict is for more than would be allowable under a correct computation. 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.*

349 So.2d at 1184-85 (emphasis supplied). The Court also noted that a determination of the maximum limit of a reasonable range in which the jury may properly operate must include consideration of inflationary tendencies in the economy. *See* footnote 46, *supra*.

The problem next confronted this Court in *Wackenhut Corp. v. Canty*, 359 So.2d 430 (Fla. 1978), in which the Court added that "[i]n its movement toward constancy of principle, the law must permit a reasonable latitude for inconstancy of result in the performance of juries"--and that a verdict cannot be declared excessive by speculating upon matters which may have influenced it, but only if the record "affirmatively show[s] the impropriety of the verdict". 359 So.2d at 430, 435. And, of course, this Court recently (and rather emphatically) reaffirmed the principle of *Bould* in *Ashcroft v. Calder Race Course, Inc.*, 492 So.2d 1309 (Fla. 1986) (relying upon *Bould*; finding abuse of discretion in trial court's determination that $10,000,000.00 awarded to quadriplegic was excessive).

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46/ In *McKelvey*, an award (in 1972 dollars) of nearly $400,000.00 in intangible damages for the loss of an arm was upheld against the defendant's claim of "excessiveness". Surely, Joel's parents' damages are as great as two and one-half times the loss of a mere arm (especially in 1985 dollars). In fact, $1,000,000.00 in 1985 is worth less in real terms than $400,000.00 in 1972 dollars--so the pain and suffering awards for Joel's wrongful death in this case were, in reality, no larger than Mr. McKelvey's pain and suffering award for the loss of his arm.

The combination of *McKelvey*, *Bould*, *Wackenhut* and *Ashcroft* has clearly placed a great deal of discretion within the jury's domain, and severely limited the ability of a trial court or an appellate court to interfere with that discretion. The result has been, as this Court is well aware, that very few recent jury awards have been found excessive as a matter of law.

As Disney has conceded, there is no way in which to measure adequately the loss of a child in dollars and cents. One thing is certain, however. The loss of a child is the loss of a large part of a parent's hopes, dreams and resolve. There is perhaps no more devastating loss than the death of a child which one has conceived, borne, delivered, nurtured, educated, prepared for life, and loved--above all, loved--and the enormous pain and suffering which accompanies the loss of a child has long been recognized by Florida courts. *See Winner v. Sharp*, 43 So.2d 634, 636-37 (Fla. 1949), quoted in relevant part in the majority opinion below. To the extent that the factual record is before the Court, it reflects that both Mr. and Mrs. Goode were totally devastated by the loss of their son, who was the light of their life; that they both suffered serious personality changes; and that they both remained empty and severely depressed (R. 881-85, 898-901, 909-14, 926-28). The damages were also no doubt aggravated by the horrifying circumstances under which the death occurred, at a time when Joel was flush with happiness and excitement, and only several yards from where Mrs. Goode began her frantic but tragically unsuccessful search for him.

We see no need to parse the evidence in detail, since the issue before the Court is simply incapable of mathematical proof, and since the Court can read the limited but compelling evidence of the damages itself. We do think it important to point out to the Court, however, that the trial court observed Mr. and Mrs. Goode from the witness stand in person--and that it observed on the record in this case after trial that "their grief was crushing"; that their grief was "overwhelming and genuine"; that "[t]hey both had almost a complete, full personality change"; that they both were in a "perpetual decline" from the loss of their son; and that, although generous, the amounts awarded to them by the jury did

not shock its judicial conscience (R. 1146-47). We think those observations are entitled to considerable weight here.

To the extent that a comparison with other cases may assist the Court in determining the issue presented here, we refer it to four previous Florida decisons. Sixteen years ago (when the dollar was worth *considerably* 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 1971), *cert. denied*, 256 So.2d 6 (Fla. 1971). Thirteen years ago, the Third District also upheld a verdict of $500,000.00 to a mother and $400,000.00 to a father for pain and suffering arising out of the wrongful death of a six-year-old child. *Metropolitan Dade County v. Dillon*, 305 So.2d 36 (Fla. 3rd DCA 1974), *cert. denied*, 312 So.2d 442 (Fla. 1975). And eight years ago, when a dollar was worth more than twice what it is worth today, the Third District reinstated an award of $1,000,000.00 for the pain and suffering of the parents of a teen-aged girl. *Corbett v. Seaboard Coast Line Railroad Co.*, 375 So.2d 34 (Fla. 3rd DCA 1979), *cert. denied*, 383 So.2d 1202 (Fla. 1980). Finally, the Third District recently upheld an award *identical* to that in the instant case--$2,000,000.00 for the pain and suffering of the parents of a teenaged girl--citing the decision under review here (and *Bould*) with approval. *Palm Springs General Hospital, Inc. v. Varona*, 504 So.2d 461 (Fla. 3rd DCA 1987).[47/] The evidence in the instant case is in no way dissimilar to the evidence in those four cases. The damage awards appear generous, to be sure--but that is simply because the pain and suffering of Mr. and Mrs. Goode was and is enormous.

This Court has made it abundantly clear in recent years that a jury should not be divested of its liberal discretion to assess intangible damages, except when its award is "so *inordinately* large as *obviously* to exceed the *maximum* limit of a *reasonable* range within which the jury may properly operate". The emphasized adjectives and adverbs were obvi-

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47/ The amount of the verdict in *Varona* does not appear on the face of the Third District's decision. The Court may take judicial notice of it, however, because the decision is pending discretionary review in this Court in case numbers 70,598 and 70,599.

ously chosen for a purpose--to ensure that jury awards of intangible damages are not disturbed by courts except (since an escape valve is necessary to cover the truly irrational verdict) in the rare case in which no reasonable person would have awarded the amount awarded by the jury. The award in the instant case falls within the "reasonable range" established by *Knapp*, *Dillon*, *Corbett* and *Varona*, however, and this Court therefore cannot say with sufficient enough certainty that the jury's award is so inordinately large as obviously to exceed the maximum limit of a reasonable range to justify vetoing the jury's verdict as a matter of law--unless, of course, it is prepared to legislate "caps" on pain and suffering awards, which it clearly has no constitutional authority to do. *See Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987). The damages awarded to Mr. and Mrs. Goode are therefore not "excessive", and the district court's determination that Disney was not entitled to a new trial on damages as a matter of immutable law was correct.

Of course, it remains for us to demonstrate that the district court's decision is not in express and direct conflict with the decision upon which Disney relies for jurisdiction--*Harbor Insurance Co. v. Miller*, 487 So.2d 46 (Fla. 3rd DCA), *review denied*, 496 So.2d 143 (Fla. 1986)--and that this decision does not require a contrary result here.[48/] Disney has been considerably less than candid with the Court, in two respects, in disclosing only that "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" (petitioners' brief, p. 25). It

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48/ Disney has also contended that a contrary result is required by *Johnson v. United States*, 780 F.2d 902 (11th Cir. 1986). We disagree. 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. As we have noted above, there are at least five Florida decisions (including the decision under review) 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 legal analysis of the "excessiveness" issue in this case, and just as clearly demonstrates that the *Johnson* Court's analysis of Florida law was incorrect.

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 comparison here is clearly the $2,500,000.00 awarded for the parents' pain and suffering, not the reduced amount of the judgment ultimately entered against the defendant. Now that we have straightened out the facts, it should be 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.[49/]

More importantly, the *Harbor Insurance* court did not hold that pain and suffering awards totalling $2,500,000.00 were excessive as a matter of law. It ordered a new trial because of improper conduct by plaintiffs' counsel (and 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.[50/] Although Disney has argued here 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

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[49/] It is arguable, perhaps, that a comparison of the $1,000,000.00 awarded to the father in *Harbor Insurance* with the $1,000,000.00 awards to Mr. and Mrs. Goode might support a "conflict". The *Harbor Insurance* court did not declare the $1,000,000.00 award excessive by itself, however. Its references to the verdict were to the total verdict alone, and it is therefore likely that its reaction was to the higher of the two awards, the $1,500,000.00 awarded to the mother. See footnote 50, *infra*. In any event, as we will demonstrate next, the *Harbor Insurance* court did not declare the verdict excessive *per se*; its reversal was bottomed upon improper conduct of plaintiffs' counsel at trial.

[50/] That conclusion is fully reinforced, of course, by the Third District's subsequent *affirmance* of the $2,000,000.00 pain and suffering award in *Palm Springs General Hospital, Inc. v. Varona, supra*. In addition, *see Good Samaritan Hospital Ass'n, Inc. v. Saylor*, 495 So.2d 782, 784 n. 3 (Fla. 4th DCA 1986) (explaining that the *Harbor Insurance* court reversed the judgment, not for "excessiveness", but because "the repetitive, highly emotional testimony . . . and the impermissible 'golden rule' arguments made by appellee in closing argument, caused the jury's verdict to be a product of passion and emotion rather than based on the evidence presented").

mention in its opinion. And since (for purposes of jurisdiction at least) this Court can look no further than the face of the decision under review here, it must assume that the type of improper conduct which provoked the reversal in *Harbor Insurance* did not occur in this case; as a result, there is clearly no conflict between *Harbor Insurance* and the decision sought to be reviewed sufficient to support this Court's jurisdiction. In any event, as we trust we have demonstrated in our argument under Issue E, plaintiff's counsel engaged in no improper conduct in this case (or the impropriety was affirmatively waived), so *Harbor Insurance* is simply inapposite here. For all of the foregoing reasons, this issue is without merit.

## V.
## CONCLUSION

It is respectfully submitted that review was improvidently granted, and that review should be denied. Alternatively, the decision under review should be approved.

## VI.
## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 28th day of August, 1987, to: John L. O'Donnell, Jr., of DeWolf, Ward & Morris, P.A., 1475 Hartford Building, 200 East Robinson Street, Orlando, Fla. 32801; and to C. Rufus Pennington, III, Esquire, Margol & Pennington, P.A., 218 East Forsyth Street, Jacksonville, Fla. 32202.

Respectfully submitted,

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