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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

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

Petitioners/Appellants,

vs.

CASE NO. 70,054

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

Respondents/Appellees.
_____/

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

PETITIONERS' REPLY BRIEF

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REPLY TO FACTS

Many of Mrs. Goode's statements of fact are wrong both in the initial Statement of Facts and in the argument.

Mrs. Goode's statement of the stipulation that no evidence would be introduced that the sides of the waterway were such as to cause any difficulty for anyone to get out, "[T]he agreement was that we would not introduce evidence that it was difficult for the plaintiff's expert to exit the moat ...."[BR. 4; Mrs. Goode's emphasis], is wrong. The stipulation [T.T.Vol.IV, 9] is attached as an appendix [App. 1]. The trial court made it clear the stipulation was not limited to the expert's personal experience:

> THE COURT: We didn't have any limitations: "who couldn't get out" when we had this stipulation.
>
> MR. FREIDIN: Well, I think we did. We were talking about the fact that he couldn't get out and it would be difficult for him to get out.
>
> THE COURT: No. [T.T.Vol.VII, 173]

At that point, the plaintiff retracted the testimony that it was difficult to get out of the moat, replacing it with the obvious statement that children "who could not swim to the edge and who [were] a height shorter than the depth of the water" would have difficulty getting out [T.T.Vol.VII, 180]. Judge Cobb's statement of the stipulation in his dissenting opinion is confirmed by the record; Mrs. Goode's recasted stipulation is not.

Mrs. Goode's assertion that the diver needed assistance to exit the moat [BR. 3] is similarly inaccurate. While one employee recalled assisting the diver on the night of the

incident by extending his hand [T.T.Vol.IV, 37], the diver testified that he got out of the waterway in 20 different places without assistance on another occasion and that he did not need assistance on the night of the accident. [T.T.Vol.X, 8-10].

Throughout her brief, Mrs. Goode refers only to the "short fence," [BR. 6, 7, 8, and throughout], ignoring the 3-foot fence around the old dock [T.T.Vol.III, 152-153] next to where Joel was found.

Her assertion, "... the only barriers to Joel's access to the moat were two short fences" is wrong. Joel either climbed a 31 inch fence and crossed a lawn before encountering the water, or climbed a 36 inch fence around the dock.

Mrs. Goode's implication that the 31-inch fence (which she refers to as the "24-inch" fence) was not approved for the grass areas here is contrary to Martin's uncontradicted testimony that they were approved [T.T.Vol.VIII, 44].

The claim on page 10 that the swan boats "required a depth of no more than two or three feet in which to operate comfortably (R. 647-51)" is wrong. The reference attributes the claim to Collier, but Collier stated quite clearly that he was not talking about the depth necessary for the swan boats, but rather for a redesigned, flat-bottom boat produced by his imagination [T.T. Vol. VII, 164], which he postulated would float in 6 inches of water. However, the Plaintiff put in evidence the fact that the swan boats are only 27 1/2 feet long, and that the distance from the lowest point in the bottom to the water line on an <u>empty</u> boat is over two feet (25 1/4 inches). [T.T.Vol.

VIII, 86].

With respect to the depth of water necessary for the actual boat, the uncontradicted testimony of Klug, the designer of the waterway, was:

> The four-foot is a nominal depth in order to have sufficient clearance for the guidance mechanism and the draft of the boat....I do know that it was very tight for a loaded -- for a loaded boat. I am sure for [sic] feet was a real requirement for draft. [T.T.Vol. X, 39].

Mrs. Goode implies that the four to five foot depth at Disney World was unnecessary because the depth of the castle waterway at Disneyland is 1 1/2 to 3 feet [BR. 11]. She fails to mention, however, that there are no boats in the waterway at Disneyland. [T.T.Vol.X, 58].

The reference to Martin as "Mr. Klug's supervisor" on page 10 is wrong. Mr. Martin had no responsibility below the water line. [T.T.Vol.VIII, 29]. Mr. Martin was the artist who designed the layout of the area. [T.T.Vol.VIII, 12 (Martin); Vol.VII, 189 (Klug)]. Klug's supervisor was the chief engineer, not Martin. [T.T.Vol.VII, 186].

Mrs. Goode states that the sides underwater "were sloped steeply simply because it costs less to do it that way" [BR. 10], falsely implying that the more expensive alternative is a shallower slope. In fact, the more expensive alternative was a vertical wall. [T.T.Vol.VII, 195-197 (Klug)].

Mr. Klug testified that the waterway was not designed with ladders or stairs because it was not foreseen that children would get into it since the public was not being invited into

the water or on the landscaped areas near the water. [T.T.Vol. VII, 199-200; 210]. The evidence shows clearly that this waterway was obviously not a swimming facility. While there was testimony that children had been seen over the fences, there was no evidence that any child had ever been seen in the water. Indeed, in the Pre-Trial Stipulation, Mrs. Goode stipulated there would be no evidence that any guest was in the water in the six years the park was open prior to this incident [R. 1503].

The same safety representative who testified that the minimum acceptable height for a barrier fence at water's edge is 42 inches [BR. 7-8], testified that the 31 inch height was adequate for a child, and that in his judgment the area was safe. [T.T.Vol.V, 182, 184].

Finally, Mrs. Goode's statement, "The sides of the moat slope sharply to the bottom at a 30° angle" [BR. 10], is wrong. The sides go out 1 1/2 feet for every foot down, creating a slope gentler than 45°. The angle of the slope down from the vertical side is, in fact, nearly 55°.

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

Mrs. Goode and her amicus expend much effort (and vituperation) arguing that Disney wishes to abolish all duties it has to invitees. Such nonsense is not the issue here.

The issue is whether a duty to prevent access to water is reasonable care or absolute liability.

The Plaintiff's position is clear: Disney had a duty "to

prevent [small children] from gaining access to the moat." [BR. 7, 9, 19, 24, 25]. Mrs. Goode is very plainly asking this Court to impose upon property owners the duty to maintain their premises so that a guest cannot be injured. She argues that the occurrence of injury alone is sufficient to establish negligence saying, "[F]our year-old boys do not drown ... in an amusement park in the absence of someone's negligence." [BR. 26].

However, "The mere occurrence of an accident is not enough to establish the negligence of anyone." Wood v. Jones, 109 So.2d 774 (Fla. 3d DCA 1959). It is well settled that:

> The law does not require a proprietor of a public place to maintain his premises in such condition that an accident could not possibly happen to a customer.

Earley v. Morrison Cafeteria Co., 61 So.2d 477, 478 (Fla. 1952).

Mrs. Goode and her amicus recognize that the Fifth District has departed from these rules, to their benefit, in holding that a property owner has a duty to prevent access to water that is not itself unreasonably dangerous.[1]

The Plaintiff's effort to focus entirely on whether this little boy could climb this particular fence misses the point entirely, unless it is her position that the duty to prevent access to water runs only to four-year-olds and not five-year-

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[1] The only jury question stated by the Fifth District was "Whether Disney breached its duty of reasonable care to the decedent by leaving the moat unprotected ...." The question was not whether Disney breached its duty by having an unreasonable waterway.

olds, or ten-year-olds, or teenagers, or adults. All these people could drown in four feet of water if they could not swim, panicked, or became disoriented. How high a fence does a property owner build to fulfill the Fifth District's duty to "protect" people from gaining access to water?

The evidence is uncontradicted in this case that the fence fulfilled the only two purposes fences serve: it warned patrons that they were not supposed to cross it;[2] it kept patrons from accidentally[3] getting into the water.

Plaintiff's reliance on Machin v. Royale Green Condominium Ass'n., 507 So.2d 646 (Fla. 3d DCA 1987) is circular in the extreme since Machin relied upon the decision in this case, the precedential value of which this Court will determine. Beyond that, Machin also involved evidence of violation of a regulation requiring self-closing gates on swimming pools. The court did not suggest that the property owner had to erect a fence high enough that children could not climb it.

Mrs. Goode's effort to distinguish all the cases relying on Allen v. William P. McDonald Corp., 42 So.2d 706 (Fla. 1949) requires her to supply holdings which none of the courts chose. Not one of the cases held that the condition was not attractive to children. Because Mrs. Goode concedes that the legal duty

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[2] Mrs. Goode testified that she knew Joel was not supposed to climb the fence, yet she permitted it [T.T.Vol. IX, 183].

[3] Mrs. Goode has never contended that Joel fell over a fence into the water.

was the same in those cases as it is here [BR. 13-14], their holdings that the waterways were not unreasonably dangerous should have controlled the decision in this case. The Fifth District's ruling that such cases involved a duty owed to trespassing children was wrong.

Finally, in her effort to distinguish Kinya v. Lifter, Inc., 489 So.2d 92 (Fla. 3d DCA), rev. den., 496 So.2d 142 (Fla. 1986), Plaintiff relies again on imagination to extract from the decision a ruling that the child was a licensee because the lake was not "reserved to tenants for their use" [BR. 18]. Such a ruling is not even a fair inference from the decision, **particularly since the court stated the lake "formed a part of the common elements area...."** 489 So.2d at 93.

It is not "perverse" that the law does not impose liability in such cases, but rather recognition that there is no fault in maintaining a condition which is familiar to all. The risks presented here are no different from those presented by lakes, streams and rivers which are the focal point of so many parks, both publicly and privately owned, throughout the country. And yet, as well-known as these risks are, no court, no legislature, no public or private code authority has imposed a duty to prevent access to the water in these parks or to insure that a drowning cannot occur.

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

The crux of the causation problems in this case is presented by Plaintiff [BR. 21]:

> [Joel] was 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...), or by Disney's swan boats (in which he had safely ridden on an earlier occasion...).

On what evidence, direct or circumstantial, does the jury decide in this case that it was more likely than not that Joel entered the water because of the condition of the premises, rather than for either of these two reasons, neither of which suggests negligence on the part of the Defendant? Mrs. Goode points to no such evidence, proclaiming, "We were not required to prove how Joel gained access to Disney World's drowning hazard" [BR. 24].

This defiant statement is incomprehensible. Surely, they are not saying that they are not required to present any evidence at all of causation. In Gooding v. University Hosp. Bldg., Inc., 445 So.2d 1015, 1018 (Fla. 1984) the Supreme Court reiterated:

> In negligence actions Florida courts follow the more likely than not standard of causation and require proof that the negligence probably caused the plaintiff's injury. [Emphasis supplied.]

The only fact Mrs. Goode cites to support an inference of causation is the fact of Joel's death, but no inference is permissible from the fact of injury alone. E.g., Clyde Bar, Inc. v. McClamma, 10 So.2d 916 (Fla. 1942).

It is precisely this type of unsupported speculation that this court sought to eliminate from civil jury trials in Voelker v. Combined Ins. Co. of America, 73 So.2d 403 (Fla. 1954) by requiring that when the facts are unknown, the evidence must in

some way exclude non-negligent causation.

In determining the sufficiency of the evidence on causation it must be remembered that Mrs. Goode neither alleged nor attempted to prove that every condition of the property around the waterway was unreasonably dangerous. There is no evidence of "climbability" for the 36-inch fence around the old dock next to where Joel was found. There was no challenge to the 36-inch fence from Collier, whose opinion was based solely on "a short fence...two feet high" [sic]. [T.T.Vol.VII, 157].

Likewise, while Mrs. Goode complained about the steep slope of the banks, it is unchallenged that the slope next to where Joel was found was flat [T.T.Vol.VII, 159-160].

In each of the cases cited by Mrs. Goode in note 18, the plaintiff's involvement with a dangerous condition was established either by direct evidence, or circumstantial evidence excluding any other inference.

Because there is no evidence of any of the circumstances surrounding Joel's death, it was impossible for Mrs. Goode to exclude Joel's intentional entry into the water which she refers to on page 21 and limit the circumstances causing the entry to only the condition of the premises.[4]

B. Foreseeability.

It has never been Disney's position that a prior similar

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[4] Quite obviously, the Fifth District's "law of the case" is not binding on this Court, which may review any errors. Kennedy v. Kennedy, 303 So.2d 629 (Fla. 1974).

incident involving the waterway was necessary to create a jury question. [BR. 8]. We do maintain that Mrs. Goode was required to present some evidence that some injury was more likely than not to occur because of the condition of the premises. Braden v. Florida Power & Light Co., 413 So.2d 1291 (Fla. 5th DCA 1982); Crislip v. Holland, 401 So.2d 1115 (Fla. 4th DCA), rev. den., 411 So.2d 380 (Fla. 1981). See, Gibson v. Avis Rent-A-Car System, 386 So.2d 520, 522 (Fla. 1980).

C. Mrs. Goode's Negligence

The decisions in Alves v. Adler Built Industries, Inc., 366 So.2d 802 (Fla. 3d DCA), cert. den., 378 So.2d 342 (Fla. 1979) and Perrotta v. Tri-State Ins. Co., 317 So.2d 104 (Fla. 3d DCA 1975), cert. den., 330 So.2d 20 (Fla. 1976) are not distinguishable in their material facts and issues. The holding in Alves that, in spite of actual knowledge by the landowner of the lack of supervision of the child, the parents' negligence was the sole legal cause of the incident is particularly relevant.

At one point in her brief Mrs. Goode suggests that because she was found negligent, Disney must also have been negligent. [BR. 25]. On the contrary, it is quite consistent that a parent's failure to supervise combined with a reasonably safe condition could produce tragedy. The classic example of such a circumstance is the unsupervised four-year-old who darts from behind a tree into the path of a car.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING COURTLAND COLLIER TO TESTIFY AS AN EXPERT WITNESS.

Mrs. Goode claims that Courtland Collier gave "an expert

opinion concerning the unreasonably dangerous nature of Disney's design" [BR. 31]. He did not, and that is the reason allowing his opinion was an abuse of discretion. Mr. Collier was asked:

> [D]o you have an opinion as to whether or not this area where we're referring to is unreasonably dangerous. [T.T.Vol.VII, 155].

He was never asked whether the grades on the banks were reasonably designed to support the bridge, or for drainage; whether the depth of the water was reasonable for the swan boats; whether the one-foot variation in the depth of the water was reasonable for draining the waterway; whether the sloped sides of the waterway were reasonably designed for their purpose.

Mr. Collier did not "redesign the area." [BR. 33]. His only "redesigning" was of the boats to eliminate the draft of the actual swan boats and then make the waterway depth three feet [T.T.Vol.VII, 124-128] instead of four [T.T.Vol.X, 39]. His only other suggestions were to place a one-foot fence at the edge of the water [T.T.Vol.VII, 158] and build a ledge underwater around the perimeter. [T.T.Vol.VII, 158], to create a sharp drop, rather than a slope. He never suggested any engineering modifications to the slopes or grades or any other aspect of the design.

The suggestion that Mr. Collier was called to rebut a "purposefully created aura of engineering expertise" [BR. 32], ignores the fact that any such aura was created by Mrs. Goode, who called Mr. Martin and Mr. Klug in her case-in-chief.

Undoubtedly Mr. Collier is an expert in civil engineering, but there is nothing in the record to suggest that he was any

better qualified than the members of the jury to decide whether the area was unreasonably dangerous. In the absence of such superior knowledge on the question he was asked, it was an abuse of discretion to permit his testimony. Buchman v. Seaboard Coastline R. R. Co., 381 So.2d 229 (Fla. 1980); Sea Fresh Frozen Products, Inc. v. Abdin, 411 So.2d 218 (Fla. 5th DCA), rev. den., 419 So.2d 1195 (Fla. 1982).

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

To support the trial court's refusal to instruct the jury on foreseeability, Mrs. Goode argues that the issue was covered by the charges; that the proposed instruction was erroneous, and that the issue was abandoned. None of the excuses is tenable.

In the vast majority of cases, no instruction on foreseeability is necessary because there is no issue over whether some harm is likely to follow the defendant's careless conduct. In this case, though, the Fifth District had ruled that foreseeability was a jury question, and the trial court still refused to instruct the jury on that issue.

The standard instruction on intervening cause does not cover the issue of foreseeability as an element of a defendant's negligence vel non. That instruction, Standard Jury Instruction 5.1c, does indeed mention "reasonably foreseeable," but only in in the alternative. In following that instruction, the jury in this case could have decided that the condition of the premises "contributed substantially" and that the lack of supervision "was itself reasonably foreseeable" and concluded that negligence by Disney was "a cause" without ever considering whether

the injury was a reasonably foreseeable consequence of the condition of the premises. Such a result is contrary to the law that one is liable only for the reasonably foreseeable consequences of his actions. See, e.g., Stark v. Holtzclaw, 90 Fla. 207, 105 So. 330 (1925).

Mrs. Goode claims now, that the proposed instruction was inaccurate. The trial court, however, believed it was an accurate statement [T.T.Vol.X, 71], and it was not substantially different from Plaintiff's alternative.

The proposed instruction was clearly supported by the authorities. Pope v. Pinkerton-Hays Lumber Co., 227 So.2d 441 (Fla. 1961); Firestone Tire & Rubber Co. v. Lippincott, 383 So.2d 1181 (Fla. 5th DCA 1980); Goode v. Walt Disney World Co., 425 So.2d 1151 (Fla. 5th DCA 1982). The trial court's outright refusal to give a non-standard instruction prevented any cosmetic changes which Mrs. Goode may have thought appropriate.

Finally, Mrs. Goode's brief is devoid of any authority for her suggestion that not arguing foreseeability waived the error in not giving the instruction.

A trial court's refusal to give an appropriate instruction on a fundamental issue deprives the party of the opportunity to have the case decided according to law and is, therefore, harmful error. E.g., Seguin v. Hauser Motor Co., 350 So.2d 1089 (Fla. 4th DCA 1977).

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

In attempting to justify her final argument, Mrs. Goode

claimed she was asking the jury to make a statement of deterrence rather than punishment [BR. 41]. Her argument here thus concedes the point -- that the trial argument called for punitive action -- for the only jury instruction incorporating deterrence is on punitive damages. Deterrence may be a goal and an effect of the tort system, but it is not a matter for a particular jury to consider in assessing legal fault and compensation.

Injecting punitive overtones into a case which does not involve punitive damages is a fundamental injustice. Indeed, it taints liability as well as damages since it is uncertain whether the verdict is the result of the jury's conclusion that the defendant breached a duty established by the law or a duty established by the jury to "deter" the conduct on trial.

Arguments calling for the jury to make statements on punishment and deterrence are reversible error. Erie Ins. Co. v. Bushy, 394 So.2d 228 (Fla. 5th DCA 1981).

Mrs. Goode's second defense of her argument as an appeal to the "conscience of the community" [BR. 41] is similarly untenable. Appeals to community duty and expectation have no proper purpose and are grounds for reversal. See, Westbrook v. General Tire and Rubber Co., 754 F.2d 1233, 1238-1239 (5th Cir. 1985); Boatwright v. State, 452 So.2d 666 (Fla. 4th DCA 1984).

Such appeals invariably set up an us-against-them attitude designed to stir the passion and prejudice of the jury. In this case it was "What do we feel about protecting children?" [T.T. Vol.X, 79] against "this corporation which figures they can do

what they want." [T.T.Vol.X, 91]. In its worst manifestation, the argument becomes an appeal to the jury to decide the case not under the law, but "under prevailing community standards," as Mrs. Goode argues [BR. 42]. The "community standards" are, of course, the passions and prejudices of the individual jurors, encouraged by comments like:

> If I built a swimming pool in my neighborhood and I put up...a two-foot fence, they would throw me out of the neighborhood....They would do more than throw me out of the neighborhood.... [T.T.Vol.X, 90].

These arguments were improper, and go to the very foundation of the case. It is the difference between a verdict based on the facts and the law and one based on passion, prejudice and the feelings of the jurors for or against the parties. Judgments obtained by such arguments ought not be affirmed.

There is indeed a ruling for this Court to reverse. The improper argument was one of the grounds for the motion for new trial which the court denied.

VI. THE DAMAGES AWARDED IN THIS CASE WERE EXCESSIVE.

Even the mathematically precise comparisons by the amicus support this conclusion. The verdict in this case, even without adjustment to 1986 dollars, exceeds the verdicts in the only two cases cited containing no elements of damage other than the parents' mental anguish. Metropolitan Dade County v. Dillon, 305 So.2d 36 (Fla. 3d DCA 1974), cert. den., 317 So.2d 442 (Fla. 1975); Corbett v. Seaboard Coastline R. Co., 375 So.2d 34 (Fla. 317 3d DCA 1979), cert. den., 383 So.2d 1202 (Fla. 1980).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to JOEL D. EATON, ESQ., 25 West Flagler Street, Suite 1201, Miami, Florida 33130; PHILIP FREIDIN, ESQ., 44 West Flagler Street, Suite 2500, Miami, Florida 33130; and, C. RUFUS PENNINGTON, III, ESQ., 218 East Forsythe Street, Jacksonville, Florida 32202 this 25th day of September, 1987.

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I HEREBY CERTIFY that a corrected copy of the foregoing has been furnished by mail to the above this 28th day of September, 1987.

John L. O'Donnell, Jr. of
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