IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO.: 10-CA-019146-O, Div. 37

SUZANNE C. CONNELL and H. TODD CONNELL, as parents and legal guardians of R.T.C., a minor,

Plaintiffs,

vs.

SEAWORLD PARKS & ENTERTAINMENT, INC., a foreign corporation; SEAWORLD PARKS & ENTERTAINMENT, LLC, a foreign corporation; SEA WORLD, LLC, a foreign corporation; and SEA WORLD OF FLORIDA, LLC, a Florida Corporation,

Defendants.

_____/

DEFENDANTS' MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW

Defendants, SEAWORLD PARKS & ENTERTAINMENT, INC.; SEAWORLD PARKS & ENTERTAINMENT, LLC; SEA WORLD, LLC; and SEA WORLD OF FLORIDA, LLC (sic)(hereafter collectively referred to as "SeaWorld"), by and through their undersigned counsel, and pursuant to Florida Rules of Civil Procedure 1.110(b) and (f), 1.140(b)(6) and (f), and 1.420(b), file this Motion to Dismiss and Incorporated Memorandum of Law, and in support state as follows:

1. Plaintiffs, SUZANNE C. CONNELL and H. TODD CONNELL, as parents and legal guardians of R.T.C., a minor, allege R.T.C. sustained damages as a result of witnessing an incident on February 24, 2010, when a SeaWorld trainer was drowned by an orca.

2. Plaintiffs' Complaint fails to state a cause of action upon which relief can be granted and should therefore be dismissed under Florida Rule of Civil Procedure 1.140(b)(6). Further, Plaintiffs' Complaint should be dismissed under Rule 1.420(b) for contumacious violations of the rules of pleading.

3. Plaintiffs assert two Counts: negligent infliction of emotional distress and intentional infliction of emotional distress. However, Plaintiffs fail to adequately plead "a short and plain statement of the ultimate facts" showing that that they are entitled to relief as required under Florida Rule of Civil Procedure 1.110(b).

4. Plaintiffs improperly try to circumvent Florida's "impact rule" by relying on narratives, rhetoric, and a formulaic recitation of the elements of each cause of action. It is well-established that pleading conclusions unsupported by the requisite ultimate facts is inadequate to state a claim.

5. As to their claim for negligent infliction of emotional distress, Plaintiffs fail to adequately plead ultimate facts supporting the elements of a close personal relationship and a discernable physical injury as required by Florida law.

6. With respect to their claim for intentional infliction of emotional distress, Plaintiffs simply mischaracterize allegations of negligence by SeaWorld toward its employees as outrageous conduct directed toward them.

7. Since Plaintiffs have not adequately pleaded ultimate facts supporting either cause of action, the Complaint should be dismissed, and because any attempt to amend would be futile, the Complaint should be dismissed with prejudice.

8. Plaintiffs' Complaint also should be dismissed for intentionally violating the rules of pleading. Plaintiffs' Complaint reads more like a press release than a legal pleading. Contrary

to Rule 1.110(f), multiple paragraphs in Plaintiffs' Complaint span more than a page and are drafted in narrative and editorial style. Further, the 26-page Complaint is unnecessarily filled with redundant, immaterial, and impertinent matter in violation of Rule 1.140(f).

WHEREFORE, Defendants respectfully request that this Honorable Court enter an Order dismissing Plaintiffs' Complaint with prejudice.

MEMORANDUM OF LAW

I. SUMMARY OF ARGUMENT

Plaintiffs, SUZANNE C. CONNELL and H. TODD CONNELL, as parents and legal guardians of R.T.C., a minor (hereafter collectively referred to as "Plaintiffs"), filed a Complaint for Damages against SeaWorld, arising out of an incident that occurred on February 24, 2010, when a SeaWorld trainer was unfortunately drowned by an orca. Plaintiffs claim 10-year-old R.T.C. sustained recoverable damages from witnessing the incident. Even accepting the "well-pleaded" allegations as true, the Complaint is devoid of the ultimate facts necessary to state a cause of action. Plaintiffs' vain attempt to state a claim resulted in a 26-page Complaint rife with redundancy, inflammatory accusations, and superfluous factual allegations—many of which are unfounded and inaccurate. When held up to the applicable law, Plaintiffs' lawsuit is shown to be legally deficient and nothing more than an improper attack on SeaWorld's reputation.

Plaintiffs assert two counts: (1) negligent infliction of emotional distress and (2) intentional infliction of emotional distress. In violation Florida Rule of Civil Procedure 1.110(b), Plaintiffs rely on rhetoric, conclusory statements, and a formulaic recitation of the elements of each cause of action to try to circumvent the "impact rule". Given Plaintiffs' utter failure to recognize the elements of each cause of action, the Complaint should be dismissed under Florida

Rule of Civil Procedure 1.140(b)(6). Further, since Plaintiffs cannot possibly state a cause of action arising out of this incident, the Complaint should be dismissed with prejudice.

Plaintiffs' claim of *negligent* infliction of emotional distress is futile since they were simply sideline bystanders who witnessed the alleged incident. They do not allege a close personal or familial relationship with the SeaWorld trainer. Additionally, they do not allege any ultimate facts supporting a significant discernable physical injury. Under these circumstances, their claim is barred by Florida's impact rule.

Although claims of *intentional* infliction of emotional distress are exempt from the impact rule, Plaintiffs errantly try to state a cause of action by mischaracterizing allegations of negligence as something more sinister. Contrary to Plaintiffs' effort, they cannot transform allegations of negligence into intentional or reckless conduct merely by affixing the labels "intentional" or "reckless". Allowing otherwise would render the impact rule totally meaningless. Additionally, Plaintiffs' allegations that SeaWorld provided discourteous treatment and made an inaccurate statement (which was later retracted) likewise are woefully insufficient to state a cause of action for intentional infliction of emotional distress.

Permitting Plaintiffs to proceed with this action would open the courtroom doors for every other opportunistic claimant who witnesses an accident. Preventing such an imprudent result is one of the primary reasons Florida has steadfastly adhered to the impact rule. Even if the Complaint had been competently or artfully drafted, it inevitably would fail to state a cause of action. Plaintiffs' frivolous attempt to fasten liability where it so patently does not exist should be rejected, and their Complaint should be dismissed with prejudice.

Moreover, Plaintiffs' Complaint should be dismissed under Florida Rule of Civil Procedure 1.420(b) for trampling on the rules of pleading. In addition to failing to state a cause

of action, Plaintiffs repeatedly violate Florida Rule of Civil Procedure 1.110(f) by including lengthy narrative allegations containing multiple averments in a single paragraph. Plaintiffs also ignore Florida Rule of Civil Procedure 1.140(f) by including redundant, immaterial, and impertinent matter. Pleading perfection is not required, but as here, where the entire Complaint is tainted by calculated and willful disregard for the rules, dismissal is warranted.

II. FACTS ALLEGED IN THE COMPLAINT

On February 24, 2010, Plaintiffs allege they were business invitees of SeaWorld, visiting from New Hampshire. While at the park, they attended Dine with Shamu where guests can have lunch while watching a whale show. **[Plaintiffs' Complaint, ¶¶ 2-4, 10]**

Plaintiffs acknowledge the show went as SeaWorld "*had planned*" and was a very positive experience.[1] In fact, when the show ended, Plaintiffs remained in the dining area "basking in the euphoria of the show." According to Plaintiffs, the SeaWorld trainer [Dawn Brancheau] "made a very deep, positive impression *during the performance*."[2] Further, Plaintiffs claim that the orca [Tilikum] "*performed as Defendants had envisioned*" also "forming a deep, positive impression." **[Plaintiffs' Complaint, ¶ 11]** (emphasis added)

Shortly after the show ended, Plaintiffs allege that "without warning, things suddenly turned tragically wrong." Plaintiffs further allege the trainer was lying at the edge of the pool when the orca pulled her into the water. Within minutes, someone sounded the pool alarm and several trainers responded. Plaintiffs claim other trainers and/or SeaWorld employees were "frantically running around the pool trying to get a view of Dawn and Tilikum." The trainers had to corral the whales in another pool, but, according to Plaintiffs, "[d]ue to the excitement and

[1] As a preliminary matter, Plaintiff's acknowledgement that SeaWorld "planned" to make the show such a "positive" experience illustrates why Plaintiff's inconsistent allegation of intentional misconduct is so preposterous.

[2] Significantly, there are no other allegations regarding the nature or extent of the minor Plaintiff's relationship with the trainer, and as will be addressed below, Plaintiffs' allegations do not satisfy the close personal relationship test required to state a cause of action under Florida law.

frantic actions of the trainers and/or SeaWorld employees… these killer whales refused to follow directions."[3] Nevertheless, the trainers were able to move the whales into another pool. They also were able to direct Tilikum into a separate pool with a false bottom where they retrieved the deceased trainer's body. Plaintiffs allege the entire process took approximately forty (40) minutes, and "Minor Plaintiff RTC saw much of what transpired and what he didn't see he was subjected to in the pandemonium and chaos that surrounded this tragic event."[4] **[Plaintiffs' Complaint, ¶¶ 11-12, 14]**

Plaintiffs admit they were instructed to leave the area and were asked by a SeaWorld employee if they needed assistance following the incident. They were escorted to Guest Services where they spoke with an Operations Manager. According to Plaintiffs, the Operations Manager asked what they wanted. They offered to enlighten him about how the incident occurred, but the Operations Manager allegedly declined their assistance. Thereafter, Plaintiffs left SeaWorld and returned to their hotel. **[Plaintiffs' Complaint, ¶¶ 68-71]**

Plaintiffs claim they contacted FOX News to explain what they had observed, but the version reported by FOX News was inconsistent with what they had relayed. Plaintiffs allege that the inaccurate report was caused by a statement from SeaWorld, which SeaWorld subsequently retracted. A FOX News person reportedly contacted Plaintiffs and suggested their account of the events was untruthful. **[Plaintiffs' Complaint, ¶ 71]**

Plaintiffs allege that the incident at SeaWorld and the events that followed "physically manifested on minor Plaintiff RTC as he screamed, and cried so profoundly that his face turned

[3] The Complaint does not elaborate on what expertise Plaintiffs have in interpreting the thoughts and behaviors of killer whales.

[4] It is unclear from the Complaint why Plaintiffs, Suzanne C. Connell and H. Todd Connell, did not immediately remove their 10-year-old son from the area as opposed to letting him witness "much of what transpired"—only to later subject him to media attention.

red then a shade of blue." **[Plaintiffs' Complaint, ¶ 14; see also ¶ 70]** This is all Plaintiffs allege, none of which constitutes a discernable physical injury as required by Florida law.

III. PLAINTIFFS' COMPLAINT FAILS TO STATE A CAUSE OF ACTION

A. Legal Standard for a Motion to Dismiss under Rule 1.140(b)(6)

Florida Rule of Civil Procedure 1.140(b)(6) authorizes dismissal of a complaint where it fails to meet the pleading requirements of Rule 1.110(b). Rule 1.110(b) states, in pertinent part, that a claim for relief "shall contain a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." Expounding on this Rule, the Fifth District explained, "[i]t is axiomatic that a complaint must allege ultimate facts establishing each and every essential element of a cause of action in order to entitle the pleader to the relief sought." *Sanderson v. Eckerd Corp.,* 780 So.2d 930, 933 (Fla. 5th DCA 2001); *see also Barrett v. City of Margate*, 743 So.2d 1160, 1162-1163 (Fla. 4th DCA 1999)(stating a complaint "must set forth factual assertions that can be supported by evidence which gives rise to legal liability."). As a fact-pleading jurisdiction, Florida's pleading rule requires counsel to "determine whether they have or can develop the facts necessary to support [a cause of action], which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort." *Continental Baking Co. v. Vincent*, 634 So.2d 242 (Fla. 5th DCA 1994).

On a motion to dismiss, all well-pleaded allegations in a complaint must be accepted as true, but the required elements of a cause of action must be adequately pleaded and cannot be inferred by the context of the allegations. *Sanderson,* 780 So.2d at 933. A pleading is insufficient if it contains merely conclusions as opposed to ultimate facts supporting each element of the cause of action. *Price v. Morgan,* 436 So.2d 1116 (Fla. 5th DCA 1983); *see also Barrett,* 743 So.2d at 1163 ("It is insufficient to plead opinions, theories, legal conclusions, or

argument"). Thus, a formulaic recitation of the elements of a cause of action supported only by opinions, conclusions, argument, and rhetoric will not suffice.

Although Florida Rules of Civil Procedure generally allow liberal amendments to pleadings, a trial court should not allow a party to amend if "allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or *amendment would be futile*." *State Farm Fire & Cas. Co. v. Fleet Fin. Corp.*, 724 So. 2d 1218, 1219 (Fla. 5th DCA 1998)(emphasis added). Where it would be impossible for a plaintiff to state a cognizable cause of action, as here, dismissal with prejudice is warranted.

B. The Impact Rule

Florida generally applies the "impact rule" which provides that "before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from the physical injuries the plaintiff sustained in an impact." *R.J. v. Humana,* 652 So.2d 360, 362 (Fla. 1995). Florida courts have recognized several justifications for following the impact rule: (1) "emotional harm is difficult to prove as the source of the injury is often illusive;" (2) "courts need to assure a tangible validity to claims involving emotional or psychological harm;" (3) "if a physical impact or injury is not required, courts will be inundated with fictitious or speculative claims;" and (4) "defendants' ability to defend these claims will be paralyzed." *School Board of Miami-Dade County v. Trujillo*, 906 So.2d 1109, 1111 (Fla. 3rd DCA 2005)(internal citations omitted). Beyond these practical considerations,

> [t]he impact doctrine gives practical recognition to the thought that not every injury which one person may by his negligence inflict upon another should be compensated in money damages. There must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society.

Champion v. Gray, 478 So.2d 17, 18 (Fla.1985).

Despite carving out very narrow exceptions to the impact rule, Florida continues to recognize its viability and utility. *See Rowell v. Holt,* 850 So. 2d 474 (Fla. 2003). Since R.T.C. was merely a witness to this incident who did not sustain any impact, absent an exception, any claim for damages is barred by the impact rule. As explained below, no exception applies.

C. Plaintiffs fail to state a Cause of Action for Negligent Infliction of Emotional Distress

1. Standard for Negligent Infliction of Emotional Distress

Negligent infliction of emotional distress provides a very limited exception to Florida's impact rule where each of its elements is met. The Supreme Court of Florida first recognized this tort in *Champion v. Gray, supra*, explaining that

> [w]e now conclude that the price of death or *significant discernable physical injury*, when caused by psychological trauma resulting from a negligent injury imposed upon a *close family member* within the sensory perception of the physically injured person, is too great a harm to require direct physical contact before a cause of action exists.

Id. at 18-19. (emphasis added).

The elements of negligent infliction of emotional distress are: (1) the plaintiff must suffer a physical injury, (2) the plaintiff's physical injury must be caused by the psychological trauma, (3) the plaintiff must be involved in some way in the event causing the negligent injury to another, and (4) the plaintiff must have a close personal relationship to the directly injured person. *Id.; see also Zell v. Meek*, 665 So.2d 1048, 1054 (Fla. 1995). Unless each of the foregoing elements is supported by ultimate facts, a claim for negligent infliction of emotional distress is barred by the impact rule. Here, Plaintiffs fail to allege ultimate facts showing that R.T.C. had a close personal relationship with the trainer and that he sustained a discernable physical injury.

2. Plaintiffs have not adequately alleged a Close Personal Relationship

Interpreting the "close personal relationship" element, the Third District Court of Appeal held that there must be a *legal familial relationship* between the plaintiff and the directly injured person to recover for negligent infliction of emotional distress. *Ferretti v. Weber*, 513 So.2d 1333 (Fla. 3rd DCA), *cause dismissed*, 519 So.2d 986 (Fla. 1987)(finding plaintiff's relationship with his "live in ladyfriend" to be insufficient). The Fourth District Court of Appeal further limited recovery to situations where "the deceased or injured person is not only a *close family member* but is one with whom the plaintiff has a relationship with an especially close emotional attachment." *Reynolds v. State Farm Mutual Automobile Ins. Co.,* 611 So.2d 1294, 1297 (Fla. 4th DCA 1992). The *Reynolds* Court concluded that the plaintiff's boyfriend/fiancé did not meet the standard despite testimony that they had a close relationship for more than five years and undoubtedly would have married if the accident had not occurred *Id.*

These decisions flowed naturally from the *Champion* Court's decision to permit recovery for emotional distress stemming from "a negligent injury imposed upon *a close family member"*.[5] Although not directly addressing the issue, in 1995, the Supreme Court of Florida reiterated its holding in *Champion:*

> we held that psychological trauma and mental distress are recoverable as elements of damage without direct physical impact in cases where a plaintiff was in the sensory perception of physical injuries negligently imposed upon *a close family member* and where the plaintiff suffered a discernible physical injury.

See R.J. v. Humana of Florida, Inc., 652 So.2d 360, 363 (Fla. 1995)(emphasis added). Six years later, in *Hagan v. Coca-Cola Bottling Co.,*804 So.2d 1234 (Fla. 2001), the Supreme Court of Florida again echoed the effect and holding of *Champion*:

[5] Significantly, *Champion* involved a mother who heard an accident and rushed to the scene where she realized her daughter had been killed. Upon seeing her daughter's body, she collapsed and died on the spot. *Champion*, 478 So.2d at 18.

> this Court modified the impact rule in bystander cases by excusing the lack of a physical impact… where one person suffers death or significant discernable physical injury when caused by psychological trauma resulting from a negligent injury imposed on *a close family member* within the sensory perception of the physically injured person."

Id. at 1237 (emphasis added and internal citation omitted). The Florida Supreme Court's repeated use of the phrase "a close family member" in discussing the *Champion* holding cannot be ignored. The Court requires a close and legal familial relationship to state a cause of action for negligent infliction of emotional distress.

Accordingly, the Middle District of Florida also has found that a plaintiff cannot sustain a claim for negligent infliction of emotional distress without *a legal familial relationship* to the directly injured or deceased person. *See Geidel v. City of Bradenton Beach, 56 F.Supp.2d 1359, 1368 (M.D.Fla. 1999)*(dismissing a claim for negligent infliction of emotional distress where plaintiffs failed to allege a legal relationship with each other).

Significantly, these decisions are in accord with the majority of other jurisdictions which favor a bright-line rule. California first addressed this issue in *Elden v. Sheldon*, 758 P.2d 582, 588 (Cal. 1988), holding that unmarried co-habitants cannot recover damages for bystander emotional distress. In *Thing v. La Chusa,* 771 P.2d 814, 828 (Ca. 1989), the California Supreme Court further limited recovery to persons closely related by blood or marriage, since they are the most likely to foreseeably endure severe emotional distress as a result of watching a loved one suffer. Following California's lead, "[m]ost jurisdictions limit the bystander-victim relationship in bystander emotional distress claims to family member." *Arnott v. Liberty Mutual Fire Ins. Co.,* 2010 Me.Super.LEXIS 80 *10 *citing Ozdemir v. Somerset Med. Cir.,* 2007 U.S. Dist. LEXIS 48586 *7 n. 3 (N.D. N.Y. 2007)(stating New York "permits only spouses and immediate family members to pursue a bystander" emotional distress claim)*; Bowen v. Lumbermens Mut.*

Casualty Co., 183 Wis. 2d 627, 633 (Wis. 1994)(requiring the victim and plaintiff to be related as spouses, parent-child, grandparent-grandchild, or siblings)*; Grotts v. Zahner,* 989 P.2d 415 (Nev. 1999)(holding that under Nevada law a fiancé lacks standing to bring a bystander emotional distress claim); *Lindsey v. Visitec, Inc.*, 804 F.Supp. 1340 (D.Wash. 1992)(holding that under Washington law, a fiancé who was living with deceased was not permitted to bring a claim for bystander emotional distress); *Bercevicz v. Liberty Mutual Ins. Co.*, 865 A.2d 1267, 1272 (Conn. Super. Ct. 2004)(holding a fiancé could not satisfy the closely related requirement); *Sollars v. City of Albuquerque,* 794 F.Supp. 360, 363 (D. N.M. 1992)(holding that the girlfriend of deceased could not assert a bystander claim under New Mexico law); *Milberger v. KBHL. LLC*, 486 F.Supp.2d 1156, 1167 (D. HI, 2007)(holding that Hawaii law precludes a bystander claim for emotional distress by an unmarried partner).

Plaintiffs do not allege that they were legally related to the SeaWorld trainer, nor do they allege that she was a close family member. Therefore, Plaintiffs cannot meet the close personal relationship test espoused by the Florida Supreme Court and adopted by the Third District, Fourth District, Middle District of Florida, and the majority of other jurisdictions. Applying this test, since any attempt to state a cause of action would be futile, Plaintiffs' claim of negligent infliction of emotional distress should be dismissed with prejudice.

Based on the allegations in the Complaint, Plaintiffs appear to mistakenly rely on the First District's decision in *Watters v. Walgreen Company, 967 So.2d 930 (Fla. 1st DCA 2007),* which departed from Florida's long line of precedent requiring a legal familial relationship. Such reliance is misplaced. The *Watters* Court decided that whether a stepfather met the close personal relationship test was a question of fact for the jury. Importantly, by examining the facts, the First District identified the type of close personal relationship that would create an

issue for the jury. The Court explained that the decedent-stepfather referred to one of the plaintiff-stepchildren as "[his] baby" and his "little girl." Further, the stepchildren referred to their stepfather as "Daddy" and "dad". Even when the decedent's biological son visited, they all participated together in family activities. At the decedent's funeral, one of the stepchildren expressed, "My dad was a dad when he didn't have to be." Thus, while the First District did not expressly provide any guideposts for determining the existence of a close personal relationship, it certainly implied that the requisite relationship must be tantamount to a close familial relationship.

Decisions from other jurisdictions also are instructive on this issue. Despite an exhaustive search, the undersigned has been unable to identify a single case from any jurisdiction in the United States permitting recovery for negligent infliction of emotional distress based on the type of relationship alleged by Plaintiffs. Even jurisdictions that do not require a legal familial relationship require a strong family-like bond. *See Dunphy v. Gregor 642 A.2d 372, 380 (N.J. Sup. Ct. 1994)*(permitting a fiancé to assert bystander emotional distress when she had been engaged to and cohabitated with the decedent for two and a half years); *Graves v. Estabrook,* 818 A.2d 1255 (N.H. 2003)(allowing plaintiff to recover where her fiancé was killed in a motorcycle accident after they lived together for seven years); *Leong v. Takaskai,* 520 P.2d 758, 766 (HI, 1974)(allowing a child to bring a bystander claim after he witnessed his stepfather's mother get hit by a car because the court found emotional and functional equivalent to a nuclear family relationship). Addressing the trial court's role in determining whether the requisite relationship exists, the *Dunphy* Court explained that this "critical determination must be guided as much as possible by a standard that focuses on those factors that identify and define the *intimacy and*

familial nature of such a relationship." *Dunphy,* 642 A.2d at 378 (emphasis added). The *Dunphy* Court identified several factors to be considered:

- the duration of the relationship;
- the degree of mutual dependence;
- the extent of common contributions to a life together;
- the extent and quality of shared experience;
- whether the plaintiff and the injured person were members of the same household;
- their emotional reliance on each other;
- the particulars of their day to day relationship; and
- the manner in which they related to each other in attending to life's mundane requirements.

Id. Notably, in the 13 years following *Dunphy*, not a single New Jersey Court allowed recovery to a non-cohabiting plaintiff. *Ozdemir v. Somerset Medical Center*, 2007 U.S. Dist. LEXIS 48586 *15 (July 3, 2007).

When viewed in this context, similar factors must be inferred from the First District's *Watters* decision. While there does not appear to be a specific formula for making a determination under these factors, a review of them clearly illustrates why Plaintiffs have not met—and cannot meet—their burden. At the time of this incident, Plaintiffs were visiting from New Hampshire as business invitees. They attended a show featuring the SeaWorld trainer and claim that R.T.C. bonded with the trainer "during the performance" when she made a "very deep, positive impression" on him. Notably, Plaintiffs used the exact same terminology to describe the impression that the orca made on R.T.C. There is no allegation that Plaintiffs lived with the trainer, had a long relationship with the trainer, depended on the trainer, or attended to "life's mundane requirements" together. The nearest Plaintiffs come to alleging a close personal

relationship appears in paragraph 50, where they claim, "[t]he intimacy of the situation is intended to create *a feeling of* a close bond or personal relationship." (emphasis added). A feeling of a close bond or personal relationship is insufficient; an actual close personal relationship is required. Based on the allegations in the Complaint, R.T.C. was affected by the trainer and cared about her because of her performance—not even personal interaction, much less a close bond or personal relationship. Their relationship was that of performer and spectator. The bond between a performer and an audience member clearly is not the type of relationship contemplated by the case law. Any argument to the contrary is specious.

The ramifications of creating liability for negligent infliction of emotional distress in this case would be far-reaching, overwhelming, and unforeseeable. If Plaintiffs' claim were valid, there would be enumerable circumstances where liability might exist to hundreds or thousands of onlookers for a single incident. If a cause of action existed here, it also would exist for thousands of football fans who witness the death of a player due to a helmet alleged to be negligently designed; it would exist for a thousands of fans who see a singer collapse at a concert due to alleged negligent overmedication; it would exist for thousands of fans who witness an obsessed person run onto a tennis court and stab a professional player due to alleged negligent security; it would exist for hundreds of thousands of fans who witness a racecar driver die in a crash due to a car or track alleged to be negligently designed. In fact, these types of events are even more apt to give rise to a close personal relationship since fans often avidly follow such athletes and performers for years as opposed to a one-time encounter during a lunch show. Although people undeniably develop admiration, sympathy, and attachment to actors, celebrities, athletes, and performers, the Supreme Court of Florida did not contemplate this type of tenuous and distant relationship to give rise to bystander liability. Since Plaintiffs' Complaint

conclusively establishes the lack of a close personal relationship under any standard, their claim of negligent infliction of emotional should be dismissed with prejudice.

3. Plaintiffs have not adequately alleged a Physical Injury

Having failed to establish a close personal relationship, Plaintiffs also fail to plead sufficient ultimate facts to support a claim that R.T.C. sustained a discernable physical injury. While the *Champion* Court created a limited exception to the impact rule, it emphasized "the requirement that a causally connected clearly discernable physical impairment must accompany or occur within a short time of the psychic injury." *Champion*, 478 So.2d at 19. The same day it decided *Champion*, the Florida Supreme Court issued its decision in *Brown v. Cadillac Motor Car Division*, 468 So.2d 903 (Fla. 1985), where it reiterated this requirement:

> In a parallel case, *Champion v. Gray*, No.662,830 (Fla. Mar. 7, 1985), we modified, in some limited situations, the requirement of an impact as a basis for a cause of action in negligence. We did not and do not, however, abolish the requirement that a discernable and demonstrable physical injury must flow from the accident before a cause of action exists.

Id. at 904.

In *Brown*, the Court listed several conditions that might qualify: "death, paralysis, muscular impairment, or similar objectively discernable physical impairment." *Id.* Following this analysis, one court held that a crying episodes, panic attacks, and temporary elevations of blood pressure are not significant and discernable physical injuries. *See Ledford v. Delta Airlines, Inc.,* 658 F.Supp. 540, 542 (S.D. Fla. 1987). Similarly, nightmares and wetting the bed do not constitute discernable physical injuries. *See School Board of Miami-Dade County v. Trujillo*, 906 So.2d 1109 (Fla. 3rd DCA 2005). Addressing the outer limits of what constitutes a discernable physical injury, one court held that a plaintiff who became physically ill, experienced stomach pain and nausea, vomited, and experienced an exacerbation of her multiple sclerosis

symptoms requiring hospitalization shortly after an incident thinly raised a question of fact about whether she sustained a discernable physical injury. *Langbehn v. The Public Health Trust of Miami-Dade County*, 661 F.Supp.2d 1326, 1341 (S.D. Fla. 2009).

The only physical manifestation averred by Plaintiffs was that R.T.C. turned red and then "a shade of blue". Turning red and then blue may be an indicator of emotional distress, tearfulness, or holding one's breath, but it is not a discernable physical injury as a matter of law. Virtually everyone that experiences sadness, anger or fear exhibits some physical sign of the emotion. If such a mild and temporary reaction to emotion were sufficient, the requirement of a discernable physical injury would be meaningless. As such, Plaintiffs' conclusory allegation that R.T.C.'s emotional distress resulted in discernable physical injury is unsupported by the requisite ultimate facts.

4. Conclusion on Negligent Infliction of Emotional Distress

Plaintiffs failed to adequately plead the necessary ultimate facts supporting two of the critical elements of negligent infliction of emotional distress. As bystanders who first encountered the decedent during her performance on the date of the alleged incident, Plaintiffs can never meet the close personal relationship prong. Therefore, any attempt to amend Count I would be futile, and Plaintiffs' claim for negligent infliction of emotional distress should be dismissed with prejudice.

D. Intentional Infliction of Emotional Distress

1. Standard for Intentional Infliction of Emotional Distress

The Supreme Court of Florida first recognized the tort of intentional infliction of emotional distress in *Metropolitan Life Insurance Co. v. McCarson*, 476 So.2d 277 (Fla. 1985) where it adopted *section 46, Restatement (Second) of Torts (1965)*. *Section 46* states,

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

In the subsequent case of *Eastern Airlines, Inc. v. King*, 557 So.2d 574 (Fla. 1990), the Supreme Court of Florida examined the importance of the comments to *section 46* which explain the application of the tort. The Court specifically pointed out comment *d*, which states:

> It has not been enough that the defendant has acted with an intent which is tortuous or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which could entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Id. at 576.

As the law regarding the tort of intentional infliction of emotional distress developed, Florida courts formulated the following elements: (1) the wrongdoer's conduct was intentional or reckless, that is, he intended his behavior when he knew or should have known that emotional distress would likely result; (2) the conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community; (3) the conduct caused emotional distress; and (4) the emotional distress was severe. *LeGrande v. Emmanuel*, 889 So.2d 991, 994 (Fla. 3rd DCA 2004) *citing Clemente v. Horne,* 707 So.2d 865, 866 (Fla. 3rd DCA 1998). Plaintiffs' claim of intentional infliction of emotional distress is unsupported by ultimate facts demonstrating outrageous conduct directed toward them on the part of SeaWorld.

2. Plaintiffs do not adequately plead Outrageousness

Whether the conduct complained of is sufficiently outrageous and extreme to withstand a motion to dismiss is purely a question of law for the Court to decide. *Vance v. Southern Bell Telephone,* 983 F.2d 1573 (11th Cir. 1993)*; see also Johnson v. Thigpen,* 788 So. 2d 410, 413 (Fla. 1st DCA 2001). "The standard for 'outrageous conduct' is particularly high in Florida." *Patterson v. Downtown Med. & Diagnostic Ctr., Inc.,* 866 F. Supp. 1379, 1383 (M.D. Fla. 1994). Florida courts recognize this tort only in the most outrageous circumstances. *Sylfanie Decius v. National Service Industries, Inc.*, 2001 U.S. Dist. LEXIS 21400 *4 *citing Habelow v. Travelers Ins. Co., 389 So. 2d 218, 220 (Fla. 5th DCA 1980)*. Further, this test must be applied objectively as the "subjective response of the person who is the target of the actor's conduct does not control the question of whether the tort occurred." *State Farm Mut. Auto Ins. Co. v. Novonty,* 657 So.2d 1210, 1213 (Fla. 5th DCA 1995)(internal citations omitted). Further, a plaintiff cannot state a claim for intentional infliction of emotional distress merely by characterizing a defendant's conduct as outrageous. *See Fridovich v. Fridovich*, 598 So.2d 65, 70 (Fla. 1992). A complaint that does not contain a sufficient basis for a court to find that the behavior complained of is egregious enough to meet this rigid standard must be dismissed. *See Vance,* 983 F.2d at 1573; *Martin v. Baer,* 928 F.2d 1067, 1073 (11th Cir. 1991).

Eastern Airlines, Inc. v. King, supra illustrates why Plaintiffs' allegations fail to reach the required level of outrageousness. In that case, the plaintiff alleged that he sustained emotional damages when the airplane in which he was riding lost power to its engines. The plaintiff claimed that the engine failure was caused by Eastern Airlines' failure to "properly inspect, maintain, and operate its aircraft." Further, the plaintiff alleged "Eastern's records reveal at least one dozen prior instances of engine failures due to missing O-rings [oil seals], and yet Eastern failed to institute appropriate procedures to cure this maintenance problem despite such

knowledge." *Id.* at 575. Applying the principles set forth in the Restatement (Second), the Court held it was clear that the plaintiff failed to state a claim for reckless or intentional infliction of emotional distress. Irrespective of the label, allegations of failure to properly inspect, maintain, and operate an aircraft "rise to no higher than negligence." *Id*. at 576. The Court found that even if there were at least 12 prior instances of missing O-rings causing engine failures, that "does not reflect 'extreme and outrageous conduct intentionally or recklessly' causing emotional distress." *Id.* Significantly, the Court pointed out that "it is incongruous that Eastern would recklessly or intentionally place its passengers, crews, and multimillion dollar airplanes in such peril." In fact, the Court concluded that "[f]ailing to take 'appropriate' action to correct the problems would appear to negate an intentional act or an intentional failure." *Id.* The *Eastern Airlines* plaintiff concluded his claim for intentional infliction of emotional distress by alleging that Eastern" actions constituted an "entire want of care" and "indifference" demonstrating "such wantonness, willfulness, and malice as would justify punitive damages." *Id. at 575.* The Court dispatched with these allegations as "only conclusions." *Id*. at 576.

Similarly, in this case, Plaintiffs make 20 unfounded allegations of omissions on the part of SeaWorld that—even if true—amount to nothing more than claims of negligent training, maintenance, and operation. **[Plaintiff's Complaint, ¶ 63]** For example, Plaintiffs claim that Defendants failed to "train its employees to safely interact and handle the wild animals it used in the SeaWorld park;" failed to "ensure the wild animals utilized in its shows…were trained…;" and failed to "ensure and/or establish protocols which would prevent and/or minimize the severity of attacks by the wild animals it utilized in its shows on the SeaWorld trainers." Plaintiffs cannot convert these allegations of negligence into anything more malicious simply by

inserting the words "knowingly, intentionally and recklessly".[6] As explained by the Court in *Eastern Airlines*, renaming negligent acts or omissions as intentional or reckless is totally insufficient to state a cause of action for intentional infliction of emotional distress. *See also Fridovich v. Fridovich, supra* (holding that allegations of defamation cannot be transformed into a claim of intentional infliction of emotional distress simply by characterizing the alleged statements as "outrageous".).

SeaWorld is in the business of providing family entertainment and caring for its employees, guests, and animals. It is spurious to suggest that SeaWorld intentionally or recklessly placed its trainers at risk. As the Court pointed out in *Eastern Airlines*, it is "incongruous" to suggest SeaWorld would act in a manner so antithetical to its interests. SeaWorld's expert trainers are among the most highly skilled animal trainers in the world. SeaWorld has numerous policies and procedures in place to protect their safety. Plaintiffs' conclusory allegation that those policies and procedures were inadequate falls well below the level required to support a claim of intentional infliction of emotional distress. SeaWorld's conduct in this case does not come close to being outrageous as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community as required by Florida law.

Apparently recognizing these shortfalls, Plaintiffs attempt to conjure up liability for intentional infliction of emotional distress by highlighting SeaWorld's actions after this incident. **[Plaintiffs' Complaint, ¶¶ 68-71]** Plaintiffs admit that after they were instructed to leave the area, they were approached by a SeaWorld employee who asked if they needed assistance and took them to Guest Services. Plaintiffs allege that the Operations Manager with whom they met

[6] In fact, it should be noted that Plaintiffs recited these same omissions as negligent omissions in their claim for negligent infliction of emotional distress. **[Plaintiff's Complaint, ¶ 47]**

asked what they wanted and refused to listen to their story about how the incident occurred. Plaintiffs allege that they became upset and left the premises. When they returned to their hotel, Plaintiffs claim they watched a FOX News broadcast about this incident and called the station to relate their version of events. FOX News reportedly told R.T.C.'s family that their version of events was untruthful based on a statement from SeaWorld. Plaintiffs admit that SeaWorld later corrected its misinterpretation of the events.

Even accepting Plaintiffs' allegations as true, these acts do not constitute the type of outrageous conduct required to state a cause of action for intentional infliction of emotional distress. In *Williams v. Worldwide Flight Svcs., Inc.*, 877 So.2d 869 (Fla. 3rd DCA 2004), the Court upheld dismissal with prejudice of a claim for intentional infliction of emotional distress where the plaintiff claimed that his employer falsely accused him of stealing and made various racial slurs. The Court explained that liability for this tort "does not extend to mere insults, indignities, threats, or false accusations." *Id.* at 870 *citing Scheller v. American Med. Int'l, Inc.,* 502 So.2d 1268,1271 (Fla. 4th DCA 1987) *and Food Lion, Inc. v. Clifford,* 629 So.2d 201, 202-03 (Fla. 5th DCA 1993)(stating a false accusation of theft was insufficient to support a cause of action for intentional infliction of emotional distress). Similarly, in *Valdez v. GAB Robins North America, Inc.*, 924 So.2d 862 (Fla. 3rd DCA 2006), the Court held that

> "[w]hile the anxiety and stress of being charged by the Division of Insurance fraud with making false statements and being arrested by the State in connection with those charges is understandable, the appellees' behavior in investigating Valdes and then allegedly falsely reporting to the Division of Insurance that Valdez had committed fraud is not the type of conduct that is so outrageous in character and extreme in degree as to go beyond the bounds of decency and be deemed utterly intolerable tin a civilized society."

Id. at 866; s*ee also LeGrande,* 889 So.2d at 994 (upholding dismissal of a claim of intentional infliction of emotional distress, finding that branding a clergy member a thief in front of

parishioners "might certainly be unsettling, embarrassing, and/or humiliating," but it did not rise to the level of conduct needed to support such a claim.). In *Williams v. Worldwide Flight Svcs. Inc., supra*, the Court pointed out the type of case that would support a claim for intentional infliction of emotional distress, such as where the allegations involved death threats or threats to rape the plaintiff's children or other family relatives or where there are repeated acts of offensive sexual contact. The allegations in Plaintiffs' Complaint clearly do not rise to the level required to support a claim for intentional infliction of emotional distress.

3. The alleged Conduct was not directed at Plaintiffs

Even if the conduct alleged in the Complaint were outrageous, Plaintiffs' claim still would fail because these alleged acts or omissions were not directed at them. Florida courts require a plaintiff to be the recipient of the insult or abuse in order to recover for intentional infliction of emotional distress. *See M.M. v. M.P.S.*, 556 So.2d 1140, 1141 (Fla. 3rd DCA 1989) *citing Habelow v. Travelers Ins. Co.*, 389 So.2d 218, 220 (Fla. 5th DCA 1980). Again, *Eastern Airlines* illustrates this point. While the *Eastern Airlines* Court found that the conduct of Eastern was not outrageous as a matter of law, the only reason it even reached that issue is that the plaintiff was actually on the airplane when the engines failed. Thus, the alleged outrageous conduct of Eastern was directed toward the plaintiff.

The only exception to this rule, which does not apply here, is that "the actor is subject to liability if he intentionally or recklessly causes severe emotional distress to a *member of such person's immediate family* who is present at the time." *M.M.*, 556 So.2d at 1140 (emphasis added and internal citation omitted). As explained above, R.T.C. was not related to the trainer and the allegations in the Complaint do not even support a close personal relationship.

Contrary to the applicable law, Plaintiffs attempt to put R.T.C. in the shoes of the trainer or her immediate family. Instead of alleging conduct directed toward them, Plaintiffs

inaccurately allege that they were owed a duty by SeaWorld to keep its employees safe. For instance, Plaintiffs claim SeaWorld failed to "ensure that the wild animals it utilized in its shows, including Dine with Shamu, were trained *so that they did not present a dangerous and/or deadly threat to the SeaWorld trainers*." (emphasis added) While SeaWorld makes great effort to protect its employees, there is no nexus between the duty to protect an employee and the duty owed to a business invitee. An alleged breach of duty to protect an employee cannot form the basis of a claim for intentional infliction of emotional distress by a third party.

Similarly, even if SeaWorld made a misstatement to a reporter about how an incident occurred, that statement cannot form the basis for recovery since it was not a direct attack on Plaintiffs' truthfulness. It should be noted that Plaintiffs only seek damages on behalf of R.T.C., and there is no allegation in the Complaint that anyone from FOX News or SeaWorld even spoke directly with him. Further, as Plaintiffs allege, the alleged misstatement which had absolutely nothing to do with Plaintiffs was subsequently retracted by SeaWorld. Nevertheless, as noted above, even if SeaWorld had called Plaintiffs liars or worse, such a statement would not support a claim for intentional infliction of emotional distress. *See Williams v. Worldwide Flight Svcs., Inc, supra*.

4. Conclusion on Intentional Infliction of Emotional Distress

On a motion to dismiss, the trial court must decide as a matter of law whether a plaintiff's factual allegations meet the test for intentional infliction of emotional distress. Here, even if true, Plaintiffs' allegations arise to nothing more than simple negligence and perhaps non-actionable discourteousness. Plaintiffs have not met their burden of pleading ultimate facts sufficient to demonstrate the requisite outrageous conduct. Even if the alleged acts constituted outrageous conduct, these allegations pertain to duties owed by SeaWorld to its employees—not

to Plaintiffs. Since Plaintiffs cannot plead the ultimate facts necessary to state a cause of action for intentional infliction of emotional distress, Count II should be dismissed with prejudice.

IV. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED UNDER RULE 1.420(b)

A. Rule 1.420 authorizes dismissal for Pleading Improprieties

Florida Rule of Civil Procedure 1.420(b) provides, in part, that "[a]ny party may move for dismissal of an action or of any claim against that party for failure of an adverse party to comply with these rules…." Further, "a dismissal under this subdivision… operates as an adjudication on the merits." A trial court should require compliance with the rules of pleading, and even where a complaint might state a cause of action, pleading deficiencies or improprieties can justify dismissal under Rule 1.420(b). *See Dewitt v. Rossi*, 559 So.2d 659 (Fla. 5th DCA 1990). Where, as here, a complaint does not state a cause of action, Rule 1.420(b) simply provides an additional basis for dismissal.

B. Plaintiffs' Complaint is replete with Pleading Deficiencies and Improprieties

In formulating the Complaint, Plaintiffs lost sight of the fact that "[a] complaint in a lawsuit is not a press release." *Rapp v. Jews for Jesus, Inc.,* 944 So.2d 460, 463 (Fla. 4th DCA 2006) *quashed on other grounds by Jews for Jesus, Inc. v. Rapp,* 2008 Fla.LEXIS 2010 (Fla., Oct. 23 2008). A complaint should be pleaded succinctly and without excessive editorialization. *See Rapp v. Jews for Jesus, Inc.,* 1 So.3d 1284 (Fla. 4th DCA 2009). Indeed, "[t]he hallmarks of good pleading are brevity and clarity in the statement of the essential facts upon which the claim for relief rests rather than intricate and complex allegations designed to plead a litigant to victory." *Rapp*, 944 So.2d at 463-464 (internal citation omitted); *see also Barrett,* 743 So.2d at 1162 ("It is a cardinal rule of pleading that a complaint be stated simply, in short and plain language."). Applying these principles, in *Dewitt,,supra,* the Court upheld the trial court's

dismissal of a complaint based on violations of Rule 1.110(b) and Rule 1.110(f), explaining that "several paragraphs in the amended complaint contained multiple or narrative allegations, involving multiple sets of circumstances, making a cumbersome pleading difficult to respond to."

Plaintiffs' Complaint reads more like the work of a spokesperson than a legal pleading. Plaintiffs repeatedly violate Florida Rule of Civil Procedure 1.110(f), which requires that all averments of claim be made in consecutively numbered paragraphs, with the contents of each to be limited as far as practicable to a statement of a single set of circumstances. For example, Plaintiffs scripted a narrative in paragraph 11 that literally spans two full pages. The improper narrative is comprised of five different paragraphs containing a total of 31 sentences. Similarly, paragraph 14 is a narrative that covers more than a full page with 19 sentences. These are not isolated violations. **[See also Plaintiffs' Complaint, ¶¶ 10, 16, 17, 20, 50, 54, 57, 58, 64, 65, 70, and 71]**. Since a complaint is not the appropriate forum to package a story, this pleading error cannot be corrected simply by enumerating each sentence. Plaintiffs were required under the rules to set forth the ultimate facts—and only the ultimate facts—supporting each of their causes of action. Instead, contrary to the rules of pleading, Plaintiffs chose to use the Complaint as an inaccurate press release.

Allegations which are "redundant, bellicose, and unnecessary to state the cause of action alleged" also are improper. *Id.* at 463; *see also* Florida Rule of Civil Procedure 1.140(f)(permitting a party to move to strike redundant, immaterial, impertinent, or scandalous matter from any pleading.). In terms of redundancy, Plaintiffs assert duties owed by SeaWorld in 14 separate paragraphs. **[Plaintiffs' Complaint, ¶¶ 33-46]** A few examples will amply illustrate that Plaintiffs' allegations are repetitive, redundant, and unnecessary:

> In paragraph 36, Plaintiffs claim "…Defendants owed a duty of reasonable care to its business invitees, including minor Plaintiff RTC, to ensure and/or establish protocols which would prevent and/or minimize the severity of attacks by the wild animals it utilized in its shows on the trainers it employed."
>
> In paragraph 37, Plaintiffs claim "…Defendants owed a duty of reasonable care to its business invitees, including minor Plaintiff RTC, to ensure that protocols were in place which would prevent and/or minimize the severity of attacks by wild animals it utilized in its shows on the trainers it employed."
>
> In paragraph 38, Plaintiffs claim "…Defendants owed a duty of reasonable care to its business invitees, including minor Plaintiff RTC, to ensure protocols were followed would prevent and/or minimize the severity of attacks by wild animals it utilized in its shows on the trainers it employed." (sic)
>
> In paragraph 39, Plaintiffs claim "…Defendants owed a duty of reasonable care to its business invitees, including minor Plaintiff RTC, to ensure and/or establish protocols which would allow its employees to provide immediate assistance and/or aid to the SeaWorld trainers if they were attacked by a wild animal while at SeaWorld."

Compounding this redundancy, Plaintiffs alleged breaches of each of these claimed duties multiple times, the net effect of which is to repeat nearly identical allegations more than ten times. Further, as noted above, irrespective of how craftily Plaintiffs word these allegations, they are impertinent to this action since they all pertain to duties owed by SeaWorld to its employees—not Plaintiffs.

Also, throughout the Complaint, Plaintiffs string together redundant adjectives, apparently in an attempt to manipulate the reader and provoke the sense of *outrage* required to state a cause of action for intentional infliction of emotional distress. **[See Plaintiffs' Complaint, ¶ 49 ("sheer terror, helplessness and trauma"); ¶ 51 (chaos, bedlam, pandemonium, turmoil, destruction, helplessness, fear, terror and trauma *and* fear, anxiety, horror, distress, powerlessness, despair, distress, panic, revulsion and confusion);**

¶ 65 (identical to ¶ 51--chaos, bedlam, pandemonium, turmoil, destruction, helplessness, fear, terror and trauma *and* fear, anxiety, horror, distress, powerlessness, despair, distress, panic, revulsion and confusion)]. Contrary to Plaintiffs' apparent belief, the requisite outrage must be evoked by a short and plain statement of ultimate facts showing they are entitled to relief—not a list of synonyms.

Plaintiffs also improperly use the cloak of the litigation privilege as a platform for impertinent, inaccurate, and defamatory allegations of fact. For instance, Plaintiffs claim that in 2007 Cal/OSHA advised that "it [was] only a matter of time" before someone was killed by a captive orca." **[Plaintiffs' Complaint, ¶20]**. Plaintiffs' reference to the report constituting an *expert opinion* is proven false by the exact article cited in the Complaint: "The report, issued this week, contained 'expressions of opinion and other statements' about animal behavior *that Cal/OSHA does not have the expertise to determine*..."[7] Plaintiffs improperly implicate SeaWorld in some type of lobbying scheme. SeaWorld, like every other citizen of the United States (both individual and corporate), has the right to challenge unfounded and unwarranted allegations and conclusions, and Cal/OSHA acknowledged that its findings and opinions in their initial report were in error. Indeed, Cal/OSHA admitted to violating its own procedures and acknowledged that its conclusions lacked the necessary foundation and expertise. As with several other paragraphs, Plaintiffs simply cut and pasted paragraph 20 into paragraph 58, creating further unnecessary and inappropriate redundancy.

Plaintiffs should not be permitted to ignore the rules of pleadings and use the Complaint as a forum to denigrate SeaWorld and spread disinformation through an inaccurate narrative. Plaintiffs' repeated and deliberate violations of the rules of pleading to spread falsehoods and raise the ire of the community warrants dismissal under Rule 1.420(b).

[7] See Tony Perry, *State to Rewrite Whale Report,* L.A. Times, March 3, 2007. (emphasis added)

V. CONCLUSION

Plaintiffs fail to plead the requisite ultimate facts necessary to state a cause of action for either negligent infliction of emotional distress or intentional infliction of emotional distress. With respect to their claim for negligent infliction of emotional distress, they have not—and cannot—satisfy the close personal relationship prong as required by Florida law. Additionally, they have not pleaded sufficient ultimate facts to support that R.T.C. sustained a discernable physical injury as required by Florida law. As to their claim for intentional infliction of emotional distress, despite the labels to the contrary, Plaintiffs' allegations amount to nothing more than averments of simple negligence and discourteous treatment. These allegations are devoid of the necessary outrageous conduct directed toward Plaintiffs as required by Florida law. Indeed, Plaintiffs admit that SeaWorld intended the show they attended to be a positive family experience.

Plaintiffs' Complaint also should be dismissed for willfully violating the rules of pleading and abusing the legal system. A Complaint should be limited to the ultimate facts necessary to state a claim for relief. Instead, Plaintiffs' Complaint is a thinly-veiled attack on the good faith SeaWorld has built in the community through an excellent record of safety and compassion for animals. Plaintiffs' redundant, impertinent, and malicious allegations—many of which are inaccurate—serve no other purpose than to tarnish SeaWorld's image.

As mere witnesses to this unfortunate incident, Plaintiffs utterly fail to state any cause of action recognized by Florida law, and any attempt to do so would be futile. Under these circumstances, Plaintiffs' frivolous Complaint should be dismissed with prejudice under both Rule 1.140(b)(6) and Rule 1.420(b).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 23, 2010, I electronically filed the foregoing with the Clerk of the Courts by using the ECF system which will send a notice of electronic filing to the following: **John R. Overchuck Esq. and Paul G. Byron, Esq.,** OVERCHUCK & BYRON, P.A., 2709 W. Fairbanks Ave., Winter Park, FL 32789.

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