IN THE SUPREME COURT OF FLORIDA

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FEB 4 1987
CLERK, SUPREME COURT
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Deputy Clerk

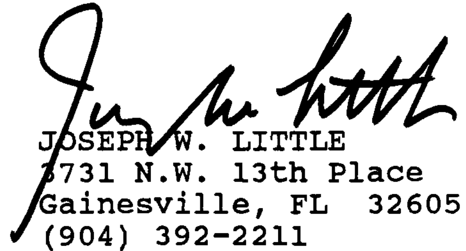
Walt Disney World Co., Petitioner

v.

Case No. 68,647

Aloysia Wood and Daniel S. Wood,
Respondents

Brief of Amicus Curiae
Joseph W. Little



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SUMMARY OF ARGUMENT

Amicus Curiae files this brief to bring five matters to the attention of the Court.

First, the deciding principles under current law are to be found in Hoffman v. Jones and §768.31 Fla. Stat., and not Lincenberg v. Issen.

Second, the Tort Reform and Insurance Act of 1986 has modified this area of the law extensively, making the Court's decision in this case less important to the development of the law than to the interests of these parties and others whose actions arose before the effective date of the 1986 legislation.

Third, because an Academic Task Force, created by the legislature, is now undertaking a study of this area of the law with a mandate to make final recommendations to the 1988 legislature, the Court needs to render a timely opinion in this case if the opinion is to be given fullest consideration by the study group.

Fourth, the doctrine of joint and several liability does not produce unjust outcomes in the bulk of the cases; whereas, its outright abrogation could.

Fifth, proper application of the law of causation eliminates any injustice in the application of the doctrine of joint and several liability in many cases.

STATEMENT OF FACTS

Amicus Curiae adopts by reference the facts mutually agreed to by the parties.

ARGUMENT

The certified question is:

> (1) Does the holding in Lincenberg v. Issen Dictate an affirmance of the trial court's decision in this case?

The correct answer is that Lincenberg does not dictate the outcome of this appeal. Instead, this case is controlled by Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), in determining the liability between the plaintiff on the one hand and all of the defendants collectively on the other, and upon §§768.31(2)(b) and (3) in determining the right of contribution between the two defendants. Each of these authorities applies a rule of pure comparative fault without qualification: under, Hoffman, the plaintiff's fault must be compared with the collective fault of all the defendants; and, under §768.31, the comparative fault ("relative degrees of fault") of the various defendants controls the reallocation of fault among them for the purposes of contribution.

The common law doctrine of joint and several liability, which is assailed in this appeal, is intended to hold all tortfeasors liable for all consequences of their wrongful acts and, by doing so, to make it more likely for worthy plaintiffs to recover all losses. As the Court well knows, the common law doctrines that contributory negligence however slight bars a plaintiff's recovery and that no contribution is permitted among joint tortfeasors have been supplanted by the pure comparative negligence rules of Hoffman v. Jones and §768.31 for the very

purpose of bringing more overall fairness to the law. The issue presented in this case arises out of extreme circumstances in which the doctrine of joint and several liability applied in the new comparative fault context produces what may appear to many to be an unjust outcome.

The purpose of this amicus brief is to inform the Court that certain statutory changes have already been made to this area of the law (though without application to this case); that a legislatively mandated study of this area of the law is in progress; that a timely decision of this appeal is needed if the decision is to have greatest effect on the study; and, most important, to warn that outright abrogation of the doctrine of joint and several liability without other change would probably produce far more injustice than it would prevent.

POINT I

THE TORT REFORM AND INSURANCE ACT OF 1986 MODIFIES THE RULES OF JOINT AND SEVERAL LIABILITY AND OF PURE COMPARATIVE FAULT IN CASES SUCH AS THIS.

Although the 1986 provisions have no applicability to this case, the Court should know that §60 of the Tort Reform and Insurance Act of 1968 (codified as §768.81 Fla.Stat. (1986 Supp.)) dramatically modifies this area of the law. If that statute were applicable to this case, it would avoid what is seen by some as an unjust outcome. *Amicus* will not elaborate on those provisions, which are supplied in the appendix, and will merely observe that, under them,defendant Walt Disney World would be liable for only 1% of plaintiff's losses.

The point of bringing this to the Court's attention is to observe that the issue before the Court is important primarily to the parties in this litigation and others whose causes of action matured prior to the effective date of the 1986 Act, and not to the proper development of the law.

Point II

THE TORT REFORM AND INSURANCE ACT OF 1986 HAS MANDATED A THOROUGH STUDY OF THE LAW OF TORTS WHICH IS NOW IN PROGRESS.

The 1986 reform law (§63) created within the Executive Office of the Governor an Academic Task Force for Review of the Insurance and Tort Systems.[1] That Task Force is charged to study

1. Amicus Curiae is a member of the academic study group advising the Task Force members but represents only himself in this brief.

all phases of the law of torts, as it pertains to the so-called crisis in availability and affordability of liability insurance, and to report back to the legislature with recommendations in 1987 and 1988. The very issues in litigation in this case are part of the study plan. It appears certain that these issues will be exhaustively examined within the next year both in the overall scheme of the law of Torts and with an eye to legislative modification, if needed. Thus, whether the Court affirms the decision below or announces some new rule, it may do so with confidence that its ruling, if timely rendered, will be given thorough consideration in the study. If, on the other hand, the Court's ruling were delayed much beyond mid-1987, the study group may find it much more difficult to consider it as thoroughly as it does the other elements of the study.

POINT III

THE DOCTRINE OF JOINT AND SEVERAL LIABILITY DOES NOT PRODUCE UNJUST OUTCOMES IN MANY CASES.

Under the doctrine of joint and several liability as applied before the comparative fault era, an innocent (non-negligent) plaintiff who was injured by the combined fault of two equally at fault defendants, A and B, could collect all his losses from either defendant or both defendants in any combination plaintiff saw fit to collect them. Thus, if A was judgment proof, plaintiff could collect all from B.

No one ever deemed this to be unjust as between plaintiff and B, because plaintiff was an innocent victim who would not have been injured in the absence of B's negligent act.

In short, B was an author of all the harm and the law rightfully held him for all the consequences. Hence, between plaintiff and B, no injustice was perceived, even though B paid the entire judgment.

This precise scenario, and many slight variations of it, probably occur much more frequently under the current comparative fault regime than do cases with extreme facts such as those in this particular litigation. In those far more typical occurrences, the common law rule of joint and several liability continues to produce a sound outcome. The Court should not upset a system that produces just results in the bulk of the cases in the hope of avoiding injustice in a much smaller class of extreme cases. If the Court is inclined to make a change, it should narrowly tailor its decision to avoid unjust results without creating a massive amount of new injustice in the more typical cases.

For example, although *Amicus* does not recommend this as a best possible solution, a modification of the pure comparative negligence rule to hold that a plaintiff may not recover from a defendant whose percentage of fault was less than that of the plaintiff would be a far better modification than the outright abrogation of the doctrine of joint and several liability. The great bulk of deserving plaintiffs would not be hurt by such a rule (but would be hurt by outright abrogation of joint and

several liability), and defendants, such as Walt Disney World, whose fault was less than that of the plaintiffs would be exonerated as they would have been at common law before Hoffman v. Jones.

POINT IV

THE ROLE OF CAUSATION IS USUALLY IGNORED IN CRITICISMS OF THE DOCTRINE OF JOINT AND SEVERAL LIABILITY.

The current debate about the "fairness" of the doctrine of joint and several liability almost always ignores the implications of the law of causation. In Florida, following the dictates of this Court's opinion in Lawrence v. Florida East Coast Ry. Co., 346 So.2d 1012 (Fla. 1977), juries must return special verdicts in comparative negligence cases. Following the format of the Florida Standard Jury Instruction Special Verdict Form, the trial court must instruct the jury to decide initially whether the negligence of each defendant was a cause of the plaintiff's injuries. If the answer as to cause is no, then the action against that defendant is dismissed. Only after a yes answer as to cause is returned, is the percentage of negligence allocated to a defendant.

If the law of causation is being applied properly, a yes answer to the causation question means, in most cases, that had this defendant not been negligent, then the plaintiff would not have been injured at all. (Exceptions exist, but will not be elaborated here.) Thus, in that bulk of cases wherein the plaintiff would not have been hurt at all had a particular

defendant not been negligent, it does not seem unjust to hold that defendant liable for all the ensuing harm, even though the jury assigns him a relatively small percentage of total negligence. That defendant remains a wrongdoer without whose fault, however small a number it may be assigned, the plaintiff would not have been hurt at all.

Amicus makes this argument, not to suggest a solution to the Court, but to urge the Court to consider all factors in rendering its opinion. In particular, Amicus repeats the argument that although some modification of the law might be appropriate, outright abrogation of the doctrine of joint and several liability of itself is not. That alone could serve to create more injustice than it avoids, and would ignore thoughtful and needed examination of related areas of the law.

CONCLUSION

For the reasons presented above, Amicus Curiae respectfully suggests that the Court issue a timely opinion so that it may be considered fully by the Academic Task Force and also urges that simple abrogation of the doctrine of joint and several liability is not the best resolution of this matter.

Respectfully submitted

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<u>Certificate of Service</u>

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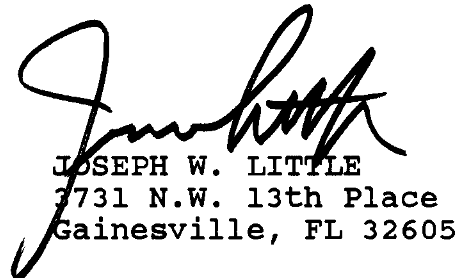

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