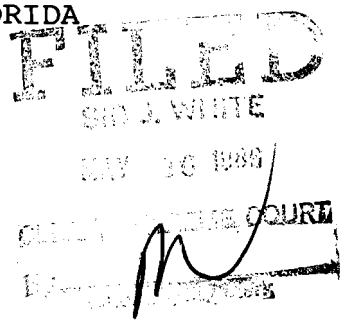
IN THE SUPREME COURT OF FLORIDA



WALT DISNEY WORLD CO. and
INSURANCE COMPANY OF NORTH
AMERICA,

Petitioners,

v. CASE NO. 68,647

ALOYSIA WOOD and DANIEL S.
WOOD,

Respondents.
_____/

BRIEF OF AMICI CURIAE, COUNSEL FOR THE FLORIDA RAILROAD ASSOCIATION, IN SUPPORT OF POSITION OF PETITIONERS

CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

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STATEMENT OF THE CASE AND FACTS

The Amici adopt the statement of the case and facts in Petitioners' Initial Brief.

INTEREST OF THE AMICI

The Amici represent the Florida Railroad Association which is composed of Burlington Northern Railroad, Norfolk Southern Corporation, and Seaboard System Railroad, Inc. These corporations operate railroads inside and outside the State of Florida.

This case presents a question of important interest to the above corporations. These corporations are frequently joined in negligence suits brought against multiple defendants. Often, the plaintiff and the other defendants in such suits are found much more at fault than the corporations. Nevertheless, due to a codefendant's inability to pay or absence from the litigation, the above corporations are often forced to unfairly bear all the liability due to the doctrine of joint and several liability.

SUMMARY OF THE ARGUMENT

The doctrine of pure comparative negligence as adopted by this Court in Hoffman v. Jones, 280 So.2d 431, 438 (Fla. 1973) mandates the abrogation of the doctrine of joint and several liability since the main justification for joint and several liability disappears once a system of pure comparative negligence is adopted. Furthermore, joint and several liability is contrary to the principle of liability based on fault. Each defendant should now be only proportionately and severally liable for its own fault--not anyone else's fault. This Court has never before ruled on this issue but has previously indicated its willingness to abrogate joint and several liability in a proper case. Other jurisdictions with pure comparative negligence have done so. This Court should follow those well reasoned decisions.

This is a most appropriate case to abrogate the doctrine because a defendant only one percent at fault is being held accountable for 86 percent of a plaintiff's damages even though the plaintiff himself was 14 percent at fault.

ARGUMENT

I. BECAUSE THE DOCTRINE OF JOINT AND SEVERAL LIABILITY CONFLICTS WITH THE FUNDAMENTAL PRINCIPLES OF NEGLIGENCE LAW IN THIS STATE, IT SHOULD BE ABOLISHED.

The Petitioner, Walt Disney World, was found by the jury to be only one percent negligent. Yet the effect of the Final Judgments appealed from is to require Walt Disney World to pay 86 percent of Plaintiff's damages even though the Plaintiff herself was 14 percent at fault. This situation arises because of the doctrine of joint and several liability.

This result is inherently unfair and presents to this Court a dramatic example of the inherent unfairness of joint and several liability in a state that, by judicial fiat, has adopted pure comparative negligence as the proper way to equate liability with fault. This case presents the "textbook" example that requires this Court to make a basic public policy decision to return fairness to the law.

It is the duty of the courts of this state to seek fair and equitable results. Hoffman v. Jones, 280 So.2d 431, 438 (Fla. 1973). Obviously, there is nothing fair about a one percent negligent defendant having to pay 86 percent of a plaintiff's damages who himself is 14 times more at fault than the defendant. Liability should now be fully equated with fault.

A. Florida History of Pure Comparative Negligence.

This Court eliminated contributory negligence as a

complete defense and adopted pure comparative negligence in Hoffman, supra. Thus, began a revision in negligence law--a revision which has not yet been completed. The decision did not treat various questions, including the effect of pure comparative negligence on the doctrine of joint and several liability.

Under the doctrine of joint and several liability, a defendant can be held liable for all of the damages although he is only negligent to a small degree whereas another joint tortfeasor is liable to a large degree. Historically, the principle of joint and several liability of concurrent tortfeasors is based mainly on the assumed inability of the fact-finding process to apportion negligent fault. See Comment, Contribution Act Construed--Should Joint And Several Liability Have Been Considered First?, 30 U. Miami L. Rev. 747 at 752 (1976).

Upon the adoption of pure comparative negligence, this basic reason for joint and several liability disappeared. The doctrine of joint and several liability is in fact contrary to the purpose of pure comparative negligence, since it assesses full liability regardless of degree of fault.

Recent decisions of other jurisdictions hold it is proper to abrogate joint liability once pure comparative negligence is adopted. Furthermore, the most recent Florida Supreme Court decision touching on the point, Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975), indicated its willingness

to abrogate joint liability.[1]

In their Brief before the Fourth District, Plaintiffs maintained that this Court has already approved the retention of joint and several liability, indicating that Department of Transportation v. Webb, 409 So.2d 1061 (Fla. 1st DCA 1981) had been "approved as modified," at 438 So.2d 780 (Fla. 1983). Plaintiffs stated:

> ...the First District's opinion [in Webb]--although modified on another issue--was expressly approved by the Supreme Court: "As modified, we approve the decision of the district court." Department of Transportation v. Webb, 438 So.2d 780, 781 (Fla. 1983).

Plaintiff's Fourth District Answer Brief at 9, 12. The First District's opinion in Webb did in fact approve the retention of joint and several liability. However, that particular holding was never approved by this Court. The cite given by Appellees as approving the First District Court's opinion in Webb (438 So.2d 780) actually approved the holding in a related but different case. The First District Court opinion

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[1]Florida District Courts of Appeal, however, have held that joint and several liability is not abrogated in Florida. See General Dynamics Corp. v. Wright Airlines, Inc., 470 So.2d 788 (Fla. 3d DCA 1985); Department of Transportation v. Webb, 409 So.2d 1061 (Fla. 1st DCA), review denied, 419 So.2d 1200 (Fla. 1982); Metropolitan Dade County v. Asusta, 359 So.2d 58 (Fla. 3d DCA 1978); Keyes Co. v. Sens, 382 So.2d 1273 (Fla. 3d DCA 1980); Moore v. St. Cloud Utilities, 337 So.2d 982 (Fla. 4th DCA), cert. denied, 337 So.2d 809 (Fla. 1976), and Sundstrom v. Grover, 423 So.2d 637 (Fla. 4th DCA 1982). These cases, however, were not presented with facts, such as are involved in the instant case, which so clearly illustrate the inequity of joint liability. In addition, they did not properly interpret Lincenberg, supra, particularly in light of the amendment to the contribution statute, discussed below.

in Webb was actually two separate cases, number 61,908 and number 61,909. Case No. 61,909 was the only case dealing with the issue of joint and several liability. That case, Seaboard Coast Line R. Co. v. Webb, was never heard by this Court, since a Petition for Review was denied in that case at 419 So.2d 1200. The other cases, Case No. 61,908, was appealed to this Court in Department of Transportation v. Webb, and was the one approved as modified at 438 So.2d 780.

The First District in Webb (Case No. 61,908) specifically noted that the "bulk of the argument in this appeal concerns SCL's contention that the concept of joint and several liability in Florida has been, or should be, superseded...." 409 So.2d at 1063. The separate contention of the Department of Transportation regarding immunity from tort liability was treated separately at 409 So.2d at 1063, and it was this part of the opinion which was approved by this Court at 438 So.2d 780.

The Fourth District also cited Webb incorrectly, also apparently believing that this Court had "approved as modified" the First District's decision as to joint and several liability. Walt Disney World Co. v. Wood, 11 FLW 823, 824 (Fla. 4th DCA, April 9, 1986).

The Fourth District Court below also misinterpreted this Court's decision in Lincenberg v. Issen, 318 So.2d 386

(Fla. 1975) as retaining joint and several liability.[2] However, Lincenberg never so held.

In fact, this Court has never addressed the continuing validity of joint and several liability since the adoption of comparative negligence in Hoffman v. Jones. It did not address it in either Lincenberg or Webb, and in fact, the analysis of Lincenberg below suggests that the Lincenberg court desired to do away with joint and several liability, but could not due to the legislative scheme in effect at that time.

Before analyzing Lincenberg, it is first helpful to analyze the language from Hoffman, 280 So.2d 431, in order to determine the court's true intent,

> . . .[I]t is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss. If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.

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[2]The Fourth District also cites to Woods v. Winthrow, 413 So.2d 1179 (Fla. 1982) as retaining the doctrine of joint and several liability, referring to footnote 3 of the opinion. However, that footnote is pure dicta, not necessary to the decision. The only issue involved was whether a joint tortfeasor who did not obtain a full release of another joint tortfeasor would be permitted to obtain contribution. In addition, footnote 3 of the opinion can be merely read as a reference to Florida's then existing statute as "retaining" joint and several liability. In fact, the statute makes no reference to retaining joint and several liability, but simply states that "when two or more persons become jointly or severally liable in tort . . . ." Section 768.31(2)(a) (emphasis added). See note 3 below.

Id. at 436 (emphasis added).

> A primary function of a court is to see that legal conflicts are equitably resolved. In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault.

Id. at 438 (emphasis added).

> The court's primary responsibility is to enter a judgment which reflects the true intent of the jury,
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> * * * *
>
> The liability of the defendant . . . should not depend on what damages he suffered but upon what damages he caused.

Id. at 439 (original emphasis).

The court held that jury could apportion fault, and that damages are to be apportioned according to the proportionate fault of each party.

Thus, we come to Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975). In Lincenberg, the plaintiff was free of negligence. Defendant Lincenberg's negligence was 15 percent while the other codefendant's negligence was 85 percent. Plaintiff's damages were $20,000. Lincenberg contended that he should be held responsible for only 15 percent since the Hoffman principles equating liability with fault implied that each party could only be held liable for his proportionate share of the damages (i.e. the doctrine of joint liability should be abrogated). The court instead focused on a collateral issue of contribution.

However, the court first indicated that it had

considered the alternative of pure apportionment whereby each defendant would be only individually liable:

> We considered pure apportionment whereby plaintiff or plaintiffs may recover judgment against a defendant or defendants only for the percentage of damages caused by the negligence of each defendant individually. . . .

318 So.2d at 392, n.2 (emphasis added). Thus, the court indicated its willingness to abrogate joint liability.

However, after walking up to the issue, the court turned away noting that the legislature had recently passed the Uniform Contribution Act which at that time provided for contribution on a pro rata basis and specifically provided in Section 768.31(3)(a), Florida Statutes (1975) that relative degrees of fault were not to be considered (i.e., apportionment was to be based on the number of defendants). Because of this legislative enactment, the court had to leave the doctrine of joint and several liability undisturbed. Otherwise an obvious conflict would have resulted from a judicial holding that damages should be severally apportioned among defendants according to their relative degrees of fault, whereas a legislative statute required pure pro rata apportionment based simply on the number of defendants and not according to fault.

The court decided the case under the new statute, and it was not necessary, nor ripe, to decide whether joint liability should be abrogated. Nevertheless, the court

indicated its willingness to do so in a proper case.[3]

Since Lincenberg, the Florida Legislature has changed the language relied on by the court in Section 768.31(3)(a) regarding determination of a defendant's pro rata share of the fault from: "their relative degrees of fault shall not be considered" and amended it to read: "their relative degrees of fault shall be the basis of allocation of liability." (Emphasis added.)

Thus, abrogation of joint liability is now appropriate. Furthermore, it is necessary in the instant case to abrogate joint liability, since otherwise, liability will not be equated with fault.

B. Recent Decisions Judicially Abrogating Joint and Several Liability.

Several jurisdictions with pure comparative negligence schemes similar to Florida's have correctly reasoned that joint liability must be abrogated once pure comparative negligence is adopted.

In Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (Ct. App.), cert. denied, 98 N.M. 376, 648 P.2d 794 (1982), the court, after reviewing decisions from Oklahoma, Kansas, Florida, Michigan, California, and

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[3]The statute itself does not mandate or even approve of joint and several liability. Rather, it assumes the continued existence of the doctrine stating: "when two or more persons become jointly or severally liable in tort . . . ." Section 768.31(2)(a).

Alaska held that joint and several liability could not be retained under that state's pure comparative negligence system.[4] Bartlett rejected joint and several liability for the reason that it was incompatible with a pure comparative negligence system. The court also rejected as grounds for the retention of joint and several liability both the theory that joint tortfeasors had committed a single, indivisible wrong and also the theory that a plaintiff should not bear the risk of being unable to collect his judgment.[5] The court noted that joint and several liability had its genesis in the common law concept of the unity of a cause of action and was not based on any sound reason. Id. at 584. As to insulating a plaintiff from the risk of uncollectibility, the court stated:

> We fail to understand the argument. Between one plaintiff and one defendant, the plaintiff bears the risk of the defendant being insolvent; on what basis does the risk shift if there are two defendants, and one is insolvent?

Id. at 585.

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[4]Bartlett has been repeatedly reaffirmed. See, e.g., St. Savior v. New Mexico Peterbilt, Inc., 101 N.M. 84, 678 P.2d 712, 714 (Ct. App. 1984), and Wilson v. Galt, 100 N.M. 227, 668 P.2d 1104 (Ct. App.), cert. quashed, 100 N.M. 192, 668 P.2d 308 (1983).

[5]Bartlett, as have other cases discussed below, cited the well reasoned California Court of Appeal decision in American Motorcyle Ass'n v. Superior Ct., 65 Cal. App. 3d 694, 135 Cal. Rptr. 497 (1977), even though the case was later reversed by the California Supreme Court (despite a strong dissent) in American Motorcycle Ass'n, 20 Cal. App. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978).

Similarly in Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978) the Supreme Court of Kansas held that the concept of joint and several liability was abrogated upon adoption of pure comparative negligence. The plaintiff was a nonnegligent plaintiff. He was the bailor of the car involved in the accident. The driver was found to be 90 percent negligent and another defendant was found 10 percent negligent. The plaintiff sued for damages to his car. The court said there could only be individual and several liability and held that the plaintiff could not recover all of the damages against the defendant who was only 10 percent negligent. The court stated:

> There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss. The same is true if one of the defendants is wealthy and the other is not.

580 P.2d at 874.

The Kansas Supreme Court emphasized this position in Miles v. West, 224 Kan. 284, 580 P.2d 876 (1978). The court specifically held that the fact that plaintiffs are without fault does not prevent the application of pure comparative negligence and several liability. The court stated:

> The ill fortune of being injured by an immune or judgment-proof person now falls upon plaintiffs

> rather than upon the other defendants, ... The risk of such ill fortune is the price plaintiffs must pay for being relieved of the burden formerly placed upon them by the complete bar to recovery based on contributory negligence.

580 P.2d at 880.

In Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978), the Supreme Court of Oklahoma also abrogated joint liability.[6] Involved was the construction of a modified comparative negligence statute. The plaintiff was 30 percent negligent and the two defendants were 50 percent and 20 percent negligent, respectively. The Oklahoma Supreme Court noted a number of policy reasons for adopting several liability and said:

> This in effect drastically changes the theory of joint-tortfeasors. So be it.

Id. at 1074 (footnote omitted). The court also quoted Prosser:

> The only completely satisfactory method of dealing with the situation is to bring all parties into court in a single action to determine the damages sustained by each and to required that each bear a proportion of the total loss according to his fault.

Id. at 1075. As to the insolvent codefendant situation, the court stated:

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[6]The decision has since been reaffirmed in Paul v. N. L. Industries, Inc., 624 P.2d 68 (Okla. 1980) and Berry v. Empire Indemnity Insurance Co., 634 P.2d 718 (Okla. 1981).

> It is argued this court work a hardship on a plaintiff if one co-defendant is insolvent. But the specter of the judgment-proof wrong-doer is always with us, whether there is one defendant or many. We decline to turn a policy decision on an apparition. There is no solution that would not work an inequity on either the plaintiff or a defendant in some conceivable situation where one wrongdoer is insolvent.

Id.[7]

In addition, the District Court below properly noted that in recent years:

> [F]ourteen states have limited or abolished the doctrine of joint and several liability. See Granelli, "The Attack on Joint and Several Liability," 71 ABA Journal 61 (July 1985). Legislation to do so is pending in California and New York, home of the nation's largest personal injury verdicts.

Walt Disney World Co. v. Wood, 11 FLW 823, 824 (Fla. 4th DCA, April 9, 1986.

Equity, logic, practicality and policy dictate that joint liability be abrogated once pure comparative negligence

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[7]There are other policy reasons in addition to those mentioned in the cases above, for abrogating joint and several liability. These are discussed in Timmons & Silvis, Pure Comparative Negligence In Florida: A New Adventure In The Common Law. 28 U. Miami L. Rev. 737, 778-84 (1974). The writers advocate the total abrogation or severe limiting of joint and several liability, saying that after Hoffman, there can only be joint and several liability where the jury is unable to make a logical apportionment. (Therefore, Section 768.31, Florida Statutes, would have continuing validity even under this argument--but it would be limited.)

is adopted, and this court should so hold.[8]

CONCLUSION

This case involves very real questions of policy and equity. The basic fairness of our legal system is involved. If a judgment is entered jointly and severally against Walt Disney World, the result will be that a defendant who was found by the jury to be only one percent negligent, will have to pay 86 percent of a plaintiff's damages even though that plaintiff himself was 14 times more at fault. This is obviously a grossly unfair result. Such a result does not comport with the adoption of pure comparative negligence in Florida. The result will have the effect of completely ignoring the basic purpose of comparative negligence, that

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[8]Cases such as Artic Structures, Inc. v. Wedmore, 605 P.2d 426 (Alaska 1979) and Tucker v. Union Oil Co. of California, 100 Idaho 590, 603 P.2d 156 (1979) are distinguishable as involving different statutes, or having modified versions of comparative negligence rather than pure comparative negligence. In Artic Structures, the Uniform Contribution act in effect provided for "pro rata shares" with relative degrees of fault not to be considered. 605 P.2d at 430. Thus, as the court points out, a deliberate decision was made not to consider comparative negligence or degree of fault. Florida, since the 1976 amendment, is precisely opposite. The Legislature has made a conscious decision to consider degrees of fault. This legislative change in connection with the judicial adoption of pure comparative negligence in Florida, mandates the abrogation of joint and several liability. Tucker is also distinguishable since the court, 603 P.2d at 165, pointed out that the statute specifically provided that multiple tortfeasors were to remain: ". . . severally liable to the injured person for the whole injury as at common law." Florida, of course, has no such statutory provision.

liability should be based on fault and in accordance with the true intent of the jury. This Court should abrogate the doctrine of joint and several liability.

Respectfully submitted this 16th day of May, 1986.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to Mr. Joel D. Eaton, 25 West Flagler Street, Suite 800, City National Bank Building, Miami, Florida 33130; Mr. Sheldon J. Schlesinger, 1212 Southeast 3rd Avenue, Fort Lauderdale, Florida 33316; Mr. John L. O'Donnell, Jr., DeWolf, Ward & Morris, P.A., 1475 Hartford Building, 200 East Robinson Street, Orlando, Florida 32801-1975; and Ms. Marjorie Gadarian Graham, Post Office Drawer E, West Palm Beach, Florida 33402, this 16th day of May, 1986.

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