

IN THE SUPREME COURT OF FLORIDA

CASE NO.: ~~68,647~~

FILED

SID J. WHITE

WALT DISNEY WORLD COMPANY
and INSURANCE COMPANY OF
NORTH AMERICA,

Petitioners,

vs.

ALOYSIA WOOD and DANIEL S.
WOOD,

Respondents.

JUN 16 1986

CLERK, SUPREME COURT

By

Deputy Clerk

Certified Question of Great
Public Importance from the
District Court of Appeal, Fourth
District, State of Florida

AMICUS CURIAE BRIEF OF THE
ACADEMY OF FLORIDA TRIAL LAWYERS
IN SUPPORT OF THE POSITION OF RESPONDENTS

THE ACADEMY OF FLORIDA TRIAL LAWYERS

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PREFACE

Petitioners, WALT DISNEY WORLD and INSURANCE COMPANY OF NORTH AMERICA, were the defendants in the trial court and the appellants in the district court of appeal. Respondents, ALOYSIA WOOD and DANIEL S. WOOD, were the plaintiffs in the trial court and the appellees in the district court of appeal. Herein, ALOYSIA WOOD and DANIEL S. WOOD will generally be referred to as "Respondents"; WALT DISNEY WORLD and INSURANCE COMPANY OF NORTH AMERICA will generally be referred to as "Petitioners". Amicus Curiae, the Academy of Florida Trial Lawyers will be referred to as the "Academy". References to the initial brief of the petitioners will be abbreviated, followed with the appropriate page numbers, as [PB, p. 1].

STATEMENT OF THE CASE AND OF THE FACTS

The Academy of Florida Trial Lawyers adopts the statement of the case and of the facts of respondents.

SUMMARY OF THE ARGUMENT

In the early morning hours of June 7, 1986, and after the initial briefs were served in this action, the Legislature passed the Tort Reform and Insurance Act of 1986 ("Insurance Act"),^{1/} which extensively modifies the doctrine of joint and several liability. Because of the passage of this new law, the interests of judicial administration would be harmed by an additional, judicially-crafted formula for the modification of joint and several liability.

The new law notwithstanding, the present system of interplay between comparative negligence, joint and several liability and contribution does in fact work. Although the system may be capable of generating apparent inequities at either extreme, in the present case the remedy of contribution adequately mitigates any such apparent unfairness.

Contrary to the petitioners' argument, there is no discernable judicial trend to abolish joint and several liability. Rather, the leading courts which have recently considered the issue have followed the majority rule and have fully retained

^{1/} Committee substitute for committee substitute for Senate Bill 465 and other bills. The Insurance Act awaits the Governor's signature as this brief is served. Excerpts are included in the Appendix.

joint and several liability following the adoption of comparative negligence.

Even if one rejects the well articulated majority view and accepts the petitioners' position that the assigned degree of percentage fault is the ultimate criterion for determining liability, then it is still unfair to abolish joint and several liability and place the entire burden of the insolvent wrongdoer on the plaintiff -- rather, one should adopt the approach of the Uniform Comparative Fault Act and allocate the uncollectible portion of a judgment based on the solvent parties' respective degrees of fault. There is simply no rational justification for the complete abrogation of joint and several liability as advocated by the petitioners.

ARGUMENT

Ironically, when the issue raised on this appeal was first presented to the Court in Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975),^{2/} the Legislature preempted the area by enacting the Uniform Contribution Among Joint Tortfeasors Act ("Contribution Act"); after the initial briefs in this case were filed, the Legislature again made extensive modifications to the law governing the extent of a defendant's liability, this time by statutorily modifying the doctrine of joint and several liability. See The Tort Reform and Insurance Act of 1986 ("Insurance Act"), excerpted in the Appendix. The new statute, which "applies only to causes of action arising after July 1, 1986," id., Section 50, is of course not applicable to the present case and is not now before the Court. In addition, the new legislation is based upon a perceived crisis in the availability and affordability of

^{2/} Petitioners go to great lengths to argue that the Lincenberg Court did not consider whether joint and several liability should be retained following the adoption of pure comparative negligence and the Contribution Act. The plain fact is that the Court squarely held: "The [Contribution] Act retains the full, joint and several liability of joint tortfeasors to the plaintiff..." 318 So.2d at 392. Later Florida decisions have consistently adhered to this view. Woods v. Withrow, 413 So.2d 1179, 1182 n.3 (Fla. 1982); Dept. of Transportation v. Webb, 409 So.2d 1061, 1063 (Fla. 1st DCA 1981), app'd as modified, 438 So.2d 780 (Fla. 1983).

liability insurance. (Section 2). Clearly, the interests of judicial administration would not be served by the creation of an **additional** judicially-crafted formula for application in cases occurring before the effective date of the statute.

**Notwithstanding the 1986 Insurance Act,
the Present System of Liability Allocation Works**

In the preamble to the 1986 legislation, there is no mention of inequity or unfairness in the application of the doctrine of joint and several liability; rather, the Insurance Act is based exclusively upon a perceived connection between the doctrine of joint and several liability and unacceptably high liability insurance premiums or the unavailability of liability insurance. (Insurance Act, Section 2). Although there appears to be very little empirical support for the Legislature's finding, see DiMento & Harrison, "Joint and Several Liability: A Study of the Fiscal and Social Impact of a Change in the Doctrine" (Center For Governmental Responsibility, University of Florida College of Law, December 1985), the Legislature's motivation was clearly limited to solving a perceived liability insurance crisis. This is significant in that the Legislature previously answered the "hardship" arguments raised by petitioners with the adoption of the Contribution Act in 1975, see 1975 Laws of Florida, Chapter 75-108, and the amendments to the Act in 1976 making the assigned degree of fault the basis for determining the amount of contribution. See 1976 Laws of Florida, Chapter 76-186. The recognized remedy to mitigate the harshness of joint and several liability -- a contribution action -- is fully available in this

case to Walt Disney World and, by way of subrogation, to its liability insurer. See Shor v. Paoli, 353 So.2d 825 (Fla. 1977).

The basic system of interplay between joint and several liability and contribution is in balance and has worked well in innumerable cases in our state court system for many years.^{3/} Our system ensures that:

1. A plaintiff absolutely **cannot** recover from any defendant for injuries to the extent caused by the plaintiff's own negligence. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).

2. To the extent that injuries are separately caused by an independent person or act and to the extent that a jury can apportion such injuries, then the defendant is entitled to have the jury determine the extent of those separately caused damages

^{3/} The historical evolution of the system may be briefly stated as follows: Florida early recognized that tortfeasors whose negligence combined to cause an indivisible injury were jointly and severally liable. Louisville & N.R. Co. v. Allen, 67 Fla. 257, 65 So. 8 (1914). In 1973, Florida judicially adopted "pure" comparative negligence. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). In 1975, while Lincenberg was pending before the Supreme Court, the Legislature adopted the Contribution Act providing for contribution among joint tortfeasors on a pro rata basis. 1975 Laws of Florida, Chapter 75-108. One year later, the remaining "inequity" of the system was removed when the Legislature amended the Contribution Act to make the respective degrees of fault the basis for a contribution award. 1976 Laws of Florida, Chapter 76-186.

and **only** to award compensation for the injuries caused by the defendant's negligence. This is true whether the separately caused damages are due to:

(a) another tortfeasor's act in causing such injuries, see Washewich v. LeFave, 248 So.2d 670 (Fla. 4th DCA 1971); Wise v. Carter, 119 So.2d 40 (Fla. 1st DCA 1960); Great Atlantic & Pacific Ten Co. v. Lanteri, 221 So.2d 158 (Fla. 3d DCA 1969);

(b) a determinable pre-existing illness or condition, C.F. Hamblen v. Owens, 127 Fla. 91, 172 So. 694 (1937); or,

(c) the plaintiff's own negligence (e.g., as recognized in Insurance Company of North America v. Pasakarnis, (451 So.2d 447 (Fla. 1984))).

3. A plaintiff can **only** recover from jointly and severally liable defendants to the extent that their negligence combined to proximately cause the plaintiff's indivisible injuries. Hoffman; Lincenberg, supra.

4. The defendant has the option, which he may exercise at his strategic discretion, to cross-claim against another joint tortfeasor, to implead him, or to bring an independent action for contribution later. See Christiani v. Popovich, 363 So.2d 2 (Fla. 1st DCA 1978), affirmed and adopted as opinion of Supreme Court sub. nom. Pensacola Interstate Fair, Inc. v. Popovich, 389 So.2d 1179 (Fla. 1980). Thus, the Contribution Act, which is now fault

based, see Florida Statutes Section 768.31 (1985), is not only a remedy to mitigate the effects of joint and several liability -- it is also a strategic weapon available to the defendant.

Indeed, it is precisely this tactical effect of the contribution claim that has allowed petitioners to set the stage for their "hard case" argument that the doctrine of joint and several liability should be abolished (while presumably leaving the defendants with the advantage of the option to cross-claim or not to cross-claim against, or to implead or not to implead, other "severally" liable defendants at their discretion). Respondent Aloysia Wood brought this action against Walt Disney World and its insurer,^{4/} for Walt Disney World's negligence in causing her personal injuries. She could not join her husband (her fiance at the time of the accident) because of the Court's decision in Raisen v. Raisen, 379 So.2d 352 (Fla. 1979), cert. denied, 449 U.S. 886 (1980), and other cases establishing the doctrine of interspousal immunity. The petitioner Walt Disney World, however, was authorized under the decision in Shor v. Paoli, 353 So.2d 825 (Fla. 1977), to counterclaim for contribution against respondent Daniel A. Wood (who asserted as plaintiff his derivative claim

^{4/} At the time the action was commenced, Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969), permitted direct actions against liability carriers.

for Mrs. Wood's injuries). Thus, as the case below went to the jury for a determination of the relative degrees of fault, it was in the posture of one of the extremely rare cases where a plaintiff is precluded from asserting a claim against a party who may be sued for contribution by the defendant. See, e.g., Seaboard Coastline R.R. Co. v. Smith, 359 So.2d 427 (Fla. 1978) (precluding contribution action against plaintiff's employer, who was immune from claim by plaintiff because of worker's compensation law); Joseph v. Quest, 414 So.2d 1063 (Fla. 1982) (permitting a contribution action against minor plaintiff's parent, but only to the same extent that the minor plaintiff could bring a direct action against his parent).

In this unique posture, the jury performed its responsibility and allocated the relative degrees of fault in contributing to cause Aloysia Wood's indivisible injuries in the following amounts: Walt Disney World - one percent (1%); Daniel S. Wood - eighty-five percent (85%); and Aloysia Wood - fourteen percent (14%). Because of interspousal immunity, respondent Aloysia Wood was precluded from bringing an action against her husband and, of

course, may not recover from him. 5/ Most significantly, it is not clear on the record now before the Court whether petitioners Walt Disney World and Insurance Company of North America have obtained a judgment against respondent Daniel S. Wood (which under Shor, supra, they are clearly entitled to do) or whether they have sought to execute or collect any such judgment from Mr. Wood or any available liability insurance carrier. The reason is clear: to have made a record of the contribution remedy would have destroyed the simplistic "hard case" that has been so carefully orchestrated for presentation to this Court.

5/ The unique procedural context of this case, which is obviously unusual and which was apparently necessary to create this distinctive "hardship" situation, arises not only because of the doctrine of interspousal immunity, but specifically because of the ruling in Shor v. Paoli, supra. Unlike the Court's recent decisions which waive interfamily (parental/child) immunity to the extent of liability insurance (and which limit an action for contribution against a co-tortfeasor family member on the same basis), Shor and the cases reaffirming the interspousal immunity have created a situation where no cause of action between spouses is permitted, but an unlimited right of contribution continues to exist against the tortfeasor spouse. (For the policy reasons supporting this distinction, see Joseph v. Quest, 414 So.2d 1063 (Fla. 1982) and Justice Boyd's dissenting opinion therein suggesting that at a minimum Shor should be overruled to conform the law of interspousal immunity to Joseph v. Quest). The petitioners' entire hardship case would be rendered moot by modifying Shor v. Paoli to conform to Joseph v. Quest and limiting the right of contribution from Mr. Wood to the amount of any available liability insurance.

**There is No Judicial Trend toward the
Abolition of Joint and Several Liability**

The petitioners argue that the trend of judicial authority is to abrogate joint and several liability, relying on a pair of 1978 cases from Kansas and Oklahoma and an intermediate appellate court decision from New Mexico.^{6/} The fact is that a number of highly respected courts have considered this issue more recently and that the preferred, majority view continues to be that joint and several liability should be fully retained following the adoption of either pure or modified comparative negligence. See Coney v. J.L.G. Industries, Inc., 97 Ill.2d 103, 73 Ill. Dec. 337, 454 N.E.2d 197 (Ill. 1983); Rozevink v. Faris, 342 N.W.2d 845 (Iowa 1983); Kirby Building Systems v. Mineral Explorations, 704 P.2d 1266 (Wyo. 1985); Arctic Structures, Inc. v. Wedmore, 605 P.2d 426 (Alaska 1979); Tucker v. Union Oil Company of California, 100 Idaho 590, 603 P.2d 156 (1979); American Motorcycle Assn. v. Superior Court, 20 Cal.App.3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978). Even the New Mexico decisions upon which petitioners

^{6/} Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978); Brown v. Keill, 580 P.2d 867 (Kan. 1978); Bartlett v. N.M. Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (Ct. App.), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982).

rely recognize that the New Mexico rule is the distinct minority. See St. Sauver v. New Mexico Peterbilt, Inc., 678 P.2d 712, 715 (N.M. Ct. App. 1984).

The suggestion of a legislative groundswell of support for the abolition of joint and several liability is also disingenuous at best,^{7/} because we have no way of determining how many state legislatures have rejected calls for such action. We do know that the petitioners' suggestion that seven (7) states have abolished or limited joint and several liability since 1982 is inaccurate [PB, p. 24].^{8/} More importantly, the "abolition or limiting" of joint and several liability accomplished by several of these state statutes was part of the original legislative adoption of the doctrine of comparative negligence. See, e.g., 1973 Laws of Nevada, p. 1722; 1969 New Hampshire Laws Section 225:1; 1979

^{7/} Part of the "trend" cited by petitioners is Kentucky's rule of apportionment of damages among defendants [PB, p. 13-14]. The Kentucky rule is based on a statute originally adopted in the nineteenth century, see Ky. Rev. Stat. §454.040, and is hardly part of any current trend in the law. See Central Passenger Ry. v. Kuhn, 86 Ky. 578, 6 S.W. 453 (1888).

^{8/} The correct number of states modifying joint and several liability since 1982 appears to be three (3): Indiana and Iowa by statute (Ind. P. L. 174 -1984; 1984 Iowa Acts Chapter 1293); and New Mexico by judicial decision, Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (Ct. App.), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982).

Vermont Laws, No. 179 (Adj. Sess.); 1975 Laws of Oregon, Chapter 599, Section 2.^{9/} The broad picture of a comparative analysis of the law is that the majority view continues to be that joint and several liability is properly fully retained after the adoption of comparative negligence; and that out of the 43 comparative negligence states other than Florida, only 13 have made any legislative or judicial modifications to the doctrine of joint and several liability.

**Compelling Public Policy Reasons Militate
Against the Abrogation of Joint and Several Liability**

The view that joint and several liability should be retained under comparative negligence is not only the majority view -- numerically and in terms of the stature of the courts so ruling -- it is also the better reasoned position. As the courts in Washington (another pure comparative negligence state) have held:

"The cornerstone of tort law is the assurance of full compensation to the injured party. To attain this goal, the procedural aspect of our

^{9/} As the petitioners correctly note [PB, p. 9], the Florida and general American rule of joint and several liability has always been broader than the strict English common law rule that "joint tortfeasors" are those who act in concert. Petitioners' citations to the later-developed English and Canadian law [PB, p. 12] should therefore be viewed in the correct perspective.

rule permits the injured party to seek full recovery from any one or all of such tort-feasors. So long as each tort-feasor's conduct is found to have been a proximate cause of the **indivisible** harm, we can conceive of no reason for relieving that tort-feasor of his responsibility to make full compensation for all harm caused the injured party. What may be equitable **between multiple tort-feasors** is an issue totally divorced from what is fair to the injured party...." Jensen v. Beard, 696 P.2d 612, 617 (Wash. App. 1985)(emphasis supplied by the Court), quoting Seattle-First National Bank v. Shoreline Concrete Co., 91 Wash.2d 230, 236, 588 P.2d 1308 (1978).

The courts have repeatedly recognized that the mere fact that relative degrees of fault may be assigned in determining comparative negligence or the entitlement to a contribution claim is no automatic justification for the abrogation of joint and several liability. As the Illinois Supreme Court stated in Coney, supra:

"(1) The feasibility of apportioning fault on a comparative basis does not render an indivisible injury "divisible" for purposes of the joint and several liability rule. A concurrent tortfeasor is liable for the whole of an indivisible injury when his negligence is a proximate cause of that damage. In many instances, the negligence of a concurrent tort-feasor may be sufficient by itself to cause the entire loss. The mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury." 454 N.E.2d at 205.

The Coney Court went on to give three additional reasons for retaining joint and several liability after the adoption of pure comparative negligence:

"(2) In those instances where the plaintiff is not guilty of negligence, he would be forced to bear a portion of the loss should one of the tortfeasors prove financially unable to satisfy his share of the damages.

"(3) Even in cases where a plaintiff is partially at fault, his culpability is not equivalent to that of a defendant. The plaintiff's negligence relates only to a lack of due care for his own safety while the defendant's negligence relates to a lack of due care for the safety of others; the latter is tortious, but the former is not.

"(4) Elimination of joint and several liability would work a serious and unwarranted deleterious effect on the ability of an injured plaintiff to obtain adequate compensation for his injuries. American Motorcycle Association v. Superior Court, (1978), 20 Cal.3d 578, 578 P.2d 899, 146 Cal. Rptr. 182. See Arctic Structures, Inc. v. Wedmore, (Alaska 1979), 605 P.2d 426; Tucker v. Union Oil Co., (1979), 100 Idaho 590, 603 P.2d 156; Seattle First National Bank v. Shoreline Concrete Co., (1978), 91 Wash. 2d 230, 588 P.2d 1308. See also Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Construction Corp., (1980), 96 Wis.2d 314, 291 N.W.2d 825." Id.

The second reason cited by the Coney Court, i.e., that abolition of joint and several liability would place the entire burden of an insolvent wrongdoer on the plaintiff is indeed compelling. Should this Court adopt the petitioners' suggested

remedy of abolition of the doctrine of joint and several liability, the Court would quickly be inundated with much harder cases than that now presented. Plaintiffs who were faultless or relatively faultless would be unable to recover more than a portion of the damage wrongfully caused if any of the joint tortfeasors were insolvent. If one accepts the petitioners' argument that the degree of percentage fault as assigned by a jury in determining contribution claims is the ultimate criterion for determining contribution claims is the ultimate criterion for determining liability (and if one rejects the analysis of the majority view), then it is still unfair to place the entire burden of the insolvent wrongdoer on the plaintiff -- according to such a view, the burden of the insolvent wrongdoer should be allocated between the plaintiff and the solvent wrongdoers on the basis of each party's respective degree of fault as determined by the jury. Indeed, this is precisely the basis of Uniform Comparative Fault Act. See Note, The Modification of Joint and Several Liability: Consideration of the Uniform Comparative Fault Act, 36 U.Fla.L. Rev. 288 (1984). If the Court is inclined to agree with petitioners and to reject the majority view, then perhaps the Court should suggest to the Legislature that the 1986 Insurance Act be modified to conform to the Uniform Comparative Fault Act.

CONCLUSION

We respectfully submit that the apparent harshness of the doctrine of joint and several liability is adequately mitigated by the Contribution Act; and that our system of liability allocation is fair, works well and should not be modified. Under the existing law, which is equitable and which is consistent with the majority view, the opinion of the Fourth District Court of Appeal should be approved.

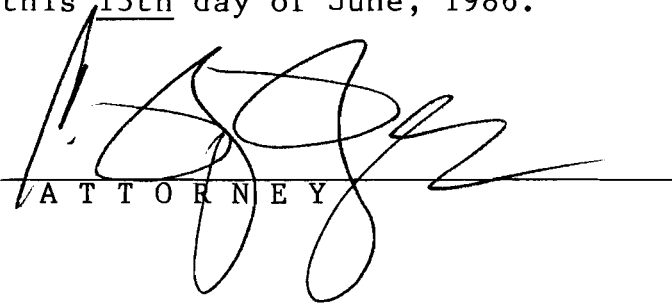
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Certificate of Service

I HEREBY CERTIFY a copy of the foregoing has been furnished to Marjorie Gadarian Graham, Post Office Drawer "E", West Palm Beach, Florida, 33402; John L. O'Donnell, Jr., Esquire, 1475 Hartford Building, 200 East Robinson Street, Orlando, Florida, 32801-1975; Joel D. Eaton, Esquire, 25 West Flagler Street, Suite 800, City National Bank Building, Miami, Florida, 33130; and William J. Smith, Esquire, Post Office Box 392, Tallahassee, Florida, 32302, by U.S. Mail, this 13th day of June, 1986.


A T T O R N E Y