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IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,647

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

Petitioners,

vs.

ALOYSIA WOOD,

Respondent.

_____/

ON REVIEW OF A CERTIFIED QUESTION FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF RESPONDENT (ALOYSIA WOOD) ON MERITS

SHELDON J. SCHLESINGER, P.A.
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-and-
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I.
STATEMENT OF THE CASE AND FACTS

We have no quarrel with Disney World's (and its insurer's) brief sketch of the case and facts, so far as it goes.[1/] We do think that Disney World has been less than straightforward with this Court in two significant respects, however, and we therefore feel constrained to supplement its statement of the case and facts briefly.

First, although Disney World has mentioned the existence of its counterclaim for contribution against Mrs. Wood's husband, it has failed to inform the Court that its contribution claim was submitted to the jury for determination and decided by the jury (R. 90-91, 118). The abbreviated record which Disney World has brought to the Court does not reflect whether Disney World ever sought entry of a judgment upon the verdict against Mr. Wood, but on the limited record provided here it is a certainty that it is entitled to such a judgment. *See Shor v. Paoli*, 353 So.2d 825 (Fla. 1977). The point is important because, as we shall point out in the argument which follows, the remedy of contribution has been provided to Disney World by this Court and the legislature to cure precisely the inequities which Disney World purports to perceive in the doctrine of "joint and several liability" after *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973).

Second, Disney World has completely avoided the subject of whether--and, if so, how--it preserved for appellate review the constitutional issues which it has argued here. The fact of the matter is that Disney World never challenged the "constitutionality" of the doctrine of "joint and several liability" in any manner, shape, or form in the trial court. Its *only* position was that *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), mandated that it should pay Mrs. Wood no more than 1% of her damages (R. 167-68, 137-

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[1/] The petitioners here are Walt Disney World Company and its insurer, Insurance Company of North America. For simplicity's sake, we will refer to both of them simply as "Disney World".

39). As we shall point out in the argument which follows, the "constitutional" challenges are therefore not properly before the Court.

II.
ISSUE ON REVIEW

WHETHER THE DOCTRINE OF "JOINT AND SEVERAL LIABILITY" OUGHT TO BE ABOLISHED.

III.
SUMMARY OF THE ARGUMENT

The doctrine of "joint and several liability" should not be "abolished" by this Court in this case for several very good reasons. First, the doctrine has been a settled fixture of this Court's jurisprudence for nearly a century, and this Court has repeatedly refused to abolish it. Disney World's contention that this Court's decision in *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), now compels abolition of the doctrine is simply wrong. This Court has considered the viability of the doctrine several times since *Hoffman v. Jones* was decided and has repeatedly refused to abolish it, concluding instead that *Hoffman* requires no more than the remedy of contribution among joint tortfeasors. We do not doubt the Court's ability to change its mind, but given the long pedigree of the doctrine and this Court's repeated recent refusals to abolish it, the wisdom of the century should be honored--absent clearly changed social conditions and the most compelling reasons for a change of mind.

Second, although we have recognized the Court's ability to disagree with the wisdom of a century, it cannot do so if the doctrine of "joint and several liability" has been codified in this case. In our judgment, §768.31, Fla. Stat., codifies the doctrine, and Disney World's insistence that it does not would appear to have been already squarely rejected by this Court. Moreover, it is perfectly obvious from the plain language of §768.31 that it makes absolutely no sense unless the doctrine of "joint and several liability" in tort is alive in Florida. And because the doctrine has been codified, of course, the issue presented here is simply beyond the purview of the judicial process.

Third, there are several public policy reasons supporting the doctrine, which is why it has survived repeated judicial scrutiny over the ages. Disney World does not really quarrel with those long-accepted public policy reasons; instead, it has redefined the problem on its own terms in an effort to make the doctrine appear less palatable than it is. It has redefined the problem by insisting that it caused only 1% of Mrs. Wood's damages. If that were true, however, then it would not be a "joint tortfeasor" at all, and it would clearly owe Mrs. Wood compensation for only the damages it caused. The facts in this case are not that Disney World caused only 1% of Mrs. Wood's damages; the facts are that the combined negligence of Disney World, Mr. Wood, and Mrs. Wood caused Mrs. Wood a single, indivisible injury resulting in damages totalling $75,000.00. Put another way, the jury in this case found that but for the negligence of Disney World, although its contribution was slight, Mrs. Wood would not have been injured--that, because of its negligence (together with the negligence of others), Mrs. Wood suffered a single injury.

It is recognition of that fact which has always supported, and still supports, the doctrine of "joint and several liability"--and this Court has long recognized that fact as a foundation for the doctrine, properly concluding that where the negligence of several has concurrently produced a single, indivisible injury which would not have occurred but for the negligence of each, each should logically be responsible for the whole of the indivisible injury--and that the matter of apportionment should be worked out among the parties by contribution from the plaintiff (under the doctrine of comparative negligence), and by contribution among the tortfeasors if possible. Once the problem is properly redefined in its real terms, rather than as Disney World has improperly redefined it, the perfectly logical reason for the long-settled doctrine becomes clear--and its application in any given case becomes much more palatable.

In the final analysis, of course, the question boils down to who should bear the risk of loss which must inevitably occur where a joint tortfeasor is insolvent or immune from

suit--the victim or the solvent tortfeasor? For a number of reasons, the overwhelming majority of courts which have considered the question after adoption of comparative negligence have refused to disturb the common law's long-settled answer that the risk of loss should fall on the tortfeasor rather than the victim. We will examine those reasons, as well as several other pragmatic rationales for the doctrine, in the argument section of this brief.

Fourth, Disney World's attacks upon the constitutionality of the doctrine were not preserved for review, and therefore cannot properly be considered here. And even if the Court should consider the arguments here, they rest solely upon the fundamental misunderstanding of the concept of "joint and several liability" which we have previously explained. Once it is understood that Disney World has been ordered to pay no more than the damages it caused (less contribution available from all other parties), the predicate for Disney World's challenges to the constitutionality of the doctrine simply evaporates. What remains is a perfectly rational legal basis for the doctrine, simply that Disney World should pay for the damages it caused whether its concurrent tortfeasor is able to contribute or not--which is why the doctrine has never been declared unconstitutional by any court in the century or so of its existence. We are confident that this Court will not be the first to take such an indefensible step.

Finally, for a number of reasons which we shall explain in the argument which follows, we think the complex issue presented here is more appropriately a matter for legislative action, rather than judicial lawmaking. More importantly, the legislature has recently investigated, debated, and acted on the issue in a manner which, in our judgment, simply precludes retroactive abolition of the doctrine by this Court in this case. The recently enacted "Tort Reform and Insurance Act of 1986", which modifies the docrine of "joint and several liability" in several significant respects, is expressly made prospective in operation only, and the Act contains a provision which "sunsets" the modi-

fication of the doctrine by repealing it on July 1, 1990. Abolition of the doctrine in this case would totally subvert both of these provisions of the Act.

Abolition of the doctrine in this case would also totally upset an important purpose of those provisions. It is clear from other provisions of the Act that modification of the doctrine is merely an experiment, and not a final resolution of the complex problem at issue here. Rather than mandating modification of the doctrine for all time, the Act requires the insurance industry to provide reports to the Department of Insurance to create a data base upon which the real facts can be ascertained, and it creates a task force to review the data, make appropriate findings concerning the need for tort reform, and make recommendations concerning the desirability of continuing the various temporary measures adopted by the Act. The Act also expressly requires the legislature itself to review the question of whether its modification of the doctrine should be retained or repealed after the data, the findings, and the recommendations are in. The possibility therefore clearly remains that the legislature may ultimately conclude that its modification of the doctrine was a misguided mistake, and restore the doctrine to its position as a settled fixture of the law of torts. This Court should defer to that ongoing investigation and leave that possibility open, rather than upset the legislature's plans by accepting Disney World's position here.

Finally, it is abundantly clear from the recent Act that its modification of the doctrine contained a *quid pro quo* in the form of a rollback in liability insurance rates. That, of course, is the reason why the Act was expressly made only prospective in operation. In effect, the legislature has said that the doctrine of "joint and several liability" remains alive in all cases where the insurance industry has collected premiums to cover the risk presented by the doctrine, and that it is modified only in those cases in which the industry is required to charge lower rates in exchange for modification of the doctrine. Given that recognition, it would subvert the purpose of the Act, it would be unfair to

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Mrs. Wood, and it would provide Disney World's insurer with a windfall if the Court were to accept Disney World's position here. Disney World's insurer collected premiums to cover the risk of the doctrine of "joint and several liability" in this case, and it should therefore be obligated to respond under the doctrine. For a smaller premium, Disney World's insurer can avoid the doctrine in the future (unless the legislature ultimately undoes its mistake), but it cannot fairly avoid the perfectly sensible obligation to pay for the damages caused by Disney World's negligence in this case.

IV.
ARGUMENT

THE DOCTRINE OF "JOINT AND SEVERAL LIABILITY" SHOULD NOT BE "ABOLISHED" BY THIS COURT, FOR SEVERAL REASONS: (1) ABOLITION OF THE DOCTRINE HAS BEEN REPEATEDLY REJECTED BY THIS COURT; (2) A STATUTE PREVENTS ITS ABOLITION; (3) SOUND PUBLIC POLICY MILITATES IN FAVOR OF RETAINING IT, WHERE A RIGHT OF CONTRIBUTION BETWEEN JOINT TORTFEASORS IS PROVIDED TO REMEDY ITS OCCASIONAL INEQUITIES; (4) THE DOCTRINE IS NOT "UNCONSTITUTIONAL"; AND (5) ABOLITION OF THE DOCTRINE IS MORE APPROPRIATELY A MATTER FOR THE LEGISLATURE, WHICH HAS RECENTLY ACTED IN A WAY WHICH PRECLUDES RETROACTIVE ABOLITION OF THE DOCTRINE BY THIS COURT.

1. This Court has repeatedly rejected arguments seeking abolition of the doctrine.

As Disney World has conceded, the doctrine of "joint and several liability" has been firmly established by this Court for nearly a century.[2/] *See, e. g., Louisville & N. R. Co. v. Allen*, 67 Fla. 257, 65 So. 8 (1914); *Feinstone v. Allison Hospital, Inc.*, 106 Fla. 302, 143 So. 251 (1932); *Stanley v. Powers*, 123 Fla. 359, 166 So. 843 (1936). Given this venerable lineage, as well as more recent pronouncements on the subject, this Court should be most

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[2/] Disney World has not challenged the correctness of the amount of Mrs. Wood's judgment under the doctrine of "joint and several liability". The amount is clearly correct if the doctrine survives Disney World's challenge here. *See Department of Transportation v. Webb*, 409 So.2d 1061 (Fla. 1st DCA 1981), *approved as modified*, 438 So.2d 780 (Fla. 1983); *Moore v. St. Cloud Utilities*, 337 So.2d 982 (Fla. 4th DCA 1976); *Sundstrom v. Grover*, 423 So.2d 637 (Fla. 4th DCA 1982).

reluctant to overrule itself absent clearly changed social conditions and the most compelling of reasons. *See Raisen v. Raisen*, 379 So.2d 352 (Fla. 1979).

Disney World seeks to finesse the doctrine's long pedigree by arguing that the legal landscape upon which the doctrine had initially been constructed was changed by *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973); that no decision of this Court subsequent to *Hoffman v. Jones* has decided the issue presented here; and that the issue is therefore open here. We will concede the first step of this argument--that *Hoffman v. Jones* changed the legal landscape somewhat--but we cannot concede the next steps of the argument, because they are wrong.

The precise issue presented here was recently presented to this Court in *Lincenberg v. Issen*, 318 So.2d 386 (Fla. 1975). In that case, a jury verdict was returned against two defendants--the jury finding that one defendant (Lincenberg) was 15% at fault in causing the plaintiff's damages, and that the other defendant (Rhodes) was 85% at fault. On review from a decision of the Third District, Mr. Lincenberg contended (as Disney World contends here) that his ultimate liability after *Hoffman v. Jones* should be determined by "a rule of apportionment among joint tortfeasors", rather than by reference to the degree of fault attributed to the plaintiff. 318 So.2d at 389. The plaintiff contended in turn that "the principles of comparative negligence does [sic] not require a change in the law of Florida to permit apportionment or contribution among joint tortfeasors". *Id.*

This Court agreed with Mr. Lincenberg that the adoption of comparative negligence (which, albeit by it a different name, is nothing more than the remedy of "contribution" against the plaintiff) required reevaluation of the doctrine of "joint and several liability", but it did not abolish the doctrine. Instead, it expressly retained it, but modified it (in accordance with a statute recently enacted by the legislature--§768.31, Fla. Stat.) to allow contribution among defendant-joint tortfeasors as well, in order to ameliorate possible inequities which might arise in its application after *Hoffman v. Jones*. That the

doctrine was not abolished is made perfectly clear by this Court's holding that "multi-party defendants will remain jointly and severally liable for the entire amount". 318 So.2d at 394.[3/]

Disney World argues that *Lincenberg* is not controlling here because "the issue before the Court in *Lincenberg* was whether to allow contribution and . . . the Court . . . did not address the rule of 'joint and several liability'" (petitioner's brief, p. 11). That is simply not true, however. Mr. Lincenberg's contention was that the Court should "adopt a rule of apportionment among joint tortfeasors" (318 So.2d at 389); the Court considered two methods to accomplish this purpose--"pure apportionment" (which is what Disney World seeks here) and "contribution" among defendants (318 So.2d at 392 n. 2); and the Court rejected the former in favor of the latter. The issue of "pure apportionment" was therefore squarely before this Court in *Lincenberg*. *See Moore v. St. Cloud Utilities*, 337 So.2d 982, 984 (Fla. 4th DCA 1976).

Lincenberg is not the only recent decision of this Court rejecting Disney World's position here. Recently, the First District confronted the precise issue presented here in *Department of Transportation v. Webb*, 409 So.2d 1061, 1063 (Fla. 1st DCA 1981), *approved as modified*, 438 So.2d 780 (Fla. 1983), and held as follows:

> 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 by the doctrine of comparative negligence. We reject this notion because it misconceives comparative negligence theory. Comparative negligence, as defined in *Hoffman v. Jones*, 280 So.2d. 431 (Fla. 1973), is a device designed to allow compensation for plaintiffs who may themselves be partly negligent, instead of eliminating their

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[3/] At the time *Lincenberg* was decided, the contribution statute required that a defendant's ultimate liability was to be determined on a "pro rata basis without considering relative degrees of fault". 318 So.2d at 394. The statute was subsequently amended to conform more closely to the theoretical underpinnings of *Hoffman v. Jones*, and it now provides that contribution is to be based upon relative degrees of fault. As we shall point out *infra*, however, the statute preserves the doctrine of "joint and several liability", as this Court did in *Lincenberg*.

> recovery altogether under the common law doctrine of contributory negligence. SCL and the amicus Florida Defense Lawyers' Association argue that because the *Hoffman* opinion permits juries to apportion damages according to the proportion of fault of each party, the concept of joint and several liability no longer has a place in Florida courts. However, this argument ignores *Lincenberg v. Issen*, 318 So.2d 386 (Fla. 1975) and subsequent statutory developments. In *Lincenberg*, the court decided that the doctrine of comparative negligence was not incompatible with the 1975 version of the Uniform Contribution Among Joint Tortfeasors Act, Section 768.31, Florida Statutes (1975), which required that fault could not be the basis for determining a defendant's contribution. The present contribution statute provides that relative degrees of fault *shall* be the basis for determining contribution. Section 768.31(3)(a) Florida Statutes (1979).
>
> Clearly, if the interplay between comparative negligence and the contribution statute was workable in 1975, it is even more workable now. We must reject the appellant's arguments that the law of comparative negligence requires a pure apportionment of damages. *See Lincenberg* at 392, n.2.

As we have noted previously, this Court accepted review of this decision. It modified it slightly on another issue, but, in the penultimate paragraph of its opinion, it unequivocally stated that "[a]s modified, we approve the decision of the district court". *Department of Transportation v. Webb*, 438 So.2d 780, 781 (Fla. 1983).[4/]

Subsequent to *Lincenberg*, this and other Florida courts have also decided numerous cases in which the result depends upon retention of the doctrine of "joint and several liability", and recognition of the doctrine of "contribution" (by the plaintiff, and among the defendants) as the remedy for the inequities of which Disney World complains here. In one of those decisions, this Court expressly recognized that *Lincenberg* required retention of the doctrine of "joint and several liability"--and it held once again: "We

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[4/] Amicus argues that the Court did not mean what it said--that its approval of the District Court's decision was limited to another issue. In response, we can only presume that the Southern Reporter has accurately reproduced the Court's decision--and that the Court meant what it said.

fully retain the doctrine of joint and several liability". *Woods v. Withrow*, 413 So.2d 1179, 1182 n. 3 (Fla. 1982).

There are numerous additional decisions in which the result depends upon this Court's conclusion in *Lincenberg*--retention of the doctrine of "joint and several liability", and recognition of the doctrine of "contribution" as a remedy required by *Hoffman v. Jones*. *See, e. g., Rader v. Variety Children's Hospital*, 323 So.2d 564 (Fla. 1975); *Shor v. Paoli*, 353 So.2d 825 (Fla. 1977); *Seaboard Coast Line Railroad Co. v. Smith*, 359 So.2d 427 (Fla. 1978); *Houdaille Industries, Inc. v. Edwards*, 374 So.2d 490 (Fla. 1979); *Florida Farm Bureau Insurance Co. v. Government Employees Insurance Co.*, 387 So.2d 932 (Fla. 1980); *Pensacola Interstate Fair, Inc. v. Popovich*, 389 So.2d 1179 (Fla. 1980); *Joseph v. Quest*, 414 So.2d 1063 (Fla. 1982). Because none of these decisions would make any sense if the issue presented by Disney World here were still "open" after *Hoffman v. Jones*, we take it that they are also, although indirectly, dispositive of the issue presented here.

In short and in sum, the issue argued by Disney World here has been definitively resolved by this Court after *Hoffman v. Jones*, and it is therefore not an "open" question here. To adopt Disney World's position here, this Court must clearly overrule nearly a century of thoughtful precedent, including numerous decisions rendered in only the last decade. We do not doubt the Court's oft-demonstrated ability to change its mind (absent a statutory prohibition to do so--a point which we will next address), but we do insist that no such change of mind is justifiable here, given the long pedigree of the doctrine, absent the most compelling reasons. We will discuss the reasons why the Court should follow its settled precedent in a moment. For the moment, we turn to a reason why this Court *cannot* change its mind in this case.

2. Section 768.31, Fla. Stat., prevents "abolition" of the doctrine.

Although we have recognized the Court's ability to disagree with the wisdom of a century, it cannot do so if the doctrine of "joint and several liability" has been codified in

this case. In our judgment, §768.31, Fla. Stat., codifies the doctrine; it provides the remedy of contribution to answer the charges leveled at the doctrine by Disney World here; and it prevents judicial abolition of the doctrine as a result. To avoid this obvious conclusion, Disney World argues that the statute does not codify, but merely recognizes, the doctrine of "joint and several liability". We fail to see the difference, and this Court also failed to see the difference in *Lincenberg v. Issen*, in which it observed that the statute codifies the doctrine: "The Act retains the full, joint, and several liability of joint tortfeasors to the plaintiff, and provides for contribution between them . . .". 318 So.2d at 392. This Court reached the same conclusion in *Seaboard Coast Line Railroad Co. v. Smith*, 359 So.2d 427, 428-29 (Fla. 1978): "Contribution was unknown to the common law. It is a statutory recognition of the common liability of multiple tortfeasors to the injured party." In view of those pronouncements, Disney World's contention that the statute imposes no impediment to its position here would appear to have been already squarely rejected by this Court.

Moreover, it is perfectly obvious that §768.31 makes absolutely no sense unless the doctrine of "joint and several liability" in tort is alive in this case, because its only purpose is to provide a mechanism for apportionment between defendants who are jointly and severally liable to a tort victim. *See Lincenberg v. Issen, supra; Seaboard Coast Line Railroad Co. v. Smith, supra; Sobik's Sandwich Shops, Inc. v. Davis*, 371 So.2d 709 (Fla. 4th DCA 1979); *Metropolitan Dade County v. Asusta*, 359 So.2d 58 (Fla. 3rd DCA 1978); *Frier's, Inc. v. Seaboard Coast Line Railroad Co.*, 355 So.2d 208 (Fla. 1st DCA), *cert. dismissed*, 360 So.2d 1250 (Fla. 1978).

It is also facile for Disney World to suggest that the statute does not expressly embrace the doctrine of "joint and several liability" in tort, because the statute makes numerous references to the doctrine which are totally inconsistent with the notion that the doctrine is not an inherent part of it:

(2) **RIGHT TO CONTRIBUTION.—**

(a) Except as otherwise provided in this act, when two or more persons become *jointly or severally liable in tort for the same injury* to person or property, or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a *tortfeasor who has paid more than his pro rata share of the common liability*, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

. . . .

(4) **ENFORCEMENT—**

. . . .

(d) If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has either:

1. Discharged by payment *the common liability* within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within 1 year after payment, or

2. Agreed, while action is pending against him, to discharge *the common liability* and has within 1 year after the agreement paid the liability and commenced his action for contribution.

(e) The recovery of a judgment for an injury or wrongful death against one tortfeasor *does not of itself discharge the other tortfeasors from liability for the injury* or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.

. . . .

(6) **UNIFORMITY OF INTERPRETATION.—**

This act shall be so interpreted and construed *as to effectuate its general purpose* to make uniform the law of those states that enact it.

(7) **PENDING CAUSES OF ACTION.—**

This act shall apply to all causes of action pending on June 12, 1975, wherein the rights of contribution among *joint tortfeasors* is involved and to cases thereafter filed.

(Emphasis supplied).

All things considered, we think this Court would be torturing §768.31 beyond recognition if it were to conclude that it did not prevent it from holding that there is no "joint and several" or "common liability" among multiple tortfeasors in Florida after *Hoffman v. Jones* and enactment of §768.31. Certainly, this Court read the statute properly in *Lincenberg v. Issen, supra*, when it read the statute as being the legislature's response to the problem presented by the accepted doctrine of "joint and several liability" after the adoption of comparative negligence, and we do not think this Court is free to read it any other way. Neither, of course, is this Court free to "abolish" the doctrine in this case in view of the legislature's clear recognition of it in §768.31. We therefore respectfully submit that the issue presented here is foreclosed by §768.31 itself--and that Disney World's remedy, if any, lies with the legislature (which has recently acted in a manner which does not help Disney World in this case, as we shall discuss *infra*). In short, because of §768.31, the issue presented here is simply beyond the purview of the judicial process.

3. There are sound public policy reasons militating against "abolition" of the doctrine.

Although we are convinced that both the decisional law and §768.31 foreclose the issue presented here, we will, of course, address the merits of the issue. Before we reach the merits, however, we feel constrained to point out that Disney World's broad attack on the doctrine of "joint and several liability" has no factual support in the record--because the record does not demonstrate that Disney World has been harmed in any way by the doctrine. So far as the record presently reflects, Disney World is entitled to a judgment against Mr. Wood on its contribution claim,[5/] and a recovery on that judgment will put Disney World in exactly the same position it would be in if this Court were to accept its

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5/ *See Shor v. Paoli*, 353 So.2d 825 (Fla. 1977).

argument and abolish the doctrine of "joint and several liability" altogether. Put another way, absent some demonstration here that Disney World cannot collect upon a contribution judgment against Mr. Wood, the law already provides Disney World exactly the relief it seeks here. And until such a demonstration is made, Disney World's complaints concerning the doctrine are purely hypothetical. In our judgment, if the issue presented here is to be considered at all, it should be considered only in a case requiring its consideration; it should not be considered in a case where it does no demonstrable harm. And because no demonstrable harm has been shown in this case, we think the issue (if not foreclosed) should be left for another day.

It should be apparent from the foregoing that the remedy of contribution solves all of Disney World's complaints concerning the doctrine of "joint and several liability", where contribution is available. The only case in which the doctrine creates any problem at all after *Lincenberg* and the enactment of §768.31 is the case in which contribution is unavailable from one of two or more tortfeasors because of insolvency, immunity, or the like. That is not a new problem, however; that problem has existed throughout the long history of the doctrine, and has never been considered a legitimate reason for abolition of the doctrine. Neither does Disney World advance it directly as a reason for abolition of the doctrine. Instead, Disney World has redefined the problem on its own terms in an effort to make the doctrine appear less palatable than it is. There is a fundamental (indeed, pivotal) flaw in Disney World's redefinition of the problem, however, which renders its proposed solution fundamentally flawed as well.

The fundamental flaw in Disney World's argument (as well as the arguments of its amici) is its repeated contention that its negligence caused only *1% of Mrs. Wood's damages.* If that is what the jury had found, of course, then Disney World would be correct that it should pay for only 1% of Mrs. Wood's damages; it would be correct because a tortfeasor is responsible only for the damage he causes. In fact, if that is what

the jury had found, Disney World would not be a "joint tortfeasor" at all. That is not what the jury found in this case, however. The jury found that the combined negligence of Disney World, Mr. Wood, and Mrs. Wood caused Mrs. Wood a single, indivisible injury resulting in damages totalling $75,000.00. Put another way, the jury found that but for the negligence of Disney World, although its contribution was slight, Mrs. Wood would not have been injured--that, because of its negligence (together with the negligence of others), Mrs. Wood suffered a single indivisible injury.

It is recognition of that fact which has always supported, and still supports, the doctrine of "joint and several liability"--even in cases where no contribution is available:

> Where, although concert is lacking, the separate and independent acts of negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it. . . . If their acts of negligence, however separate and distinct in themselves, are concurrent in producing the injury, their liability is joint as well as several. * * * Each becomes liable because of his neglect of duty, and they are jointly liable for the single injury inflicted because the acts or omissions of both have contributed to it. . . .

Louisville & N.R. Co. v. Allen, 67 Fla. 257, 65 So. 8, 12 (1914).

Although these words are over 70 years old, the law of Florida is the same today:

> In the ordinary negligence context, a defendant is liable for injury produced or substantially produced in a natural and continuous sequence by his conduct, such that "but for" such conduct, the injury would not have occurred. Such liability is not escaped in the recognition that the injury would not have occurred "but for" the concurrence or intervention of some other cause as well. The defendant is liable when his act of negligence combines with some other concurring or intervening cause in the sense that, "but for" the other cause as well, injury would not have occurred. . . .

Jones v. Utica Mutual Insurance Co., 463 So.2d 1153, 1156 (Fla. 1985).

This settled proposition has been expressed, in perhaps the leading decision rejecting Disney World's position after the advent of comparative negligence, as follows:

> In the concurrent tortfeasor context, . . . the "joint and several liability" label does not express the imposition of any form of vicarious liability, but instead simply embodies the general common law principle, . . . that a tortfeasor is liable for any injury of which his negligence is a proximate cause. Liability attaches to a concurrent tortfeasor in this situation not because he is responsible for the acts of other independent tortfeasors who may also have caused the injury, but because he is responsible for all damage of which his own negligence was a proximate cause. When independent negligent actions of a number of tortfeasors are each a proximate cause of a single injury, each tortfeasor is thus personally liable for the damages sustained, and the injured person may sue one or all of the tortfeasors to obtain a recovery for his injuries; the fact that one of the tortfeasors is impecunious or otherwise immune from suit does not relieve another tortfeasor of his liability for damage which he himself has proximately caused.

American Motorcycle Ass'n. v. Superior Court of Los Angeles County, 20 Cal.3d 578, 578 P.2d 899, 146 Cal. Rptr. 182, 187 (1978).

This proposition is so well settled in Florida that it is embodied in Fla. Std. Jury Instn. (Civ.) 5.1b (concurring cause). It is also a complete answer to Disney World's argument (borrowed from a New Mexico decision), expressed as follows: "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?" The simple answer to this rhetorical question is that the "risk" is not shifted at all. Both the solvent tortfeasor and the insolvent tortfeasor have caused a single, indivisible injury, and the plaintiff should not forfeit the logical right to recover all of the damages caused by the solvent concurrent tortfeasor merely because the other concurrent tortfeasor is insolvent. In short, the New Mexico court's query makes sense only if the damages caused by two concurrent tortfeasors are divisible into those caused by each.

Where the damages are indivisible, however, the New Mexico court's query clearly misses the point of joint liability for a single injury caused by concurrent tortfeasors. Once the conceptual foundation of the doctrine is properly understood, the only relevant rhetorical question is this: between one plaintiff and one solvent defendant, the plaintiff

is entitled to full compensation for his single injury; by what logic does the risk of less than full compensation shift to the plaintiff if he suffers a single injury caused by the concurring negligence of the same solvent defendant and an additional insolvent defendant? The answer is, of course, as the common law has always recognized, that there is no logic at all in relieving the solvent defendant of his obligation to compensate the plaintiff for the damages he caused in that circumstance.[6/]

In contradistinction to this long-settled proposition that concurrent tortfeasors are both liable for an indivisible injury which they have jointly caused, Disney World is proposing here that, notwithstanding that its negligence (combined with the negligence of others) caused a single injury totaling $75,000.00 in damages (which would not have

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6/ The rule of joint liability for indivisible injuries applies not only to concurrent tortfeasors but to successive tortfeasors as well, where the damages caused by each cannot be apportioned between the two accidents. When a defendant causes an injury and the injury is aggravated by a *subsequent* accident or act, the defendant is responsible for the plaintiff's total damages if they cannot be apportioned between the two accidents. *See Underwriters at Lloyds v. City of Lauderdale Lakes*, 382 So.2d 702 (Fla. 1980); *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977); *Feinstone v. Allison Hospital*, 106 Fla. 302, 143 So. 251 (1932); *J. Ray Arnold Corp. of Olustee v. Richardson*, 105 Fla. 204, 141 So. 133 (1932).

Similarly, when a defendant causes an accident which aggravates an injury caused by a *prior* accident or act, the defendant is responsible for the plaintiff's total damages if they cannot be apportioned between the two accidents. *See C. F. Hamblen, Inc. v. Owens*, 127 Fla. 91, 172 So. 694 (1937); *Washewich v. LeFave*, 248 So.2d 670 (Fla. 4th DCA 1971); *Mack v. Garcia*, 433 So.2d 17 (Fla. 4th DCA 1983); *Schwab v. Tolley*, 345 So.2d 747 (Fla. 4th DCA 1977); *McLeod v. American Motors Corp.*, 723 F.2d 830 (11th Cir. 1984) (construing Florida law); Fla. Std. Jury Instn. (Civ.) 6.2b (aggravation or activation of disease or defect).

This Court has also held that it is against public policy to require a plaintiff to sue every concurrent or successive tortfeasor who may be liable for the losses caused by them, and that defendants will not be allowed to bring third-party actions against such tortfeasors in certain circumstances--such as forcing a plaintiff to litigate a medical malpractice action which he has elected to forego. *See Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977).

If Disney World's position is adopted in this case, all of these decisions would also logically have to be overruled as well. A plaintiff would then be prevented from recovering any damages caused by a prior or successive tortfeasor if he could not apportion the damages between the two accidents. A plaintiff would also be required to litigate the liability of everyone involved, whether he wished to do so or not, and even when some of the tortfeasors were immune from suit or were unidentifiable "phantoms". These "ripple effects" of Disney World's position clearly counsel considerable additional caution here.

occurred except for its negligence), it should only be responsible for $750.00 of those damages merely because its "joint tortfeasor" may be unable to contribute toward compensating the plaintiff for the damages caused by both.[7/] Once the problem is defined in its historical (and real) terms, rather than as Disney World has improperly redefined it, it is clearly a much more complex problem than the one Disney World has presented to this Court. And once the problem is viewed in its real terms, rather than as Disney World has redefined it, the perfectly logical reason for the long-settled doctrine becomes clear--and its application in any given case becomes much more palatable.

In the final analysis, of course, the question boils down to this: Who should bear the risk of loss which must inevitably occur where a joint tortfeasor is insolvent or immune from suit--the victim or the solvent tortfeasor? For a number of reasons, the overwhelming majority of courts which have considered the question after adoption of comparative negligence have refused to disturb the common law's long-settled answer that the risk of loss should fall on the tortfeasor rather than the victim. We consider the California Supreme Court's reasons representative:

> First, the simple feasibility of apportioning fault on a comparative negligence basis does not render an indivisible injury "divisible" for purposes of the joint and several liability rule. As we have already explained, a concurrent tortfeasor is liable for the whole of an indivisible injury whenever his negligence is a proximate cause of that injury. In many instances, the negligence of each of several concurrent tortfeasors may be sufficient, in itself, to cause the entire injury; in other instances, it is simply impossible to determine whether or not a particular concurrent tortfeasor's negligence, acting alone, would have caused the same injury. Under such circumstances, a defendant has no equitable claim vis a vis an injured plaintiff to be relieved of liability for damage which he has proximately caused simply because some other tortfeasor's negligence may also

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7/ This is a particularly harsh result for the plaintiff in the instant case, because another doctrine of tort law--the interspousal immunity doctrine--prevents her from recovering a nickel from Disney World's "joint tortfeasor" for the single injury caused by both. Disney World, on the other hand, is not prevented by this doctrine from recovering contribution from Mr. Wood.

have caused this harm. In other words, 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.

Second, abandonment of the joint and several liability rule is not warranted by [the defendant's] claim that, after [the adoption of comparative negligence], a plaintiff is no longer "innocent." Initially, of course, it is by no means invariably proved that after [the adoption of comparative negligence] injured plaintiffs would be guilty of negligence. In many instances a plaintiff will be completely free of all responsibility for the accident, and yet, under the proposed abolition of joint and several liability, such a completely faultless plaintiff, rather than a wrongdoing defendant, would be forced to bear a portion of the loss if any one of the concurrent tortfeasors should prove financially unable to satisfy his proportioned share of the damages.

Moreover, even when a plaintiff is partially at fault for his own injury, a plaintiff's culpability is not equivalent to that of a defendant. In this setting, a plaintiff's negligence relates only to a failure to use due care for his own protection, while a defendant's negligence relates to a lack of due care for the safety of others. Although we recognized [in our decision adopting comparative negligence] that a plaintiff's self-directed negligence would justify reducing his recovery in proportion to his degree of fault for the accident, the fact remains that insofar as the plaintiff's conduct creates only a risk of self-injury, such conduct, unlike that of a negligent defendant, is not tortious. . . .

Finally, from a realistic standpoint, we think that [the defendant's] suggested abandonment of the joint and several liability rule would work a serious and unwarranted deleterious affect on the practicability of negligently injured persons to receive adequate compensation for their injuries. One of the principle by-products of the joint and several liability rule is that it frequently permits an injured person to obtain full recovery for his injuries even when one or more of the responsible parties did not have the financial resources to cover their liability. In such a case the rule recognizes that fairness dictates that the "wronged party should not be deprived of his right to redress," but that "(t)he wrongdoers should be left to work out between themselves the apportionment." . . .

For all of the foregoing reasons, we reject [the defendant's] suggestion that our adoption of comparative negligence logically compels the abolition of joint and several liability of concurrent tortfeasors. Indeed, although [the defendant] fervently asserts that the joint and several liability concept is totally

> incompatible with a comparative negligence regime, the simple truth is that the overwhelming majority of jurisdictions which have adopted comparative negligence have retained the joint and several liability doctrine. . . .

American Motorcycle Ass'n. v. Superior Court of Los Angeles County, supra, 146 Cal. Rptr. at 188-89.

It is true, of course, as Disney World and its amici have pointed out, that a handful of states have reached a contrary conclusion. However, most of the changes have been wrought through legislative response to pressure from special interest groups, who have succeeded in misleading legislators (in need of campaign contributions) into believing that the doctrine requires a defendant to pay more than the damages he has caused, as Disney World has attempted to convince this Court here. Very few courts have been misled in this fashion, however, and the overwhelming majority of courts (including Florida's) which have considered abolition of the doctrine upon a proper conceptual foundation have remained faithful to the settled wisdom of the common law. We respectfully submit that the historical, majority rule is the better rule.[8/]

We think two more brief pragmatic observations are in order. This is, of course, a "hard case"--because Disney World's contribution to Mrs. Wood's injury was slight, and less than Mrs. Wood's contribution. It is equally true, however, that hard cases make bad law. And abolition of the doctrine of "joint and several liability" in this hard case will clearly make bad law in numerous other cases in which the doctrine is far more defensible. For example, consider the case in which a solvent defendant is found 10% at fault, an insolvent defendant is found 90% at fault, and the plaintiff is found blameless for a

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8/ Many of the numerous recent judicial decisions which have rejected Disney World's position are collected in *American Motorcycle Ass'n, supra*, and in a thought-provoking student note in a recent edition of the University of Florida Law Review: Note, *The Modification of Joint and Several Liability: Consideration of the Uniform Comparative Fault Act*, 36 Fla. L. Rev. 288 (1984). Rather than collect all those decisions here, the Court is simply referred to these sources.

single crippling injury which prevents him from supporting himself and his family. If Disney World's position is adopted here, the solvent defendant will pay 10% of the plaintiff's damages, and the plaintiff will suffer 90% of his life-threatening loss without compensation--notwithstanding that the solvent defendant's negligent conduct (without which there would have been no injury) caused 100% of the plaintiff's damages.

That case and this case are polar extremes, of course, and there are numerous cases in between, which we will not belabor. The point is simply this: No matter how compelling the facts in this case may be for relieving Disney World of its long-settled responsibility under the doctrine of "joint and several liability", there are equally compelling cases in which abolition of the doctrine would offend the consciences of most right-thinking persons. And all of those cases must be considered in deciding the complex issue presented here, not merely this one.

We also think it is of no moment here that the plaintiff was found 14% at fault and Disney World was found 1% at fault. As long as the law of Florida recognizes "pure" comparative negligence (rather than a modified form of comparative negligence in which the defendant's fault must be greater than the plaintiff's before the plaintiff can recover), the plaintiff is entitled to recover a portion of her damages even if her fault is greater than that of the defendant. The defendant receives the benefit of the plaintiff's fault in another way--by "contribution" from the plaintiff in the form of a percentage reduction of the total damages for which it would otherwise be liable.

We also remind the Court that there is always an injured victim in cases like this one, and frequently the victim is so badly injured that he can neither afford his medical bills nor support himself and his family. He is therefore typically in a very poor position to bear the loss associated with a triangle in which one joint tortfeasor is insolvent or immune from suit. He is certainly in a much poorer position than the solvent tortfeasor to bear that loss. That disparity in positions is exacerbated by the fact that plaintiffs

generally cannot purchase insurance coverage comparable to the liability insurance coverage available to defendants, to cover all their losses in the event one of several joint tortfeasors is financially irresponsible.[9/] That is especially true in the instant case, where the solvent tortfeasor is a multi-million dollar industry which can absorb the cost of Mrs. Wood's injuries by tacking a few pennies onto a half-day's worth of ticket sales--which brings us to our final pragmatic observation.

Our final pragmatic observation is this: Whatever the outcome of the issue before the Court, the public will ultimately pay the loss in cases like this one. If the doctrine of "joint and several liability" *is* abolished, an injured plaintiff who cannot pay his medical bills or support his family--and who is not compensated adequately to do so because one of the tortfeasors who has caused his injury is insolvent or immune from suit--will ultimately become a ward of the public, cared for and supported by tax monies from the public's pockets. If the doctrine of "joint and several liability" is *not* abolished, then the public will also pay for the loss. The public will pay because the cost of the solvent defendant's insurance coverage (or self-insurance) is passed on to its customers in the price of the product or services it sells--and each consumer will therefore pay a fraction of a cent of the plaintiff's loss. (Indeed, because insurance rates are generally based upon industry-wide experience, the customers of the entire industry, not merely the customers of the tortfeasor, will pay for the loss.)

If the public must ultimately pay in either event, it seems far more sensible to us that the plaintiff's compensation should come from that portion of the public supporting

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9/ One exception to this general rule comes to mind--the availability of uninsured motorists coverage for automobile accidents--although even that exception is sometimes unavailable because of the perverse way in which some courts have read the statute mandating availability of that coverage. *See, e.g., Craft v. Government Employees Insurance Co.*, 432 So.2d 1343 (Fla. 2nd DCA), *review denied*, 440 So.2d 351 (Fla. 1983) (where compromise settlement with solvent joint tortfeasor exceeds UM coverage available for other uninsured joint tortfeasor, no coverage is available for uninsured joint tortfeasor's share of plaintiff's total damages). That exception is not relevant here, however.

the tortfeasor's enterprise, rather than the general public at large (many of whom may have elected not to contribute to the tortfeasor's enterprise precisely because of the injuries it is causing to others). Simply put, the enterprise which negligently causes an injury should pay its own way--not the victim of the enterprise or the public at large. It is for that far more general social policy reason that we suspect the doctrine of "joint and several liability" has survived to this day--notwithstanding the advent of comparative negligence--and it is for that reason, among the others which we have briefly advanced here, that the doctrine should survive this singularly "hard case". A doctrine which has survived nearly a century of judicial scrutiny is not always right--but it is seldom wrong. At the very least, the reasons for its extended survival deserve careful consideration and respect before it is carelessly cast aside, at the vocal insistence of a well-heeled profit-motivated minority, by a mere panel of successor judges asked to reconsider its accepted wisdom for the umpteenth time. *See Raisen v. Raisen*, 379 So.2d 352 (Fla. 1979).

4. The "constitutionality" of the doctrine is not properly before the Court, nor is the doctrine "unconstitutional".

Disney World's attacks upon the *constitutionality* of the doctrine of "joint and several liability" were never raised in the trial court in any manner, shape, or form. They therefore cannot properly be considered here. *Clark v. State*, 363 So.2d 331 (Fla. 1978); *Sanford v. Rubin*, 237 So.2d 134 (Fla. 1970); *Smith v. Ervin*, 64 So.2d 166 (Fla. 1953); *Henderson v. Antonacci*, 62 So.2d 5 (Fla. 1952). *See Tillman v. State*, 471 So.2d 32 (Fla. 1985); *Dober v. Worrell*, 401 So.2d 1322 (Fla. 1981); *Castor v. State*, 365 So.2d 701 (Fla. 1978); *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977).

And because the arguments simply cannot be considered here, we will spare the Court a lengthy response to them. Suffice it to say simply that the arguments are built solely upon the fundamental misunderstanding of the concept of "joint and several liabil-

ity" which we have previously explained. Once it is understood that Disney World has been ordered to pay no more than the damages it caused (subject to its right to contribution from the plaintiff through the doctrine of comparative negligence and its right to contribution from its "joint tortfeasor"), the predicate for Disney World's challenges to the constitutionality of the doctrine simply evaporates. What remains is a perfectly rational legal basis for the doctrine, simply that Disney World should pay for the damages it caused whether its concurrent tortfeasor is able to contribute or not--which is why the doctrine has never been declared unconstitutional by any court in the century or so of its existence. Because we are confident that this Court will not be the first to take such an indefensible step (especially in a case where the issue was not preserved for review), we will simply pass on the unpreserved constitutional arguments, and leave them in this Court's capable hands.

5. Abolition of the doctrine is more appropriately a matter for the legislature, which has recently acted in a way which precludes retroactive abolition of the doctrine by this Court.

Finally, we should make the obvious point that several factors render consideration of the issue presented here to be more appropriately a matter for legislative action, rather than judicial lawmaking. To be more specific, the doctrine of "joint and several liability" has a long pedigree based on sound public policy; this Court has consistently refused to abolish it for nearly a century; and, as we trust we have demonstrated, there have been no sweeping changes in the law or social conditions which would render suspect the sound public policy reasons upon which the doctrine has always rested. In addition, as we note at some length in footnote 6, *supra*, abolition of the doctrine will have broad "ripple effects" upon several other settled areas of the common law, and the desirability of those additional effects deserves extensive investigation and debate in a forum more appropriately suited to that task, before dozens of this Court's decisions settling various aspects of the common law are tilted head-over-heels in a headlong rush to shift the risk

of tortious injury from tortfeasors to victims. Similarly, unlike the legislature, this Court simply does not have the capability of investigating the facts behind the various positions taken by the several sectors of the society who have an interest in the issue presented here to determine whether such a change is needed, or what the economic effects of such a change would be to the various interested sectors of the public. All of these factors, in our judgment, militate in favor of this Court deferring to the legislature on the socially disruptive issue presented here. *See Raisen v. Raisen*, 379 So.2d 352 (Fla. 1979).

Deferring the issue to the legislature would be particularly appropriate in this case because the legislature has recently investigated, debated, and temporarily acted on the issue--enacting a complex compromise of the various competing interests in a crazy-quilt form which this Court could not have invented in its wildest judicial nightmares.[10/] To be more specific, the legislature recently passed the "Tort Reform and Insurance Act of 1986", which includes a new §768.81, Fla. Stat., which reads as follows:

> Section 60. Section 768.81, Florida Statutes, is created to read:
>
> 768.81 Comparative fault.--
>
> (1) DEFINITION.--As used in this section "economic damages" means past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repeairs, including labor, overhead, and profit; and any other economic loss which would not have occurred but for the injury giving rise to the cause of action.
>
> (2) EFFECT OF CONTRIBUTORY FAULT.--In an action to which this section applies, any contributory fault chargeable to

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10/ From our observations of the lobbying efforts and debates leading up to this response, it would unfortunately appear that the legislature was misled into believing what Disney World has argued here--that the doctrine of "joint and several liability" requires it to pay more than the damages it caused in this case. The legislative process is beyond our reach here, of course, but we do ask this Court not to be carelessly misled in the same fashion in analyzing the issue presented here.

the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

(3) APPORTIONMENT OF DAMAGES.--In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

(4) APPLICABILITY.--

(a) This section applies to negligence cases. For purposes of this section, "negligence cases" includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. In determining whether a case falls within the term "negligence cases," the court shall look to the substance of the action and not the conclusory terms used by the parties.

(b) this section does not apply to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895.

(5) Notwithstanding the provisions of this section, the doctrine of joint and several liability applies to all actions in which the total amount of damages does not exceed $25,000.00.

Ch. 86-___, §60, Laws of Florida.[11/]

Disney World will no doubt urge that this Act represents the "will of the people" and that it should be adopted by this Court to govern all cases presently pending, includ-

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11/ This brief was written within days following the legislative action, and the bill had not yet been signed into law by the Governor. For purposes of our argument here, we will assume that the bill will be signed. If the Governor vetoes the bill, however, our position will still be the same--that this Court should defer to the legislative process and the executive veto, in light of the ongoing debate on the issue in those two branches of government.

ing this one. This Court is not free to do that, however, because such a course of action would completely subvert another express provision of the Act creating a new §768.71(2), Fla. Stat., which provides that §768.81 "applies only to causes of action arising on or after July 1, 1986, and does not apply to any cause of action arising before that date". Ch. 86-____, §50, Laws of Florida. Adopting the new statute as the law of Florida in pending cases would also completely subvert another provision of the Act which "sunsets" §768.81 by repealing it on July 1, 1990. Ch. 86-___, §65, Laws of Florida.

These provisions should be honored, rather than ignored, by this Court--because they have an important purpose which will be totally upset if the doctrine of "joint and several liability" is abolished by this Court in this case. The purpose of these provisions can be gleaned from other provisions in the Act which make it clear that the Act is merely an experiment, and not a final resolution of the complex problem at issue here. To be more specific, the Whereas clauses of the Act make it clear that the legislature's modification of the doctrine is not based upon any quarrel with the public policy reasons upon which this Court has always justified the doctrine, but solely upon the present cost of liability insurance coverage. In effect, the legislature has simply deprived tort victims of recovery of some of their damages by arbitrarily reducing the liability of tortfeasors in certain circumstances, thereby (theoretically) reducing the cost of liability insurance.

This deprivation was not intended to be final, however. Instead, the Act creates an "Academic Task Force for Review of the Insurance and Tort System", and charges the task force with the responsibility, among other things, of investigating the accuracy of the facts provided to the legislature by the insurance industry in connection with its lobbying for "tort reform", and of investigating the effects of §768.81 itself to determine whether it has had any of the desired effects. Ch. 86-___, §63, Laws of Florida. The Act also requires the task force to report its findings and make recommendations for changes

in tort law to the legislature by the end of the 1988 session. *Id.* The Act also requires all insurers writing liability insurance in Florida to make various reports to the Department of Insurance to create a factual data base upon which to judge the propriety of the industry's various proposals for "tort reform". Ch. 86-___, §64, Laws of Florida.

The Act also expressly requires the legislature itself to review the question of whether its interim efforts at "tort reform" (including §768.81) should be retained or repealed after the findings, recommendations, and data are in. Ch. 86-___, §65, Laws of Florida. The possibility therefore clearly remains that the legislature will ultimately determine that it has been sold a pig in a poke at the unnecessary and unjustifiable expense of the citizenry of this State, and that it will ultimately repeal the mistake into which it has been stampeded by the vocal, well-heeled, profit-motivated minority represented by the petitioners and their amici here. This Court should defer to that ongoing investigation and leave that possibility open, rather than upsetting the legislature's well-laid plans for investigation and review by accepting Disney World's position here.[12/]

There is an additional reason why the legislature's recent action should not be adopted as the solution to this case. As noted previously, the so-called "tort reform" represented by the Act was not based upon any reason other than the arbitrary reduction of liability insurance rates, and the legislature made that perfectly clear by coupling the "reform" to a mandatory rollback of insurance rates, insisting that the insurance industry put its money where its mouth is. Put another way, the legislature has insisted that the insurance industry reduce its rates in exchange for the deprivation of individual rights

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12/ The possibility that §768.81 will ultimately be abandoned in favor of the settled law is not at all fanciful. After extensive investigation, the "Tort Litigation Review Commission" established by the Florida Bar recommended in its final report of March, 1986, that the doctrine of "joint and several liability" be retained. A copy of the Commission's recommendation is included in an appendix to this brief for the convenience of the Court. If the legislature's "Academic Task Force" should reach the same conclusion, it is entirely possible that the "experiment" represented by §768.81 will ultimately be abandoned.

which it successfully demanded. That, of course, is the reason why the Act was expressly made only prospective in operation. In effect, the legislature has said that the doctrine of "joint and several liability" remains alive in all cases where the insurance industry has collected premiums to cover the risk presented by the doctrine, and that it is modified only in those cases in which the insurance industry is required to charge lower rates in exchange for modification of the doctrine.

Given that recognition, it would subvert the purpose of the Act (and would be altogether unfair to Mrs. Wood) for this Court to give Disney World's insurer, Insurance Company of North America, the benefit of the "tort reform" contained in the Act, where it has not suffered the balancing detriment imposed upon it by the Act as a condition of receiving the benefit. Put another way, Insurance Company of North America collected premiums from Disney World to cover the risk of the doctrine of "joint and several liability" in this case, and its obligation to respond under its policy of insurance therefore implicitly embraces an obligation to respond under the doctrine. For a smaller premium, Insurance Company of North America can avoid the doctrine in the future (unless the legislature ultimately undoes its mistake), but it cannot fairly avoid the perfectly sensible obligation to pay for the damages caused by Disney World's negligence in this case.

For all of these reasons, we respectfully submit that even if this Court were of a mind to overturn nearly a century of the wisdom of its predecessors, in the current climate it should stay its hand and leave it to the legislature to decide whether, in the future, tortfeasors like Disney World should pay only $750.00 when their negligence has caused $75,000.00 in damages, merely because a concurring tortfeasor is perhaps incapable of contribution (a fact which, we remind the Court, is not demonstrated on the record in this case).

V.
CONCLUSION

It is respectfully submitted that the doctrine of "joint and several liability" should not be "abolished" in this case; that the certified question should be answered in the affirmative; and that the District Court's affirmance of Mrs. Wood's judgment should be approved.

VI.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13th day of June, 1986, to: JOHN L. O'DONNELL, JR., ESQ., 1475 Hartford Building, 200 East Robinson Street, Orlando, Florida 32801; MARJORIE GADARIAN GRAHAM, ESQ., P.O. Drawer E, West Palm Beach, Florida 33402; RUFUS PENNINGTON, ESQ., 222 East Forsyth Street, Jacksonville, Fla. 32202; KAREN GEIVERS, ESQ., 100 North Biscayne Blvd., Suite 2300, Miami, Fla. 33132; and to WILLIAM M. SMITH, ESQ., P.O. Box 391, Tallahassee, Florida 32302.

Respectfully submitted,

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