IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

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

Defendants/Appellants/
Petitioners,

vs.

CASE NO. 68,647

ALOYSIA WOOD and DANIEL S. WOOD,

Plaintiffs/Appellees/
Respondents.

REPLY REPLY BRIEF ON THE MERITS OF PETITIONERS

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

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REPLY ARGUMENT

IN COMPARATIVE NEGLIGENCE CASES, THE RULE OF JOINT AND SEVERAL LIABILITY SHOULD BE REPLACED WITH THE RULE THAT A DEFENDANT MAY BE ADJUDGED LIABLE ONLY FOR THOSE DAMAGES WHICH A JURY DETERMINES WERE CAUSED BY THE DEFENDANT'S FAULT.

1. Especially When A Plaintiff's Proportionate Fault Exceeds The Proportionate Fault of Another Party, The Risk Of An Uncollectible Tortfeasor Should Remain With The Plaintiff.

The Plaintiffs and Disney seem to agree on the statement of the narrowest basic issue presented by this appeal. As the Plaintiffs indicate, the question "boils down" to which party should bear the risk of loss when a judgment debtor is uncollectible. (Plaintiffs' Brief, pp. 3-4) The Plaintiff, of course, bears the risk of loss when there is only a single judgment debtor. This Court must now decide whether that risk should remain with the Plaintiff when the Plaintiff's proportionate fault is greater than the proportionate fault of another defendant.

The fact that this issue is a matter of great public importance is clearly established by the on-going debate concerning this subject not only in the Florida Legislature in the last two sessions, but also in the legislatures and courts of numerous other states.[1] Indeed, in early June the citizens of

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[1] In addition to the judicial and legislative activity described in Disney's initial brief, there are reports that 2,000 legislative bills were filed in state legislatures this year to reform tort law and that 19 states have enacted (footnote continued)

California modified the joint and several liability doctrine by a 62% approval of Proposition 51.[2] See, The National Law Journal, p. 36, June 16, 1986.

Despite the great public importance of this issue, it is important to recognize that the issue is a narrow issue. The issue does not change the essential elements of any tort or the basic proof required under any cause of action. This proposed change in joint and several liability does not resolve issues of contribution or liability concerning persons who are not parties to the lawsuit. Contrary to the suggestions of the Plaintiffs and the Academy, the issue merely determines whether one party at fault (a plaintiff) or another party at fault (a defendant) should be jointly responsible for the damages caused by an uncollectible party.

The Plaintiffs argue that Disney has "redefined the problem on its own terms." (Plaintiffs' Brief, p. 3) Neither party is "redefining" the problem. It is far more objective to state that this problem can be approached from at least two analytical theories.

(footnote continued from previous page)
reform laws. This specific issue concerning joint and several liability has, thus, been a subject of substantial recent debate. Fortune, p. 85 July 7, 1986.

2 Thus, the people of California have overruled the California Supreme Court's decision in American Motorcycle Ass'n. v. Superior Court of Los Angeles County, 20 Cal.3d 578, 146 Cal.Rep. 182, 578 P.2d 899 (Cal. 1978).

The Plaintiffs prefer to approach this problem on the older analysis based upon Indivisible Injury. The Plaintiffs argue that Disney's "fundamental flaw" concerns the assumption that one percent causation means one percent of the damages. (Plaintiffs' Brief, pp. 14-15) The Plaintiffs argue that joint and several liability is necessary because the injury is indivisible and, thus, the damages are indivisible. For this proposition, the Plaintiffs rely upon Louisville & N.R. Co. v. Allen, 67 Fla. 257, 65 So. 8 (1914).

The alternative analytical approach to this problem is the Proportionate Fault theory. This theory holds that the existence of an indivisible injury does not logically prevent a court from allocating monetary damages based upon the fault of each party. As Disney observed in its initial brief, this Court clearly voiced approval for the proportionate fault analysis in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973):

> "In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault."
>
> . . .
>
> In other words, the jury should apportion the negligence of the plaintiff and the negligence of the defendant; then, in reaching the amount due the plaintiff, the jury should give the plaintiff only such an amount proportioned with his negligence and the negligence of the defendant." 280 So.2d at 438

This Court has clearly decided that the Proportionate Fault theory is superior to the Indivisible Injury theory when determining whether a plaintiff is allowed to receive no recovery or a limited recovery in cases involving contributory/comparative negligence. The question which this Court must now decide is whether Proportionate Fault is a superior theory to Indivisible Injury when analyzing joint and several liability.

When one examines these two theories to determine which is the better public policy concerning the placement of the risk of an uncollectible judgment debtor, it soon becomes obvious that Indivisible Injury is not even a theory which can answer the question. Between an at-fault plaintiff and an at-fault defendant, the Indivisible Injury theory logically places the risk upon both parties. Since both the Plaintiff and the Defendant caused the injury both are entirely responsible for the damages to compensate for the injury. Indeed, if the Plaintiffs truly desire this Court to apply the Indivisible Injury theory to this pre-Hoffman accident, it would then be equally logical to apply contributory negligence to bar this claim. Indivisible Injury simply is not a theory which rationally decides the party who should risk the possibility of an uncollectible judgment debtor.

In contrast, the Proportionate Fault theory has a fundamental sense of fairness which was recognized by this Court in the Hoffman case and quite recently by the Florida Legislature. For over a decade, as a result of comparative

negligence, the citizens of this state who serve as jurors have found little difficulty in utilizing proportionate fault to apportion damages arising out of indivisible injuries. Thus, we know that such damages can and are apportioned in Florida every day. We know that comparative fault is a theory which the public understands and regards as fair. The intuitive fairness of this doctrine is a major reason to establish this change.

The Plaintiffs, of course, argue that joint and several liability fulfills the goal of fully compensating the Plaintiff.[3] This "goal" is not an unbending policy of this state. If Florida had a strong policy to guarantee compensation to each plaintiff, Florida would have mandatory automobile liability insurance. Instead, Florida typically has mandatory first-party coverages and encourages the purchase of uninsured motorist coverage. Section 324.021 and Section 627.727, Florida Statutes. Florida would make homeowners insurance compulsory. If Florida actually had a strong policy to guarantee compensation to plaintiffs, Florida would create a state compensation fund to reimburse

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[3] Although the joint and several liability doctrine does tend to fulfill this goal, it should be noted that the doctrine historically protected defendants as much or more than plaintiffs. Thus, the early cases which the plaintiffs cite as support for the doctrine of joint and several liability are cases in which the plaintiff could not recover from one joint tortfeasor because the plaintiff had released another tortfeasor. 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). This benefit to defendants of the Indivisible Injury theory has long been eliminated. Section 768.041, Florida Statutes. Thus, a theory which historically created balanced rights in both the plaintiff and the defendant has now become lopsided in favor of the plaintiff because of the creation of comparative negligence and the elimination of the defense of release.

plaintiffs. Alternatively, Florida could simply agree that it would be liable on every personal injury judgment and that the State would then seek reimbursement from the other defendants. Obviously, the "goal" to fully compensate plaintiffs is frequently overcome by many competing factors. When a plaintiff bears greater responsibility for her own injuries than does the defendant, the risks concerning full compensation are more logically placed upon the plaintiff than upon the defendant who is less at fault.

2. Neither Section 768.31, Florida Statutes, Nor Prior Precedent Prohibit This Court From Modernizing This Rule Of Law.

The Uniform Contribution Among Tortfeasor's Act, Section 768.31, Florida Statutes, clearly is not a codification of the doctrine of joint and several liability. It does not prohibit this Court from announcing a rule that two or more persons are not jointly and severally liable as defendants when the plaintiff is comparatively negligent. Contrary to the Plaintiffs' suggestion, this Court did not hold that the Uniform Contribution Act codified joint and several liability in either Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975) or Seaboard Coastline R.R. Co. v. Smith, 359 So.2d 427 (Fla. 1978). In Lincenberg, this Court correctly noted that the Legislature "retains" joint and several liability in this act. In other words, the Legislature in 1975 did not enact a statute which expressly limited joint and several liability - - as it did in 1986. The Uniform Contribution Act, however, merely provides a

remedy - - a right to contribution - - "when two or more persons become jointly or severally liable in tort for the same injury to person or property . . . ." Section 768.31(2)(a), Florida Statutes. The Legislature made no attempt in Section 768.31, Florida Statutes, to determine when and under what circumstances two or more persons could become jointly or severally liable. The Legislature is merely providing a remedy which applies if and when a court decides that two people are jointly or severally liable.

Indeed, the rule proposed by Disney in this case and the statute recently enacted by the Florida Legislature, both require the retention of Section 768.31, Florida Statutes. The Legislature apparently made no changes to this statute in the Tort Reform and Insurance Act of 1986. Chapter 86-___, Laws of Florida.

Section 768.31, Florida Statutes primarily creates a right of recovery concerning a person who either settles a claim or satisfies a judgment. It creates a right of recovery against persons who were not parties to the underlying lawsuit. In contrast, both the Legislature and Disney are merely proposing rules which would apportion judgments in cases which go to verdict involving multiple parties. If there is only one defendant in the lawsuit, for example, under Disney's approach and under the Legislature's approach the entire judgment will be entered against that defendant. If there are other persons who are liable for the same tort, the right of contribution would

still exist under Disney's approach or under the Legislature's approach. If other defendants have entered into good faith settlements, a setoff for those amounts will still be necessary.

Likewise, prior case law from this Court which discusses the doctrine of joint and several liability does not prohibit this Court from modernizing the rule. Obviously, the old rule of joint and several liability has been recognized by many courts on many occasions. This appeal appears to be the first case in which this Court has been asked to determine whether joint and several liability should exist when the plaintiff is more responsible for the injury than a co-defendant. Neither DOT v. Webb, 409 So.2d 1061 (Fla. 1st DCA 1981), modified, 438 So.2d 780 (Fla. 1983) nor Woods v. Withrow, 413 So.2d 1179 (Fla. 1982) address this issue.

Obviously, this is the first time that a district court has asked this Court to consider this issue as a matter of great public importance. In Champion v. Gray, 478 So.2d 17 (Fla. 1985) this Court reviewed and modified the well-established "impact doctrine" on a certified question of great public importance. Although this Court had reviewed the matter as recently as 1974, Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974), this Court nevertheless decided that a modernization of Florida's tort law was in order. In this case, the Court has never squarely considered the issue now presented by Disney. Neither statutory provisions nor the older case law prohibit this modernization.

3. Although The Constitutional Question Was Not Raised In The Circuit Court, This Basic Issue Is Properly Presented To This Court.

The issue of joint and several liability became relevant to this lawsuit when the jury returned its verdict placing 1% on Disney, 14% on Mrs. Wood, and 85% on Mr. Wood. The judgment was entered without notice to Disney, and Disney immediately raised the issue in a motion to alter the judgment. (R. 167-168) The motion is admittedly not couched in constitutional terms. The arguments made to the circuit court also were not constitutional arguments. The constitutional analysis of the problem was, however, presented to the District Court of Appeal.

Whenever possible, this Court is obligated to render a decision on non-constitutional grounds. Metropolitan Dade County Transit Authority v. State Department of Highway Safety, 283 So.2d 99 (Fla. 1973). This Court can modify this doctrine without ruling upon the constitutional issue. Joint and several liability is not a statutory creature, but merely a doctrine which this Court's case law created. Thus, this Court merely needs to modify its earlier decisions to allow for the modernized rule because modern public policy supports it.

Technically, these constitutional issues are matters of fundamental error because they go to the very heart of the Plaintiff's right to recover these compensatory damages from this

Defendant. See, Sanford v. Rubin, 237 So.2d 134 (Fla. 1970); Keyes Company v. Sens, 382 So.2d 1273 (Fla. 3d DCA 1980); Marks v. DelCastillo, 386 So.2d 1259 (Fla. 3d DCA 1980).

From a more practical perspective, these arguments have been couched in constitutional terms because the public policies they announce are so strong that they invoke principles of constitutional law. As discussed earlier, this Court must make a public policy decision as to whether the risk of an uncollectible co-defendant should be placed upon the plaintiff at fault or upon a defendant who is less at fault than the plaintiff. The fact that the public policies which support Disney's arguments in this case can be made at the constitutional level is strong evidence that these public policies should be followed by this Court and that this Court should modify joint and several liability. Since the doctrine is a case law doctrine, it is not essential for this Court to declare the doctrine unconstitutional - - merely to modify it.

4. The Tort Reform And Insurance Act Of 1986 Establishes A Public Policy Which Supports This Refinement In The Law.

Both the Plaintiffs and the Academy take the position that this Court should not modify the law in this case because the Legislature recently performed a major overhaul upon both tort law and insurance law in the State of Florida.[4] The reason

[4] The Academy's brief does not assure this Court that the Academy intends to support the modifications to joint and several liability recently created by the Legislature. Certainly, the Academy should not be permitted to ask this Court to defer to the Legislature today and then attack the Legislature's work tomorrow.

for that major overhaul and the goals of the Legislature, however, are substantially different than the goals of Disney in this case. Indeed, the problem-solving function of this Court and the problem-solving function of the Legislature are substantially different.

The Tort Reform and Insurance Act of 1986 is a major piece of legislation which changes numerous areas of tort law and insurance law. The Legislature determines that a crisis exists and that the major alterations created by the act are necessary to cure that crisis. Chapter 86-___, §2, Laws of Florida. For example, the statute places a cap of $450,00.00 on each person's claim for non-economic damages. Chapter 86-___, §59, Laws of Florida. It creates alternate methods to pay damage awards. Chapter 86-___,§57, Laws of Florida. These tort reforms and the equally important reforms to the insurance regulatory system are determined by the Legislature to be necessary to insure a stable insurance market and to insure "the widest possible availability of liability insurance at reasonable rates." Chapter 86-___, §2, Laws of Florida. Thus, the Legislature has used a big stick in an effort to solve a major social problem.[5]

The Plaintiffs admit that the new act is experimental and that it "sunsets" on July 1, 1990. Chapter 86-___, §65, Laws of Florida. Since the act only applies to causes of action

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[5] The joint and several liability issue is certainly not the major economic component of this social crisis. Fireman's Fund Insurance Company estimates that this issue is only about 5% of the problem. Business Week, p. 37, June 16, 1986.

arising on or after July 1, 1986, it provides no relief to Disney in this case. Chapter 86-___, §50, Laws of Florida. Thus, the Legislature's attempt to solve a social crisis does not solve Disney's problem in this case even though Disney raised this problem even prior to the 1985 legislative proposals. More importantly, the legislative experiment does not guarantee that this specific inequity in the joint and several liability doctrine will be permanently eliminated.

In contrast, this Court should have a more narrow problem-solving function to establish specific changes in tort law and in the law of judgments. In a case law system, a court functions best when it fine tunes the fabric of the law by specific, deliberate changes which are intended to slowly improve and modernize our tort system. Disney is asking this Court to make such a specific change in joint and several liability, not because this Court should act to solve a major social crisis, but because the specific change is the best rule and because it is a rule which properly allocates risks based upon the party's respective responsibility for the injuries. Even if the Legislature changes its complex statutory provisions in 1990, the "most equitable result that can ever be reached by a court is the equation of liability with fault." Hoffman v. Jones, 280 So.2d 431, 438 (Fla. 1973). This Court should modify joint and several liability so that the risk of an uncollectible judgment debtor is placed upon the party most responsible for the injury. [6]

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[6] The Plaintiffs argue that Disney and INA should not receive (footnote continued)

CONCLUSION

For the foregoing reasons and for the reasons contained in their Initial Brief, the judgment should be reversed and the case remanded with instructions to enter judgment against Walt Disney World Co. and INA for one percent of the total damages in accordance with the jury's verdict.

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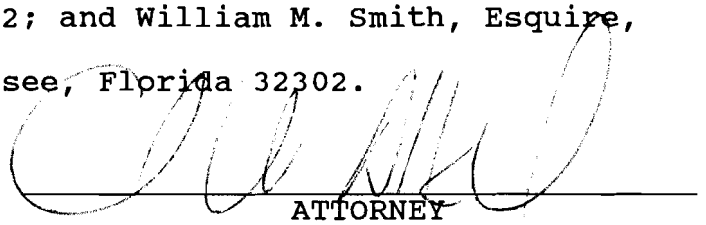
the benefit of a modified rule because joint and several liability should remain "alive in all cases where the insurance industry has collected premiums to cover the risk presented by the doctrine. . . ." (Plaintiff's Brief, p. 29) It is worth noting that INA collected its premium for this risk in 1971 when contributory negligence was the law of Florida. It is doubtful that the Plaintiffs will submit themselves to contributory negligence merely because the Disney risk was underwritten on that assumption.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 18th day of July, 1986 to John L. O'Donnell, Jr., Esquire and John H. Ward, Esquire, DeWolf, Ward & Morris, P.A., 1475 Hartford Building, 200 East Robinson Street, Orlando, Florida 32801; Jack E. Vital, III, Esquire, 1212 Southeast Third Avenue, Fort Lauderdale, Florida 33316; Joel D. Eaton, Esquire, 25 Flagler Street, Miami, Florida 33130; Marjorie Gadarian Graham, Esquire, Post Office Drawer E, West Palm Beach, Florida 33402; and William M. Smith, Esquire, Post Office Box 391, Tallahassee, Florida 32302.



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