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4/28/88

IN THE SUPREME COURT OF FLORIDA

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

Petitioners/Defendants,

vs.

CASE NO. 68,677

ALOYSIA WOOD and DANIEL S.
WOOD,

Respondents/Plaintiffs.

FILED

SID J. WHITE

MAY 22 1988

CLERK, SUPREME COURT

By: [Signature]
Chief Deputy Clerk

INITIAL BRIEF ON THE MERITS
BY PETITIONERS/DEFENDANTS, WALT
DISNEY WORLD CO. AND INSURANCE
COMPANY OF NORTH AMERICA

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

John L. O'Donnell, Jr.
Thomas B. DeWolf, and
John H. Ward, of
DeWOLF, WARD & MORRIS, P.A.
1475 Hartford Building
200 East Robinson Street
Orlando, Florida 32801
(305) 841-7000

and

Chris W. Altenbernd, of
FOWLER, WHITE, GILLEN, BOGGS,
VILLEREAL and BANKER
501 East Kennedy Boulevard
Tampa, Florida 33602
(813) 228-7411
Attorneys for Petitioners

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STATEMENT OF THE CASE AND FACTS

In November, 1971, Aloysia Wood was on the Grand Prix attraction at Walt Disney World when her vehicle was struck in the rear by one negligently operated by her fiance, Daniel Wood [R: 146; 157; 166].

In the Third Amended Complaint, Aloysia Wood sought \$1.5 million [R: 43] from Disney and INA for damages allegedly caused by negligence on the part of Disney [R: 145-156]. Daniel Wood sought recovery against Disney and INA for a derivative claim, although he and Aloysia Wood were not married at the time of the Disney incident [R: 154-155]. This claim was not abandoned until the start of the second trial [R: 165-166].

Disney and INA counterclaimed against Daniel Wood for contribution, alleging that negligent operation of his vehicle contributed to Mrs. Wood's injuries [R. 157-160].

The first trial of this case resulted in a jury verdict that Walt Disney World Co. was not at fault, which was reversed on appeal. Wood v. Walt Disney World Co., 396 So.2d 769 (Fla. 4th DCA 1981), rev. den., 407 So.2d 1106 (Fla. 1981).

The case was then tried to a jury a second time before the Honorable Otis Farrington, who had presided at the first trial.

The jury began deliberations at 3:10 p.m. on September 12, 1984, and returned with their first question at 3:17,

asking to have the definition of negligence re-read [R: 103-104]. At 4:00 p.m. the jurors announced that they could not reach a verdict [R: 106-107], but changed their minds and asked for an adding machine [R: 107]. At 5:20 the jury announced they were unable to decide on percentages [R: 108]. The jurors said they had tried to compromise, but that discussion of other questions had divided them again [R: 108]. They indicated they could not reach a verdict [R: 109].

The trial judge instructed the jury to continue their deliberations [R: 109-110].

At 5:27 the jury had another question. This time, they were concerned with whether the amount they set as damages could be changed [R: 113]. One juror asked:

The amount that we put down there, right, is determined by the percentage that is further up, right? Now, can you change that amount in any way? When you make your decision on who gets what from that amount we have there at the bottom? [R: 114].

The judge again explained the verdict form [R: 115-116].

At 5:53 the jury returned a verdict finding Aloysia Wood 14% at fault; Daniel Wood 85% at fault, and Walt Disney World Co. 1% at fault, and assessed Mrs. Wood's damages at \$75,000.00 [R: 165-166].

The trial court, without notice [R: 132], entered judgment against Walt Disney World Co. and INA for 86 percent of Mrs. Wood's damages [R: 162-164]. The

defendants moved to alter the judgment to reflect the jury's finding that Disney was only one percent at fault [R: 167-168]. The motion was denied [R: 169], and the Defendants appealed.

On April 9, 1986, the Fourth District Court of Appeal affirmed the judgment against Disney and INA for 86% of Mrs. Wood's damages, but certified the following question to this Court:

Does the holding in Lincenberg v. Issen dictate an affirmance of the trial court's decision in this case?

On April 17, 1986, Disney and INA filed a Notice to Invoke Discretionary Jurisdiction and on April 24, 1986, this Court entered an order requiring briefs on the merits.

CERTIFIED QUESTION

DOES THE HOLDING IN LINCENBERG v. ISSEN DICTATE AN AFFIRMANCE OF THE TRIAL COURT'S DECISION IN THIS CASE?

ISSUE ON APPEAL

IN COMPARATIVE NEGLIGENCE CASES, SHOULD THE RULE OF "JOINT AND SEVERAL LIABILITY" 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?

SUMMARY OF ARGUMENT

The rule of "joint and several liability" which requires a defendant substantially less at fault than the plaintiff and other parties to pay damages in excess of those assessed by a jury ought to be abolished because it conflicts with the fundamental principle of tort law that one whose fault is only partially the cause of injury may not be made to bear the entire loss. The reasons for this common law rule have all evaporated and the rule should no longer be applied.

Thirteen states, the United Kingdom and the Canadian provinces have abandoned "joint and several liability" as outmoded and inconsistent with the principles of comparative fault.

The combination of pure comparative negligence and several liability is consistent with the principal goal of the tort system that a defendant should compensate a plaintiff for damages caused by the defendant's fault and permits full recovery of those damages even by a culpable plaintiff. Moreover, several liability avoids the arbitrary imposition of liability on one party for damages caused by another.

After the fundamental changes in the tort system announced in Hoffman v. Jones, there is no clear precedent from this Court on the continued vitality of the rule of "joint and several liability." The only two decisions to mention the rule both involved plaintiffs free from fault,

and each was decided on other issues. There is no act of the legislature incorporating "joint and several liability" for all tort actions into the statutory law of Florida. This Court has an essential role, which it should not abdicate, in considering this court-made rule.

Application of the rule of "joint and several liability," under modern law and practice, is unconstitutional because it denies the right to have a jury determination of fault and causation and because it arbitrarily discriminates among parties at fault in determining the amount of loss each will bear. No reasonable alternative has been provided to replace the right to a jury determination of liability.

ARGUMENT

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

When the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused...

The judgment in this case violates this fundamental principle of negligence law announced by the Supreme Court in Hoffman v. Jones, 280 So.2d 431, 437 (Fla. 1973). In spite of the fact that the jury found that Walt Disney World Co. caused \$750 in damages to the plaintiff, the judgment compels Disney to pay \$64,500 to Aloysia Wood. The judgment results from the rule that one of many tortfeasors whose acts concur in producing injury is liable for the entire damage. Moore v. St. Cloud Util., 337 So.2d 982 (Fla. 4th DCA 1976), cert., den., 337 So.2d 809 (Fla. 1976).

That rule is inequitable and unjust. It conflicts with the fundamental principles of negligence law enunciated in Hoffman v. Jones. Those principles and modern practice have eroded the foundation of the rule. The rule should now be abolished.

"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." Hoffman, at 438.

The Supreme Court established comparative negligence to give life to this principle. The change was made because:

[T]oday it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss. Id. at 436.

The Court approved comparative negligence because it allows "apportionment of the loss among those whose fault contributed to the occurrence." Id. That decision affirmed that the liability of the defendant should depend "upon what damages he caused." Id. at 439 (Emphasis in original).

In Hoffman, the Court declined to address all the issues raised by adoption of comparative negligence. Rather, the Court said that those issues could be resolved in the future by applying the principles governing comparative negligence which are:

(1) To allow a jury to apportion fault as it sees fit between negligent parties whose negligence was part of the legal and proximate cause of any loss or injury; and

(2) To apportion the total damages resulting from the loss or injury according to the proportionate fault of each party. Id. at 439.

The rule of "joint and several liability" conflicts with these principles. The judgment in this case violates the mandate of Hoffman that:

The Court's primary responsibility is to enter a judgment which reflects the true intent of the jury, as expressed in its verdict or verdicts. Id. at 439.

In Florida, the principle that each of several tortfeasors whose acts combine to produce a single injury is liable for the entire injury was apparently first applied in Louisville & N. Ry. Co. v. Allen, 67 Fla. 257, 65 So. 8 (1914), adopting the following statement:

"Where, although concert is lacking, the separate and independent acts of negligence of several combined 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...." 65 So. at 12.

Thus, Florida joined those jurisdictions departing from the English common law rule that "joint tortfeasors" were those who acted in concert. See, Prosser, Law of Torts, §46 (4th ed. 1971).

While English common law developed a rule that concurrent, but independent, wrongdoers were each liable for the entire damage, each had to be sued separately and there was no requirement that the verdicts be in the same amount. See, Prosser, supra, §47.

The original basis of the "joint and several liability" rule was that a plaintiff had but one cause of action for a single injury, and causation of injury could not be apportioned among tortfeasors. See, Louisville & N. Ry. Co. v. Allen, supra, 65 So. at 12.

The application of the rule not only made one tortfeasor liable for the entire damage, but also prohibited contribution among tortfeasors, Seaboard Air Line Ry. Co. v.

American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932), and provided that the release of one tortfeasor, released all. Louisville & N. Ry. Co. v. Allen, supra.

Over the years, Florida has repudiated all the corollaries of "joint and several liability" but for the rule of entire liability. In 1975, the courts and legislature simultaneously eliminated the rule against contribution. Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975). A release of one tortfeasor no longer releases all. Fla. Stat. §768.041 and §768.31(5). The time has come to eliminate the injustice of requiring a defendant to pay more than the damages a jury has determined he caused.

At the time the rule was developed in the early 1800's, a plaintiff could recover nothing if at fault to any degree. There was no mechanism for juries to apportion fault. Now, "contemporary conditions must be met with contemporary standards which are realistic and better calculated to obtain justice among all the parties involved...." Lincenberg, supra, at 388-389. (Emphasis in original).

This state, and other jurisdictions, have recognized the inequity of the "joint and several liability" rule and the conflict between the rule and the principles of comparative negligence. In Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975), the Supreme Court agreed that:

In any full consideration of the degrees of liability of the parties involved in a single accident, it now seems

essential to a complete disposition of the relative claims, that we remove the limitation imposed by the rule against the division of liability among joint tortfeasors.

* * * *

To continue without this completion of the change over to comparative negligence, is to allow what was a well-intended joint tortfeasor rule to be used unfairly as a tool to avoid complete justice. Id. at 391, citing with approval, Ward v. Ochoa, 284 So.2d 385, 388 (Fla. 1973) (concurring opinion).

In Lincenberg, the Court, based on the principles of law and equity announced in Hoffman, concluded:

[I]t would be undesirable for this Court to retain a rule that under a system based on fault, casts the entire burden of a loss for which several may be responsible upon only one of those at fault.... Id. at 391.

At that time, the Supreme Court considered adopting a rule of apportionment whereby the plaintiff might recover judgment against a defendant only for the percentage of damages caused by that defendant. Id. at 392, n. 2. Because, however, the issue before the Court in Lincenberg was whether to allow contribution and the contribution statute had become effective while the case was pending, the Court deferred to the legislative enactment on the issue being considered and did not address the rule of "joint and several liability" itself. Id. at 392.

The Florida contribution statute recognizes the injustice of "joint and several liability." It provides that the

right of contribution exists in favor of one "who has paid more than his. . . share of the common liability." Fla. Stat. §768.31(2)(b) (Emphasis added). If liability for the entire damage were just, then the entire damage would be a defendant's share, and he could never pay "more than his share."

Other jurisdictions which have adopted comparative negligence have abolished the rule of joint and several liability in negligence cases.

England, the source of our common law, has abandoned the rule of joint and several liability for concurrent tortfeasors, as have the Canadian provinces. Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 504 (1953).

The states of Indiana, Iowa, Kansas, Kentucky, Louisiana, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Texas and Vermont have abolished or modified the rule that multiple defendants are each liable for the entire recoverable damage.¹

¹Some commentators also include Pennsylvania and Minnesota among the jurisdictions limiting the rule of joint and several liability. See, Granelli, The Attack on Joint and Several Liability, 71 ABA Journal 61 (July, 1985).

Minnesota and North Dakota have adopted a rule that by settling with a tortfeasor a plaintiff "waives" joint and several liability between the settling tortfeasor and the remaining defendants for the settling tortfeasor's share of fault, but the remaining defendants continue to be jointly and severally liable for their percentage of fault. Hosley v. Armstrong Cork Co., 383 N.W.2d 289 (Minn. 1986); Hoerr v. Northfield Foundry & Mach. Co., 376 N.W.2d 323 (N.D. 1985).

In Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978), the Kansas supreme court abolished the rule of "joint and several liability" in light of the adoption of a comparative negligence statute. In interpreting Kan. Stat. Ann. §60-258a, the court said:

The legislature intended to equate recovery and duty to pay to degree of fault. Of necessity, this involved a change of both the doctrine of contributory negligence and of joint and several liability. There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss....

It appears more reasonable for the legislature to have intended to relate duty to pay to the degree of fault. Any other interpretation ... destroys the fundamental conceptual basis for the abandonment of the contributory negligence rule.... 580 P.2d at 873-874.

The purpose and principles of the Kansas legislative intent in adopting comparative negligence are identical with those declared in Hoffman. To maintain the integrity of those principles the rule of "joint and several liability" should be abolished by Florida.

Kentucky required apportionment of damages among multiple defendants even before it adopted comparative negligence. Orr v. Coleman, 455 S.W.2d 59 (Ky. 1970); Daulton v. Reed, 538 S.W.2d 306 (Ky. 1976); D.D. Williamson & Co. v. Allied Chem. Corp., 569 S.W.2d 672 (Ky. 1978). Kentucky judicially adopted pure comparative negligence in

Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984), partly because of its rule of several liability.

Statutes in Indiana, New Hampshire, Ohio and Vermont limit the judgment entered against a single defendant to that defendant's percentage of the plaintiff's damages. Ind. Stat. Ann. §34-4-33-5; N.H. Rev. Stat. Ann. §507:7-a; Ohio Rev. Code Ann. §2315.19(A); Vt. Stat. Ann., tit. 12, §1036.

In Louisiana, Nevada, Oregon and Texas a defendant's liability is limited to his percentage of negligence when his negligence is less than the plaintiff's. La. Stat. Ann., art. 2324; Nev. Rev. Stat. §41.141; Ore. Rev. Stat. §18.485; Tex. Civ. Stat. Ann., art. 2212a.

The Iowa legislature passed comprehensive comparative fault legislation in 1984. 1984 Iowa Acts, ch. 1293. The new statutes supplanted the Iowa supreme court decisions in Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982) and Rozevink v. Faris, 342 N.W.2d 845 (Iowa 1983). The Iowa act provides:

In actions brought under this chapter, the rule of joint and several liability shall not apply to defendants who are found to bear less than fifty percent of the total fault assigned to all parties. Iowa Code, §668.4 (1985).

See, Beeler v. Van Cannon, 376 N.W.2d 628 (Iowa 1985).

In Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978) the Oklahoma supreme court abrogated the rule of "joint and

several liability," even though the state's comparative negligence statute did not deal with the issue. The court acted because:

Absent specific legislation, this court must augment our statutory scheme to meet the intent and underlying principle of comparative negligence.... Id. at 1074.

Joint liability was abrogated because:

Holding a defendant tortfeasor, who is only 20 percent at fault, liable for entire amount of damages is obviously inconsistent with the equitable principles of comparative negligence as enacted by the Legislature. We should allow a jury to apportion fault as it sees fit. Id. at 1075.

The opinion of the Oklahoma supreme court abandoning "joint and several liability" echoes the purpose for adopting comparative negligence in Florida: "To allow a jury to apportion fault as it sees fit...." Hoffman, 280 So.2d at 439; Lincenberg, 318 So.2d at 390.

New Mexico did not adopt comparative negligence until 1981. Drawing upon the large body of opinions, statutes and commentaries, particularly the opinions from Florida, the New Mexico supreme court judicially adopted comparative negligence in Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981). One year later, compelled by the principles of comparative fault, New Mexico abandoned the rule of joint and several liability in Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (App.), cert. den., 98 N.M. 336, 648 P.2d 794 (1982).

In abolishing the rule of "joint and several liability," the New Mexico court was critical of decisions in other comparative negligence states, notably Michigan, California, and Alaska, retaining joint and several liability, and declared that the reasoning of such decisions:

departs from the concept on which pure comparative negligence is based -- that fairness is achieved by basing liability on a person's fault. 646 P.2d at 582.

The court in Bartlett, as the Oklahoma court in Lau-bach, was greatly persuaded by the opinion of the California court of appeal in American Motorcycle Ass'n v. Superior Ct., 65 Cal.App.3d 694, 135 Cal.Rptr. 497 (1977), holding that adoption of pure comparative negligence required abandoning joint and several liability. The Bartlett court (like the dissent in American Motorcycle Ass'n. v. Superior Ct., 20 Cal.3d 578, 146 Cal.Rptr. 182, 578 P.2d 899 (1978), in which the California supreme court reversed the abolition of joint and several liability) criticized the California supreme court for repudiating the principle that:

in a system based on fault, the "primal concept that *** the extent of fault should govern the extent of liability - remains irresistible to reason and all intelligent notions of fairness." Bartlett, 646 P.2d at 583, citing Li v. Yellow Cab Co., 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226 (1975).

The Bartlett court observed that the rule holding a concurrent tortfeasor liable for the entire loss had its genesis in the common law concept of the unity of a cause of

action and cannot be said to be based on any sound reason.

646 P.2d at 584. The court concluded:

Joint and several liability is not to be retained in our pure comparative negligence system on a theory of one indivisible wrong. The concept of one indivisible wrong, based on common law technicalities, is obsolete, and is not to be applied in comparative negligence cases in New Mexico. Id. at 585.

Dean Prosser himself asserted:

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

Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 503-504 (1953).

The two reasons most frequently given for retaining "joint and several liability" are (1) that a plaintiff's injury is "indivisible," and (2) that a plaintiff should not bear the risk of being unable to collect his judgment. Neither ground is defensible.

Clearly, the first reason has no vitality in this state. In Lincenberg, the Court specifically removed "the limitation imposed by the rule against the division of liability among joint tortfeasors." 318 So.2d at 391. After Lawrence v. Florida East Coast Ry. Co., 346 So.2d 1012 (Fla. 1977), Florida juries apportion fault among parties on a routine basis, dividing liability for a plaintiff's

injury. In the thirteen years following Hoffman, there has been no suggestion that juries are incapable of performing this function.

The second reason has been addressed in a number of jurisdictions. In Bartlett v. New Mexico Welding Supply, Inc., supra, the court abandoned "joint and several liability" in light of the adoption of comparative negligence. With respect to the argument that the rule should be retained to insulate a plaintiff from the risk of uncollectibility, the court said:

We fail to understand the argument. Between one plaintiff and one defendant, the plaintiff bears the risk of the defendant being insolvent; on what basis does the risk shift if there are two defendants, and one is insolvent? 646 P.2d at 585.

In Brown v. Keill, the Kansas supreme court also rejected this argument, saying:

There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss. The same is true if one of the defendants is wealthy and the other is not. 580 P.2d at 874.

Moreover, the financial reason for retaining "joint and several liability" completely ignores the fact that the rule applies even in cases where all the parties at fault are capable of paying a judgment based on their fault. The wealth of an individual ought not be the basis for compelling a person to pay damages caused by another's fault.

Abolition of joint and several liability would not frustrate the principal goal of the tort system that a defendant should compensate a plaintiff for damages caused by the defendant's fault. Adopting several liability would advance "the underlying philosophy of individual responsibility upon which the decisions of this Court succeeding Hoffman have been predicated." Insurance Company of North America v. Pasakarnis, 451 So.2d 447, 451 (Fla. 1984).

In "pure" comparative negligence jurisdictions like Florida, a plaintiff need no longer be free from fault, or even relatively less at fault than the defendant, in order to recover. In this case, for example, the change to several liability would allow Mrs. Wood to recover from Disney all the damages which the jury found Disney caused, even though the jury found Mrs. Wood 14 times more culpable than Disney.

The combination of pure comparative negligence and several liability permits even a culpable plaintiff some recovery which she would not have if there were no solvent or non-immune defendants; recovery she would not have under

the common law rule;² and recovery she would not have in the 30 comparative negligence states which bar any recovery to a plaintiff more at fault than the defendant.³

²Alabama, Maryland, North Carolina, South Carolina, Tennessee [Arnold v. Hayslett, 655 S.W.2d 941 (Tenn. 1983)], and Virginia, still retain the rule that a plaintiff's negligence which is a proximate cause of injury completely bars recovery. See, Comparative Negligence Law and Practice, Appendix (Matthew Bender, 1985).

³No recovery unless plaintiff's fault is less than all defendants' combined (49% Unit Rule):

Arkansas, Ark. Stat. Ann., §27-2765 (Supp. 1983)

Colorado, Colo. Rev. Stats. 1973, §13-21-111(1).

Kansas, Kan. Stats. Ann., §60-258a (Supp. 1984)

Utah, Jensen v. Intermountain Health Care, Inc., 679 P.2d 903 (Utah 1984)

West Virginia, Bradley v. Appalachian Power Co., 163 W.Va. 322, 256 S.E.2d 879 (1979).

No recovery unless plaintiff's fault is less than or equal to all defendants' combined (50% Unit Rule):

Connecticut, Conn. Gen. Stats. Ann. §52-572h(a) (Supp. 1984)

Delaware, Del. Code Ann., §10-8132 (Supp. 1984)

Hawaii, Ha. Rev. Stats., §663-31 (Supp. 1983)

Indiana, Ind. Stats. Ann., §34-4-33-5 (Supp. 1984)

Iowa, Iowa Code, §668 (1985)

Massachusetts, Mass. Laws Ann., ch. 231, §85 (Supp. 1984-1985)

Nevada, Nev. Rev. Stats. §41.141 (1979)

New Jersey, N.J. Stats. Ann., 2A:15-5.1 (Cum. Supp. 1983-1984)

Ohio, Ohio Rev. Code Ann. §2315.19 (Supp. 1983)

Oklahoma, Okla. Stats. Ann., tit. 23, §13 (Supp. 1983-1984)

Oregon, Ore. Rev. Stats., §18.470 (1981)

Pennsylvania, Pa. Consol. Stats. Ann., tit. 42, §7102(a) (Cum. Supp. 1983-1984)

Texas, Tex. Civ. Stat. Ann., art. 2212a (Supp. 1984)

Vermont, Vt. Stat. Ann., tit. 12, §1036 (Supp. 1983)

(Footnote continued on next page.)

Pure comparative negligence and several liability insure that each party will be completely responsible for his own fault, but not for the fault of others.

In Florida, basing the liability of one defendant on the ability of others to pay is contrary to Hoffman's pronouncement that "The liability of the defendant ... should not depend upon what damages ... [were] suffered, but upon what damages he caused," Hoffman, at 439 (Emphasis in original). A judgment which is not based on a defendant's fault violates the fundamental negligence principle:

In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault. Id. at 438.

No recovery against an individual defendant unless plaintiff's fault is less than individual's (49% Individual Rule):

Georgia, Ga. Code Ann., §105-603; Mishoe v. Davis,
64 Ga. App. 700, 14 S.E.2d 187 (1941)

Idaho, Idaho Code, §6-801 (Supp. 1983)

Maine, Me. Rev. Stats. Ann., tit. 14, §156 (Supp.
1983-1984)

Nebraska, Neb. Rev. Stat. §25-1151 (Supp. 1983)

North Dakota, N.D. Cent. Code §9-10-07 (Supp. 1983)

South Dakota, S.D. Comp. Laws §20-9-2 (Supp. 1983)

Wyoming, Wyo. Stats. Ann. §1-1-109(a) (Supp. 1983)

No recovery against an individual defendant unless plaintiff's fault is less than or equal to individual's (50% Individual Rule):

Minnesota, Minn. Stat. §604.01 (1982)

Montana, Mont. Code Ann., §27-1-702 (Supp. 1983)

New Hampshire, N.H. Rev. Stats. Ann. §507:7-a (Cum
Supp. 1983)

Wisconsin, Wis. Stat. Ann. §895.045 (Supp. 1984)

This principle is, and should remain, the governing rule of loss distribution and embodies the paramount social policy to be applied in tort litigation.

The Fourth District believed that this Court's decision in Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975) required affirmance of the judgment in this case, viewing that decision as reaffirmation of the common law rule of joint and several liability after Hoffman v. Jones. [Op., p. 2]. The Fourth District, however, noted the fundamental difference between Lincenberg, Woods v. Withrow, 413 So.2d 1179 (Fla. 1982), Department of Trans. v. Webb, 409 So.2d 1061 (Fla. 1st DCA 1981), rev. den. sub nom., Seaboard Coast Line R. Co. v. Webb, 419 So.2d 1200 (Fla. 1982), and app'd as mod., 438 So.2d 780 (Fla. 1983), and this case: that the plaintiffs in Lincenberg, Withrow, and Webb were all free of fault while here Mrs. Wood was found 14 times more at fault than Disney. [Op., p. 3]. Consequently, the Fourth District certified to this Court the question whether Lincenberg required affirmance under these facts.

This Court is not as constrained as the Fourth District. As with contributory negligence, the Court has:

the power and authority to reexamine the position ... taken ... and to alter the rule ... adopted previously in light of current "social and economic customs" and modern "conceptions of right and justice." Hoffman, 280 So.2d at 436.

When facing issues of tort law:

[T]his Court has not abdicated its continuing responsibility to the citizens of this state to ensure that the law remains both fair and realistic as society and technology change. Pasakarnis, 451 So.2d at 451.

None of the previous decisions mentioning the rule of joint and several liability provides a clear precedent for this case. Decisions like Feinstone v. Allison Hosp., Inc., 106 Fla. 302, 143 So. 251 (1932) which antedate Hoffman v. Jones, are no longer controlling because of the Court's opening the door in Hoffman to address anew "problems created by our change to a comparative negligence rule as these problems arise ... in light of the purposes for which we adopt the rule...." 280 So.2d at 439.

While Withrow and Lincenberg each mentions joint and several liability, neither was directly concerned with the continued vitality of the rule.

In Woods v. Withrow, the issues were whether there was a right to contribution against a parent and whether a tortfeasor who failed to comply with a portion of the statute may obtain contribution. 413 So.2d at 1181. In a footnote, the Court said:

We fully retain the doctrine of joint and several liability. Four states have abolished or limited the doctrine of joint and several liability through their comparative negligence statutes. Id. at 1182, n. 3.

There was no other discussion of joint and several liability or of the context in which it was raised.

In only four years since Withrow was decided, the number of states abolishing or limiting joint and several liability has risen to thirteen.

Although the opinion of the Fourth District implies that the Supreme Court opinion in Department of Transp. v. Webb, 438 So.2d 780 (Fla. 1983) approved the rule of joint and several liability, in fact the opinion does not even mention the concept. The opinion dealt with only the governmental immunity issue. The joint and several liability issue was separately appealed, but the Court denied review. Seaboard Coast Line R.R. Co. v. Webb, 419 So.2d 1200 (Fla. 1982).

In Lincenberg the issue was whether to allow contribution. The Court said of the month-old contribution statute:

The Act retains the full, joint and several liability of joint tortfeasors to the plaintiff.... 318 So.2d at 392.

The question which the Fourth District certified strongly implies that this comment was the only impediment to full consideration of whether the facts of this case required affirmance of the judgment.

The comment in Lincenberg was unnecessary to the decision to allow contribution. Moreover, the statement is ambiguous and may properly be understood to mean that the contribution statute does not abolish "joint and several liability," for the contribution statute nowhere uses the term "joint and several liability."

The legislature, unlike some states, did not define "joint tortfeasor" to mean "joint and several liability." See, e.g., Ore. Rev. Stat., §18.485. Nor did the legislature provide, as have other states, that "where there are two or more persons who are jointly liable ... each shall remain jointly and severally liable for the whole award." See, e.g., Minn. Stat. §604.02.

Instead, the legislature chose the disjunctive form, allowing contribution among "two or more persons [who] become jointly or severally liable in tort for the same injury." Fla. Stat. §768.31(2)(a) (1985) [Emphasis added].

In Bartlett v. New Mexico Welding Supply, Inc., 646, P.2d at 581-582, interpreting the same Uniform Contribution Among Tortfeasors Act, the court said:

Section 41-3-1 does not state when a person is jointly or severally liable. New Mexico's statute involves the relationship among joint tortfeasor defendants and not the relationship between defendants and plaintiffs. (Emphasis in original).

The New Mexico court specifically rejected Lincenberg's comment that the Uniform Contribution Among Tortfeasors Act enacted joint and several liability into statutory law. Id. at 581. See also, Berry v. Empire Indem. Ins. Co., 634 P.2d 718 (Okla. 1981); Bowling v. Jake Sweeney Chevrolet, Inc., ___ N.E.2d ___ (Oh. App. 1986) [Case No. CA 84-05-054, March 31, 1986], to the same effect.

Because of the actual language of the contribution statute and the decisions in other states construing the same act, particularly in light of Fla. Stat. §768.31(6) requiring uniform interpretation of the act with other states, the decision in Lincenberg does not require affirmance of the judgment in this case, when the plaintiff was substantially more at fault than Disney.

The basis for the rule of "joint and several liability" ended with the decision in Hoffman v. Jones, when this Court ruled that one of two concurrent tortfeasors, the plaintiff and defendant, could not in justice be made to bear the entire loss. There is no longer any reason to maintain the last vestige of a rule where the reasons for the rule have all passed into history; all of its applications, save one, have been repudiated, and it flies in the face of modern principles of justice and constitutional protection.

It is undesirable "to retain a rule that under a system based on fault, casts the entire burden of a loss for which several may be responsible upon only one of those at fault...." Lincenberg, at 391. The rule that a defendant may be adjudged liable for the entire damage recoverable by a plaintiff should be abolished in comparative negligence cases, and the rule established that judgment may be entered against a defendant only for those damages which the jury

determines were caused by the fault of the individual party, in accordance with Hoffman v. Jones.

II. THE RULE OF "JOINT AND SEVERAL LIABILITY" IS UNCONSTITUTIONAL UNDER MODERN LAW AND PRACTICE.

Application of the rule of "joint and several liability" by Florida courts infringes the right to jury trial, and denies equal protection and due process guaranteed by the Florida and federal constitutions.

A rule of common law can become unconstitutional with changes in society and the law. In Gates v. Foley, 247 So.2d 40 (Fla. 1971), the Supreme Court abolished as unconstitutional the common law rule that wives could not recover for loss of consortium because:

The classification by sex formerly made by this Court discriminates unreasonably and arbitrarily against women and must be abolished. Id. at 45.

Rules of English common law, if contrary to Florida customs, institutions, or intendments of constitutional provisions must be abrogated. See, Id. at 43-44; Waller v. First Sav. & Trust Co., 103 Fla. 1025, 138 So. 780 (1931).

The rule of "joint and several liability" has become such a rule.

A. Application of the rule infringes the right to trial by jury.

The Florida constitution guarantees the right to trial by jury that under no circumstances is to be denied. Art. I, §22, Fla. Const.; Orr v. Avon Florida Citrus Corp., 130

Fla. 306, 177 So. 612 (1937); Tesher & Tesher, P.A. v. Rothfield, 392 So.2d 1000 (Fla. 4th DCA 1981). This right means that all questions of fact are to be determined by the jury, and that determination may not be disturbed by a court. Placing the entire loss on one defendant in spite of the jury determination that the defendant caused but a small portion of the loss denies the defendant trial by jury.

The pernicious effect of the rule on the right to jury trial is clearly demonstrated in this case. The jury, which was unusually communicative [R: 104-116], sought assurances from the trial judge that its verdict could not be altered [R: 112-114]. The jury expected, and the parties had a right to expect, that the jury's labor in assigning percentages of fault would be respected. The rule of "joint and several liability" frustrates the court's primary responsibility "to enter a judgment which reflects the true intent of the jury, as expressed in its verdict or verdicts." Hoffman, at 439.

No issue is more particularly a jury question than apportionment of fault. See, e.g., Cooper Transp., Inc. v. Mincey, 459 So.2d 339 (Fla. 3d DCA 1984), rev. den., 472 So.2d 1181 (Fla. 1985). In this case, the jury determined that Walt Disney World Co. caused 1% of Mrs. Wood's damage. The right to a jury trial, as well as the overriding tort principles of Hoffman v. Jones, demand that the judgment

against Walt Disney World Co. reflect the true intention of the jury and equate the liability of Walt Disney World Co. with its fault as found by the jury.

By application of the rule of "joint and several liability," however, the court ignored the jury's determination that Walt Disney World Co. was responsible for only 1% of the damage and substituted the factual determination that Disney was responsible for 86% of the damage. The court entered judgment based on the facts as determined by the court, and not on the facts determined by the jury.

A court may not substitute its factual determination for the jury's. See, Adams v. Wright, 403 So.2d 391 (Fla. 1981). The rule of "joint and several liability" violates this constitutional standard.

B. Application of the rule denies equal protection.

Equal protection of the law implies that all litigants similarly situated may appeal to the courts for relief under like conditions and without discrimination.⁴ Republic

⁴Equal protection is guaranteed by U.S. Const., amend. XIV, §1, and Art. I, §2, Fla. Const. It is well established that the action of state courts is state action governed by the Fourteenth Amendment. Palmore v. Sidoti, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984), n.1; Shelley v. Kraemer, 334 U.S. 1 (1948); Ex Parte Virginia, 100 U.S. 339, 25 L.Ed 676 (1880).

Pictures Corp. v. Kappler, 151 F.2d 543 (8th Cir. 1945),
aff'd 327 U.S. 757, 66 S.Ct. 523, 90 L.Ed. 991 (1946). The
rule of "joint and several liability" fails that test.

Changed conditions have long been recognized as circum-
stances which make unconstitutional previously valid rules.
In Georgia Southern & Fla. Ry. Co. v. Seven-Up Bottling Co.,
175 So.2d 39 (Fla. 1965), the Supreme Court ruled unconsti-
tutional the original comparative negligence statute which
applied only to railroads, even though it had previously
withstood constitutional attack. Changed circumstances
invalidated the statute because it singled out railroads as
special subjects for arbitrary and unjust discrimination
given the modern ubiquitous presence of automobiles as
another "commonly dangerous instrumentality operated in the
state." Id. at 40.

Similarly, the once-valid medical mediation statute was
declared unconstitutional in Aldana v. Holub, 381 So.2d 231
(Fla. 1980) because it was arbitrary and capricious in its
operation.

The advent of comparative fault has changed the circum-
stances in which the rule of "joint and several liability"
is applied.

Before Hoffman, the rule of "joint and several liabil-
ity" did not arbitrarily discriminate among litigants whose

fault contributed to an injury. At that time both plaintiffs and defendants who were at fault faced the burden of liability for the entire damage. Now, however, that burden has been lifted from plaintiffs. A plaintiff bears the burden of only her fault; a defendant, though, bears not only his fault, but that of all others at fault, except the plaintiff.

The rule arbitrarily shifts the burden of loss because of immune or insolvent tortfeasors from the plaintiff who bears that burden when only the plaintiff and a single defendant are at fault, to the defendant when there are multiple parties at fault. See, Bartlett, supra; Brown, supra; Laubach, supra.

It is as much an injustice to require a party defendant to bear the entire loss for which he is only partially at fault as it is to require a party plaintiff to bear the entire loss. There is no rational basis for discriminating between plaintiffs and defendants at fault. Cf., Gates v. Foley, supra.

C. Application of the rule denies due process.

Vital to the concept of procedural due process is the notion that valuable property interests must not be arbitrarily undermined.⁵ Aldana v. Holub, 381 So.2d at 236,

⁵Due process is guaranteed by U.S. Const., amend. XIV, §1 and Art. I, §9, Fla. Const.

n.9; Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). An individual's interest in retaining his money is a valuable property right. If his fault causes injury, the state can compel him to pay the one injured for the damages he caused. He should not be compelled to pay for damage he did not cause. Yet, the rule of "joint and several liability" arbitrarily sets aside the jury determination of fault and holds it for naught.

By entering a judgment at odds with the jury's determination of fault, the state takes the defendant's property without due process. Due process requires a meaningful opportunity to be heard. Even an inordinate delay in obtaining a hearing has been held violative of due process. Aldana v. Holub, 381 So.2d at 238. If the determination of the fact finder can be set aside following the hearing in favor of an arbitrary allocation of damages, the hearing is meaningless.

It has been suggested that contribution provides a reasonable alternative for the defendant deprived of his property. But, a right to sue to recover the loss is not a substitute for the property taken. See, Bartlett, 646 P.2d at 582.

Moreover, contribution does not provide a reasonable alternative to limited liability because it is an incomplete

remedy. See, Kluger v. White, 281 So.2d 1, 4 (Fla. 1973); Aldana v. Holub, 381 So.2d 231 (Fla. 1980). In the first place, the money expended to get contribution is unrecoverable. Secondly, the courts have restricted contribution, prohibiting contribution from employers, Seaboard Coast Line R. Co. v. Smith, 359 So.2d 427 (Fla. 1978); Blocker v. Chance Hauling and Paving Co., 426 So.2d 70 (Fla. 1st DCA 1983), and uninsured parents, Joseph v. Quest, 414 So.2d 1063 (Fla. 1982).

The delay, expense and incompleteness of contribution bring it squarely under the condemnation of Kluger and Aldana as an inadequate substitute for a defendant's due process right to a meaningful trial before a jury.

The rule of Hoffman v. Jones, conferred the right to have a jury equate liability with fault. The rule of "joint and several" liability sweeps that right away. As the Supreme Court said in Aldana, supra, 381 So.2d at 236:

It simply offends due process to countenance a law which confers a valuable legal right, but then permits that right to be capriciously swept away.

It is no secret that the negligence system as currently applied in this state is under attack. The reason for the dissatisfaction with the system is undoubtedly a general perception that it is unjust in its application. As was true with contributory negligence at the time of Hoffman, it can be said of "joint and several liability":

Whatever may have been the historical justification for it, today it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss. Hoffman, 280 So.2d at 436.

In Gates v. Foley, 247 So.2d 40, 43 (Fla. 1971), the court said:

[W]e abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court made rule.

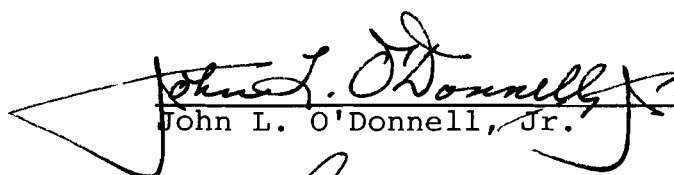
If the tort system is to survive, it must apportion accidental loss among all the parties at fault in an equitable manner. The basis for that apportionment is set forth eloquently and concisely in Hoffman, 280 So.2d at 438:

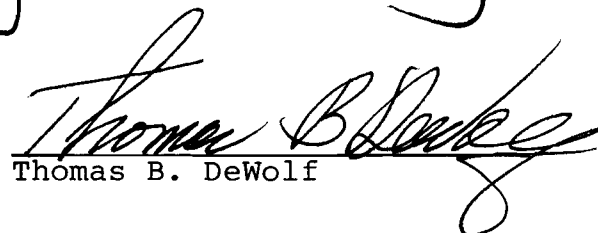
In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault.

CONCLUSION

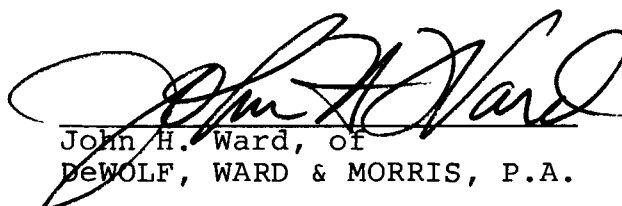
For the foregoing reasons, the judgment should be reversed and the case remanded with instructions to enter judgment against Walt Disney World Co. and INA for 1% of the total damages in accordance with the jury verdict.

Respectfully submitted,


John L. O'Donnell, Jr.


Thomas B. DeWolf

and


John H. Ward, of
DEWOLF, WARD & MORRIS, P.A.

and

Chris W. Altenbernd, of
FOWLER, WHITE, GILLEN, BOGGS,
VILLEREAL and BANKER