**IN THE FLORIDA SUPREME COURT**

**Case No. 95,595**

**L.T. Case No.: 96-02758**

---

On Discretionary Review Of The Decision
Of The Second District Court of Appeal

---

**LAWRENCE D. McDOUGALD,**
Petitioner,

v.

**HENRY D. PERRY and C&S CHEMICALS, INC.,**
a foreign corporation,
Respondents.

---

# ANSWER BRIEF OF RESPONDENTS

---

Douglas M. Fraley, Esq.
Fraley and Fraley, P.A.
Suite 1225
501 East Kennedy Blvd.
Tampa, Florida
(813)229-8300
Florida Bar No.: 654728

Margie I. Fraley, Esq.
Post Office Box 130294
Tampa, Florida
(813)229-8300
Florida Bar No.: 0655368

**TABLE OF CONTENTS**

**TABLE OF CITATIONS**

CASES

STATUTES

OTHER

## STATEMENT OF THE CASE

Henry D. Perry and C&S Chemicals, Inc., ("Perry" and "C&S") include a Statement of the Case and a Statement of the Facts to support the issues they raised in their appeal to the Court of Appeals for the Second District and to specify areas of disagreement with Lawrence McDougald's ("McDougald") Statement of the Facts.

McDougald sued Perry, C&S and Ryder Truck Rental ("Ryder"). Ryder is not a party to this appeal. Ryder answered the Complaint, admitting that it owned the trailer which had been leased to and was in the custody and control of C&S. (R 7-9) McDougald took a voluntary dismissal against Ryder just prior to trial.

## STATEMENT OF THE FACTS

### NEGLIGENCE

The independent witness, Leslie Waters, testified that he did not notice any improper driving by Perry. (T 64) Perry reduced his speed to 35 to 40 mph when crossing the railroad tracks. (T 275) McDougald had been following the vehicle and observed it as it went over the tracks. (T 170) There was no testimony from McDougald that Perry improperly operated his vehicle.

At the time of the accident and continuing up to trial McDougald owned and ran a trucking company. (T 169) One of his functions was to inspect his trucks for safety. (T 188)

The investigating officer recalled that he had found some relatively minor damage from the accident to the undercarriage of the trailer, although he could not specifically remember what was

damaged. (T 336-337)

In his Statement of the Facts, McDougald maintains the chain "restrained the spare tire" and "served to secure the tire." (Initial brief, pp. 2,3) However, the safety chain is a back-up measure. (T 255, 369) The tire is held in place by its own weight, and is cradled in a rack. (T 369) There is no stress placed upon the chain during normal driving unless the tire moves. (T 260) McDougald states that Perry conducted a "cursory" inspection of the spare tire. (Initial brief, p. 3) The word "cursory" is McDougald's conclusion because the word is not used in the record.

Perry does not know when the link in the chain was stretched out allowing the bolt and washer to pass through, but he testified the chain had to have stretched on the trip (T 259) because it was secure and together when he began the trip that morning. (T 260) Roy Beverly ("Beverly") testified that the vehicles undergo routine safety inspections. (T 367) He also averred that the chain and its method of attachment met all Department of Transportation ("D.O.T.") regulations. (T 367-368)

In his Statement of the Facts, McDougald quotes Perry as admitting a lock was originally used to attach the chain. (Initial brief, p. 4) Perry never testified a lock was originally or ever used. McDougald further cites Perry as testifying the chain was originally supposed to be secured in place with a latch and bolt system. (Initial brief, p. 3) However, Perry testified he was "sure" there was a latch system originally. (T 257) There was no predicate establishing he ever saw this latch system on the subject

vehicle.

In his Statement of the Facts, McDougald states the tire was held in place by its own weight (Initial brief, p. 3), and cites Beverly's opinion that "it is very difficult to pull the tire in and out of the rack." (Initial brief, p. 5) McDougald concludes "presumably because of the tire's weight." (Initial brief, p. 5) The tire is also difficult to remove because it is cradled in a rack which sits at a 45 degree angle. (T 369)

Perry testified he had been driving tractor trailers since 1963 and has experience with spare tires and safety chains similar to those involved in this incident. (T 282) Perry and C&S attempted to admit through Perry evidence of industry custom on safety chains and their method of attachment. However, the court sustained McDougald's objection as to relevancy, and in addition held that in order for Perry to testify regarding this issue he would need to be qualified as an expert. (T 285-286) Furthermore, if he were so qualified the court would allow McDougald to question him regarding a subsequent remedial measure which C&S undertook. (T 285-286) C&S and Perry made a short proffer of Perry's expected testimony that others in the industry at the time of this accident used similar types of safety chains affixed with similar bolts, nuts, and washers. (T 328-330)

The original chain was not kept because no one realized that McDougald was injured in the accident. McDougald testified that approximately six days after the accident he told an investigator from C&S that although he had some tenderness to the outside of his

knee it was "no big thing." (T 223-224) Upon McDougald's questioning, the investigating police officer also testified that he used a short form report at the accident scene because no one claimed any injuries requiring medical attention. (T 332) C&S and Perry did not learn that McDougald was hurt until suit was filed years later. (T 287)

**LOSS OF EARNING CAPACITY**

McDougald presented absolutely no evidence regarding any lost wages or income or any financial impact to his trucking business. There was no evidence of McDougald's salary, yearly income, or trucking company's profits. His treating physician since 1992, Dr. Donald Gale, testified that he had placed no restrictions, work or otherwise, on McDougald as long as he was wearing his brace. (T 125)

McDougald's claim for past and future loss of earning capacity was based upon his involvement with hunting guide referrals. (T 454, 518) He went hunting approximately three weeks out of the year prior to the accident. (T 247) Given his hunting experience and familiarity with outfitters in the western states he planned to semi-retire from his trucking business at the age of 50 in 1996 (T 182) and become more involved in the hunting referral business. (T 198) McDougald testified that after he became more successful and experienced as a hunter he incorporated a sports and referral service. The incorporation of the referral business did not occur until after the subject auto accident. (T 237) McDougald testified that he never made a profit from this pursuit or even operated it

as a business. (T 201) The money for hunting trips was always paid by other individuals to the outfitters and guides who owned the hunting property. McDougald did not own any hunting property out west. (T 247)

McDougald testified that prior to the accident if he lined up sufficient hunters the outfitters would give him his hunts for free. (T 213) Typically, the hunts cost approximately $2,500.00. (T 199) McDougald continued hunting after the accident, although not as much. (T 198) He went on hunts at least once a year after the accident and took three people hunting in 1995. (T 230-237) However, even if he did not go on a hunt himself he still sent groups out. (T 231) McDougald stated that the injury to his knee has curtailed his ability to hunt and to lead guide trips. (T 198) With his brace on he can do most of the activities involved in hunting. (T 233)

Over C&S and Perry's objection, McDougald was allowed to estimate that he could earn a profit of approximately $20,000.00 to $25,000.00 per year running a guide business. (T 213) He also testified that prior to getting his hunting trips for free they were costing him between $5,000.00 to $6,000.00 total per year. (T 251) McDougald did not testify when he first got free trips or that after the accident he ever had to pay for a trip. He testified that the outfitters/hunting guides would pay a 10% to 12% referral fee based upon the hunting fees paid by clients. (T 201) There was no evidence that McDougald ever received such a fee prior to or after the accident.

C&S and Perry moved for a directed verdict as to both past and future loss of earning capacity arguing there was an insufficient evidentiary basis to award either type of damage. McDougald admitted that he did not have a claim for past lost wages. (T 454) Instead, McDougald argued that he was entitled to an award of past loss of earning capacity because he had at some point received hunting trips for free. C&S and Perry also objected to such evidence because it was a special damage which had not been specifically pled. The court overruled C&S and Perry's objections and denied their motions for directed verdicts. The court's rulings appeared partly based upon the court's understanding, which McDougald's counsel confirmed, that **past economic loss entails damages incurred prior to the filing of the Complaint and future damages afterwards**! (T 461-462, 524)

**INJURY TO RIGHT KNEE**

McDougald's main knee problem is the absence of his anterior cruciate ligament (ACL) and the resulting degenerative changes. (T 76,77) On the issue of injury and causation, expert testimony was received from McDougald's three treating physicians, Dr. Donald Gale, Dr. Peter Indelicato, Dr. Diana Carr, and defense IME Dr. Mark Mudano. Dr. Carr, an orthopaedic surgeon who specializes in hand surgery performed arthroscopic surgery on McDougald's right knee in 1987 for an injury to the meniscus. (T 290-294) McDougald recovered from this injury and surgery with occasional swelling and popping thereafter. (T 296-297) Dr. Carr first saw McDougald after the subject accident in August of 1990. (T 297) After several

office visits, in March of 1991 she performed an arthroscopy on the right knee in which she examined the ACL with a hook and microscope and concluded it was completely normal and uninjured. (T 312-313) Based on her treatment and arthroscopic examination Dr. Carr testified that there had not been any tear to the ACL from the July 1990 accident. (T 312)

Dr. Carr believed that certain abnormalities found during her surgery, a partial tear of the posterior cruciate ligament (PCL) and a plica (an irritated band of tissue behind the knee cap), were probably caused by the accident. (T 310) At trial, she could not testify to a reasonable degree of medical probability that these abnormalities contributed to the eventual loss of the ACL because McDougald had had another injury to his knee subsequent to the subject accident. (T 309)

During one of McDougald's earlier visits to Dr. Carr, she advised him that given the condition of his knee it was not the best idea for him to go hunting, but it was up to him how much risk he wanted to take. (T 301-302) The doctor also testified that someone like McDougald with weak quadriceps needs to work with physical therapists doing specific exercises in order to stabilize the knee. (T 325) As of May 2, 1991, (approximately three weeks prior to the second MRI) Dr. Carr felt that his only problem was weakness in the muscles affecting the knee. (T 307-308) On May 16, 1991, McDougald advised her that sometime after his arthroscopic surgery in March he experienced additional popping and swelling of his knee from a fall in his backyard. (T 309) As a

result of this fall Dr. Carr recommended the second MRI (T 309) which revealed a complete tear (absence) of the ACL. (T 309) Dr. Carr testified that an ACL tear could occur from stepping in a hole as McDougald described. (T 312) Over C&S and Perry's objection, McDougald was allowed to "impeach" Dr. Carr, his own witness, with her deposition testimony in which Dr. Carr had testified that the accident was the most likely cause of McDougald's ACL injury in spite of Dr. Carr's explanation that this opinion was based upon her misunderstanding at the deposition that there had not been any subsequent reinjuries or traumas to the knee. (T 313-317)

Concurrent with McDougald's visits to Dr. Carr, he also treated with Dr. Indelicato (his deposition was read into evidence and filed as McDougald's Exhibit 3) from September 19, 1990 through February 6, 1991. (Ex. 3, p. 7). Dr. Indelicato is a board certified orthopaedic surgeon practicing at various hospitals in Gainesville, Florida, and has devoted his entire professional career to the study of ligament injuries in the knee joint. (Ex. 3, p. 4-6). At the first examination in September of 1990, McDougald complained only of some pain along the outside of his right knee. (Ex. 3, p. 7). At this time and throughout his visits up to February 6, 1991, Dr. Indelicato's examination of McDougald's knee was entirely normal. (Ex. 3, pp. 8-9). Dr. Indelicato testified that the abnormalities found by Dr. Carr during her March arthroscopic examination most likely predated the July 1990 accident. (Ex. 3, p. 11). The degenerative process which Dr. Carr found is known as osteochondritis dissecans ("ODC") and was not

related to the July 1990 accident. (Ex. 3, p. 11). This condition will usually continue to progress or worsen. (Ex. 3, p. 14). Finally, Dr. Indelicato testified McDougald was not going to his physical therapy as instructed which deprived him of the opportunity to improve his condition or heal. (Ex. 3, p. 16-17).

In 1992, McDougald began treating with Dr. Gale, an orthopaedic surgeon in Bartow, Florida. (T 73) Dr. Gale performed two arthroscopic procedures on McDougald, the first in 1993 and again in 1995. (T 76) On direct, Dr. Gale stated his opinion was McDougald's current condition for the most part related to the accident. (T 79-80)

Dr. Gale further testified on direct that this was also his opinion at his deposition. (T 84) Dr. Gale also averred that since his deposition he had two or three meetings with McDougald's attorneys, but did not believe his opinions changed too much from what he said in the deposition. (T 98-99) On cross-examination, C&S and Perry impeached Dr. Gale with his deposition on this crucial point. The following deposition testimony was shown and read to Dr. Gale:

> Only in the fact that Dr. Indelicato is an astute, very experienced orthopaedic surgeon who deals almost exclusively with knee injuries. The evaluation, all of them, September, November of 1990 and February of 1991, do not show any evidence, either on physical exam or on MRI of anterior cruciate ligament injury. <u>If there has been an anterior cruciate ligament injury, I am 100 percent certain that it would have been picked up either on the MRI or by Dr. Indelicato on clinical exam</u>. (T 108-109)

On re-direct the court allowed McDougald's counsel, over objection, to read several pages of Dr. Gale's deposition testimony (pp.15-19) into evidence. (T 143-145) (This deposition testimony occurred before the doctor had reviewed Dr. Indelicato's records and MRI report. (R 108, 143)) McDougald then confirmed with Dr. Gale that his testimony "had not changed since his deposition." (T 143-144) The court prohibited defense counsel from re-crossing Dr. Gale to clarify the deposition testimony and to establish that he had changed his opinion. (T 151-152) McDougald stipulated that a sufficient proffer could be made regarding this prohibited re-cross examination. (T 154)

On cross-examination Dr. Gale admitted that the radiologist read the initial MRI as normal. (T 111-112) He also conceded it was not his opinion that the MRI shows an injury, but at most there is no way to tell. (T 115) He was only suggesting it is possible the radiologist may have missed something. (T 112) Furthermore, Dr. Gale agreed that at most the only significant injury McDougald sustained as a result of the accident was to the ACL. (T 126) The arthritis and the ODC all pre-dated the accident. (T 122) Dr. Gale agreed that after the subject accident and up until the May 1991 MRI McDougald could have sustained an injury tearing the ACL. (T 118) McDougald told him he had suffered a twisting injury and direct blow to his knee just prior to a May 22, 1992, office visit. (T 123) Additionally, McDougald advised Dr. Gale of other events causing twisting and popping of his knee including walking in his backyard and attempting to get on a horse. (T 186-187)

Dr. Gale testified that Mr. McDougald should be doing weight lifting exercises to strengthen the muscles in his knee which would also help to diminish his symptoms. (T 126, 177) Dr. Gale told McDougald that putting off the initial arthroscopic surgery so that

he could go hunting would worsen his problems. (T 127-128)

McDougald testified at trial that at the time of his deposition he was not doing any exercises for his knee muscles although he had done them at different times. (T 233) He did not wear his brace in 1991. (T 228) He did not have any stability problems with his right knee for several months after the accident up until April or May of 1991. (T 223) He admitted that a few months following the subject accident he flipped a four wheel vehicle he was driving although he denied injuring his right knee during that incident. (T 218) With regard to these activities and subsequent injuries, the court prohibited defense counsel from arguing on closing that McDougald's knee condition and resulting damages and pain and suffering could partially have resulted from his failure (negligence) to take reasonable precautions or follow the advice of his doctors. (T 637-638)

Finally, the only other significant medical witness was the defense IME physician, Dr. Mudano. (T 472) Dr. Mudano is a board certified orthopaedic surgeon who specializes in sports medicine and performs knee operations. (T 472-473) In Dr. Mudano's opinion, based upon the review of the records and the diagnostic testing, McDougald did not tear or in any way injure his ACL in, or as a result of, the 1990 accident. (T 478-479, 483)

## SUMMARY OF THE ARGUMENT

The Court of Appeals for the Second District correctly ruled McDougald did not prove that in the ordinary course of events, the accident would not have happened in the absence of negligence. Therefore, the lower court committed reversible error in giving a res ipsa loquitur instruction.

In an attempt to satisfy his burden of proof, McDougald argues the accident entailed a "wayward wheel." McDougald is trying to

benefit from case law which he argues holds that res ipsa loquitur applies to wayward wheel cases as a matter of law because in the ordinary course of events such wheels do not become loose absent negligent installation or maintenance. **However, the wayward wheel cases uniformly entail wheels coming off the axles of vehicles**. This crucial factual difference makes them inapposite because McDougald presented no evidence whatsoever that in the ordinary course of events, a spare tire under the instant set of facts does not come out of a cradle off the bottom of a truck in the absence of negligence. Quite to the contrary, as Perry and C&S explained and the Second District found, the incident could be due to reasons other than negligence, such as vandalism or debris on the road.

The Second District properly ordered the lower court to enter a directed verdict for Perry and C&S on negligence. McDougald did not introduce any evidence, expert or otherwise, on negligent maintenance or operation of the trailer, or attachment of the safety chain. McDougald merely proved an accident happened.

On past or future loss of earning capacity, the Second District rightly held there was not sufficient evidence to raise a jury question. McDougald's claim for future damages was based on expected lost profits of an anticipated hunting guide business without an established track record. The only evidence he introduced was his own unfounded estimate he could make between $20,000 to $25,000 a year as a guide. There was no evidence of past losses. Thus, McDougald simply failed to provide the jury with the requisite "yardstick" to measure his damages.

Finally, Perry and C&S argued four additional errors which the Second District did not consider but could support the Second District's decision or the granting of a new trial. The errors are as follows: the court wrongly gave a res ipsa loquitur instruction

because the facts concerning the accident were known, provable or discoverable; the court excluded highly relevant evidence that C&S and Perry's acts complied with industry custom; the court improperly allowed McDougald to read into evidence and to impeach its own medical witness from prior deposition testimony; and the court prohibited counsel from arguing on closing that McDougald was comparatively negligent for his injuries because of his actions after the accident.

## ARGUMENT

### I. THE COURT OF APPEALS FOR THE SECOND DISTRICT CORRECTLY RULED THE LOWER COURT MADE A REVERSIBLE ERROR IN GIVING THE JURY A RES IPSA LOQUITUR INSTRUCTION

In Goodyear Tire and Rubber Co. v. Hughes Supply Inc., 358 So.2d 1339 (Fla. 1978), this Court reigned in the use of the res ipsa loquitur instruction, stating the doctrine is of extremely limited applicability. Id. at 1341. Similarly, in City of New Smyrna Beach Utilities Commission v. McWhorter, 418 So.2d 261 (Fla. 1982), this Court indicated that: "Given the restrictive nature of the doctrine, a court should never lightly provide this inference of negligence." Id. at 262.

A plaintiff has the burden to prove to the court three elements to avail himself of the inference: 1. direct evidence of defendant's negligence is unavailable; 2. the accident is one that would not, in the ordinary course of events, have occurred without defendant's negligence; and 3. the defendant was in exclusive control of the mechanism of the injury. See, City of New Smyrna and Goodyear. The Second District correctly recognized that at trial, McDougald failed to meet his burden of proving the second element.

In an attempt to satisfy this element, McDougald classifies

the accident at hand as a "wayward wheel" case. **Yet, all the wayward wheel decisions which McDougald cites are factually distinguishable because they deal with wheels coming off axles of vehicles**. In applying res ipsa loquitur to wayward wheels, these opinions hold that a wheel would not come off the axle of a vehicle in the absence of negligent maintenance or installation. In other words, wayward wheel cases satisfy the res ipsa loquitur requirement that in the ordinary course of events, the accident would not have happened without negligence. But the accident at hand did not concern a wheel coming off an axle but a spare tire leaving its cradle underneath the truck. Since the spare tire is installed, maintained, and affixed completely differently from an axle tire, the wayward wheel cases are irrelevant. As Perry and C&S suggested and the Second District found, the exiting of the subject tire could happen in the absence of negligence which precludes application of res ipsa loquitur.

The crux of the wayward wheel cases is the installation or maintenance of an axle wheel which is entirely different from the installation or maintenance of a spare wheel. Hence, the finding that a wayward wheel would not come off its axle in the absence of negligence simply cannot be transferred to the instant spare tire coming off its cradle. Not surprisingly, McDougald stays away from any reference to the basic difference between wayward wheel cases and the accident at hand. The dynamics of a wheel which is supporting a vehicle weighing thousands of pounds and revolving at significant speed as it travels down the road is in no way comparable to a spare tire cradled underneath a trailer. While a juror may have some exposure to and understanding of the importance

of tire pressure, lug-nuts, and the integrity of the rubber and rim of a wheel, this knowledge provides no help in understanding the proper procedures for installing and maintaining a spare tire in a cradle under the trailer of a semi-truck.

Taking McDougald's argument to its logical conclusion shows the error of labeling the instant case a wayward wheel case. Under McDougald's argument, every time an object comes off a vehicle -regardless of whether it is affixed, installed, or maintained like an axle wheel— res ipsa loquitur would be proper. The bottom line is that just because the object coming off Perry's vehicle happened to be a wheel does not make this a wayward wheel case.

Most of the Florida and foreign case law which McDougald cites date prior to this Court's Goodyear opinion and seem to embrace the expansive view of the doctrine which Goodyear rejects. Furthermore, the opinions which McDougald quotes are either not relevant to the second element or include the type of evidence on the issue which was not admitted in the instant matter.

McDougald's main argument is based on Cheung v. Ryder Truck Rental, Inc., 595 So.2d 82 (Fla. 5th DCA 1992), which appears to be the case upon which McDougald claims conflict jurisdiction. McDougald did not cite Cheung in its Answer Brief to the Second District and it is inapplicable to the issue at hand. In Cheung, the Fifth District reversed a summary judgment in defendant's favor. The standard of review for motions for summary judgment is

not the same as that involved in granting a directed verdict.[1] More importantly, Cheung contains very few facts; and those facts discussed paint a distinguishable scenario. In Cheung, a wheel came off the axle of a vehicle the defendant was towing. Although not explicit in the opinion, Cheung is more concerned with the doctrine's "control" requirement. Cheung contains no analysis or citations regarding the second element of res ipsa loquitur that a plaintiff prove the accident would not normally happen in the absence of negligence.

Similarly, McDougald's discussion of Yarbrough v. Ball U-Drive System, Inc., 48 So.2d 82 (Fla. 1950), and Tamiami Trail Tours Inc., v. Locke, 75 So.2d 58 (Fla. 1954), is not helpful to him. First, these decisions deal mainly with "control." Neither case discusses or analyzes the doctrine's requirements pertinent to the matter at hand. In Yarbrough, this Court was concerned with whether a defendant-lessor was in "control" of a vehicle which another party drove in the accident. In Tamiami Trail, although the plaintiff's employee was operating the vehicle, this Court held the defendant was in control because he alone hooked up the equipment which caused the damage.

Following the progeny of these decisions is enlightening. In the cases citing Tamiami Trail, the courts hold the res ipsa loquitur instruction should not have been given because plaintiff had not excluded intervening forces as a cause of the mishap.

[1]"A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." Moore v. Morris, 475 So.2d 666 (Fla. 1985).

Wagner v. Associated Shower Door Co., 99 So.2d 619 (Fla. 3d DCA 1958); Brookshire v. Florida Bendix Co., 153 So.2d 55 (Fla. 3d DCA 1963).

Although numerous cases cite Yarbrough, they either deal with the "control" issue, contain no facts or analysis, or are eventually dispproved or quashed in Goodyear. Goodyear specifically disapproves of two district court cases which cite Yarbrough as controlling authority. See, Auto Specialties Mfg. Co., v. Boutwell, 335 So.2d 291 (Fla. 1st DCA 1976); and Kulczynski v. Harrington, 207 So.2d 505 (Fla. 3d DCA 1968).

The disapproval of Auto Specialties has minimal impact on the present matter since it dealt mostly with "control." However, in Kulczynski the question of control is a minor issue. In Kulczynski, plaintiff was injured by a ladder rack which swung out from the side of defendant's pick-up truck because one of the rack's supports became dislodged from the truck. Kulczynski approved the use of the res ipsa loquitur instruction under facts similar to the instant case. Therefore, this Court would likely disapprove using the instruction in the case at bar.

The foreign cases which McDougald cites are either factually or legally irrelevant to the matter at hand. Either these cases do not address the issue of proving the accident would not have happened in the absence of negligence or plaintiff submitted expert or other evidence on the issue. See, Hanson v. Dalton Coal & Materials Co., 264 S.W.2d 897, 900 (Mo. Ct. App. 1954)("A great volume of testimony was introduced as to what might cause [the

accident]... Experts testified [about proper maintenance]... One witness for plaintiff testified [proper maintenance had not been performed].”); Dearth v. Self, 220 N.E.2d 728 (Ohio Ct. App. 1966)(concerns application of doctrine to multiple defendants); Ross v. Tynes, 14 So.2d 80 (La. Ct. App. 1943)(there was “considerable testimony” that the cause of the accident resulted from improper maintenance to a “patchwork” vehicle); Wilson v. Spencer, 127 A.2d 840 (D.C. 1956)(“there was no explanation by either plaintiff or defendant as to the cause of the hubcap becoming detached...”)

Nowhere in the record or case law is there any proof that in the ordinary course of events a spare tire like the one at issue would not come out off its cradle breaking through the safety chain in the absence of negligence. Quite the opposite, Beverly adduced the only evidence“in the light of past experience,” Goodyear, 358 So.2d at 1342, when he testified he had never heard of a similar incident. Significantly, neither did McDougald who owns a trucking company.

As far as the record is concerned, the tire at hand could very well be the first and only one ever to exit its cradle. On what basis could anyone conclude that something which has never happened would only occur if someone, especially the lessee or operator of a tractor-trailer, were negligent? Since Perry and C&S only admitted they were responsible for the maintenance of the trailer, the court would have to conclude that this incident would usually not occur without negligent maintenance.

Unfortunately for McDougald, the second element of res ipsa loquitur is not easily met. Even in Marrero v. Goldsmith, 486 So.2d 530 (Fla. 1986), the most expansive application of the doctrine, the plaintiff "produced expert medical testimony that this type of injury is one that ordinarily does not occur in the absence of negligence..." Id. at 531. In the instant matter, as is obvious, there was no similar expert or other testimony.

In Burns v. Otis Elevator Company, 550 So.2d 21 (Fla. 3d DCA 1989), the court, reversing a summary judgment in favor of the defendant because of the availability of the res ipsa loquitur doctrine, stated that "to prevail at trial, plaintiff must still present sufficient evidence, beyond that of the accident itself, from which the jury may infer that the accident would not have occurred but for the defendant's breach of due care." Id. at 22.

Although it perhaps does not need to be restated, there was no expert or other testimony or evidence that the failure of the safety chain and the spare tire's exit onto the roadway would not ordinarily occur in the absence of C&S and Perry's negligence. They cannot be presumed negligent because of the equipment when there was no evidence that either one of them placed the equipment on the trailer. As alleged in the Complaint and admitted in C&S, Perry and Ryder's Answer, Ryder owned the trailer and leased it to C&S. C&S and Perry only admitted they were responsible for the trailer's maintenance, not its original condition.

No court, without evidence about this particular field, could determine from a common sense point of view that the incident would

not have occurred in the absence of negligence much less from negligent maintenance. Imagining reasons other than negligent maintenance which could have caused this incident is not difficult. An attempted theft of the spare tire or simply vandalism could have weakened the chain. Perhaps the force of the tire bouncing in the cradle while traveling over unusually rough railroad tracks produced a force on the chain which no one could reasonably expect or protect against. It is also conceivable the chain itself, which Perry and C&S did not place on the trailer, was flawed or that some road debris which the tractor-trailer encountered after it left Melbourne affected the chain's integrity.

Interestingly, the court in Phillips Buick-Pontiac-GMC, Inc., v. Dallon, 602 So.2d 594 (Fla. 5th DCA 1992), advances these final two possibilities to explain why the trial court properly denied a res ipsa loquitur instruction. In Phillips, a child was run over by a car due to a faulty transmission. The parents sued the seller of the vehicle alleging that while replacing an engine in the vehicle its mechanic negligently dislocated a cable which affected the transmission. Expert testimony supported this theory.

The trial court rejected the res ipsa loquitur instruction but after a defense verdict granted plaintiffs a new trial because of that ruling. The district court reversed, finding that the instruction was properly refused because the plaintiffs failed to meet the second element.

The appellate court noted that the dislocation of a transmission cable could have occurred "as a result of original

equipment design defect... or could have been dislocated by road hazards... or in diverse other ways..." Phillips, 602 So.2d at 595. Similarly, it would be improper for the instant trial court to infer, from no evidence but the occurrence itself, that the safety chain would not have "dislocated" in the absence of negligence. In Phillips, the plaintiff even supported his theory with expert testimony, absent in the case at bar.

Under the case law, McDougald had the burden to prove the accident would not have happened in the absence of negligence. As the record unequivocally establishes, he failed to meet his burden which precludes application of res ipsa loquitur.

## II. RES IPSA LOQUITUR WAS NOT APPLICABLE BECAUSE THERE WAS DIRECT EVIDENCE OF NEGLIGENCE

If this Court decided that the exit of the instant spare tire would not have happened in the absence of negligence, the opinion of the Second District should still be affirmed because McDougald did not prove that direct evidence of negligence was unavailable. Goodyear explains that the res ipsa loquitur inference is only applicable when "direct evidence of negligence is unavailable to the plaintiff due to the unusual circumstances of the injuring incident." Goodyear, 358 So.2d at 1341. Furthermore, in rejecting earlier district court decisions which expanded the doctrine, this Court indicated that the inference had been inappropriate in those cases because "the facts surrounding the incident were discoverable and provable." Id. at 1342.

In Metropolitan Dade County v. St. Claire,445 So.2d 614 (Fla.

3d DCA 1984),for instance, a hotel clerk sued the city because one of its officers had accidently shot her while defending himself against an attack by her employer's dog. The court ruled that since the events surrounding the discharge of the gun were "both discoverable and provable" sufficient evidence of the defendant's negligence was available to plaintiff so the instruction should not have been given. Id. at 617. Similarly, in the instant matter all of the necessary facts from which McDougald could have established C&S and Perry's negligence were discoverable and provable.

McDougald was aware of the size of the chain, nut, bolt and washers. He was aware of and in no way disputed the method by which the nut, bolt and washers attached the ends of the chain together. There was also no disagreement with or attack on C&S and Perry's maintenance or safety procedures. The general configuration of the spare tire and its cradle, the roughness of the roadway caused by the railroad tracks and the proper method of attaching a safety chain were certainly discoverable. Furthermore, McDougald, witnessed the operation of the vehicle. He was on the scene and saw the relevant evidence.

All that McDougald needed to properly submit a direct negligence case to the jury was a witness with expertise in trucking safety to testify that the method of securing the chain or the chain itself was improper. An expert could have testified that the size, shape or strength of the materials which Perry and C&S used were inadequate. **McDougald's failure to meet the requirement that direct proof of negligence was wanting is obvious from his**

**failure to complain or reference any missing or unknown facts at trial**.

In Marrero, this Court explained that even if a plaintiff does introduce some direct evidence of negligence he does not automatically lose the availability of the inference. This Court noted that the first element does not require there be a complete absence of direct proof. In Marrero, the plaintiff, suing for medical malpractice, developed weakness and numbness in her left arm after surgeries by different doctors on other parts of her body. Apparently, this arm may not have been properly positioned during the surgeries. However, this Court in Marrero did not analyze or even clearly indicate what direct evidence the plaintiff had. In fact, the main focus of the opinion was to permit an exception to the exclusive control requirement because the plaintiff was unconscious and therefore in no position to prove which defendant caused her injury. Conversely, in the instant matter McDougald was not unconscious. McDougald had more than enough evidence to prove his case if C&S and Perry were negligent and therefore can find no solace in Marrero.

McDougald knew or could have discovered everything there was to know. At no point has he argued that there was something he did not know. **In fact, while arguing in opposition to C&S and Perry's motion for directed verdict, (T 440), at the charge conference, (T 547-548), and during his closing argument, (T 575-578), McDougald never suggests he is hindered in his proof at trial by the absence of evidence and quite clearly describes how the incident occurred**.

Therefore, McDougald failed to prove the first element required to trigger the res ipsa loquitur instruction, that there be an absence of discoverable or provable facts surrounding the incident.

McDougald at no time, including his brief to this Court, requests any special dispensation because of the alleged inability to obtain the chain or the maintenance records. However, he alludes to this in a footnote of his brief with hardly any record support. (Initial Brief, p. 4) McDougald does not cite any motions in the trial court, any discussions with the trial judge at or before trial, or any case law which would entitle him to the res ipsa loquitur instruction because of the supposedly unobtainable matters.

With regard to the chain, McDougald now complains that C&S did not produce the chain but at trial suggests through Beverly the chain may still be on the trailer. McDougald may have forgotten the trailer was leased from Ryder and it may well have been back in Ryder's possession six years after the accident. Certainly, C&S and Perry should not suffer the res ipsa loquitur instruction because McDougald did not pursue discovery.

With regard to maintenance records, McDougald holds a short discussion at trial with Beverly. Nowhere in the record or transcript is there a thorough examination of this matter as might have occurred if McDougald had claimed at trial that he was entitled to the instruction because of the "missing" records. If these unsupported insinuations, obviously meant to suggest a prejudicial impact to McDougald, were valid, they would have been

a legal issue at trial, referenced in the Answer Brief to the Second District, or discussed beyond a footnote. If an expert was unable to render an opinion because of any missing evidence, he did not appear at trial.

Once again, McDougald failed to prove an element of res ipsa loquitur. Hence, the judge committed reversible error in giving the instruction.

## III. THE COURT OF APPEALS FOR THE SECOND DISTRICT CORRECTLY RULED C&S AND PERRY WERE ENTITLED TO A DIRECTED VERDICT ON NEGLIGENCE

In his Initial Brief, McDougald raises four circumstances which supposedly raise sufficient evidence "by inference or otherwise" of C&S and Perry's negligence: 1. the attachment of the chain; 2. the age of the chain; 3. the operation of the vehicle; and 4. the pre-trip inspection.

### 1. THE ATTACHMENT OF THE CHAIN

McDougald states that a nut and bolt which purportedly held the chain in place had slipped through a stretched link in the chain; and that a latch and lock which originally held the chain in place had been replaced with the nut and bolt some time before the accident. (Initial brief, p. 23) As previously noted, Perry never testified a lock had ever been used. Moreover, there was no evidence that C&S and Perry as opposed to Ryder, the owner, instituted the nut and bolt change. Therefore, at most, C&S and Perry could only be responsible for allowing the condition to continue.

Is it negligent to attach such a chain with a bolt, two washers and a nut screwed onto the end of the bolt? Who knows? Certainly not six jurors with no relevant experience. This question could possibly be answered by the original manufacturer of

the trailer and chain, by various state and federal regulations governing tractor-trailer equipment, or by persons with specialized knowledge or experience in the trucking industry, such as McDougald or Perry. McDougald did not even attempt to admit any such evidence. Ironically, the only evidence on the merit of the nut and bolt replacement came from Perry, who testified this method "would be better" than a latch (T 257); and Beverly, who indicated the method of attachment did not violate D.O.T regulations. (T 367-368)

**2. THE AGE OF THE CHAIN**

McDougald states that "the 'dog-type' chain at issue was the original chain that came with the trailer over twenty years ago." (Initial brief, p. 23) The implied argument is that C&S and Perry (not even the owners of the trailer) should have installed a new chain at some point prior to the accident. There are a myriad of state and federal regulations pertaining to proper tractor-trailer equipment. The only mention of these was Beverly's testimony that the set-up complied with all D.O.T. regulations. Inspectors from D.O.T. or other experts in the field of trucking safety could have described the requirements and standards for inspecting and if necessary, replacing worn out equipment. None did!

McDougald testified in evidence and on proffer that he saw the chain after the accident. (T 174, 513) However, he did not indicate that the chain was worn, rusted or inadequate for its assigned task. This chain did not even support the weight of the tire, but was simply a back-up for a tire carried in an angled cage under the trailer. Would evidence of a five or fifteen year old chain also be sufficient for a jury to infer negligence? Surely not, especially when its function is not within the common experience of a jury.

**3. THE OPERATION OF THE VEHICLE**

McDougald references that "Mr. Perry described the railroad tracks that he crossed on the day of the accident as 'real rough,' so much so that Mr. Perry had to reduce the speed of his truck and trailer when crossing or else 'hit the ceiling.'" (Initial brief, p. 23)

McDougald seems to suggest excessive speed. Yet, Perry was traveling at 35 to 40 mph in a 55 mph zone. An independent witness, Leslie Waters, testified that he noticed no improper driving by Perry. Perry had crossed those tracks hundreds of times the year before the accident. (T 275) Furthermore, McDougald who had been following Perry's vehicle did not testify that the speed was unreasonable or unsafe for the road conditions. The lack of such testimony is especially enlightening considering McDougald owns and runs a trucking company. It is not within a jury's common understanding to infer that driving a tractor-trailer over railroad tracks at 15 to 20 miles under the speed limit was negligent. If any of the multitude of experts on trucking safety held the opinion that this was an unsafe speed, they did not testify at trial. Moreover, McDougald did not request, and the jury was not instructed, on any state or federal traffic laws or regulations which would govern the speed at which Perry should have been driving. (T 662-664) No evidence or law existed upon which to find Perry's speed was negligent. This is evident from McDougald's failure to reference this point during closing argument. (T 575-578)

**4. THE PRE-TRIP INSPECTION**

McDougald alleges that "the 'pre-trip inspection' did not include an actual physical inspection of the aged spare tire chain." (Initial brief, pp. 22-23) Perry testified that earlier in

the day of the accident he checked the truck to ensure safety, checked the tires, lights, oils, waters, and the chain. (T 254) Once again, there is no testimony whatsoever, expert or otherwise, that Perry's inspection was deficient.

McDougald did not submit any evidence from which a jury could reasonably find or infer that the loss of the spare tire from its rack resulted from C&S and Perry's negligence. Florida Law is clear that "negligence ... may not be inferred from the mere happening of an accident alone." Cooper Hotel Services, Inc., v. MacFarland, 662 So.2d 710, 712 (Fla. 2d DCA 1995). Therefore, because the tire came out of its rack, partly as a result of the failure of the safety chain, cannot in and of itself be adequate evidence of negligence.

The law presumes that C&S and Perry fulfilled their duty of care, so that their actions cannot lead to an inference of negligence. Atlantic Coast Line R.Co., v. Johnson, 40 So.2d 892, 895 (Fla. 1949)("there is a time honored universal rule of law -indeed it is as old as the law itself- that a person upon whom a duty has been placed is presumed to have performed it unless the contrary be made to appear.") It is thereby presumed that Perry's speed was safe and the chain attached by a bolt, nut, and washer was proper equipment. McDougald submitted no evidence or law to the contrary. To hold otherwise would establish a standard of strict liability for any person whose vehicle lost a part on the roadway. This is not and should not be the law of Florida.

## IV. THE COURT OF APPEALS FOR THE SECOND DISTRICT CORRECTLY RULED THERE WAS INSUFFICIENT EVIDENCE OF FUTURE OR PAST LOSS OF EARNING CAPACITY TO RAISE A JURY QUESTION

### FUTURE LOSS OF EARNING CAPACITY

In his Initial Brief, McDougal contends he presented

"sufficient competent evidence" of future loss of earning capacity. At trial, McDougal merely estimated that based on his experience, he could have made $20,000 to $25,000 a year of anticipated profits in a hunting guide business he planned to start upon retirement in 1996. (T 213) This is it.[2] Certainly, this evidence does not allow the jury to reasonably calculate lost earning capacity. As a result, the Second District correctly ordered the lower court to enter a directed verdict for Perry and C&S on future damages.

The Second District properly concluded McDougald did not provide the jury with a "yardstick" to measure damages for two reasons. McDougald failed to prove his damages to a reasonable certainty; and he did not introduce testimony on the employment market of an individual with his credentials.

**McDOUGALD DID NOT ESTABLISH "REASONABLE CERTAINTY"**

Damages for loss of any future earning capacity compensate a plaintiff for the loss of capacity to earn income. W.R. Grace & Company-Conn. v. Pyke, 661 So.2d 1301, 1302 (Fla. 3d DCA 1995). The measure of damages is the loss of capacity to earn by virtue of any impairment found by the jury which must base its decision on all relevant factors including the plaintiff's age, health, habits, occupation, surroundings, and earnings before and after the injury. Id.

At trial, McDougal conceded the only basis for the loss of

[2]McDougald had retained two experts, Lee Wall ( R 60, 237) and Dr. James Watson ( R 62, 237) on the issue of loss of earning capacity. (R 56-61) McDougald chose not to call either at trial. (T 207, 464)

future earning capacity was prospective lost profits from a hunting guide business.[3] (T 518) He had planned to operate this venture as a business upon turning 50, in 1996. (T 198) McDougald never made a profit from the business. (T 201) Thus, this business was not established and lacked a "track record."

Evidence of the loss of prospective profits of a business is one measure of the earning ability of a plaintiff. 22 Am. Jur. 2D Damages § 634 (1988). See, also, Jonathan Purver, Annotation, Profits of Business as Factor in Determining Loss of Earnings or Earning Capacity in Action for Personal Injury or Death, 45 A.L.R 3d 345, 353 (1972). A business can recover lost prospective profits regardless of whether it is established or has any "track record" as long as there is a standard by which the amount of damages may be adequately determined. W.W. Gay Mech. Contr. v. Wharfside Two, 545 So.2d 1348, 1351 (Fla. 1989)(citing Twyman v. Roell, 166 So. 215, 218 (Fla. 1936); F.A. Conner v. Atlas Aircraft Corp.,310 So.2d 352, 354 (Fla. 3d DCA 1975)(amount of damages has to be established with reasonable certainty)). Similarly, in a personal injury action, plaintiff may recover his business' lost profits if they are proven to a reasonable certainty, see, 17 Fla.

---

[3]At trial, McDougal's counsel clearly specified that future loss of earning capacity was to be measured in terms of anticipated lost profits:

| | |
|---|---|
| The Court: | "Future loss of earning capacity." |
| Mr. Fraley: | "Measured by the profits that he would have received from his guide and hunting business." |
| The Court: | "Is that correct?" |
| Mr. Campbell: | "Yes." |

(T 518)

Jur. 2d Damages §76 (1980); 25 C.J.S. Damages §42 (1966); 22 Am. Jur. 2D at § 634, and arise solely out of the personal endeavors of the injured plaintiff. Mullis v. City of Miami, 60 So.2d 174 (Fla. 1952); 22 Am. Jur. 2D at §634.

The requisite degree of certainty must satisfy the mind of a prudent and impartial person. Resolution Trust Corp., v. Stroock & Stroock & Lavan,853 F.Supp. 1422, 1426 (S.D. Fla. 1994). The reasonable certainty threshold leaves no room for guesswork: "In Florida, unless the fact-finder is presented with evidence which will enable it to determine damages for lost profits with a reasonable degree of certainty, rather than by means of speculation and conjecture, the claimant may not recover such damages." Himes v. Brown & Company Securities Corp., 518 So.2d 937, 938 (Fla. 3d DCA 1987). Generally, courts find that businesses which were merely contemplated fail to establish loss profits with the requisite certainty. Todd Smyth, Annotation, Recovery of Anticipated Lost Profits of New Business, 55 A.L.R. 4th 507, 518 (1987); 25 C.J.S. at §42.

Thus, a plaintiff must overcome a stringent standard to establish lost profits. For instance, in Mullis v. City of Miami, 60 So.2d 174 (Fla. 1952), a woman attempted to use lost profits as a measure of her loss of future earning capacity. She argued that due to injuries from a fall she could not make as much money from a new business in Miami taking in roomers. She had previously earned money doing this in Jacksonville. This Court rejected the two types of evidence she introduced in the lower court. First,

profits derived from taking in roomers in a different locality were not proper data. Second, the plaintiff had not proffered testimony showing that the profits were solely the results of her labor. Id at 177.

Mullis adopts two widely utilized criteria courts consider in determining sufficient proof of lost profits: the first is proof of profitability of a similar business in a similar locality. See, e.g., 55 A.L.R. 4th at 521. The second question is whether the profits arise out of the personal endeavors of the plaintiff or rest upon the labor and capital of others. If the latter, the evidence is inadmissible. 22 Am. Jur. 2d at §634.

In Florida Outdoor, Inc., v. Stewart, 318 So.2d 414 (Fla. 2d DCA 1975), appellees owned a dilapidated billboard which appellants tore down. At a trial on damages for destruction of the billboard, the court awarded appellees five years of future profits based on expected rentals of the sign. The Second District reversed the award due to insufficient evidence. The appellate court noted that there was no evidence of the billboard's life expectancy, and no evidence concerning demand for renting the sign.

Both Mullis and Florida Outdoor establish that the plaintiff must introduce evidence of profitability of a similar business in the same locality, demand of services, life expectancy of the business and whether profits derive solely from plaintiff's efforts. Nevertheless, this list is not exhaustive since courts consider numerous other factors such as: 1. evidence of general economic conditions, 55 A.L.R. 4th at 561; 2. existence of

contracts or orders on product or services, Id. at 521; 3. advantageous location of business, Id. at 559; 4. investment of time and money, Id. at 558; 5. existence and quality of market for product or services, Id. at 566; 6. riskiness of business, Id; and 7. contingencies which could make the future of the business doubtful. Beverage Canners, Inc., v. Cott Corp., 372 So.2d 954, 956 (Fla. 1979).

When McDougald's evidence of lost profits is measured against this backdrop, it is immediately clear he did not meet his burden of "reasonable certainty." The only evidence on the amount of lost profits came from McDougald, who estimated he could have made between $20,000.00 and $25,000.00 a year.[4] (T 213) According to McDougald, he had an "understanding" with the owners of some hunting land (outfitters) that he would get 10% to 12% of what clients paid for hunting trips. (T 201) He stated the trips cost between $2,500.00 and $3,000.00. (T 201) However, no outfitter ever paid McDougald anything. (T 206) McDougald's testimony is the extent of the evidence on lost profits. This patently inadequate evidence simply cannot support an award of $45,000.[5]

---

[4]C&S and Perry objected that this evidence was speculative, was an improper opinion, lacked a proper predicate and was not based on competent evidence. (T 204, 207, 211). If this Court decides such evidence was sufficient to support an award but should not have been admitted, C&S and Perry request a new trial on this issue. (T 212)

[5] There does not appear to be a Florida case where the only evidence of prospective lost profits is plaintiff's opinion. However, in Popkowsi v. Gramza, 671 S.W. 2d 915 (Tex. Ct. App. 1984), plaintiff's opinion, without more, was inadequate. In Popkowsi, plaintiff testified he had lost approximately $7,000 in profits due to injuries arising from an accident. He stated he lost these profits upon turning down contracting jobs on three homes. The court rejected this testimony as insufficient.

McDougald failed to introduce an iota of evidence that the profits would result solely of his labors, that his services were in demand or that contracts were in existence. McDougald also neglected to introduce proof of economic conditions, profitability of similar business in a similar locality, viable markets and life expectancy of his venture. As argued by defense counsel, McDougald should have proven at the very least client demand, availability of hunting land, cost of licensing and the role of weather conditions. (T 515)

**THERE WAS NO PROOF OF WORK AVAILABLE TO MCDOUGALD**

Even if this Court did not measure McDougald's claim for future loss of earning capacity in terms of loss of future profits, McDougald still failed to present the requisite "evidence which will allow a jury to reasonably calculate lost earning capacity." W.R. Grace, 661. So.2d at 1302. Specifically, Mc Dougald did not introduce evidence of available employment.

Damages for decreased earning capacity should be determined by deducting plaintiff's earning ability after the injury from his earning ability immediately prior to the injury. 22 Am. Jur. 2D at §168. As a result, it is the jury's role to determine the amount plaintiff could earn in other occupations. W.R. Grace, 661 So. 2d at 1303. Thus, plaintiff must produce evidence regarding the types of work or employment which may have been available to him but for his alleged injury. Id. Once again, McDougald failed to introduce any evidence whatsoever of work or employment which may have been available but for his injury. This void impedes the jury's job of

quantifying the loss of McDougald's earning capacity. Hatfield v. Wellsbros., Inc., 378 So.2d 33 (Fla. 2d DCA 1979). Like the failure to prove lost profits to a reasonable certainty, the failure to present evidence of forsaken employment entitled C&S and Perry to a directed verdict. See, e.g., W.R.Grace.

**PAST LOSS OF EARNING CAPACITY**

The Second District correctly ordered the lower court to enter a directed verdict on past loss of earning capacity due to lack of evidence. McDougald admitted that there was no claim for past lost wages or income. (T 463) McDougald testified that he did not even intend to operate his hunting referrals as a business until 1996. Accordingly, he also testified that he had never made any profit from the referrals. Therefore, he could not be claiming any loss from a referral business prior to it being a business i.e. prior to trial.

Although the Florida Standard Jury Instructions reference a claim for past loss of earning capacity, Perry and C&S could find no case law on point. Fla. Std. Jury Inst. 6.2(d). A claim of this nature is generally for a loss of income or wages. Perhaps if McDougald had no income prior to his injury a claim for money he could have made between the injury and trial would be considered "loss of earning capacity." However, before and after the accident McDougald made his living running his trucking business. There were absolutely no monetary figures or expenses associated with running the trucking company after the accident from which the jury could have based any award. As indicated by McDougald’s counsel,

this claim was based upon his hunting referral business. (T 454)

There was no evidence presented that between the accident and trial McDougald missed an opportunity to earn income from referring other hunters. McDougald testified that if he was able to line up enough other hunters, the outfitters would give him his hunts for free.[6] There was no indication this ever happened before the accident. McDougald testified that trips cost between $2,500.00 and $3,000.00 each and generally $5,000.00 to $6,000.00 per year. These trips undoubtedly included other expenses, such as plane fare and equipment which would not be included in the "free" hunts.

Nowhere does McDougald testify that after the accident he had to pay for one of his own hunts. To be entitled to any compensation for such loss McDougald would also have had to prove that his inability to line up hunters was related to his knee injury. To the contrary, even though McDougald testified he missed a couple of hunts because of his knee he was still able to send "a group out." (T 231)

The instant record establishes that McDougal did not meet his burden of proving past and future loss of earning capacity. Moreover, McDougald's Initial Brief does not even mention evidence supporting the past loss of earning capacity. In the end, McDougald is advocating the untenable proposition that all a plaintiff needs to prove loss of earning capacity is to suggest an

---

[6]C&S and Perry also objected to any evidence or claim regarding a loss of free hunting trips because it was a special damage not pled. (R. 1-3) Augustine v. Southern Bell Telephone and Telegraph Co., 91 So.2d 320 (Fla. 1956); Alderman v. Murphy, 486 So.2d 1334 (Fla. 4th DCA 1986).

estimate unsupported by evidence.

## V. THE COURT MADE A REVERSIBLE ERROR IN EXCLUDING EVIDENCE OF INDUSTRY CUSTOM

Even if it were not reversible error to instruct the jury regarding res ipsa loquitur, a new trial is required because the lower court committed harmful error in excluding evidence related to the issue of C&S and Perry's negligence. When a judge gives a res ipsa loquitur instruction, it is incumbent upon a defendant to overcome the inference of negligence by submitting his own evidence that he did not breach the standard of care. In attempting to do so in the instant matter, the judge did not permit Perry and C&S to introduce evidence of industry custom.

### EVIDENCE OF INDUSTRY CUSTOM WAS ADMISSIBLE

Perry testified that he had been driving tractor trailers since 1963 which has exposed him to safety chains and their method of attachment. Perry proffered testimony that prior to this accident he had seen **thousands** of other trucks using similar types of safety chains. These trucks used the same practice of affixing the chain with bolts and nuts. When this line of questioning initially began before the jury, McDougald objected on relevancy grounds. The court sustained the objection. (T 282) During side bar the reasons for excluding this evidence became convoluted.

At first the court indicated that in order to answer questions pertaining to industry custom the witness would have to be qualified as an expert. (T 283) Upon defense counsel's indication that he would do so if necessary, McDougald challenged that making Perry an expert would open the door to a subsequent remedial measure. The court agreed. Based upon the court's refusal to allow

lay testimony of industry custom and the threat of introducing a subsequent remedial measure, Perry and C&S had no choice but to avoid this line of questioning.

Prior to opening arguments (T 3) and during discussion related to industry custom (T 282), it became apparent that C&S replaced the existing chain with a larger (log) chain after this accident. Upon C&S and Perry's Motion in Limine, the court indicated that such evidence was not admissible or at least that McDougald would first be required to proffer such evidence outside the presence of the jury. (T 3)

The court clearly erred when it disallowed evidence of industry custom as irrelevant at trial. As early as Holgate v. Jones, 113 So. 716 (Fla. 1927), this Court held industry custom was relevant and admissible on the issue of negligence.

> It would seem to us that the proper rule in such a matter would be, in cases where the method used was not clearly and inherently negligent or dangerous, to admit evidence of the general custom of others engaged in the same kind of business or occupation, as to the particular method under investigation, for the consideration of the jury for whatever light it might throw upon the question as to whether or not the method used was or was not negligent under the circumstances of the particular case, but not to any extent whatever as conclusive of the question.

Id. at 718. In Holgate, this Court upheld the lower court's exclusion as to whether the procedure for moving railroad cars was "customary" because the offering party had not clarified whether it was a general custom of railroads or simply a custom of that defendant. This Court noted: "if the question had been asked as to

the general custom of railroads in that particular, it would have been permissible and proper." Id. at 718. In the instant matter, Perry was asked about the custom of others in his industry regarding a particular practice. Under Holgate such evidence was clearly relevant. Exclusion of industry standards was very harmful because the res ipsa loquitur doctrine forces defendants to produce evidence that they were not negligent. See, also, Nesbitt v. Community Health of South Dade, 467 So.2d 711 (Fla. 3d DCA 1985).

The lower court also erred to the extent it precluded this evidence because it was offered through lay testimony. In Holgate, there is no indication that such evidence can only be offered through expert testimony. In fact, expert testimony must usually meet a higher burden then lay testimony. See, Buchman v. Seaboard Coast Line R.Co., 381 So.2d 229 (Fla. 1980). Perry was not offering an opinion but simply attesting to facts seen with his own eyes.

In Ploetz v. Big Discount Panel Center, Inc., 402 So.2d 64 (Fla. 4th DCA 1981), lay testimony was properly admitted on industry custom. In Ploetz, the plaintiff was injured when paneling, temporarily stacked in a customer area, fell on her. The defendant called a witness in the same business as defendant who testified that the defendant's practice of stacking the paneling was not unlike the custom of "other stores." The appellate court upheld the lower court's admission of this evidence. Nowhere is it suggested that the witness was, or needed to be, an expert. The witness simply testified as to his "observation of other stores."

Similarly, in the instant matter, Perry would have testified as to his observation of the spare tire and safety chain practices of others in the business prior to the accident.

To admit evidence of a subsequent remedial measure because a party uses expert testimony on industry custom would also be error. §90.407, Fla. Stat. Perry and C&S did not waive this error by not qualifying Perry as an expert. McDougald offered no reason the privilege would be lost if Perry was qualified as an expert. The reasoning from the court was:

> "... and he's going to testify to it being the standard in the industry, he (McDougald) gets to ask him well, did the standard change on the date of the accident?"

(T 284) This statement does not seem to relate to any of the recognized exceptions to the privilege. Carnival Cruise Lines v. Rosania, 546 So.2d 736 (Fla. 3d DCA 1989). It also does not suggest a proper line of impeachment or inquiry into an "expert's" qualifications or the reasons for his "opinion." Even if there were some probative value to asking Perry, as an expert on industry custom, about the post-accident change, surely it would be outweighed by the unfair prejudicial effect. See, §90.403, Fla. Stat.

Without evidence of industry custom, the instant jury had almost no basis upon which to determine whether Perry and C&S breached their standard of care. McDougald offered no evidence to guide the jury regarding negligence. The only law upon which the jury was instructed, other than the standard negligence instruction, was the doctrine of res ipsa loquitur. Given this situation it clearly would have been important for the jury to know that many others in the industry employed the same methods as Perry

and C&S, especially since they only maintained the trailer. After placing the burden on Perry and C&S to prove they were not negligent, it was unfairly prejudicial to disallow their evidence on this issue. The court's exclusion of this evidence requires a new trial on negligence.

## VI. THE COURT MADE REVERSIBLE ERRORS DURING THE PHYSICIANS' TESTIMONY

Perry and C&S are entitled to a new trial, on liability and damages, because of prejudicial errors occurring during the testimony of Dr. Gale and Dr. Carr. As to these errors it is important to note that neither the verdict form nor the jury instructions direct the jury to determine whether any party's negligence caused the accident but instead whether a party's activities were a "cause of damage" to McDougald. (R 319-321, T 661-664) McDougald took no exception to this language. Therefore, if there is an error regarding the medical evidence on causation it would affect the jury's determination as to the "cause" of McDougald's damages.

Over defense objection, McDougald was allowed to admit into evidence portions of Dr. Gale's deposition testimony during McDougald's re-direct of Dr. Gale.[7] This error was magnified by the court's refusal to allow Perry and C&S to re-cross Dr. Gale on the applicable subject matter. Perry and C&S were also unfairly prejudiced when the court allowed McDougald to "impeach" his own witness, Dr. Carr.

It is apparent from the Statement of the Facts, that the cause of McDougald's injuries, especially the loss of his ACL, was

[7] This issue was first discussed during C&S and Perry's cross-examination of Dr. Gale. (T 101-105) McDougald first argued that since the portions used to impeach Dr. Gale were "in evidence" he was entitled to read into evidence other parts of the deposition. McDougald also claimed that he was entitled to introduce a "prior inconsistent statement." (T 135-141).

uncertain and hotly contested. The substance of Dr. Gale's testimony was that a partial tear of the ACL might have occurred during the accident which eventually lead to a complete tear as a result of continuing stresses and trauma to the knee. Dr. Gale also testified that this opinion had not changed from what he said in his deposition. (T 99)

On this point, Dr. Gale was effectively impeached by C&S and Perry's use of his prior deposition. In the deposition the doctor admitted that after reviewing Dr. Indelicato's records and the radiologist's report, provided during the deposition, he was "100% certain" that any ACL injury from the accident would have been picked up either on the (first) MRI or by Dr. Indelicato. Perry and C&S also brought out that since Dr. Gale's deposition he had met with McDougald's counsel two or three times to discuss this opinion.

Prior to reading the relevant deposition excerpts McDougald first subtly suggested to the jury that Perry and C&S may not have accurately read from the deposition during impeachment:

> "Dr. Gale, a couple of things. First you were asked about your testimony back at your deposition in October, <u>you weren't actually shown it</u> but if I might approach that he can <u>accurately</u> tell that I am reading this correctly."

(T 143) This was clearly inappropriate since the doctor indicated during C&s and Perry's cross-examination that he had the deposition in front of him and agreed to making the prior statements. (T 109) McDougald then read portions of the doctor's deposition, the first from page 15, the second beginning at page 19. It is crucial to realize that at this point in the deposition Dr. Gale had not yet been provided with the MRI or other medical reports which clearly affected his opinion. It is not until later, at page 22 of the

deposition, that Dr. Gale reviewed this additional material. (T 108) At trial, after reading these two portions of the deposition McDougald then confirmed with Dr. Gale that this testimony had not changed from the time of his deposition until trial. (T 144-145)

First, the deposition portions which C&S and Perry used to impeach Dr. Gale were not admitted into evidence. Section 90.614 of the Florida Evidence Code, provides that extrinsic evidence of a prior statement can be admitted "if a witness denies making or does not distinctively admit making the prior inconsistent statement." In the instant matter, Dr. Gale admitted to making the prior inconsistent statement. (T 109) Therefore, Perry and C&S did not, and did not need to, admit that part of the deposition into evidence. See, Ivery v. State, 548 So.2d 887 (Fla. 2d DCA 1898); Wingate v. New Deal Cap. Co., 217 So.2d 612 (Fla. 1st DCA 1969).

As allowed under §90.608, Fla. Stat., Perry and C&S used this prior inconsistent testimony simply to "attack the creditability" of Dr. Gale. C&S and Perry's purpose was to show Dr. Gale's opinion had changed and more importantly that it had changed after his two or three meetings with McDougald's counsel. Similarly, although Fla.R.Civ.P. 1.330(1) clearly allows the defendant to use the deposition to "contradict or impeach" Dr. Gale, since these matters were not admitted into evidence, subsection (4) does not provide McDougald with the vehicle to admit deposition portions of its choice.

Brown v. State, 13 So.2d 3 (Fla. 1943), establishes the requirements necessary to use prior statements to rehabilitate an unfairly impeached witness.

> When a witness is sought to be impeached by the introduction of a fragmentary portion of a sworn statement made by him at a former

> hearing, the other party may then introduce the whole statement, so far as it is concerned with, or explanatory of, the part previously introduced, and tends to give a clearer picture of what the witness actually said on the prior occasion than does the fragmentary portion.

Id. at 3. See, also, American Motors Corp. v. Ellis, 403 So.2d 459 (Fla. 5th DCA 1981). First of all, in order to introduce a whole statement, it must give "a clearer picture" of what the witness actually said. The Brown court cautioned:

> "Of course, this is not to say that the whole testimony is admissible if it is not relevant or material to the precise matter on which the witness had been interrogated, or if its only purpose is to collaborate or bolster, the testimony presently given by a witness..."

Brown, 13 So.2d at 3.

In Brown, the witness had been impeached with fragmentary portions of prior testimony. At trial he admitted giving certain testimony but flatly denied making the other statements. The impeaching party introduced these portions of his testimony into evidence. This Court held that the trial court, pursuant to the opposing party's request, properly admitted the witness' entire prior testimony.

First, C&S and Perry did not read fragmentary portions of Dr. Gale's testimony and Dr. Gale admitted giving it. More importantly, the intent under Brown is to allow a party to cure confusion created by its opponent. In the instant matter, the court's ruling had the opposite effect. McDougald was allowed to mislead the jury that Dr. Gale's opinion was not affected by his review of the additional information at his deposition, clearly it was.

Furthermore, the portions which McDougald read were not on the

"precise matter" which Perry and C&S brought out. The portions McDougald read related only to whether "a doctor," not a specialist like Dr. Indelicato, would pick up a partially torn ACL on clinical examination. Conversely, C&S and Perry's impeachment involved the effect on Dr. Gale's opinion of reviewing several months of Dr. Indelicato's examinations in conjunction with a negative MRI report. This is important since Dr. Gale himself recognized Dr. Indelicato as one of the most experienced knee doctors in the southeastern United States. (T 112-113) In fact, Dr. Gale went to Dr. Indelicato for his own knee surgery. (T 112) Dr. Gale's prior deposition testimony that "a doctor" might miss a partially torn ACL does not equate with or clarify Dr. Gale's deposition testimony that Dr. Indelicato and the radiologist would not have missed such an injury.

The unfairly prejudicial effect of allowing McDougald to read this prior testimony into evidence, and then confirm that Dr. Gale's opinions had not changed, might have been reduced if C& S and Perry had been allowed to re-cross Dr. Gale on this point. In denying defense counsel's request to do this the court ruled: "I am only going to let you do what's new." (T 151) Apparently, the court felt that McDougald's reading of the prior deposition sections was not "new" and therefore prohibited any re-cross of the subject. (T 151-152)

McDougald stipulated to C&S and Perry's proffer, and the deponent's responses, as to this alleged error. (T 154) Therefore, based upon McDougald's stipulation, if the court's refusal to allow cross-examination of Dr. Gale was error such error would be deemed to be unfairly prejudicial entitling C&S and Perry to a new trial. Clearly, the jury was left with the impression that defense counsel

may have misread Dr. Gale's deposition testimony and that Dr. Gale's opinions at trial were the same as those given at his deposition. Since this error impacted the most important causation issue at trial it entitles C&S and Perry to a new trial.

With regard to Dr. Carr, McDougald was improperly allowed to impeach her with her deposition testimony. Although §90.608, Fla. Stat., was amended in 1990 to allow a party to impeach his own witness, this provision requires that this be done to "attack the creditability of a witness." §90.608, Fla. Stat. Clearly, McDougald was not attacking the creditability of Dr. Carr, a witness who McDougald called to establish he had been permanently injured in the subject automobile accident. In Brumbley v. State, 453 So.2d 381 (Fla. 1984), this Court stated:

> We conclude that what these authorities say is that a witness may not be impeached by prior inconsistent statements merely because the witness failed to provide the testimony the party calling him desired or expected. However, if the witness becomes adverse by providing testimony that is actually harmful to the interests of the party calling him, then impeachment by prior inconsistent statements is permissible.

Id. at 384.

The reasoning under this is clear, that if a witness becomes adverse his creditability can be attacked. In Brumbley, a witness for the state, whom the state had expected to testify that the criminal defendant shot the victim, testified that he himself shot the victim. This Court ruled that it was not improper to impeach this witness with his prior statements that the defendant shot the victim. This Court stated:

> "While impeachment by prior statements is not proper when a witness merely fails to give the expected testimony, it is proper when the witness becomes adverse."

Brumbley, 453 So.2d at 385.

In the instant matter McDougald never argues to the court nor are there any facts to suggest that Dr. Carr became adverse to McDougald. McDougald's testimony makes it plain that Dr. Carr simply did not give the testimony he expected. (T 313-315) Allowing McDougald to read more than a page of testimony on the most significant issue in the case, the cause of the ACL tear, (T 315-317) was error. The real question is whether such error was sufficiently prejudicial to warrant a new trial. C&S and Perry believe so, especially in conjunction with the error involving the deposition testimony of Dr. Gale.

The main injury in the case, a loss of McDougald's ACL, undoubtedly did not occur at the time of the accident. McDougald's only opportunity to blame such loss on the accident arises from the opinions of Dr. Carr and Dr. Gale. However, even their opinions with regard to the possibility of undetected damage to the ACL in the accident were contradictory. Dr. Carr was certain that there had been no damage but that the ACL may have torn because of other injuries to the knee in the accident. Although Dr. Gale's ultimate opinion was that the accident caused the ACL loss this was based only on the possibility that there had been damage to the ACL in the accident which Dr. Indelicato and the first MRI's radiologist did not notice.

Clearly, reading a portion of Dr. Carr's deposition in which she indicates that the accident was the "most likely cause" of the ACL loss (which was no longer her opinion at trial) would have a substantial impact on the jury.

## VII. THE COURT MADE A REVERSIBLE ERROR IN DISALLOWING CLOSING ARGUMENT ON McDOUGALD'S COMPARATIVE NEGLIGENCE

C&S and Perry are entitled to a new trial on damages because the lower court committed reversible error when it prohibited them from arguing during closing that McDougald was comparatively negligent for his own injury. Perry and C&S were not contending that McDougald was negligent in operating his motor vehicle, but that after the accident he contributed to his own injury and damages through his negligent conduct. The issue before the jury was not only liability or negligence relating to the accident, but also related to his damages.

Furthermore, as discussed in the preceding section, McDougald's main injury, the complete tear of his ACL, did not occur during the accident. It is at least arguable the ACL tore in May of 1991 when he stepped into a hole in his backyard. Dr. Carr testified that just prior to that incident she felt his only problem was a weakness in the muscles stabilizing his knee. Not coincidentally, Dr. Indelicato testified McDougald was not following the physical therapy intended to strengthen those muscles. Doctors Carr and Gale testified McDougald postponed arthroscopic procedures to go on hunting trips. In Dr. Carr's opinion the loss of the ACL may have been caused by other injuries to his knee. C&S and Perry were entitled to argue that McDougald's failure to exercise or undergo physical therapy; failure to undergo arthroscopic procedures when recommended by his doctor; eventual failure to wear a knee brace to protect himself from the stresses and trauma of hunting before his knee condition improved or his muscles strengthened; and failure to avoid stepping in holes in his

backyard, could have contributed to his damages and injuries.

Furthermore, all the doctors testified that after the loss of his ACL, McDougald's knee condition continued to deteriorate. This continued deterioration may require a total knee replacement in the future. Even after the torn ACL was diagnosed McDougal continued to engage in activities which would produce abnormal and significant stress on his knee. McDougald admitted that he had not always performed his exercises or worn his brace. C&S and Perry should have been allowed to argue to the jury that such activities by a person with a very unstable knee could be considered negligent as well as a cause of his claims for loss of earning capacity, pain and suffering, and future medical care.

In Slawson v. Fast Food Enterprises, 671 So.2d 255 (Fla. 4th DCA 1996), the court dealt with whether §768.81(4), Fla. Stat., allows a defendant to reduce its liability because of another person's intentional acts. The court found that it was error for the lower court to allow this as well as error to prohibit plaintiff from arguing to the jury the effects of the law on their verdict. The court found that this was an independent reason for reversing the trial because "a lawyer is usually entitled to argue the applicable law to the jury." Id. at 260. Similarly, in the instant matter C&S and Perry should have been entitled to argue to the jury that McDougald's actions, which were well within a jury's common understanding, were negligent and a legal cause of McDougald's injuries. This error, in and of itself, should entitle C&S and Perry to a new trial on liability and damages.

## CONCLUSION

Wherefore, C&S and Perry respectfully request this Honorable Court deny conflict jurisdiction. Alternatively, C&S and Perry

request this Court affirm the decision of the Court of Appeals for the Second District. If this relief is not granted, C&S and Perry request a new trial on the issue of negligence because the lower court excluded relevant evidence on industry custom. On the issue of loss of past and future earning capacity, C&S and Perry request a new trial because special damages were not properly pled and the court improperly allowed evidence of expected future profits. Finally, the court's errors during the testimony of McDougald's medical experts and exclusion of C&S and Perry's closing argument that McDougald was comparatively negligent entitle them to a new trial on damages.