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IN THE SUPREME COURT
STATE OF FLORIDA

LAWRENCE D. MCDOUGALD,

Petitioner,

v.

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

Respondents.

CASE NO.: 91, 595

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PETITIONER'S AMENDED BRIEF ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW OF THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

Petitioner/Appellee/Plaintiff below, LAWRENCE D. MCDOUGALD (hereinafter "MCDOUGALD"), seeks to obtain this Court's discretionary review of a July 30, 1997, opinion of the Second District Court of Appeal. A.1.[1] That opinion reversed a $250,000.00 jury verdict in favor of MCDOUGALD, in part due to the Trial Court's instruction to the jury on the issue of *res ipsa loquitur*. In addition, the Second District remanded the case with directions that the Trial Court direct a verdict on the issue of negligence in favor of Respondents/Appellants/Defendants below, HENRY D. PERRY (hereinafter "PERRY") and C & S CHEMICALS, INC. (hereinafter "C&S").

At the time of the accident, PERRY was operating a C&S tractor-trailer on a four-lane highway west of Bartow, Polk County, Florida. MCDOUGALD was following the tractor-trailer in his personal vehicle. When PERRY drove over a familiar set of rough railroad tracks, the trailer's spare tire was ejected from its rack underneath the trailer, run over by the trailer, and tossed into the air and then into MCDOUGALD's vehicle. The spare tire weighed approximately 130 pounds and was cradled in a rack at approximately a 45° angle with a safety chain purportedly securing the tire to the rack. As MCDOUGALD attempted to avoid the impact, he lost control of his vehicle, his foot caught under the accelerator, brake or dash, and his knee was injured. MCDOUGALD'S treating physicians testified that as a result of the accident, MCDOUGALD'S knee was damaged such as to require three arthroscopic procedures prior to trial and multiple future knee replacements.

Prior to trial, C&S conceded its responsibility for maintenance of the subject tractor-trailer. The trailer was a 1969 model, and the four to six foot safety chain looked to be the original twenty-plus year old dog chain with one-inch links that came with the trailer when it was first purchased,

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[1] **All references to the Appendix will be indicated by the symbol "A." followed by the appropriate number from the Appendix.**

according to PERRY. PERRY testified that the chain was originally secured to the rack by a latch, however, at the time of the accident, the latch "was gone," and the chain had been re-secured prior to the accident with a one-half inch nut and bolt.

PERRY testified at trial that he inspected the tractor-trailer on the morning of the accident. However, while he looked at the spare tire and the safety chain that was supposed to secure it, he did not inspect the chain close enough to determine whether the stretched condition of the attached chain link existed prior to his inspection. After the accident, PERRY examined the chain, one end of which was still connected to the trailer, and discovered that the nut or bolt head had slipped through a stretched link of one end of the safety chain. Some time prior to the accident, one of the two links of the chain secured by the nut and bolt had stretched, and the nut or bolt head chosen to replace the latch was too small, thus allowing the chain to work its way loose without having to actually break. Thus, while PERRY was certain that the chain was on the tire when he inspected it, he was not sure whether the link through which the bolt head or nut slipped was stretched prior to his inspection.

The corporate representative for C&S, Roy Beverly, testified that there is no stress placed on the safety chain such as to cause it to stretch or break during normal driving and that he had never heard of a spare tire coming out of its rack, safety chain or not. He further testified that the accident scenario in this case was unbelievable given that the spare tire is actually held in the rack by gravity and the approximately 45° angle of the rack, such that it is difficult to even pull the tire out of its rack. Unfortunately, further inspection of the safety chain was not possible after suit was filed given the fact that neither PERRY nor C&S produced it during discovery despite MCDOUGALD'S formal Request to Produce. In fact, one of the more blatant misstatements of the Record and the facts of this case in the opinion below occurred in Footnote 1, where, in an apparent attempt at distinguishing the clearly conflicting decision of the Fifth District Court of Appeal in *Cheung v. Ryder Truck*

Rental, 595 So.2d 82 (Fla. 5th DCA 1992), the Second District stated in complete disregard of the Record and the facts that "(t)he original chain was not kept because no one realized that McDougald was injured in the accident... Perry and C&S learned of McDougald's injury when McDougald filed his complaint, four years after the accident." The record fails to bear out Footnote 1 no matter what light it is viewed in, and the actual facts belie such an assertion. In actuality, C&S and its representatives were aware of Plaintiff's initial claim of some injury within a week of the accident, and Roy Beverly testified at trial when asked, "(w)here is that chain today?" that "(i)t's probably on the trailer today." The failure to produce the chain, among substantial other repair and maintenance records, was, according to the testimony at trial, apparently too bothersome and Respondents' Response to the Request was to deny their existence or availability.

SUMMARY OF ARGUMENT

The Second District's reversal of the judgment below because of the purported erroneous instruction of the jury on the doctrine of *res ipsa loquitur* directly and expressly conflicts with the decisions of this Court in *Tamiami Trail Tours, Inc., v. Locke*, 75 So.2d 856 (Fla. 1954), and *Yarbrough v. Ball U-Drive System, Inc.*, 48 So.2d 82 (Fla. 1950), as well as the decision of the Fifth District Court of Appeal in *Cheung v. Ryder Truck Rental*, 595 so.2d 82 (Fla. 5th DCA 1992). In particular, the facts in *Cheung* are strikingly similar to this case, thus making both the conflict and the necessity of this Court's exercise of its discretion in order to reconcile that conflict more apparent.

The Second District's remand for the entry of directed verdicts as to Respondents' negligence likewise has created conflict given the substantial evidence of negligence adduced at trial and the principle that there must be neither any evidence nor inference of negligence, when viewed in a light most favorable to a non-movant, before the grant of a directed verdict is appropriate.

ARGUMENT

I. THE SECOND DISTRICT'S HOLDING THAT IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO INSTRUCT THE JURY ON THE DOCTRINE OF RES IPSA LOQUITUR DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN *TAMIAMI TRAIL TOURS, INC., V. LOCKE*, 75 So.2d 856 (FLA. 1954), AND *YARBROUGH V. BALL U-DRIVE SYSTEM, INC.*, 48 So. 2d 82 (Fla. 1950), AS WELL AS THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN *CHEUNG V. RYDER TRUCK RENTAL*, 595 So. 2d 82 (Fla. 5th DCA 1992).

The Second District's opinion creates express and direct decisional conflict within the meaning of Article V, §III(b)(3), Florida Constitution, and Rule 9.030(a)(2)(A)(IV), Florida Rules of Appellate Procedure, as to two issues. The first conflicting holding was that it was reversible error for the Trial Court to instruct the jury on the doctrine of *res ipsa loquitur*. The decisions of this Court in *Tamiami Trail Tours, Inc., v. Locke,* 75 So.2d 856 (Fla. 1954), and *Yarbrough v. Ball U-Drive System, Inc.*, 48 So.2d 82 (Fla. 1950), as well as the decision of the Fifth District Court of Appeal in *Cheung v. Ryder Truck Rental*, 595 So. 2d 82 (Fla. 5th DCA 1992), are diametrically opposed, both as to the law and the facts, to the Second District's opinion.

In *Cheung* in particular, the facts are so strikingly similar to this case and the conflict is so apparent that the cases appear to be virtual mirror images of each other except for the results. Both are "wheel off" cases logically giving rise to the classic and appropriate use of the doctrine of *res ipsa loquitur*. In *Cheung*, the left rear wheel of a car being towed behind a rented Ryder Truck detached from its axle and struck a vehicle traveling in the opposite direction. The defendant driver and owner moved for summary judgment and the trial court granted their motions on all counts. One of the counts was for "unspecified negligence under the theory of *res ipsa loquitur*."

The Fifth District affirmed the trial court except as to the *res ipsa loquitur* count against the driver, specifically stating that "**we find that *res ipsa loquitur* is particularly applicable in**

wayward wheel cases." *Id.* at 83 (emphasis added). Sometime after the accident, the driver abandoned the car and it was thus unavailable to the parties for an exact determination of the reason for the wheel's detachment. The Fifth District stated that "*[r]es ipsa loquitur* seems particularly appropriate in a case in which the defendant has disposed of the relevant evidence...." *Id.* at 84, fn.2. The case at bar is strikingly similar to and patently in conflict with the *Cheung* case.

Footnote 1 of the opinion below appears to be an attempt at distinguishing *Cheung* from the instant case, although neither party nor the Court below cited *Cheung*. However, as pointed out in the Statement of the Case and Facts, the factual foundation for Footnote 1 not only fails to view the evidence in a light most favorable to MCDOUGALD as required, but actually ignores the Record and the facts by stating that "(t)he original chain was not kept because no one realized that McDougald was injured in the accident." In actuality, the testimony of C&S' corporate representative, Roy Beverly, was that the chain very well could have been still on the trailer as of the time of trial, despite Respondents' denial during discovery of its existence. Furthermore, the testimony at trial was that MCDOUGALD, within a week of the accident, told an investigator from C&S that he had some tenderness to the outside of his knee (the "no big thing" in Footnote 1 is also not, as implied, attributable to MCDOUGALD, but rather was a quote of Respondents' counsel). There is no evidence, contrary to Footnote 1, that "C&S learned of McDougald's injury when McDougald filed his complaint, four years after the accident...", and the facts belie such an assertion.

The court in *Cheung* cited with approval three out-of-state decisions. Neither case is distinguishable from the instant case except by result. In *Dearth v. Self*, 220 N.E.2d 728 (Oh. App. 1966), the court concluded that the doctrine of *res ipsa loquitur* was appropriate for a determination of "whether the circumstances were such as to justify a finding that the casting of a wheel from the tractor-trailer into the opposite lane of traffic was the result of defendants' negligence in the

maintenance and care of the tractor-trailer equipment." In *Guerra v. W. J. Young Construction Co., Inc.*, 165 So.2d 882 (La. App. 1964), the court held that wheel detachment cases were particularly appropriate for the application of the *res ipsa loquitur* doctrine and that defendants "were thus charged with the burden of exculpating themselves, of exonerating themselves from the inference of negligence arising from the happening itself." *Id.* at 885.

Likewise, the court in *Ross v. Tynes*, 14 So.2d 80 (La. App. 1943), held:

> In our opinion the facts of this case, which are not in dispute, present a classic example of the proper application of the doctrine of *res ipsa loquitur*. Plaintiff was killed while walking on the sidewalk by a double wheel which became detached from a passing truck. It follows that there is an inference, or presumption of negligence on the part of defendants. In other words, when an injury is caused by an instrumentality under the exclusive control of the defendant, as in this case, and it is such as would not ordinarily happen that the party having control of the instrumentality had used proper care, there arises an inference or presumption of negligence.

Id. at 81.

This Court has likewise recognized the appropriateness of an instruction on *res ipsa loquitur* in cases similar in nature to the instant case. Thus, in *Yarbrough, supra*, it was held, in reversing a directed verdict in favor of the defendant, that where a drive shaft became detached from a rented truck, a *res ipsa loquitur* instruction should be given. Similarly, this Court determined in *Tamiami Trail, supra*, that where a trailer became uncoupled from its tractor resulting in an accident, the *res ipsa* doctrine was applicable and the trial court's decision not to apply same was error. As stated by this Court, "(c)ertainly the plaintiff's driver in this case, just as in the *Yarbrough* case, had 'a right to believe that the vehicle (would) not fall apart in the middle of the road'."

As stated in Justice Holt's concurring opinion in *Tamiami Trail*:

> "(a) case of *res ipsa loquitur* is no exception to these familiar rules. It is the plaintiff's task to make out a case from which, on the basis of experience, the jury may draw the conclusion that negligence is the most likely explanation of the

> accident. That conclusion is not for the court to draw, or to refuse to draw so long as there is enough to permit the jury to draw it; and even though the court would not itself infer negligence, it must still leave the question to jury where reasonable men may differ as to the balance of probabilities."

Id. at 590.

A *res ipsa loquitur* instruction was appropriately given by the Trial Court. The jury concluded, based on the evidence presented, that Respondents were negligent, and a review of the District Court's reversal of that jury determination is not only warranted but necessitated in order to provide for uniformity of the case law of this State regarding *res ipsa loquitur*.

II. THE SECOND DISTRICT'S REMAND WITH INSTRUCTIONS THAT THE TRIAL COURT DIRECT A VERDICT IN FAVOR OF RESPONDENTS ON THE ISSUE OF NEGLIGENCE DIRECTLY AND EXPRESSLY CONFLICTS WITH A LONG LINE OF DECISIONS OF THIS COURT AND THE DISTRICT COURTS OF APPEAL,

The opinion below has also created conflict in light of the Second District's remand for directed verdicts as to Respondents' negligence. Conflict, in light of the evidence of negligence adduced at trial, exists between the decision below and a number of decisions of this Court as well as the District Courts where it has previously been consistently held that there must be neither any evidence nor inference of negligence, when viewed in a light most favorable to the non-movant, before the grant of a directed verdict is appropriate.

The Second District's opinion in *Legg v. Super Saver Warehouse Club, Inc., 622 So.* 2d 167 (Fla. 2d DCA 1993), exemplifies this second basis for conflict jurisdiction. In *Legg,* a customer placed twelve metal chairs on a cart in two stacks of six chairs each. When the customer reached the cashier's station, an employee transferred the chairs to a similar cart. The employee did not secure the chairs after transferring them, and when the customer attempted to push the cart through the exit **doors, the front wheels** hit the "doorsill," the cart stopped, and the front stack of chairs slid

forward and fell onto a bystander, Mrs. Legg, as she was walking past the exit doors outside the store. The Leggs sued the store and the customer pushing the cart. *Id.* at 168.

At trial, the store's general manager testified that she examined the door sill after the accident and found nothing out of the ordinary. She also testified that it was customary for employees to transfer customer's merchandise from their cart to another when they reached the cashier's station for purposes of carrying the merchandise from the checkout area to the parking lot, that the store's employees are taught to use additional carts when a load is too large for one cart, and that the store's employees are not trained to secure merchandise to a single cart. At the close of the Leggs' case, the trial court granted the customer a directed verdict. On appeal, however, the Second District declared that this was error and stated that "[t]he evidence the Leggs presented is sufficient to create a jury question as to [the customer's] . . . negligence, if any." *Id.* at 169.

In *Cadore* v. *Karp*, 91 So, 2d 806 (Fla. 1957), this Court stated that in granting a motion for directed verdict, the court must determine that there is "no evidence" to support a jury finding for the party against whom the verdict is sought. If the evidence is conflicting, or capable of different reasonable inferences, and if there is some evidence tending to prove the disputed issue, it should be submitted to the jury as a question of fact, and not taken from them and decided by the court as a question of law. *Id.* at 807. Furthermore, in *Bruce Construction Corp. v. The State Exchange Bank,* 102 So. 2d 288 (Fla. 1958), this Court stated that "[i]t is true that the testimony and evidence in this cause is not conflicting but this fact does not mean that it does not permit different reasonable inferences which would justify a judgment for either party to be drawn therefrom." *Id.* at 291. Thus, even where the bulk of the evidence is not conflicting, it is improper for the court to direct a verdict where there is evidence subject to different but reasonable inferences. In the case at bar, MCDOUGALD arguably presented substantially more evidence of negligence than the Leggs.

Specifically, there is evidence in the record that:

(A) C&S conceded its responsibility for maintenance of the trailer;

(B) the subject safety chain was apparently more than twenty years old;

(C) the original latch securing the subject chain was missing;

(D) the latch was replaced by C&S with a nut and bolt rather than another latch;

(E) the subject safety chain never broke, but at some point stretched, allowing a link to slip over either the nut or bolt head, thus establishing that the replacement bolt head or nut selected by C&S was too small to properly secure the chain;

(F) PERRY's inspection on the date of the accident of the chain, other than to determine that it remained in place, did not reveal whether it had already stretched or not at the time of inspection;

(G) the corporate representative for C&S testified that there is no stress placed on the safety chain during normal driving, that he had never heard of a spare tire coming out of its rack, that such a scenario was unbelievable, and that the spare tire is actually held in the rack by gravity at virtually a 45 ° angle such that it is difficult to even pull it out regardless of the safety chain; and

(H) the spare tire was thrown from its rack when PERRY drove over rough railroad tracks that he was familiar with from driving over them on a daily basis.

Thus, there were sufficient facts in evidence to support the jury's finding that Respondents were negligent, despite the inability to introduce direct evidence of the specific cause of the accident, in that Respondents were responsible for the maintenance and inspection of the twenty-plus year old trailer and safety chain, the original latch of which had broken and had been replaced by a too small nut and bolt which allowed the stretched (without discovery) chain to disattach itself, resulting in the spare tire's unbelievable defiance of gravity in being ejected while the trailer was being driven over rough railroad tracks. When viewed in a light with all inferences being drawn most favorable to MCDOUGALD, conflicting conclusions or inferences as to Respondents' negligence could be drawn from the above facts, thus precluding a directed verdict. In fact, while not requested at trial

in light of the granted *res ipsa loquitur* instruction, the above facts and circumstances provide a sufficient factual basis for the jury being instructed, pursuant to Florida Standard Jury Instruction 4.11, that Respondents' violation of Florida Statutes §§ 316.520, 316.525, and 316.610, could be considered prima facie evidence of negligence, likewise precluding a directed verdict,

In the case at bar, the evidence is clearly capable of different reasonable inferences and the jury determined, based on the evidence, that Respondents were in fact negligent. As succinctly held by the Second District in *Reed* v. *Bowen*, 503 So.2d 1265 (Fla. 2d DCA 1986),

> "(a) motion for directed verdict should not be granted unless the court concludes that the evidence and all inferences of fact, construed most strictly in favor of the non-moving party, cannot support in the minds of the jurors any reasonable difference as to any material fact or inference. The fact that circumstantial evidence is relied upon does not alter the rule that it is solely within the province of the jury to evaluate or weigh the evidence,

Id, at 1266 (citations omitted). The Second District's opinion that the trial court erred by denying Respondents' Motion for Directed Verdict on the issue of negligence is clearly contrary to and conflicting with the long line of directed verdict cases of this and the District Courts of Appeal.

CONCLUSION

In order to fulfill the spirit and purpose of Article V, §III(b)(3), Florida Constitution, and Rule 9.030(a)(2)(A)(IV), Florida Rules of Appellate Procedure, of providing for the uniformity of the laws of the State of Florida as announced by this and the District Courts, this Court should exercise its discretionary jurisdiction in order to reconcile the above-noted contradictory opinions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail this 10th day of December, 1997 to DOUGLAS M. FRALEY, ESQUIRE, 501 East Kennedy Boulevard, Suite 1225, Tampa, Florida 33602.

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IN THE SUPREME COURT
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LAWRENCE D. MCDOUGALD,

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V.

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

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CASE No.: 91,595

APPENDIX TO PETITIONER'S BRIEF ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW OF THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL

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APPENDIX INDEX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

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

Appellants,

v.

LAWRENCE D. MCDOUGALD,

Appellee.

Case No. 96-02758

Opinion filed July 30, 1997.

Appeal from the Circuit Court for Polk County; Susan W. Roberts, Judge.

Douglas M. Fraley of Fraley & Fraley, P.A., Tampa, for Appellants.

Hank B Campbell and Jonathan Stidham of Lane, Trohn, Clarke, Bertrand, Vreeland & Jacobsen, P.A., Bartow, for Appellee.

PARKER, Chief Judge.

Henry D. Perry (Perry) and C 8 S Chemicals, Inc. (C & S), appeal the final judgment following a jury trial in this personal injury case arising from a dislodged spare tire striking the vehicle of Lawrence C. McDougald. We reverse with directions to the trial court to enter a directed verdict in favor of Perry and C & S because the trial court

erred by not granting Perry's and C&S's motion for directed verdict on the issue of negligence, by instructing the jury on res ipsa loquitur, and by not directing a verdict on the issue of future and past loss of earning capacity.

In July 1990, McDougald was driving his personal vehicle behind C & S's tractor-trailer, driven by Perry. As the tractor-trailer crossed over the railroad tracks traversing the road, the spare tire, weighing approximately 130 pounds, came out of its cradle located underneath the trailer. The trailer's rear wheels ran over the spare tire which caused the spare tire to bounce into the air and collide with McDougald's vehicle. McDougald told Perry and witnesses at the accident scene that he was not hurt. Subsequently, he alleged a knee injury and filed this action almost four years following the accident.

An independent witness testified that he did not notice any improper driving by Perry. There was no testimony that Perry improperly operated the tractor-trailer. Perry testified that he was traveling approximately 35 mph to 40 mph in a 55 mph zone as he crossed over the railroad tracks. Perry described the railroad as very rough.

The cradle which holds the spare tire under the trailer had an attached safety chain that secured the spare tire. Upon inspection of the chain after this incident, Perry found that one of the chain's links had stretched out allowing one end of a bolt, which secured the chain, to pass through the link. McDougald confirmed that after the accident Perry had the chain in his hand. The investigating officer recalled that he found some relatively minor damage to the undercarriage of the trailer.

Perry testified that he has been driving tractor-trailers since 1963 and has experience with spare tires and safety chains similar to those involved in this incident Perry testified that he performed a complete inspection of his vehicle, including checking the spare tire and chain, at the start of his trip that day. He admitted that although he checked the chain, he did not examine each link during his inspection. Perry did not know when the link in the chain stretched out allowing the bolt and washer to pass through the link, but he knew that the chain was secure when he began his trip that morning.

Perry testified that the chain appeared to be the original chain that came with the trailer.[1] He described the chain as approximately four to six feet long with one-inch links. Perry testified that he believed that one end of the chain originally had a latch which was used to attach the chain; however, this latch was gone and the ends of the chain were attached with a half-inch bolt and nut, with washers, which passed through the links of the chain.

Roy Beverly, C & S's operations manager, explained that the spare tire sits in an angled cradle underneath the trailer and essentially is held there by gravity, Beverly stated that the safety chain attached to the cradle is tied around the spare tire

[1] Destruction of evidence was not an issue in this case. 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." Upon McDougald's questioning, the investigating officer also testified that he used a short-form report at the accident scene because no one claimed any injuries requiring medical attention. Perry and C & S learned of McDougald's injury when McDougald filed his complaint, four years after the accident.

as a back-up measure, and that unless the tire moves there is no stress placed upon this chain during normal driving. Beverly testified that the vehicles undergo **routine** safety inspections. He also testified that the chain and its method of attachment met all Department of Transportation regulations. Prior to this accident, Beverly had never heard of a spare tire coming out of a rack. Beverly testified that Perry and another driver checked the trailer twice a day.

Following the completion of McDougald's case, Perry and C 8 S moved for a directed verdict arguing that McDougald failed to prove negligence on the part of Perry or C & S. The trial court denied the motion. We conclude that the trial court erred by denying the motion because the evidence produced at trial did not establish any negligence by Perry or C & S. The trial court instructed the jury on negligence and on the doctrine of res ipsa loquitur.

We note that directed verdicts in negligence cases should be granted with caution. In determining whether to grant the motion, the trial court must view all of the evidence in a light most favorable to the nonmoving party and all conflicts in the evidence must be resolved in favor of the nonmoving party., Azar v. Richardson Greenshields Securities. Inc., 528 So. 2d 1266,. 1269 (Fla. 2d DCA 1988). "The motion should be denied if the evidence is conflicting or different conclusions or inferences can be drawn from it." Id. Generally, there is enough evidence from which a jury can determine whether or not the defendant has been negligent. However, if the plaintiff fails to prove all the elements necessary for the application of the doctrine of res ipsa

loquitur and the evidence is insufficient to prove negligence apart from the doctrine of res ipsa loquitur, then the court should direct the verdict.

In this case, McDougald failed to provide any evidence, expert or otherwise, that Perry or C & S had been negligent in the maintenance of the trailer,, in the attachment of the safety chain, or in the operation of the trailer. McDougald only showed the occurrence and the results of the dislodged tire and broken safety chain, asserting that, the only way the chain could have broken and the tire dislodge was the product of negligent and improper maintenance by C & S and Perry, or the negligent operation of the trailer. McDougald did not present any evidence that Perry's speed was excessive and caused the chain to break as the trailer went over the railroad tracks, that Perry and C & S improperly attached the safety chain to the spare tire cradle with a nut and bolt, or whether the missing latch was contrary to industry standard.

The facts are undisputed. The central question in this case is whether Perry and/or C & S breached their duty to maintain the trailer in a reasonably safe condition. The evidence established the type of safety chain used to hold the spare tire in place. The real issue was whether this chain was secured properly with a nut and bolt and whether the chain and bolt assembly malfunctioned because it was secured incorrectly or whether it malfunctioned from some other reason. McDougald could have produced evidence regarding whether or not this safety chain was attached improperly and contrary to industry custom and whether Perry's speed was excessive for the road conditions.

If the chain broke or stretched from too much stress, and this condition had not yet occurred during the daily inspections by C & S drivers, this would not be negligence on the part of Perry or C & S because there was no showing of a breach of due care in the inspection and maintenance of this chain and tire. With no evidence offered of negligence, an equally sound argument can be made that this chain failed from a manufacturing defect, road hazards, or metal fatigue. Because McDougald did not provide any evidence, that Perry or C & S were negligent in their maintenance of the trailer, the court should have granted their motion for directed verdict. See Cooper Hotel Servs., Inc. v. MacFarland, 662 So. 2d 710, 712 (Fla. 2d DCA 1995), review denied, 670 So. 2d 939 (Fla. 1996) (Guest failed to establish that hotel breached its duty of care; therefore, the verdict should have been directed)

McDougald forcefully argues that he was entitled to a jury verdict based upon the doctrine of res ipsa loquitur. However, it was reversible error for the trial court to give the res ipsa loquitur instruction when McDougald failed to prove that this accident would not, in the ordinary course of events, have occurred without negligence by the defendants. See Goodvear Tire & Rubber Co. v. Huahes Supply Inc., 358 So. 2d 1339 (Fla. 1978). The mere fact that an accident occurs does not support the application of the doctrine. In Goodvear , the supreme court stated:

> Res ipsa loquitur--"the thing speaks for itself"--is a doctrine of extremely limited applicability. It provides an injured plaintiff with a common-sense inference of negligence where direct proof of negligence is wanting, provided certain elements consistent with negligent behavior are present. Essentially, the injured plaintiff must establish that the instrumentality causing his or her injury was under the exclusive control of the defendant, and that the accident is

> one that would not, in the ordinary course of events, have occurred without negligence on the part of the one in control . . . .
>
> Plainly, the threshold inquiry is whether that which occurred is a phenomenon which does not ordinarily happen except in the absence of due care. The initial burden is on the plaintiff to establish that the circumstances attendant to the injury are such that, in the light of past experience, negligence is the probable cause and the defendant is the probable actor. An injury standing alone, of course, ordinarily does not indicate negligence. The doctrine of res ipsa loquitw simply recognizes that in rare instances an injury may permit an inference of negligence if coupled with a sufficient showing of its immediate, precipitating cause.

Goodvear, 358 So. 2d at 1341-42 (footnotes omitted).

The facts in this case fail to support the inference that absent Perry's or C & S's negligence the chain would not have otherwise come loose. Other possible explanations exist to explain the failure of the chain. Perry's testimony regarding the chain, his inspection, and his operation of the trailer on the day of the incident was reasonable and uncontradicted by McOougald. All that McDougald showed was that an accident occurred causing him injury.[2] Accordingly, the trial court committed reversible error by giving the res ipsa loquitur instruction.

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[2] In Lewis v. Carpenter Co., 477 S.E.2d 492 (Va. 1996), the plaintiff sued a company which owned a tractor-trailer truck. The plaintiff incurred personal injuries when the trailer came unhooked at an intersection and caused the plaintiff to strike the median in an attempt to avoid being hit by the trailer. The trial court granted the defendant's motion for summary judgment and the supreme court affirmed stating that the plaintiff failed to prove the accident was one that would not happen unless the defendant was negligent. The plaintiff failed to prove anything but that an accident had occurred. Id. at 494,

Finally, we address the issue of whether the trial court erred in denying Perry's and C & S's motion for directed verdict for future and past loss of earning capacity regarding the hunting and guide referral business. McDougald testified that he planned to start a hunting and guide referral business when he retired. Based on his past experience of being a guide for other companies and how much those companies charged for hunting trips, McDougald estimated that he could earn $20,000 to $30,000 per year. McDougald did not provide any other evidence to support damages for past and future loss of capacity to earn.

While we acknowledge that a plaintiff can recover for a prospective business, case law requires that there be a "yardstick" by which the damages can be measured. Twyman v. Roell, 123 Fla. 2, 166 So. 215, 218 (1936). In W. W. Gay Mech. Contr. v. Wharfside Two, Ltd, 545 So. 2d 1348 (Fla. 1989), the supreme court held that "a business can recover lost prospective profits . .," but it must prove that: "1) the defendant's action caused the damage and 2) there is some standard by which the amount of damages may be adequately determined." 545 So. 2d at 1351

In this case, there is no expert or other competent evidence which supports McDougald's claim; therefore, the evidence was insufficient to raise a jury question on this issue. Accordingly, the trial court erred by submitting this issue to the jury

Reversed and remanded with directions to the trial court to enter a directed verdict in favor of Perry and C & S.

FULMER and QUINCE, JJ., Concur.